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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRP GROUP, INC. Defendant-Below, Appellants, v. RUBY WAGNER, on Behalf of Herself and All Other Similarly Situated Stockholders of BRP GROUP, INC., Plaintiff-Below, Appellee.	Case No. 80, 2025 Court Below: Court of Chancery; C.A. No. 2023-0150-JTL

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS[1]

This appeal is from an opinion that need not have been written and that ignored both controlling precedent and Delaware public policy, which "has long recognized the value of flexibility and private ordering." *Maffei v. Palkon*, 2025 WL 384054, at *30 (Del. 2025) (citing *Salzberg v. Sciabacucchi*, 227 A.3d 102, 116 (Del. 2020) ("[T]he DGCL allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise.")).

In October 2019, Defendant BRP Group, Inc. consummated its IPO and concurrently entered into a Stockholders Agreement with its pre-IPO owners ("Holders"). That Agreement's terms were disclosed in the IPO prospectus ("Prospectus") and at least eleven subsequent SEC filings before Plaintiff commenced litigation. Anyone acquiring stock during that time was fully informed of its terms.

More than three years later, a single Plaintiff challenged three consent rights in the Stockholders Agreement as facially invalid. The requisite parties

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[1] This brief cites Appellant's Appendix as "A__." Capitalized terms used but not defined herein have the meanings given to them in the Court of Chancery's opinion below ("Opinion" or "Op."), 316 A.3d 826 (Del. Ch. 2024) (attached as Ex. A and cited as "Op. at __"). Unless otherwise noted, section references are to the DGCL, and all emphasis is supplied.

subsequently entered into a Consent Agreement allowing Defendant's independent directors to permit Defendant to act without obtaining any otherwise-required consent if they unanimously determine in good faith the action is in the best interests of Defendant and its stockholders.

On cross-motions for judgement on the pleadings ("Cross-Motions"), the Court of Chancery held: (i) Plaintiff's claims are not subject to equitable defenses and, regardless, were timely raised; (ii) all the Challenged Provisions facially violated §141(a) before, but not after, the Consent Agreement; and (iii) the Officer Consent Right and Charter Consent Right violated 8 *Del. C.* §§142 and 242, respectively. That holding automatically triggered an existing, satisfiable right of the Holders to demand a "suitable and equitable" substitute to the Challenged Provisions. An independent committee satisfied that right by authorizing entry into a substantially similar agreement and recommending bylaw amendments incorporating the Officer Consent Right. Although Defendant was in virtually the same place as before, the lower court awarded Plaintiff's counsel $2.4 million in fees and expenses.

The Court's judgment should be reversed. Plaintiff's claims are barred at equity; the Stockholders Agreement does not facially violate any of §§141, 142 or 242; and, regardless, an award of $2.4 million, particularly given the contractual rights triggered, is excessive.

SUMMARY OF ARGUMENT

1. Plaintiff's facial validity claims are barred by equitable defenses. The Court of Chancery incorrectly held the Challenged Provisions are void so equitable defenses are unavailable, and that regardless, Plaintiff's claims remained timely.

2. The lower court, relying on its own prior opinion, improperly determined the Challenged Provisions are part of an "internal governance arrangement" that, before the Consent Agreement, could not act lawfully under any circumstance. The precedent is incorrect and erroneously applied here.

3. The lower court's determination that the Officer Consent Right and Charter Consent Right violate §§142 and 242, respectively, ignores both controlling precedent and the clear terms of the Stockholders Agreement.

4. The Court of Chancery erred in awarding $2.4 million in fees and expenses to Plaintiff's counsel. The Court ignored the direct consequence of Plaintiff prevailing on her claims—the automatic triggering of an existing, satisfiable contractual right to a "suitable and equitable" substitute—creating at best a nonquantifiable and ephemeral benefit.

STATEMENT OF FACTS

A. Defendant's IPO

Lowry Baldwin, his son, and two others formed BRP, LLC in 2011. Op. at 839. Defendant was incorporated as part of an "Up-C" structure in an IPO that closed on October 24, 2019. *Id.* at 839-40. Defendant has two classes of Common Stock. Class A carries voting and economic rights. Class B carries equal voting rights, but no economic rights; its holders' economic rights arise from stapled LLC interests. *Id.*

The Prospectus disclosed Defendant's "future success depends substantially on the continued service" of Lowry. A0290 at 31.

B. The Stockholders Agreement

Concurrently with the IPO, Defendant entered into a Stockholders Agreement with the Holders, including Baldwin Insurance Group Holdings, LLC ("Holdings"). Op. at 839-40. Until the Holders beneficially own less than ten percent of the outstanding Common Stock, Defendant must obtain Holder approval before "taking, or agreeing or committing to take," certain actions, including:

> (a) any transaction or series of related transactions resulting in the merger, consolidation or sale of all, or substantially all, of the assets of the Company[2] and its subsidiaries.... ["Transaction Consent Right"]

[2] The Stockholders Agreement refers to the LLC as "the Company" and Defendant as "Pubco." A0175 (Recitals).

> (c) any amendments to the certificate of incorporation or bylaws of Pubco.... ["Charter Consent Right"]
>
> (k) any hiring, termination, or replacement of, or establishing the compensation or benefits payable to, or making any other significant decisions relating to the Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Chief Partnership Officer or any other senior management or key employee of Pubco or the Company.... ["Officer Consent Right"]

A0175-76 (§1.01). Lowry, through Holdings, controls the outcome of any Holder approval. Op. at 841.

The Prospectus disclosed:

> [P]ursuant to the Stockholders Agreement..., the Pre-IPO LLC Members may approve or disapprove substantially all transactions…requiring approval by our stockholders, such as a merger, consolidation or sale of all or substantially all of our assets, any dissolution, liquidation or reorganization of us or our subsidiaries or any acquisition or disposition of any asset in excess of 5% of total assets....amendments to governing documents.... [and] the hiring and termination of our Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Chief Partnership Officer or other change to senior management or key employees (including terms of compensation).

A0301-02, at 42-43; *see also* A0313, A0426, A0434, at 54, 167, 175. Similar disclosures were made in at least eleven separate SEC filings before Plaintiff commenced litigation. A0581 at 9, 26-27, 74, 87; A0688 at 13, 32-33, 76, 86-88; A0797 at 12, 39-40, 91, 103-105; A0927 at 37-38, 41, 96; A1045 at 7; A1098 at 37; A1250 at 16; A1289 at 15; A1337 at 19; A1407 at 9-10, 20; A1510 at 2.

C. Plaintiff Sues

Plaintiff filed the Complaint on February 8, 2023, more than three years after the IPO. A0007; Op. at 842. The Complaint asserts three counts, each seeking declaratory relief regarding each Challenged Provision. A0034-35. Although Plaintiff contended below that she raised as-applied challenges, the Complaint does not allege consent was ever withheld under the Challenged Provisions, and the Court of Chancery's analysis focused solely on facial validity. Op. at 844, 878-79.

D. The Consent Agreement

Holdings and Defendant later entered into the Consent Agreement, whereby Holdings irrevocably consented to any matter requiring consent under the Stockholders Agreement that the Independent Committee unanimously determines in good faith is in the best interests of Defendant and its stockholders. A0240 (second Recital (definition of "Specified Matter"); §1). The Consent Agreement also contains certain agreements regarding nomination rights not challenged by Plaintiff. A0241 (§2).

