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IN THE SUPREME COURT OF THE STATE OF DELAWARE

AIM VENTURA CAPITAL FUND, LLC, and AIM VENTURA CO-INVEST I, LLC Intervenor-Plaintiffs Below, Appellants, v. GABB WIRELESS, INC., Defendant-In-Intervention Below, and STEPHEN DALBY and JANA DALBY, Plaintiffs Below, Appellees.	No. 393,2025 Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2025-0136-NAC

APPELLANTS' CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal challenges a number of legal and factual determinations made by the Court of Chancery in expedited litigation. Appellant AIM Ventura Capital Fund, LLC ("AIM Ventura") proved that Appellee Gabb Wireless, Inc. ("Gabb") breached the terms of a convertible note by failing to honor the conversion and issue preferred stock. The trial court nevertheless abused its discretion in declining to award AIM Ventura any remedy, let alone its requested remedy of specific performance.

The trial court denied specific performance, finding the equities did not clearly and convincingly favor AIM Ventura. In doing so, however, the trial court misapplied the relevant balancing test. Instead of considering the lack of hardship and the positive impacts of the conversion to Gabb, the trial court focused on potential drawbacks that a conversion could have for Appellee Stephen Dalby.[1] The trial court further failed to consider the events leading to Gabb's breach of the convertible note—featuring obstruction from Stephen, his wife, and his brother-in-law, all of whom sat on Gabb's board of directors (the "Board") together. The trial court instead set out to identify the reason for AIM Ventura's conversion, erroneously finding it was to further a plan to "extinguish" and "vitiate" Stephen's

[1] AIM Ventura refers to Stephen Dalby as "Stephen" and Jana Dalby as "Jana." Collectively, AIM Ventura refers to Stephen and Jana as "the Dalbys." AIM does not intend any disrespect to the Dalbys and only uses their first names for ease of reference due to their shared last name.

rights under two governing documents that provided Stephen with a right to sit on the Board as its "CEO Director" until a Series B transaction occurred, notwithstanding that Stephen has not been Gabb's CEO since October 2021.

The errors in the trial court's decision denying specific performance are exacerbated by the its subsequent unprecedented award of attorneys' fees to the Dalbys. The Dalbys instituted the action below under 8 *Del. C.* § 225 to determine whether Stephen's removal from the Board "for cause" was valid (the "Section 225 Action"). Appellants intervened and filed a Complaint-In-Intervention because the Dalbys intended to litigate the convertible note and conversion in their removal case. The trial court ultimately determined that Stephen's removal was invalid and Gabb had breached the convertible note. The trial court subsequently abused its direction in awarding the Dalbys over $10.5 million in attorneys' fees ("Fee Award") under a contractual fee-shifting provision and making only Appellants liable for payment notwithstanding their intervention and success in proving Gabb's breach. The Fee Award is unreasonable because the fees stem from a contingency arrangement with litigation counsel that included a 2.5x fee multiplier. And the methodology by which the trial court assessed the reasonableness of the Fee Award is full of legal and factual errors.

For the reasons addressed herein, Appellants submit that the trial court's denial of specific performance and its Fee Award should be reversed.

SUMMARY OF ARGUMENT

1. The trial court erred by declining to award AIM Ventura specific performance as a remedy for Gabb's breach of the Convertible Note because the equities, if properly balanced, weigh in favor of AIM Ventura.

2. The trial court erred in granting the Dalbys' petition for attorneys' fees, costs, and expenses, and holding Appellants the only liable parties for the unprecedented Fee Award.

STATEMENT OF FACTS

I. The Appeal Parties

Gabb is a Delaware corporation with a principal place of business in Lehi, Utah. *See* Exhibit A, August 29, 2025 Memorandum Opinion (cited herein as "Op. at __"), at 5. Gabb provides safe technology options for children. *Id.* Gabb was the Nominal Defendant in the Section 225 Complaint and the Defendant in the Complaint-in-Intervention.

Stephen Dalby founded Gabb in 2018. *Id.* He served as Gabb's Chief Executive Officer ("CEO") until his removal in October 2021, and has sat in the "CEO Director" seat on the Board at all relevant times. Op. at 9-11; A0684. Stephen is Gabb's single largest stockholder, holding approximately 86% of Gabb's common stock; however, Stephen's stockholding, on a fully diluted basis, is approximately 47%. A0060-64. Appellee Jana Dalby is Stephen's wife. Op. at 22. Jana holds no Gabb stock in her individual capacity. The Dalbys were Plaintiffs in the Section 225 Complaint. They were not named in the Complaint-in-Intervention.

AIM Ventura is a private equity fund based in Utah specializing in investments in emerging growth companies. A0684; Op. at 1. AIM Ventura holds 9,044,572 shares of Gabb's Series Seed preferred stock. A0684; A0257. AIM Ventura is party to that certain Amended and Restated Subordinated Convertible Promissory Note (the "Convertible Note") (A0110-121), under which AIM Ventura

elected on January 3, 2025 to convert the $1.5 million principal (plus interest) into shares of Series B Preferred Stock (A0262-263).