Defendant simultaneously amended its bylaws to designate the Independent Committee ("First Bylaw Amendment"). The Independent Committee must comprise all "Independent Directors"—*i.e.*, each director "the Board determines both: (i) qualifies as an independent director under the corporate governance standards of Nasdaq and (ii) has no relationship with [Defendant] or any

Holder that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director." A0244-45 (§4.02). The Independent Committee has "full power and authority of the Board" to make determinations under the Consent Agreement, and acts by unanimous approval of its members. *Id.* The Consent Agreement and First Bylaw Amendment contain provisions protecting the integrity of the Independent Committee, including prohibiting amendment or waiver of the Consent Agreement absent Committee approval (A0242-43, §7), or amendment of the First Bylaw Amendment absent unanimous director approval (A0244-45, §4.02). The Consent Agreement also includes indemnification obligations not relevant to this appeal (A0241, §3) and would have terminated following a final judgment that the Stockholders Agreement either is valid in its absence or is invalid notwithstanding its effectiveness. A0242-43 (§7). Accordingly, it would have remained in place following dismissal based on equitable defenses.

E. Opinion

The Court of Chancery issued its Opinion on May 28, 2024. Ex. A. First, it held that Plaintiff's claims, if sustained, would make the Challenged Provisions void (not voidable) such that equitable defenses are unavailable and, regardless, the Complaint was timely. Op. at 845. Next, based on its analysis in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co. (Moelis Merits)*, 311

A.3d 809 (Del. Ch. 2024), it held the Challenged Provisions invalid under §141(a) before, but not after, the Consent Agreement, which holding Plaintiff has not appealed. Op. at 883. Finally, it held that, notwithstanding the Consent Agreement, the Officer Consent Right and Charter Consent Right are invalid under §§142 and 242, respectively. *Id.*

In its analysis, the Court of Chancery considered the impact of a severability provision in the Stockholders Agreement that states, "[i]f any provision of [the Stockholders Agreement], or the application thereof to any person or entity or any circumstance, is found to be invalid or unenforceable in any jurisdiction, a suitable and equitable provision shall be substituted therefor in order to carry out, so far as may be valid and enforceable, the intent and purpose of such invalid or unenforceable provision." A0181 (§4.09). It held the Severability Provision gave Lowry the right to "demand a 'suitable and equitable' substitute, such as the issuance of a golden share of preferred stock carrying similar pre-approval rights" ("Substitution Right"). Op. at 861.

F. The New Agreement

Lowry subsequently requested Defendant issue a golden share to satisfy the Substitution Right, and the Independent Committee's mandate was expanded to consider that request. A1998. Advised by independent counsel, the Independent Committee determined entering into an agreement authorized by §122(18), instead

of issuing a golden share, was in the best interests of Defendant and its stockholders. *Id.* Following negotiation, the Holders acceded to such an agreement ("New Agreement"). *Id.*

If a final order is issued that the Stockholders Agreement is valid absent the Consent Agreement, the operative provisions of the New Agreement will not become effective and the Consent Agreement will terminate pursuant to its terms, leaving the Holders where they were before litigation. A2042-43 (§4.15); A0242-43 (§7). If this litigation is resolved in any other manner, the operative provisions of the New Agreement become effective, and the Stockholders Agreement and Consent Agreement will terminate. A2043 (§4.15(c)-(d)); A2040 (§4.02 (definition of "Effective Time")).

Once the New Agreement is effective, the Holders will have the same rights contemplated by the Stockholders Agreement with one exception: the New Agreement carves out from a consent right over changes in Board size any change mandated by Section 7.1(ii) of Defendant's charter, which addresses Board size changes in connection with certain rights of preferred stockholders. A2036 (§1.01(h)). *Cf.* §122(18) (prohibiting enforcement against a corporation of provisions "contrary to the certificate of incorporation"). However, the Holders will continue to have a consent right over charter amendments, which include designations of preferred stock. A2036 (§1.01(c)).

The Board concurrently adopted bylaw amendments, recommended by the Independent Committee, that, once the operative provisions of the New Agreement are effective, (x) disband the Independent Committee and (y) mirror the substantive terms of the Officer Consent Right ("Second Bylaw Amendments"). A2029 (§4.02); A2031-32 (§5.10). This would eliminate any potential violation of §142 associated with the Officer Consent Right.

G. Fees Ruling

Notwithstanding that Plaintiff's claims immediately triggered the existing Substitution Right contractually mandating, and ultimately resulting in, a return to the *status quo*, the Court of Chancery deemed the benefit conferred "significant" and awarded $2.4 million in fees and expenses to Plaintiff's counsel. Ex. D, at 53, 66.

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE BARRED AT EQUITY

A. Question Presented

Are Plaintiff's claims barred based on equitable defenses of laches, acquiescence, waiver or estoppel? This question was raised below at A0155-0162, A1718-1724.

B. Scope of Review

This legal question is subject to *de novo* review. *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015).

C. Merits of Argument

1. *The Court of Chancery's Void/Voidable Analysis Was Legally Erroneous*

Claims that a contract has the practical effect of precluding a "board from exercising its statutory powers and fulfilling its fiduciary duty" render the contract "voidable in equity." *Grimes v. Donald*, 1995 WL 54441, at *10 (Del. Ch. Jan. 11, 1995), *aff'd*, 673 A.2d 1207 (Del. 1996). *See also In re Sirius XM Shareholder Litigation*, 2013 WL 5411268, at *4-6 (Del. Ch. Sept. 27, 2013) (dismissing, as barred by laches, a claim (Count III) seeking "a declaratory judgment that the anti-takeover provisions of the Investment Agreement are unenforceable" under §141).

In *Grimes*, plaintiff alleged a contract delegating a CEO broad authority and allowing him to terminate it and collect severance if the board unreasonably interfered with his duties was an abdication under §141(a), rendering the contract "void as against public policy." *Grimes*, 1995 WL 54441, at *1. The Chancellor's analysis distinguished cases involving directors being formally foreclosed from exercising their authority because they either agreed in advance how to vote (*Abercrombie v. Davies*, 123 A.2d 893, 899 (Del. Ch. 1956), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957) and *Chapin v. Benwood Found., Inc.*, 402 A.2d 1205, 1211 (Del. Ch. 1979), *aff'd*, *Harrison v. Chapin*, 415 A.2d 1068 (Del. 1980)), or completely delegated their authority to someone else (*Field v. Carlisle*, 68 A.2d 817 (Del. Ch. 1949) and *Clarke Memorial College v. Monaghan Land Company*, 257 A.2d 234 (Del. Ch. 1969)).

The Chancellor observed that, unlike those other cases, it was "the alleged *practical effect* of these contracts that [was] said to constitute the abdication of directorial responsibility." *Grimes*, 1995 WL 54441, at *9 (emphasis in original). Such an effect, the Chancellor held, could render the contract "voidable in equity." *Id.* at *10. This distinction makes sense, as abdication caselaw does not address *express* violations of §141(a), but instead is based on doctrine "*derived from* Section 141(a)." *CA, Inc. v. AFSCME Empls. Pension Plan*, 953 A.2d 227, 238 (Del. 2008) (expense reimbursement bylaw "does not facially violate any provision of the

DGCL" so the "question thus becomes whether the Bylaw would violate any common law rule or precept"). Plaintiff's claims are analogous to *Grimes*: that the Challenged Provisions have the *practical effect* of abdication of director responsibility violating §141(a) and the *practical effect* of a vote on officer selection and charter amendments violating §§142 and 242, respectively. As in *CA*, such claims are "derived from" the statute, *not* a direct violation of it.

The court below wrote that the *Grimes* "voidable in equity" analysis was used "at the outset of the decision" solely to undertake a direct/derivative analysis. Op. at 846. Not so. The analysis was used by the *Grimes* Court solely to address the *substance* of the abdication claim, *not* the direct/derivative analysis. After affirming the Chancellor's ruling that the claims were direct and not derivative, this Court cited *Chapin* and *Abercrombie*, and effectively endorsed the Chancellor's reasoning by reciting his statement that the challenged agreement—like the Stockholders Agreement here—did not "formally preclude" the board from exercising its statutory authority and was therefore not an unlawful abdication. 673 A.2d 1207, 1212-15 (Del. 1996). This Court did not, as the court below incorrectly stated, "ma[k]e clear" that the plaintiff's claim would render the contract void. Op. at 847. To the contrary, it did not address the void/voidable distinction at all.

2. *Laches Bars Plaintiff's Claims*

"A filing after the expiration of the analogous limitations period is presumptively an unreasonable delay for purposes of laches." *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 769 (Del. 2013). Here, the analogous limitations period is three years. 10 *Del. C.* §8106 ("[N]o action based on a statute…shall be brought after the expiration of 3 years from the accruing of the cause of such action.").

Relying entirely on its own decision in *West Palm Beach Firefighters Pension Fund v. Moelis & Co. (Moelis Preliminary Issues)*, 310 A.3d 985 (Del. Ch. 2024), the court below held that, even if laches were *theoretically* available, it could never be *practically* applicable because "[e]very moment that the Company's board operates under the constraints of the Consent Rights interferes with the director's authority" and is thus a "continuing wrong" for purposes of determining claim accrual. *Id*. at 996; *but see Lebanon County Emp's. Ret. Fund. v. Collis*, 287 A.3d 1160, 1202 (Del. Ch. 2022) (observing that "a continuing wrong or a separate accrual approach makes more sense when it is difficult to identify a clear starting point for a claim, and the harm develops gradually over time[,]" but that a discrete act approach makes the most sense when the initial act provides a plaintiff knowledge of conduct and incentive to sue, and a "finite quantum of conduct" causes all harm that may result). The lower court's holding is contrary to settled law. *Kraft v.*

WisdomTree Invs., Inc., 145 A.3d 969 (Del. Ch. 2016) (claim accrued on date stock issued in violation of statute, not every day stock was outstanding); *In re Coca-Cola Enters., Inc. S'holders Litig.*, 2007 WL 3122370, at *1, *5-6 (Del. Ch. Oct. 17, 2007) (complaint filed in 2006 was untimely where harms arose from perpetual agreement signed in 1986).

The lower court's ruling effectively requires a perpetual carveout to the statutory limitation period applicable to *any action* based on *any claim* that an agreement or its effects violates a statute. The General Assembly included specific exceptions to §8106(a)'s accrual periods; the lower court's judicially-crafted exception is not one. *Cf. Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010) (judicial policymaking "*obiter dictum*" and without precedential effect).

Moreover, no case cited in the *Moelis Preliminary Issues* opinion mandates this result. Laches was not raised in *Abercrombie,* and the Chancellor there did address the one equitable defense raised (unclean hands) on its merits. *Abercrombie*, 123 A.2d at 896. Moreover, *In re Ebix, Inc. Stockholder Litigation* involved allegations an agreement's adoption violated a stock plan *and* constituted an ongoing entrenchment device. 2014 WL 3696655, at *1 (Del. Ch. July 24, 2014). The Court of Chancery suggested laches would have applied to alleged violations of the stock plan absent applicable tolling principles, but the claim that "the board breached its fiduciary duties in approving *and maintaining*" the agreement was not

time-barred. *Id.* at *8, *11. Plaintiff here, however, does *not* allege the Challenged Provisions constitute a breach of fiduciary duty as an improper takeover defense or that the Board has the unilateral option to rescind them. Similarly, *Politan Capital Management LP v. Masimo Corp.*, involved a challenge to governance measures taken "in connection with" a contested election; specifically, a dead-hand proxy put in an employment agreement twice amended, including as recently as the prior year. C.A. No. 2022-0948-NAC, at 168 (Del. Ch. Feb. 3, 2023) (TRANSCRIPT).[3] The Court of Chancery found it "reasonably conceivable the amendments either made the provision even more troubling or maintained and affirmed the status quo," *id.* at 188, and generally held that the agreement "amounts to abdication, ultra vires, *and/or* some form of waste." *Id.* at 181. *Politan* was a fact-based ruling in a "highly-expedited" matter. *Id.* at 184. It does not stand for the broad proposition that equitable defenses can never apply to facial invalidity claims.

The trial court also held laches inapplicable because Defendant "cannot show prejudice." Op. at 849. Prejudice is evident because shares of Company stock have traded for many years based on the Company's disclosures regarding the terms of the Stockholders Agreement and Lowry's critical role in Defendant's future success and because the Company represented to the Holders in the Stockholders

[3] Transcript rulings are contained in the Compendium to Appellant's Opening Brief, filed herewith.

Agreement that the rights granted therein were legal, valid and binding obligations of the Company, thereby causing the Holders to sell stock assuming the Stockholders Agreement is valid. A0178, §3.01 (disclosure documents and Stockholders Agreement).

3. *Plaintiff's Claims Are Barred By Waiver, Acquiescence, and/or Estoppel.*

"Anyone may forego a right intended for his own benefit in the absence of some rule of public policy. Inaction or silence on the part of a plaintiff, in certain circumstances, can bar a plaintiff from relief both equitable and legal. Delaware has implemented this umbrella rule through the doctrines of waiver, estoppel, and acquiescence." *In re Coinmint, LLC*, 261 A.3d 867, 892 (Del. Ch. 2021) (citations and internal quotations omitted). Although the court below discussed *Coinmint* in its analysis of the void/voidable distinction (Op. at 847-49), Defendant did not rely on it, and agrees it is "not pertinent" (*id.* at 849), for that analysis. Its pertinence lies in setting out the "umbrella rule."

Acquiescence is particularly salient here. It occurs when a party "has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; or (2) freely does what amounts to recognition of the complained of act; or (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved." *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1047 (Del. 2014) (quoting *Cantor Fitzgerald, L.P. v. Cantor*,

724 A.2d 571, 582 (Del. Ch. 1998)). "For the defense of acquiescence to apply, conscious intent to approve the act is not required, nor is a change of position or resulting prejudice." *Id.* (citations omitted).

The court below rejected these defenses based on the erroneous view that it "must assume" Plaintiff's "theories are correct" when evaluating equitable defenses and only on the ground of the void/voidable distinction. Op. at 845, 850. For the reasons discussed above, the lower court's analysis regarding this distinction was incorrect and should be reversed.