Appellant AIM Ventura Co-Invest I, LLC ("Co-Invest I" and together with AIM Ventura as "Appellants") is a private equity fund formed to provide additional investment into AIM Ventura's portfolio companies—primarily, Gabb. A0684; A0963-964 (442:22-443:4); A0932 (113:12-24). In or around October 2021, Co-Invest I led Gabb's "Series A1" round of financing (A0684; Op. at 6), and holds 2,604,409 shares of Series A preferred stock. A0684; A0257. Co-Invest I also invested in Gabb convertible promissory notes in 2021 and converted the principal and accrued interest of those notes into shares of Series B preferred stock in per an option in the Convertible Note. A0706; A0932 (113:12-24); A0264.

Appellants are structured similarly in that they are both managed by AIM Ventura Capital Fund Management, LLC ("AIM Manager"), which contractually delegated all of its managerial responsibility to Adams Wealth Management, LLC (d/b/a Adams Wealth Advisors) ("Adams Wealth") as the investment sub-adviser. Op. at 6; A0966 (445:8-22). Cormac Murphy is the Chief Investment Officer at Adams Wealth and has been the sole individual with investment decision-making authority for Appellants since October 2023. Op. at 45; A0685. While the structure and investment profile of AIM Ventura and Co-Invest I are similar, they each have a different investor base. A0976 (455:14-16); A0929 (110:12-14).

II. AIM Ventura Provides Funding To Gabb as Lender of Last Resort

In June 2024, Gabb found itself in a precarious financial situation. Despite marketing efforts to attract further investment, Gabb failed to close a Series B round of financing to fuel the company's growth. Even more pressing, its primary and secured lender, ZEFCOM, LLC, d/b/a Telispire PCS ("Telispire"), denied Gabb access to an anticipated $3 million credit line increase. Without this funding, Gabb was left scrambling to make payments to a critical vendor in early July.

Gabb turned to its existing investors for an immediate cash injection. When others refused or were unable to wire funds by the vendor's deadline, AIM Ventura became the lender of last resort. A0931-932 (112:19-113:7). AIM Ventura was not eager to provide emergency funding to Gabb, as it is not a debt fund and the risk of nonpayment for this particular financing was high. A0968 (447:10-12), A0969 (448:14-22).

Regardless, recognizing Gabb's need and the potential harm to AIM Ventura's existing investment, AIM Ventura sent $1.5 million to Gabb on July 3. A0122; A1006 (514:1-7). Murphy treated this as a distressed investment and required corresponding terms to account for the acute risk of nonpayment. A0968-969 (447:10-448:14-22). On July 5, Gabb and AIM Ventura finalized the promissory note for AIM Ventura's $1.5 million, which included a 90-day maturity

date of October 3, 2024—to line up with higher cash flows during Gabb's back-to-school sales, and a 22% interest rate. A0101-109; A0968-969 (447:10-448:14-22).

III. AIM Ventura Revises the Note to Meet Telispire's Demands and Avoid a Gabb Default Under its Loan Documents

Telispire subsequently threatened Gabb with default under a Loan and Security Agreement (the "LSA") for issuing a promissory note to AIM Ventura without Telispire's prior approval. Op. at 38; A0133-134. In the weeks following July 5, Murphy negotiated directly with Telispire to amend the promissory note and avoid default. A0971-972 (450:23-451:1); A0933 (114:20-23). In a reservation of rights letter dated July 26, Telispire set a resolution deadline of July 31. A0133.

On July 30, Murphy circulated the near-final draft of the Convertible Note to Gabb's Board, including the Dalbys, and explained the key terms. A0162-173; Op. at 46.

Murphy's negotiations with Telispire resulted in a fundamentally different agreement than the original promissory note, and it substantially increased the risk to AIM Ventura, as Telispire required AIM Ventura to: subordinate repayment to Telispire's debt (A0970; A0657); extend the maturity date to April 2025, which was after Telispire's $5 million loan was due (A0123-128; A0970); and forego the ability to seek accelerated repayment (A0970; A0657). A conversion feature was also added, which was valuable to AIM Ventura to account for the increased risk due to the favorable terms required by Telispire. A0973 (452:4-14). The conversion

feature also reassured Telispire that Gabb was not taking on additional straight debt. *Id.* One of the conversion options also pre-authorized an additional $1 million in cash to Gabb without needing Telispire's approval. A0111; A0975-976 (454:15-455:1).

The Convertible Note contains two options for conversion. A0111; Op. at 47. Section 2(b) provided AIM Ventura with the option to convert as part of a broader round of financing, which was the preferable option for AIM Ventura:

> (b) Optional Conversion upon an Equity Financing. In the event that the Company issues and sells shares of its preferred or common stock ("Equity Securities") to investors (the "Investors") while this Note remains outstanding in a bona fide equity financing (the "Equity Financing"), then upon the election of the Majority Holders (which election shall be made in the sole discretion of the Majority Holders), the outstanding amount of this Note and all accrued and unpaid interest thereon, plus up to an additional $1,000,000.00 at the sole discretion of the Majority Holders contributed in cash at the time of Equity Financing, shall automatically convert in whole without any further action by the Holder into the Equity Series sold in the Equity Financing....