4. *The Opinion Is Contrary To Delaware Public Policy*

In the *Moelis Preliminary Issues* opinion, the trial court wrote at length regarding policy reasons purportedly supporting its decision that equitable defenses are unavailable, including its choice of accrual method and rejection of an estoppel defense. Although too numerous to address each here, a general theme appears that, because plaintiffs' lawyers do not have "a systematic and proactive enforcement agenda," and based on speculation that stockholders might have bought stock believing "the law rendered the disclosed arrangement invalid such that they did not have to worry about it," should Plaintiff's challenge be dismissed on equitable defenses, it would "insulate illegality from review" after the analogous limitation period has run or "enable a corporation to create its own body of law through its IPO prospectus." 310 A.3d at 996-97, 1001.

The lower court's policy rationale is untrue and unconnected to the case before it. Many of the extreme hypotheticals cited by the lower court would involve void acts outside the scope of equitable defenses, and a stockholder could still bring a ripe as-applied challenge to voidable acts. Indeed, Plaintiff here purported to bring as-applied challenges, A0104, but did not allege any facts to suggest that the Holders had even once invoked or threatened to invoke any of the Challenged Provisions or that the Board had ever asked for Holder consent to permit the occurrence of any action. The trial court's decision ignored the need for a factual context in which to make a decision that was ripe for review. *See Maffei v. Palkon*, 2025 WL 384054, at *26-27 (discussing ripeness jurisprudence and reversing trial court's application of entire fairness without a factual record).

More generally, equitable defenses are intended to reach the right result given the facts of the case. It is through "case-by-case law development" that Delaware common law builds over time. *Salzberg v. Sciabacucchi*, 227 A.3d at 137. The facts here call for equitable defenses: The Prospectus acknowledged Lowry's critical role in the business before Defendant was publicly traded; the terms of the Stockholders Agreement were disclosed in the Prospectus and at least eleven subsequent filings before litigation commenced so that the choice to acquire stock, whether in the IPO or secondary market, was made with full disclosure; the Company represented to the Holders in the Stockholders Agreement that the rights

granted therein were legal, valid and binding obligations of the Company, thereby causing the Holders to sell stock assuming the Stockholders Agreement is valid; and the Complaint was filed over three years after the IPO. Under these circumstances, equitable defenses bar Plaintiff's claims. The court below erred in creating a broad rule for all facial challenges, rather than reaching the equitable result in the specific case and allowing the law to develop incrementally.

II. THE STOCKHOLDERS AGREEMENT IS NOT FACIALLY INVALID UNDER §141(A)

A. Question Presented

Did the lower court err in determining the Stockholders Agreement is an "internal governance arrangement" that, before the Consent Agreement, improperly restricted the Board from acting and could not operate lawfully under any circumstance? This question was raised below at A0144-53, A1706-15.

B. Scope of Review

This legal question is subject to *de novo* review. *RBC Cap. Markets, LLC*, 129 A.3d at 849.

C. Merits of Argument

1. *Standard For Facial Invalidity*

A facial challenge can only succeed if Plaintiff shows a provision cannot operate lawfully "under any circumstances." *Salzberg*, 227 A.3d at 113.

2. *The Moelis Merits Opinion Improperly Displaced Common Law*

The trial court relied entirely on its analysis from the *Moelis Merits* opinion in analyzing the §141(a) claims. But the *Moelis Merits* opinion suffered from the same infirm approach to law as the *Moelis Preliminary Issues* opinion. Rather than approaching the case narrowly based on the specific facts at issue, the lower court legislated a new test: "[A] nominally third-party agreement that nevertheless restricts board authority" is invalid if both "the challenged provision

constitutes part of the corporation's internal governance agreement" (a test with at least seven subparts) and has "the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters." Op. at 851-52. This two-part test finds no support in law (as the lower court observed, it "discerned" the test itself (*id.*)). It yields arbitrary distinctions (for example, the validity of a covenant could depend entirely on whether capital takes the form of debt or equity). And it raised such immediate alarm that nearly 90% of the General Assembly voted to overrule it less than four months later. A traditional, incremental approach to the law demonstrates the Challenged Provisions are not facially invalid under §141(a).

3. *The Stockholders Agreement Is Not An Impermissible Delegation Under §141(a)*

The Court of Chancery credited Plaintiff's argument that the Challenged Provisions "strip" key powers away from the Board "and hand them to" Lowry. A0093-94. Not so. *The Board* must determine whether to pursue an action; *Lowry has no right to cause the Board to act*. Accordingly, the Challenged Provisions are very different from other cases finding a potential issue under §141(a). Those cases either *mandate* the Board affirmatively *act* a certain way (*CA, Inc.*, 953 A.2d 227; *Chapin*, 402 A.2d 1205; *Abercrombie*, 123 A.2d 893; *Gorman v. Salamone*, 2015 WL 4719681, at *6 (Del. Ch. July 31, 2015)); allow *stockholders directly* to take action reserved for directors (*Gorman*, 2015 WL 4719681, at *6;

Schroeder v. Buhannic, 2018 WL 11264517, at *3-4 (Del. Ch. Jan. 10, 2018)); or *completely delegate authority* to a nonfiduciary to take action reserved for directors (*Jackson v. Turnbull*, 1994 WL 174668, at *5 (Del. Ch. Feb. 8, 1994); *Field*, 68 A.2d 819-20; *Clarke Memorial College*, 257 A.2d 240-41). As *Grimes* recognized, there is a meaningful difference between agreements that "formally preclude the…board from exercising its statutory powers and fulfilling its fiduciary duties" and agreements that are alleged to have the "*practical effect*" of "constitut[ing] the abdication of directorial responsibility." 1995 WL 54441, at *9 (emphasis in original).

For example, *Gorman* involved a bylaw granting stockholders the right *directly* to remove the CEO and *requiring* directors to implement such removal. *Gorman*, 2015 WL 4719681, at *6. While invalidating those provisions, *Gorman* left open the possibility that a bylaw may grant stockholders the ability directly to fill officer vacancies. *Id.* at *4 n.20, *6 n.37. If a bylaw may grant stockholders that power, surely a contractual consent right is permissible. Similarly, *Schroeder* addressed an attempt of stockholders directly to remove officers. *Schroeder*, 2018 WL 11264517, at *1-2, *5. *Schroeder* also involved interpretation of an agreement requiring the election of three "representatives designated by the holders of a majority of the Common Stock, one of whom shall be the Chief Executive Officer of the Company." *Id.* at *3. Plaintiffs in that case argued stockholders must "fill

one of their seats with the Board-selected CEO" and defendants countered that stockholders "are free to nominate whomever they please and that Section 7.2(b) constrains the Board's ability to choose a CEO by limiting the pool of potential CEO candidates." *Id.* The Court of Chancery noted defendants' reading would "constrain the Board by limiting its choice to one of three candidates identified by a subset of stockholders." *Id.* Here, by contrast, the Board is free to consider any number of potential CEO candidates; the Holders merely have a contractual right to consent to that choice.

Quickturn Design Systems, Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998) is similarly inapposite. There, facing a hostile takeover bid, a board adopted a document entered into for no consideration (a poison pill) for the sole purpose of preventing future directors from redeeming it for six months. *Id*. at 1287-88. Here, the Stockholders Agreement was part of the commercial IPO transaction and allows the Board to approve a change in control transaction, subject to the Holders' consent to effectuate it.