A0111; Op. at 47.

Section 2(a) allowed AIM Ventura to convert at any time:

> (a) Majority Holder Optional Conversion. Upon the election of the majority Holders while this Note remains outstanding (which election shall be made in the sole discretion of the Majority Holders) on or after the date that is thirty (30) days from the date of this Note, the Company shall convert the outstanding principal amount of this Note and all accrued and unpaid interest thereon into that number of shares of Optional Conversion Preferred Stock of the Company....In addition, at the time of Majority Holder Optional Conversion, (i) the Majority Holders may elect

> to purchase up to $1,000,000.00 worth of Optional Conversion Preferred Stock at the Optional Conversion Price (including the optional conversion to common), and (ii) the Company shall offer AIM Ventura Co-Invest I, LLC and AIM Ventura Co-Invest II, LLC the option effective at the same time as the Majority Holder Optional Conversion to convert any convertible debt that such companies hold....Should AIM Ventura Co-Invest I, LLC and AIM Ventura Co-Invest II, LLC exercise their option to convert, all other holders of the debt may convert at the same terms.

A0111; Op. at 47.

The consideration for a Section 2(a) conversion would be "Optional Conversion Preferred Stock," which was defined to mean shares of "Series B Preferred Stock." A0111, A0118. This was meaningful. A0974-975 (453:9-454:6).

Under a June 2022 settlement agreement (the "Settlement Agreement"), A0061-0072, a new CEO was put in place to hold the position "through the initial closing of Gabb Wireless's next round of bona fide financing for the primary purpose of raising capital that is consummated after the date hereof (the 'Series B')…." (Op. at 9; A0062), and Stephen would "hold the CEO Director Seat until the closing of the Series B or a new CEO is appointed, whichever is later." Op. at 9; A0062. A September 2022 Amended and restated Voting Agreement (the "Voting Agreement'), A0073-A0100, similarly provided that Stephen would continue to hold the CEO Director seat until the later of "(i) the initial closing of the Company's next bona fide equity financing for the primary purpose of raising capital that is consummated after the date hereof and pursuant to which the Company issues and

sells a new series of preferred stock at a fixed valuation (the "Next Equity Financing") or (ii) the appointment of a new Chief Executive Officer…." A0074.

From AIM Ventura's perspective, the largest threat to Gabb's future was the instability of the Board and the Board's corresponding inability to obtain much needed financing. This was attributable to Stephen taking a "'musical chairs' approach to the Common Director seats[,]" appointing directors and firing them when they disagreed with him. Op. at 23. Murphy, who crafted Section 2(a) of the Convertible Note, thus required "Series B Preferred Stock" in the event of a Section 2(a) conversion as an "emergency" option so that, should Stephen continue to destabilize the Board and block financing options, AIM Ventura could opt to convert and trigger the terms of the Voting and Settlement Agreements, thus ending Stephen's right to sit in the CEO Director seat. A0972-973 (451:24-452:2), A0977 (456:2-14).

IV. The Dalbys Approve the Convertible Note Fully Understanding its Terms

The Convertible Note was approved by the Board via Unanimous Written Consent of the Board of Directors (the "Board Consent") and by a majority of Gabb's stockholders via Action by the Written Consent of Stockholders in Lieu of Special Meeting (the "Stockholder Consent"). A0138-0145; A0146-0155; Op. at 49. Stephen and Jana signed the Board Consent (A01491), and Stephen signed the Stockholder Consent (A0149-0151). The Dalbys signed the Board Consent and

Stephen signed the Stockholder Consent after consulting with their personal legal counsel at BraunHagey. A0941-942 (305:6-9, 306:9-14); A0137; A0156; A0162.

The Dalbys had also participated in a series of phone calls with their personal legal counsel, Murphy, and Kastner to discuss the terms of the Convertible Note. A0941 (305:10-16); A0934 (115:17-20); A0979-980 (458:14-459:5). On these calls, Murphy walked Stephen and Stephen's legal counsel through the key terms of the Convertible Note, including the two options for conversion. A0981 (460:7-20); A0941 (305:10-23). Murphy explained that Section 2(b) of the Convertible Note encouraged the Board to work toward an outside Series B financing event and that AIM Ventura was financially motivated to convert under Section 2(b) as part of a broader financing. A0981 (460:7-20). Murphy pointed out, however, that should the Board continue to be dysfunctional, Section 2(a) provided an alternative conversion option for AIM Ventura that would break the Board's structural impediments and result in dilution to AIM Ventura, Stephen, and other stockholders. *Id.*

None of the Dalbys or their personal legal counsel challenged that an optional conversion by AIM Ventura under Section 2(a) would dilute Stephen's ownership, and they certainly never raised the "anti-dilution" clause of the Settlement Agreement. A0949 (313:31-24); A0938 (158:14-159:2); A0982 (461:2-5). The Dalbys also never asked questions about, or objected to, the terms of the Convertible

Note. Stephen thanked Murphy for providing Gabb with the $1.5 million to avoid missing payment to a critical vendor. A0981 (460:22-23).

After these phone calls, on July 31, in a text message with Kastner, the Dalbys' counsel noted the Dalbys were "prepared to approve the convertible note as discussed." A0175. Stephen replied, "Agreed….We are optomisitc [sic] about working together w you and Cormac." *Id.* In an email to the Board that same day, Stephen stated, "Jana and I agreed to the terms of the convertible note that was put forth to us earlier today on our call with AIM (Cormac and David)." A0157. Murphy responded to just Stephen, "[I] appreciate how productive our dialogue has been and your willingness to step up to prevent default." A0156.

In signing the Board Consent, the Dalbys endorsed that "it is in the best interest" of Gabb and its stockholders to have Gabb enter into the Convertible Note, and confirmed that they had reviewed and evaluated the "material facts," the "rights and obligations" of Gabb and its stockholders, and all "costs, obligations [and] requirements (financial or otherwise)" before approving. A0138-0139. Stephen similarly endorsed in signing the Stockholder Consent that "it is in [his] best interests and the best interest of [Gabb]" to approve the Convertible Note and further confirmed that "after careful consideration" he had "determined in good faith … that the terms and conditions of the [Convertible Note] are just, equitable, and entirely fair to the company and its stockholders." A0147.

On August 1, Telispire circulated fully executed versions of the Convertible Note and related documents, rescinding its Reservation of Rights letter and confirming that it would not find Gabb in default of the LSA. A0176.

V. The December 23, 2024 Board Meeting

Gabb's financial condition continued to deteriorate after the Convertible Note. By the end of 2024, Gabb again needed immediate funding to pay critical vendors. Op. at 68-69; A0210-0224.

The Board was scheduled to meet on December 23, 2024 to discuss financial options, including an inside Series B financing round. A0233. The Board members as of December 23 were Jana, Michael Hammond (a Common Director appointed by Stephen), Mendez, and Murphy (temporarily replacing Kastner). Stephen had stepped down from the Board on December 20 for "personal reasons" Op. at 71.[2]

Hammond resigned immediately before the December 23 meeting. Op. 71. Murphy learned of Hammond's resignation while waiting for Hammond and Jana to join the meeting. A0984 (463:5-11). Hammond intended to vote in favor of the inside Series B, against Stephen's wishes (A1005), and explained in contemporaneous text messages that Stephen "didn't fire me, but he wanted me to

[2] Blue Diamond sent notice to Stephen on December 10 that it was initiating procedures to remove him from the Board for cause. A0226-0230.

vote a certain way … I was told to give him my word to vote a certain way or he had to do something. I am not playing that game." A0231; A0242; Op. at 70-71.

Jana did not attend the December 23 meeting after Hammond resigned, so Murphy and Mendez, forming a quorum of the majority of directors, moved forward to discuss and approve the proposed internal Series B. A0984-985 (463:5-464:18).

At some point after the meeting began, Stephen appointed his brother-in-law (Jana's brother), Jason Hawke, to the Board. Op. at 71; A0244. Jana and Hawke then joined the Board meeting, were informed of the 2-0 vote to approve the internal Series B, and voiced their dissent to the inside Series B. A0985 (464:6-18).[3]

Gabb's corporate counsel recommended relying on Murphy and Mendez's 2-0 vote to push through an inside Series B round notwithstanding the fact that Jana and the newly-appointed Hawke expressed their dissent after the vote occurred. A0985 (464:5-6); A0246. Murphy refused (*see* A0246), and later expressed in writing that he was "not going along with Sandlot, Greg and Nate's preferred course of action" to abide by the clouded inside Series B vote. A0430.

[3] Murphy took extreme issue with Stephen's appointment of Hawke to the Board as Hawke was the subject of orders from the Idaho Department of Financing for violation of the Idaho Uniform Securities Act. A0448-0450. Hawke's SEC-mandated disclosures included a large number of customer complaints where Hawke was found personally liable, an unusual outcome in the industry indicating egregious conduct. A0986-987 (465:24-468:15).

VI. The December 23 Board Meeting was the Catalyst for Murphy's Decision for AIM Ventura Convert

The events that unfolded prior to and during the December 23 meeting were the catalyst for Murphy deciding to have AIM Ventura convert under Section 2(a). A0985-986 (464:24-465:5). Murphy experienced first-hand that Gabb's Board, as currently structured, "had zero ability to address the financing needs of the company" and was certain the Dalby contingent would continue its brinksmanship. *Id.* Murphy and AIM Ventura's counsel thereafter discussed the prospective conversion with Gabb's management and counsel (Op. at 72-73; *see also*, *e.g.*, A0246, A0254, A0248), and came to understand that AIM Ventura's additional $1 million cash investment would be used for operational expenses, like payroll. A1002 (481:11-20). Murphy also reconfirmed with Gabb's counsel that a Section 2(a) conversion qualifies as a "Next Equity Financing" under the Voting Agreement and a "Series B" under the Settlement Agreement. Op. at 73.