The Court of Chancery minimized these distinctions by quoting "Preliminary Reflections" of a professor that "the power to review is the power to decide." Op. 857, n.109 (citing Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 815 (2002)). Incorrect. First, as Plaintiff conceded, the Stockholders Agreement gives the

Holders no authority to act on behalf of Defendant. A1748 (PRB at 9). The Holders cannot remove or select officers, approve charter amendments, or force mergers. Second, unlike some stockholder agreements, the Stockholders Agreement here does not prevent the Board from doing anything. *Compare* A0175-76 (§1.01 (stating Defendant "shall not *permit the occurrence*" of certain matters)) *with* A2129 (§2.1(a) (stating "the Board shall *not authorize, approve or ratify* any of the following actions")). If, for example, the Board desired to change officers, it could adopt a resolution determining to do so and seek Lowry's consent. Any decision by Lowry to withhold consent would be subject to the implied covenant of good faith and fair dealing (*Baldwin v. New Wood Resources LLC*, 283 A.3d 1099, 1116-17 (Del. Ch. 2022); *Wilmington Leasing, Inc. v. Parrish Leasing Co., L.P.*, 1996 WL 560190, at *2 (Del. Ch. Sept. 25, 1996)), and potential substitution of new provisions under the Severability Provision. Should Lowry not consent, the Board may consider efficient breach. *Frederick Hsu Living Trust v. ODN Holding Corp.*, 2017 WL 1437308, at *24 (Del. Ch. Apr. 14, 2017). As discussed below, although the lower court largely ignored these scenarios, their possibility further demonstrates the difference between the Stockholders Agreement and agreements previously found to raise §141(a) issues.

4. *The Court of Chancery Improperly Applied The Facial Validity Test.*

Although the court below begrudgingly (*see* Op. at 879 n.241) acknowledged that, under this Court's precedent, a facial challenge can only succeed if Plaintiff shows a provision cannot operate lawfully "under *any* circumstances," *Salzberg*, 227 A.3d at 113, in applying that test, the Vice Chancellor simply stated that, because the provisions only operate when the Board and Lowry disagree, they are facially invalid. Op. at 878-80. That is not a faithful application of this Court's precedent.

In *CA, Inc.*, the SEC certified two questions to this Court regarding a bylaw mandating reimbursement of stockholder proxy expenses: (i) whether it was a proper subject for stockholder action and (ii) whether, if adopted, it would cause the issuer to violate Delaware law. 953 A.2d at 231. Regarding the first question, this Court determined that the proposed bylaw "does *not* facially violate *any* provision of the DGCL." *Id.* at 238. Given the nature of the second certified question, this Court considered the validity of the bylaw in the abstract. Because this Court could envision "at least one . . . hypothetical" where the bylaw could cause the board to breach its fiduciary duties, the Court answered the certified question affirmatively—in that scenario, the bylaw would "violate the prohibition, *which our decisions have derived from* Section 141(a), against contractual arrangements *that commit the board of directors* to a course of action that would preclude them from

fully discharging their fiduciary duties to the corporation and its shareholders." *Id.* The procedural posture in *CA, Inc.* is different from this case (considering any scenario where provisions could violate law versus Plaintiff's burden to show the Challenged Provisions cannot operate lawfully in any circumstance), but the analysis is clear: a bylaw that *could*, in a given set of facts, violate §141, was *not* facially invalid.

The Court of Chancery, however, got it backwards, and reached its facial validity determination notwithstanding its own acknowledgement of scenarios where the Challenged Provisions could operate lawfully. Thus, for example, although the lower court identified examples of when the implied covenant would require Lowry to grant consent, it held that "does not re-establish the Board's authority *to the degree necessary* to rectify the Section 141(a) violation." Op. at 871. The lower court likewise discounted the room for fiduciary discretion that efficient breach offers because, notwithstanding its acknowledgement of precedent declining to order specific performance of a negative covenant, it determined Lowry could "likely" obtain equitable relief. *Id.* at 858-59. Similarly, the lower court ignored the effects of the Severability Provision because it said the provision "*primarily* exists" to protect Lowry (*id.* at 862), notwithstanding precedent that relied on a "to the fullest extent permitted by law" provision to reject a claim of facial invalidity. *Wayne County Employees' Ret. Sys. v. Corti*, 2009 WL 2219260,

at *18 (Del. Ch. July 24, 2009). The Vice Chancellor even went so far as to suggest in dicta that the Consent Agreement would not have eliminated a facial invalidity outcome under §141(a) if it included a fiduciary qualifier or omitted the word "good faith" (both standard fare for decades in, for example, exceptions to deal protection measures in merger agreements) because "the directors would remain bound by a *meaningful contractual constraint* not found in the Charter." Op. at 881. (The trial court devoted much of its Opinion to discounting two possibilities, not raised by the parties, that the Board could simply ignore the Stockholders Agreement by citing its fiduciary duties (as opposed to considering efficient breach) and that Lowry's fiduciary duties would be implicated in deciding whether to provide consent).

"To the degree necessary," "primarily exists" and "meaningful constraint" are not the stuff of facial invalidity. The facial invalidity burden is high, but Plaintiff "voluntarily assumed [it] by making a facial validity challenge, and cannot satisfy it by pointing to some future hypothetical application of the [Challenged Provisions] that might be impermissible." *Boilermakers Local 154 Ret. Fund v. Chevron Corp.,* 73 A.3d 934, 948-49 (Del. Ch. 2013); *cf. Kellner v. AIM ImmunoTech Inc*, 320 A.3d 239, 258-59 (Del. 2024) (observing that facial validity challenges to bylaws require proof "that the bylaw cannot operate lawfully under an set of circumstances" and that equitable review is available when there is a ripe

controversy "involving the adoption, amendment, or application of bylaws"). The trial court erred by failing to recognize that burden.

5. *The Opinion Is Contrary To Delaware Public Policy*

Even before adoption of §122(18), the lower court's opinion was not in keeping with longstanding Delaware public policy. As the Court of Chancery recognized in *Sample v. Morgan*, adopting a "*per se* rule" that directors cannot enter into "contracts with third-parties for legitimate reasons simply because those contracts necessarily impinge on the directors' future freedom to act" would render them unable to manage the corporation. 914 A.2d 647, 672 n.79 (Del. Ch. 2007). Indeed, Delaware courts have routinely upheld contracts limiting a board's freedom of action over substantial corporate matters. *See, e.g.*, *Sirius*, 2013 WL 5411268, at *2 (dismissing on laches grounds claim regarding contract preventing board from, among other things, enacting pill to prevent large stockholder from acquiring additional stock); *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 992 (Del. Ch. 2010) (citing *Hokanson v. Petty*, 2008 WL 5169633 (Del. Ch. Dec. 10, 2008) as an example of a case rejecting fiduciary challenge to a contractual agreement forcing directors to approve a sale of the company), *aff'd*, 37 A.3d 205 (Del. 2011); *In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 998-99 (Del. Ch. 2007) (agreement prohibiting company from amending pill to include controlling stockholder); *Sample*, 914 A.2d at 672-73 (agreement requiring stockholder consent

for stock issuances); *Superior Vision Services, Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *5-7 (Del. Ch. Aug. 25, 2006) (negative covenants regarding dividends).