On January 3, 2025, AIM Ventura provided Gabb with notice of its election to convert under Section 2(a) of the Convertible Note and to invest an additional $1 million in new money. Op. at 74-75; A0263-0264. Co-Invest I, AIM Ventura Co-Invest II, LLC, (together with Co-Invest I as the "Co-Invest Entities"), Sandlot, and Blue Diamond also elected to convert. Op. 75-76. Collectively, the conversion would eliminate at least $11 million in debt (and potentially up to $17 million, including interest, if all noteholders elected to convert). A0959-961 (408:22-410:17);

A0256-A0260. This would clean-up Gabb's balance sheet and aid with obtaining external financing in the future. *See* A0959-961 (408:22-410:17).

VII. Gabb Breaches the Convertible Note Due to the Dalbys' Obstruction

On January 4, 2025, Randle emailed the Board to set up a meeting to discuss and approve the formalities necessary to effectuate the conversion, which Gabb was required to do within fifteen days under the Convertible Note. A0267; A0295. Jana and Hawke both indicated they would not be available for a meeting. A0323; A0325-0327. On January 8, Randle again emailed the Board, stating:

> The need for a board meeting is procedural at this point. The decision to take AIMs [sic] money in early July (that as a reminder both Jana and Stephen agreed to) came with obligations. Among those obligations is that the company is required to convert the note to equity upon AIMs [sic] election within 15 days. All we are trying to do now is comply with our obligations under the note….If we fail to convert AIMs [sic] note by January 18, there will be a default interest trigger event which raises the interest rate to 30%.

A0331-0332. A Board meeting was eventually scheduled for January 14. A0406.

On January 13, Randle emailed the Board, emphasizing the importance of approving the conversion because Gabb was "short on cash" and would be unable to fund upcoming payroll without AIM Ventura's additional $1 million. A0412. Hawke responded by requesting to add the appointment of a company president and Board chairperson to the agenda. *Id.* The Dalbys and Hawke had indeed devised a

plan for Stephen to resume his Board position just prior to the meeting and to appoint him as President and Hawke as Board chairperson. A0675.

Stephen attempted to resume his position on the Board just prior to the January 14 meeting (A0409), but did not provide an appropriate written consent (A0415). Stephen nevertheless joined the meeting where he, Jana, and Hawke, as planned, moved to appoint Hawke as Board chairperson and Stephen as President. A0420-0422. Neither the conversion nor Gabb's financial state were discussed. A0992 (471:2-4).

Gabb was unable to fund payroll without AIM Ventura's additional $1 million and overdrew its bank account on January 17. A0427. Despite a plea by Gabb's CFO (A0434; A1002), the Dalbys refused to act on the conversion. Gabb later overdrew its account a second time. A1002.

On January 18, Murphy emailed the Board demanding it fulfill Gabb's obligations under the Convertible Note and requested a Board meeting that day. A0431. The Board did not meet and otherwise failed to take any action on the conversion within the 15-day window, confirming the continued dysfunction. A0992 (471:12-16). The next day, AIM Ventura sent Gabb a default notice and withdrew its offer to purchase an additional $1 million in Series B Preferred Stock while reserving the option to recommit if certain conditions were met. *Id.*

Murphy nevertheless continued efforts to find a workable solution. A0992 (471:10-23). He proposed a remediation plan with two key provisions: (1) board transparency and financial discipline and (2) board stability, setting a January 30 deadline. A0993 (472:9-18); A0432-0433; A0493-0494. Murphy and Stephen discussed the remediation plan, and even reached agreement on several terms that favored Stephen, but negotiations never finished. A0993-994 (472:9-473:13); A0951-952 (315:13-316:11); *see also* A0493-0494; A0496. On January 23, Murphy again emailed the Board and Gabb's management requesting an update on whether the Board planned to meet to discuss the remediation plan by January 30. A0436. Randle proposed a meeting on January 30 for the Board and all parties to the Settlement Agreement, but Hawke responded that he could not make a meeting any day that week. A0441.

Despite the Board failing to act by January 30, Murphy again attempted to find a workable solution. Murphy emailed the Board with a plan to discuss at a meeting that day, which mirrored his discussions with Stephen. A0488. Jana responded that she and Hawke would not attend the meeting. A0485.

VIII. Dalby Challenges His Removal from the Board, and AIM Ventura Intervenes to Protect its Interests Under the Convertible Note

On February 10, 2025, the Dalbys filed an action under 8 *Del. C.* § 225 ("Section 225") seeking a judicial declaration that Stephen's "for cause" removal

from Gabb's Board was invalid. A0536 ¶ 119 ("Section 225 Complaint"). The Dalbys named Kastner and Mendez as defendants, with Gabb as a nominal defendant.

The Section 225 Complaint referenced the Convertible Note and AIM Ventura's conversion throughout, including allegations that Gabb could simply repay the Convertible Note (plus interest) at maturity notwithstanding Gabb's default for not honoring the conversion. *See* A0525 ¶ 84.

On February 14, 2025, seeking to protect its legal and economic interests, AIM[4] filed a motion to intervene. A0573. The parties agreed to the intervention, and the Court approved it on February 20. A0585. The same day, AIM filed its complaint-in-intervention (A0590) ("Complaint-In-Intervention").

Count I of the Complaint-In-Intervention asserted a claim for breach of contract against Gabb for violation of the Convertible Note, seeking specific performance. A0607-608. Count II sought a judicial declaration that Gabb was obligated to accept AIM Ventura's election to convert with no choice in whether to move forward with the conversion. A0609-610.

Due to division among the Board, Gabb was "unable to take a unified position" with respect to the Complaint-in-Intervention. *See* A0647; A0651. The Dalbys sought to preserve Gabb's defenses and interests, so as an accommodation, it was

[4] "AIM" collectively refers to AIM Ventura and the Co-Invest Entities.

agreed they could file a pleading responsive to the Complaint-In-Intervention. *See* A0585; A0613.

Trial took place on May 8 and 9 on both the Section 225 Complaint and the Complaint-In-Intervention. The Court issued its Memorandum Opinion on August 29, 2025. As it relates to the Section 225 Complaint, the Court found that Stephen's removal from the Board was invalid because the stockholder solicitation omitted material facts. Op. at 86-91. As it relates to the Complaint-in-Intervention, the Court held that Gabb breached the Convertible Note by "failing to satisfy its obligation to convert the outstanding principal amount and interest on the AIM Note into Optional Conversion Preferred Stock." *Id.* at 95. The Court nevertheless declined to award specific performance on grounds that the equities did not favor AIM Ventura. *Id.* at 95-98. The Court denied AIM Ventura's requested judicial declarations without further reasoning. *Id.* at 98.

IX. The Dalbys' Fee Petition

Following the Opinion and entry of an implementing order, the Dalbys filed a fee petition seeking an award of attorneys' fees (A0897) ("Fee Petition") as the "prevailing party" in the Section 225 action and under Section 7.17 of the Voting Agreement. The Dalbys sought over $10 million in legal fees and expenses based on a contingent arrangement with a 2.5x fee multiplier between the Dalbys and their litigation counsel, Ross Aronstam & Moritz, LLP ("RAM"). A0898, A0904. The

Dalbys requested fees from Mendez, Appellants, and Gabb. A0906 ¶¶ 25-26. Appellants opposed the Fee Petition on several grounds. *See generally* A0912.

Oral argument on the Fee Petition was held on November 6, 2025. The trial court initially indicated it would decide the Fee Petition by way of a written decision, but changed course and issued an order the same day granting the Fee Petition and holding only the Appellants liable for the entire fee award for the reasons addressed during oral argument ("Fee Petition Transcript"). *See* Exhibit C; Exhibit E.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING SPECIFIC PERFORMANCE BECAUSE IT MISAPPLIED THE BALANCING OF EQUITIES TEST BY FAILING TO CONSIDER GABB'S INTERESTS.

A. Question Presented

Whether the trial court erred in denying specific performance for Gabb's breach of the Convertible Note by misapplying the balance of equities test. (Preserved at A0886-895).

B. Scope of Review

The Court reviews *de novo* whether an equitable remedy was applied using the correct standard. *In re Tesla, Inc. Deriv. Litig.*, 2025 WL 3689114 (Del. Dec. 19, 2025) (TABLE) (citing *SIGA Techs, Inc. v. Pharmathene, Inc.*, 67 A.3d 330, 341 (Del. 2013)). Factual determinations and application of the facts to the correct standards are reviewed for whether the trial court exceeded its discretion. *Id.* The Court reviews the grant or denial of specific performance for abuse of discretion. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. Merits of Argument

Specific performance is a remedy for breach of contract that requires a party to fulfill its contractual obligations and place "the aggrieved party in the position that it would have been in but for the breach." *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, 1998 WL 71836, at *9 (Del. Ch. Feb. 4, 1998), as revised (Mar. 5, 1998). "A party seeking specific performance must establish that (1) a valid contract

exists, (2) he or she is ready, willing, and able to perform, and (3) that the balance of equities tips in favor of the party seeking performance." *Snow Phipps Grp., LLC v. Kcake Acquisition, Inc.*, 2021 WL 1714202, at *51 (Del. Ch. Apr. 30, 2021).

The trial court determined the Convertible Note is a valid contract and that AIM Ventura had "already performed under the contract by providing Gabb the $1.5 million loan and delivering notice of its election to convert and required documentation." Op. at 95. The trial court further held that Gabb breached the Convertible Note by failing to honor the conversion and issue Series B preferred stock. *Id.* The trial court nevertheless declined to award specific performance on grounds that the equities did not clearly and convincingly favor AIM Ventura.