The rule created by the lower court in the *Moelis Merits* opinion to determine when certain consent rights are facially invalid is unworkable. The clearest example is that, under the lower court's test, a restriction could be facially valid if exchanged with a debt, but not equity, provider. Other examples abound. Assume a distressed issuer accepted financing from a third-party who sought approval rights akin to those in the Stockholders Agreement. Since a factor in the lower court's analysis is the duration of the contract and ability to terminate, would the facial validity of such rights rise and fall on whether the preferred stock issued in the financing is subject to a redemption right? Alternatively, assume an issuer acquired another company in a stock-for-stock deal, and the target had a large stockholder who obtained approval rights akin to the Challenged Provisions as a condition of the deal. Is the agreement facially valid? Its counterparty is an "intra-corporate actor" and it "regulates corporate power." Yet, it is undeniably an agreement arising from an "underlying commercial exchange."

A facial invalidity determination means the agreement is "beyond the bounds of permissible private ordering." A1753. But these few examples show how difficult it is to create a rule of *facial* invalidity with a workable limiting principle.

Equity provides the tools to do so in any given factual context, and that is where Delaware public policy lies. Unlike the trial court's Opinion, predictability in Delaware law is grounded in the courts' commitment to "case-by-case" development of common law, *Salzberg*, 227 A.3d at 137, and "the values of flexibility and private ordering." *Maffei v. Palkon*, 2025 WL 384054, at *30.

III. THE COURT OF CHANCERY'S §§142 AND 242 DETERMINATIONS IGNORE PRECEDENT AND THE CLEAR TERMS OF THE STOCKHOLDERS AGREEMENT

A. Question Presented

Did the court below properly determine that the Officer Consent Right and Charter Consent Right violate §§142 and 242, respectively? The question was raised below at A0154-55, A1716-18.

B. Scope of Review

This legal question is subject to *de novo* review. *RBC Cap. Markets, LLC*, 129 A.3d at 849.

C. Merits of Argument

1. *The Trial Court Ignored A Decision From This Court That Is Directly On Point*

Plaintiff does not dispute that the Challenged Provisions are not "statutory votes"; instead she argues that is "irrelevant" to the §§142 and 242 inquiry. A1761-62. But a case analyzed in Defendant's briefs below (A0154-55, A1717), and discussed during the hearing on the Cross-Motions (A1866-68), yet not even mentioned in the Opinion, demonstrates that Plaintiff's argument is wrong.

Matulich v. Aegis Communications Group, Inc., 942 A.2d 596 (Del. 2008) involved a corporation that consummated a §253 short-form merger. A plaintiff argued the corporation could not do so because it did not own 90% of the subsidiary's Series B preferred stock and, to utilize §253, a corporation must own

90% of each class of voting stock. The Certificate of Designation for the Series B preferred stock stated it had "no voting rights" but also granted the holders the "right of approval and consent" before any merger. *Id*. at 599-601. This Court rejected the plaintiff's argument, holding the "Series B shares possess no statutory voting rights, but do have a contractual right to consent and approve." *Id.* at 602. Accordingly, the "Series B shareholders' contractual right to consent and approve does not constitute a statutory right to vote on the merger" and was "irrelevant" in determining whether the parent "had the statutory voting power necessary to execute a short-form merger." *Id.*; *cf.* §221 (allowing charters to include provisions conferring on bondholders—generally protected by contractual consent rights—the power to vote, *in which case* such holders are "deemed to be stockholders" and their bonds "shares of stock").

The distinction makes sense. If a contractual approval right were a voting right under the DGCL, then either the "approval/vote" would need to be taken at a stockholders meeting or (assuming not prohibited) by written consent, which in turn would trigger a §228 notice requirement. Moreover, regarding § 242, there is nothing about a contractual approval right that interferes with the policy behind statutory sequencing requirements for board and stockholder action. The purpose of those requirements is to prevent stockholders from acting without prior board action and a board from acting unilaterally without stockholder approval. *Williams v.*

Geier, 671 A.2d 1368, 1381 (Del. 1996). The Challenged Provisions neither allow the Holders to act without prior Board action (Plaintiff conceded the provisions "are not direct rights to take corporate action" (A1748)); nor do they permit the Board to act without stockholder approval.

Simply put, this Court was correct in *Matulich* in holding that approvals and votes are two very different things. As did the plaintiff in *Matulich*, Plaintiff here argues that a contractual approval right violates statutory provisions (here §§142 and 242), because it is *akin* to a voting right. As in *Matulich*, that argument fails, and the Court of Chancery's determination to ignore the case was improper.

2. *The Lower Court Did Not Address The Actual Text Of The Stockholders Agreement In Its §242 Analysis*

The lower court's Opinion that the Charter Consent Right violates §242 proceeds on the syllogism that: (i) under §242, charter amendments must be approved first by the board and then stockholders and (ii) the Charter Consent Right "displaces the statutory sequence by putting Lowry at the head of the line." Op. at 877. Not so.

The operative language of the Challenged Provisions does *not* contain any prohibition on the Board pursuing or considering any of the matters subject to the Consent Rights and there was no factual allegation in Plaintiff's Complaint that it ever did. Instead, the operative language requires approval before *permitting the*

occurrence of certain actions. A0175-76 (Stockholders Agreement). Indeed, although some agreements do require consent before a board authorizing, approving or ratifying certain actions, the Stockholders Agreement here does not. *Compare* A0175-76 (§1.01) *with* A2129 (§2.1(a)). Thus, even if the Challenged Provisions were statutory approvals, this Stockholders Agreement would not require any sequencing contrary to that contemplated by §242.

3. *The Opinion Is Contrary To Delaware Public Policy*

The Court of Chancery's holding the Consent Agreement "solved" the §141(a) issue but not the §§142 or 242 issues (Op. at 880) has broader implications beyond this case. In adopting §122(18), the General Assembly noted that, although that statute states contractual provisions are not enforceable against a corporation if they are "contrary to the laws" of Delaware, a provision would *not* be "deemed contrary to [Delaware law] by reason of a provision . . . that authorizes or empowers the board of directors (or any one or more directors) to take such action" and that "other provisions of [the DGCL] . . . that generally or specifically empower or authorize a board of directors to authorize or take any action would not prohibit" a contract entered into pursuant to §122(18) to require "the approval or consent of one or more other persons or bodies before the corporation may take that action." Del. S.B. 313 syn., 152d Gen. Assem. (2024). The Vice Chancellor's Opinion conflicts with the will of the Delaware Legislature by suggesting that §122(18) cannot

authorize contracts containing such consent rights. Particularly for mergers—which the Vice Chancellor suggested would be subject to the same analysis if the Transaction Consent Right applied at the Defendant level (Op. at 878)—this would substantially undermine the policy of §122(18) in that §251 requires an extra step before stockholders vote: entry into the actual merger agreement. *Tansey v. Trade Show News Networks, Inc*., 2001 WL 1526306, at *4 (Del. Ch. Nov. 27, 2001). Thus, the lower court's analysis would suggest that, to avoid violating the sequencing requirements of §251, a §122(18) agreement must allow entry into a merger agreement—one that may very well contain penalties if the contractual consent is not approved—before a consent right may be triggered. And the Vice Chancellor went even further in dicta, including gratuitous language that the Opinion "need not address" whether the Officer Consent Right would be permitted in the charter or bylaws—thus suggesting it might not, *see* Op. at 875, and "ponder[ing]" in another case whether a charter provision can "override Section 122(18)." *See Seavitt v. N-Able, Inc.*, 321 A.3d 516, 543 n.92 (Del. Ch. 2024).