The balancing of the equities factor reflects an equitable court's concern that it is "convinced that specific enforcement of a validly formed contract would not cause even greater harm than it would prevent." *Osborn*, 991 A.2d at 1158 (cleaned up and quotation omitted). This requires an "examination of the benefit which will accrue to the plaintiff upon consummation of the contract, the detriment to the defendant upon the same circumstance, and the conditions under which the defaulting party found itself in breach." *O'Connor v. Beachy Keen Servs., LLC*, 2025 WL 801165, at *4 (Del. Ch. Mar. 13, 2025). In this case, the trial court should have evaluated whether conversion would cause hardship to Gabb if enforced and the circumstances that led to Gabb's breach of the Convertible Note. It did not. The

trial court instead assessed the harm to Stephen if the conversion is enforced and the reason AIM Ventura converted. In doing so, the trial court made a number of erroneous determinations about AIM Ventura and the impacts of the conversion. Taken together, the trial court abused its discretion in denying specific performance.

1. Gabb Will Actually Benefit From the Conversion

AIM Ventura sought specific performance of the Convertible Note, a valid contract between AIM Ventura and Gabb, and accordingly named Gabb as the sole defendant in its Complaint-in-Intervention. When balancing the equities, however, the trial court considered the personal interests of Stephen, thereby excluding Gabb, the actual contractual counterparty, from its decision. Op. at 95-98. The trial court made this quite clear when stating: "Although Dalby's behavior certainly does not tip the scales of equity in his favor, I also cannot say that the equities clearly and convincingly favor AIM." Op. at 96. The trial court notably offered no support or justification for considering Stephen's interests to the exclusion of Gabb's interests.

The conversion will not result in hardship to Gabb. Tellingly, neither Gabb nor the Dalbys opposed specific performance by arguing a hardship to Gabb. The absence of any hardship is explained by the undisputed benefits the conversion offers. The conversion will eliminate at least $11 million (and up to $17 million) in debt and provide Gabb with the opportunity to receive an additional $1 million in cash from AIM Ventura. The immediate reduction in debt would clean-up Gabb's

balance sheet, the state of which has been offered by financing sources as a reason financing is unavailable. In addition, a significant reduction of debt plus a $1 million cash injection will go a long way toward curing the "going concern" note in Gabb's latest audited financial statements. *See* Cole 408:24-410:11.

AIM Ventura presented the undisputed financial benefits of the conversion to Gabb at trial, in post-trial briefing, and at post-trial argument, yet the trial court ignored them when balancing the equities. The trial court's denial of specific performance should be reversed because it abused its discretion in failing to consider the benefits of the conversion to Gabb in the absence of any hardship.

2. The Dalbys' Obstruction Caused Gabb's Breach

The trial court similarly ignored the cause of Gabb's undisputed breach of the Convertible Note when balancing the equities, opting instead to focus on AIM Ventura's decision to convert. Like its flawed hardship analysis (discussed *supra*), the trial court offered no legal support or justification for eschewing a review of the circumstances leading to Gabb's breach.

Gabb breached the Convertible Note because by failing to issue Series B preferred stock because the Dalbys and Hawke refused to approve the conversion. Jana and Hawke initially refused to meet with the Board, and when they eventually agreed to meet on January 14, they had no intention of discussing (let alone approving) the conversion. In fact, the conversion was never discussed during the

January 14 meeting. The Dalbys and Hawke instead attempted to appoint Stephen as President and Hawke and the Board's chairperson. After their ploy failed, the Dalbys and Hawke refused to attend another Board meeting. The consequences of the Dalbys' obstruction are undeniable—Gabb twice overdrew its bank account.

Worse yet, the Dalbys refused to approve a conversion they previously authorized by way of the Board and Stockholder Consents. The trial court never grappled with the import of these Consents or AIM Ventura's argument that the Dalbys should be equitably estopped from thwarting the conversion because of the Board and Stockholder Consents.

The counter to the Dalbys' obstructionist efforts was AIM Ventura's repeated offers to the Dalbys and Hawke to engage in remediation efforts of Gabb's breach of the Convertible Note. With the exception of Stephen negotiating terms beneficial to Stephen personally, the Dalbys and Hawke again refused to engage.

AIM Ventura presented the foregoing, which is largely undisputed, at trial, in post-trial briefing, and at post-trial argument, yet the trial court ignored them when balancing the equities. The denial of specific performance should be reversed because the trial court abused its discretion in failing to consider the Dalbys' self-interested, obstructionist efforts that caused Gabb to breach the Convertible Note.

3. The Trial Court's Conclusion About the Conversion is Premised on Several Erroneous Factual Determinations

The trial court's balancing of the equities was driven by a conclusion that AIM Ventura's conversion under Section 2(a) "reflects the culmination of a long-running effort by non-neutral management, working with AIM, to vitiate Dalby's bargained-for rights under the Settlement Agreement and [Voting] Agreement and thereby 'get rid' of the Company's founder and controller." Op. at 97. As an initial matter, it is unclear whether the trial court's consideration of AIM Ventura's rationale for converting was legally appropriate. Neither Gabb nor the Dalbys challenged AIM Ventura's conversion as violative of the Convertible Note. Nor could they, as AIM Ventura could elect to convert at its sole discretion. This contractual grant of sole discretion undermines the import of the trial court's conclusion about AIM Ventura's motives, were it even correct (and it is not).