The lower court's analysis also creates even more unworkable results than the test it created in the *Moelis Merits* opinion. If the difference between a consent right and statutory vote is "irrelevant," whether any consent right over charter amendments or merger agreements violates sequencing requirements in the

DGCL could depend on whether the holder of that right holds even a single share of stock. That cannot be the law.

IV. THE COURT OF CHANCERY ERRED IN AWARDING $2.4 MILLION DOLLARS IN FEES AND EXPENSES FOR MAINTAINING THE STATUS QUO

A. Question Presented

Even assuming its substantive analysis were correct, did the Court of Chancery err in awarding $2.4 million in fees and expenses to Plaintiff's counsel? This question was raised below at A1987.

B. Scope of Review

Reasonableness of fees is reviewed under an abuse of discretion standard; determinations of law are reviewed *de novo*. *In re Dell Techs. Inc. Class V S'holders Litig.*, 326 A.3d 686, 697 (Del. 2024).

C. Merits of Argument

1. *The Trial Court Committed Legal Error When It Disregarded The Contractual Right To A Substitute Provision*

As the Court of Chancery held, "[i]f one of the Pre-Approval Requirements were held invalid," then Lowry "could demand a 'suitable and equitable' substitute such as the issuance of a golden share of preferred stock carrying similar pre-approval rights." Op. at 861. In short, when the Opinion issued, a preexisting contractual right to return to the status quo automatically vested. The Independent Committee determined §122(18) offered a preferable means to satisfy that right than the golden share suggested by the lower court. However, even if

§122(18) did not exist and its adoption assumed away in this appeal, that preexisting contractual right was satisfiable through the issuance of a golden share. Thus, any benefit was of extraordinarily limited duration and at most addressed the placement of the Holders' rights rather than the effect of them.

Relying on the Court of Chancery's analysis in *Tornetta v. Musk*, 326 A.3d 1203 (Del. Ch. 2024), the lower court erroneously labeled the Substitution Right a "fix it after the fact" argument. Ex. D at 54. This ruling was legal error as the Opinion itself recognized the Substitution Right and the Court of Chancery, in prior rulings considering a fee request, has recognized the commonsense need to consider future, off-setting actions. In *In re Cheniere Energy Inc. Stockholders Litigation*, the company agreed to resolve challenges to an equity-based compensation plan by agreeing not to pursue further equity-based plans while reserving the right to award non-equity-based compensation. Consol. C.A. No. 9710-VCL, at 91-95 (Del. Ch. Mar. 16, 2015) (TRANSCRIPT). The trial court expressly recognized that in evaluating the benefit achieved, it was necessary to "take into account that there's going to be some additional compensation or other plan put into place." *Id.* at 102-03. Similarly, the Court of Chancery has, in the context of a challenge to stock options, concluded that it is "reasonable to infer" the issuance of replacement options when evaluating a fee request. *Dann v. Chrysler Corp.*, 215 A.2d 709, 714 (Del. Ch. 1965), *aff'd*, 223 A.2d 384 (Del. 1966).

In all events, Defendant's position is not that the fee should be reduced because the New Agreement and Second Bylaw Amendment were subsequently approved. Instead, Defendant's position is that the fee should be reduced because Plaintiff's claims resulted in the immediate triggering of a preexisting and then-satisfiable contract right mandating a return to the status quo. As the Court of Chancery noted, "[b]efore someone brings a case, they have to think that that case is meaningful." Ex. D at 56. Before Plaintiff brought her case, the Substitution Right was plain to see. Defendant did not "do something that render[ed] the benefit minimal," *id*., the existing Substitution Right and existing means to satisfy it meant the benefit was going to be minimal from the get-go. The lower court's failure to acknowledge that is reversible legal error.

Delaware has long recognized that in the therapeutic benefit context, fee awards are reduced when the benefit is durationally limited. *In re Golden State Bancorp Inc. S'holders Litig.*, 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000) ("In the context of a therapeutic benefit case, fee awards are minimized where the benefit is intangible or limited in duration."); *Friedman v. Baxter Travenol Laboratories, Inc.*, 1986 WL 2254, at *5 (Del. Ch. Feb. 18, 1986) ("[W]here a settlement produces a therapeutic benefit that is specific and of long-term duration, the counsel fee award should be greater than in cases such as this where the therapeutic benefit is speculative and of evanescent or limited duration."). Accordingly, fee awards have

been reduced substantially in instances where the benefit conferred was of limited duration. *Berger v. Adkins*, 2023 WL 5162408, at *5-6 (Del. Ch. Aug. 8, 2023) (reducing fee from $2.2 million to $400,000 because eliminated standstill provisions were limited in duration); Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Delaware Court of Chancery* § 17.03, 27 (2024) (lesser fees are awarded "where the benefit is intangible, speculative, or of limited duration"). The failure to consider the Substitution Right and limited duration of any arguable benefit was legal error.

2. *The Trial Court Committed Legal Error When It Failed To Apply A Quantum Meruit-Based Approach To Sugarland*

Where a benefit is not quantifiable (or not quantifiable with certainty), precedent approaches the *Sugarland* factors by beginning with the expenditure of time and effort by counsel, and then applying an appropriate premium or discount based on benefit achieved. *See, e.g.*, *In re Xencor, Inc.*, C.A. No. 10742-CB, at 50 (Del. Ch. Dec. 10, 2015) (TRANSCRIPT) (in non-quantifiable benefit cases, "the hourly considerations of the fee application take greater prominence than they might otherwise in a case that's based solely on getting a cash award"); *Fire & Policy Pension Fund, San Antonio v. Stanzione*, C.A. No. 10078-VCG, at 8 (Del. Ch. Feb. 25, 2015) (TRANSCRIPT) (because benefit is "difficult to quantify, I turn, consistent with *Sugarland*, to the time spent on the case"); *Forgo v. Health Grades,*

Inc., C.A. No. 5716-CS, at 64-65 (Del. Ch. June 29, 2011) (TRANSCRIPT) (in unquantifiable benefit cases, it is important to "look at the other *Sugarland* factors"); *In re QVC, Inc.*, 1997 WL 67839, at *3 (Del. Ch. Feb. 5, 1997) (where benefit not susceptible to quantification, "a quantum meruit analysis provides the means of determining an appropriate award"); *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *8 (Del. Ch. Nov. 27, 1990) ("When an unquantifiable benefit is involved, the quantum meruit approach gives the Court a more equitable means of determining a reasonable fee."); *Robert M. Bass Grp., Inc. v. Evans*, 1989 WL 137936, at *4 (Del. Ch. Nov. 16, 1989) ("But where, as here, the benefit conferred by the fee applicant cannot be quantified, the quantum meruit approach is often the only method that, as a practical matter, will enable the Court adequately to perform its fee-awarding function").

Under this *quantum meruit* approach to *Sugarland*, the trial court "consider[s] the work the attorneys performed to achieve the benefit, and the amount and value of attorney time required for that purpose, taking into account the experience of counsel and the contingent nature of the case." *Off v. Ross*, 2009 WL 4725978, at *7 (Del. Ch. Dec. 10, 2009) (citation omitted). Moreover, under this approach, the lower court should consider "only the time plaintiff's counsel spent in obtaining the benefit supporting the fee application". *Stanzione*, C.A. No. 10078-VCG, at 8-9; *see also In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2019 WL

994045, at *5 (Del. Ch. Feb. 28, 2019) (adjusting lodestar from $7,672,532 to $4,472,617 because "no more than half of the Plaintiffs' time was required to achieve the benefit").

This approach makes sense, as attempting to value unquantifiable benefits can lead to inconsistent fee awards, notwithstanding the efforts of judges to arrive at consistent awards for comparable unquantifiable benefits. For example, examining fee awards from the last ten years in cases making §141(a) facial invalidity arguments yields a band of decisions awarding fees that range from $37,500 to $775,000 (unadjusted for inflation). *See Pezzoli v. Clark*, C.A. No. 12556-VCL, ¶ 3 (Del. Ch. Jan. 2, 2017) (ORDER) ($37,500); *Beaulieu v. Dwek*, C.A. No. 2018-0215-JTL, at 35 (Del. Ch. Feb. 7, 2019) (TRANSCRIPT) ($50,000); *In re Colfax Corp.*, C.A. No. 10447-VCL, at 36 (Del. Ch. Apr. 2, 2015) (TRANSCRIPT) ($375,000); *In re Vaalco Energy, Inc. Consol. S'holder Litig.*, C.A. No. 11775-VCL, at 4 (Del. Ch. Apr. 20, 2016) (ORDER) ($775,000). Other types of unquantifiable benefits, such as supplemental disclosures and compliance-based reforms have also resulted in a significant range of awards. *Compare In re Xoom Corp. S'holder Litig.*, 2016 WL 4146425, at *5 (Del. Ch. Aug. 4, 2016) ($50,000 in fees for supplemental disclosures of financial advisor compensation and details of conversations regarding post-closing employment of management) *and In re Baker Hughes Inc. S'holders Litig.*, C.A. No. 10390-CB, at 5-6, 10-13 (Del. Ch. Oct. 13,

2016) (TRANSCRIPT) ($100,000 for "modest" supplemental disclosures of (i) additional line items for projections, (ii) additions to summary of analysis of free cash flows, (iii) transaction background details, and (iv) discussions of post-merger employment of management) *with Hamil v. Ambry Genetics Corp.*, C.A. No. 2017-0587-AGB, at 67-71, 75 (Del. Ch. Jan. 8, 2019) (TRANSCRIPT) (awarding $450,000 for disclosure supplement focused on (i) financial projections, (ii) summary of analyses underlying the fairness opinion, and (iii) fee arrangement for banker). *Compare also Witmer v. Kriegsman*, C.A. No. 2017-0738-JRS, at 27-28, 33 (Del. Ch. Dec. 10, 2018) (TRANSCRIPT) ($165,000 for reforms creating a regulatory compliance manager position and implementation of employee training procedures on compliance issues) *with Atul Verma v. Costolo*, C.A. No. 2018-0509-PAF, at 15, 46-47 (Del. Ch. July 27, 2021) (TRANSCRIPT) (valuing governance reforms, which included "additional employee training with respect to compliance" and "creating the new chief compliance officer position" at $1.2-1.7 million).

Accordingly, beginning the *Sugarland* analysis with a review of counsel's time and effort devoted to litigation creating an unquantifiable benefit is much more predictable and precise than first attempting to value an unquantifiable benefit. Although there will always be some variability in fee awards, tethering awards for difficult to quantify benefits to a *quantum meruit* analysis in the first

instance rewards counsel based on the effort invested, subject to adjustment based on the *Sugarland* factors.

Notwithstanding the caselaw above that suggests starting with a *quantum meruit* approach to *Sugarland* in therapeutic benefit cases, the court below rejected that approach and "start[ed] with a proxy for the benefit." Ex. D at 58, 60. That was reversible error contrary to precedent and sound public policy.

3. *The Lower Court Abused Its Discretion In Setting A Fee*

Legal error aside, Plaintiff's counsel and professional staff (totaling *thirteen* legal professionals) devoted a total of 1,042.60 hours to this matter, exceeding by 107% and 54% the hours of the attorneys in *Moelis* (501.5) and *N-Able* (677 hours, *including* hours for supplemental briefing requested by the lower court), respectively. A2019. Notwithstanding that, the Vice Chancellor decreased Plaintiff's counsel's lodestar *only by 7%* (from $644,000 to $600,000) in determining an award of fees and expenses after applying 4x multiplier. Ex. D at 64. Reducing Plaintiff's counsel's hours to 589.25 (midway between *Moelis* and *N'Able*) would result in a 56% reduction in lodestar and the award representing a nearly 8.5x multiple. And the trial court's use of a 4x multiple was significantly higher than precedent in the *quantum meruit* context, where awards generally have ranged between 1x and 3x of the claimed lodestar. *Compare In re Cheniere*, Consol.

C.A. No. 9710-VCL, at 104-105 (2.99 multiplier) *with Off v. Ross*, 2009 WL 4725978, at *7 & n.40 (1.011 multiplier).

Nor did the trial court take into account the substantial time (based on page counts from the briefing) Plaintiff devoted to challenging the efficacy of the Consent Agreement and First Bylaw Amendment, which the Opinion held effectively addressed the Section 141(a) issue with respect to the Challenged Provisions and which, had the Plaintiff acknowledged resolved that issue, might have left stockholders in a better position than they are today (Stockholders Agreement subject to Consent Agreement versus New Agreement).

Which leads to a key practical check on the award: Would a reasonable plaintiff have agreed in advance to the fee in view of the results achieved? *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, C.A. No. 961-CS, at 83-84 (Del. Ch. Dec. 19, 2011) (TRANSCRIPT) (noting a "fundamental test of reasonableness" is whether "the hypothetical plaintiff would walk away" if the lawyer sought agreement to the fee based upon a specified outcome at the outset). The Vice Chancellor rejected this common-sense test as "vulnerable to hindsight bias," but the existence of the Substitution Provision is not something that could only be accounted for in hindsight. Ex. D at 65. Particularly in light of that provision, but also given that, from the time of the IPO, the market was informed of the terms of the Stockholders Agreement and that Defendant's "future success depends substantially

on the continued service" of Lowry (A0290 at 31), no objective plaintiff would agree to pay $2.4 million for the purely therapeutic results of moving the rights from the Stockholders Agreement to a golden share that could have been achieved by this litigation.

CONCLUSION

Defendant respectfully requests this Court overrule the Court of Chancery's determination and direct it to issue judgment in favor of Defendant.

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April 8, 2025

CERTIFICATE OF SERVICE

I hereby certify that, on April 8, 2025, a copy of the foregoing *Appellant's Opening Brief* was served by File & Serve*Xpress* on the following attorneys of record:

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