Even if AIM Ventura's motives are relevant, the trial court's conclusion is misguided because it is premised on several erroneous factual determinations.

i. AIM Ventura Acted Independent of Gabb's Management

There is no direct evidence supporting that AIM Ventura "worked with" Gabb's management. But there is direct evidence demonstrating that AIM Ventura operated independent of management. For example, Murphy refused to accept corporate counsel's recommendation in late-December 2024 that the Board rely on a 2-0 vote to push through an inside Series B round in light of the dissent voiced by

Jana and Hawke after the vote had occurred. A0985 (464:5-6); A0246. Murphy further noted in mid-January 2025 that he and AIM Ventura were "not going along with Sandlot, Greg and Nate's preferred course of action." A0430.

Rather than credit the direct evidence proving AIM Ventura's independence, the trial court relied on flimsy circumstantial evidence to find that AIM Ventura "worked with" Gabb's management on a plan to remove Stephen because "Cole, the Company's CFO was a central figure [in the plan] and, being an AIM insider, kept Murphy and Kastner apprised." Op. at 97. But the handful of messages cited by the trial court in the Opinion simply do not prove that AIM Ventura converted because it was "working with" Gabb management on a plan to harm Stephen.

Four of the five messages were after the disastrous December 23, 2024 Board meeting that Murphy testified was the catalyst for his decision to have AIM Ventura convert under Section 2(a). *See* A0248-0249; A0251-0253; A0411; A0423. Two actually post-date AIM Ventura's conversion notice of January 3, 2025. *See* A0411; A0423. And the substance of these messages show AIM Ventura in a passive role that forced even the trial court to describe them as Cole keeping Murphy "apprised." Op. at 97.

The only message pre-dating the December 23 Board meeting does not include Murphy, but includes Kastner. *See* A0199. Importantly, Kastner is not synonymous with Murphy or AIM Ventura. Kastner holds no role or decision-

making authority at AIM Ventura, and is not compensated by AIM Ventura. This was intentional so that Kastner could "vote his conscience" and fulfill his fiduciary duties as a Gabb director. The fact that Kastner received messages from Cole referencing Board related matters is unsurprising given that Kastner is on the Board.

The trial court also overstated Cole's "insider" status and inferred influence at AIM Ventura. Cole has had no role or investment authority at AIM Ventura since October 2023 precisely because Cole began working as the full-time Gabb CFO. Although Cole holds an indirect ownership interest in the management entity responsible for managing AIM Ventura, that management entity delegated its management authority to Adams Wealth, where Murphy is employed and Cole is not. Even accepting that Cole "apprised" Murphy of a plan by management, there is no proof that Murphy acted to further that plan. The evidence instead proves that Murphy was "not going along with" management's plan. A0430.

ii. A Conversion Would Not "Vitiate" Stephen's Rights, and AIM Ventura Could Not "Get Rid Of" Stephen by Converting

The fact that AIM Ventura's conversion qualifies as the requisite financing under the Settlement and Voting Agreement would not "vitiate" Stephen's right to serve as CEO Director (*see* Op. at 97), as a new CEO still needed to be appointed. In any event, Stephen relinquishing the CEO Director seat brings life to the bargain that Stephen struck under the Voting and Settlement Agreement. But it would by no means "get rid of" Stephen. *See id*. Even with the dilution resulting from the

conversion, Stephen could appoint himself to one of the Common Director seats. He could also appoint the other Common Director. Alternatively, if the trial court was correct that a Section 2(a) conversion does not qualify as the financing contemplated by the Settlement or Voting Agreement (discussed *infra*), then Stephen would remain in the CEO Director even if specific performance were awarded. Either way, enforcing AIM Ventura's Section 2(a) conversion would not "get rid" of Stephen.

iii. AIM Ventura Could Not "Take Over" Gabb by Converting

AIM Ventura also would not "take over" the Board or Gabb post-conversion. Op. at 3. AIM Ventura would still be entitled to appoint one of the five Board seats. AIM Ventura's stake in Gabb following the conversion would increase from 12.4% to 13.6%. A0258. Even adding in the Co-Invest Entities' resulting stake of 14.6% (*id.*), AIM would own less than the 28.9% that would be owned by Stephen. In other words, Stephen would still be the single largest Gabb stockholder following conversion. The trial court's "take over" finding is based on hyperbole from Murphy in a text message to his boss at Adams Wealth. Op. at 82; A0482. But nothing Murphy says can change the actual effects of the conversion. Moreover, the timing of Murphy's text messages—January 29, 2025—provides critical context. Gabb had twice overdrawn its bank account and breached the Convertible Note, and the Dalbys were rebuffing Murphy's efforts to engage in meaningful remediation discussions.

iv. Stephen Does Not Control Gabb

Stephen does not control Gabb. He holds less than 50% of Gabb's voting power and cannot unilaterally direct stockholder action. Although Stephen sits in the CEO Director seat and can appoint two Common Director Seats, his ability to control the Board stems from inequitable entrenchment. As the trial court correctly concluded, "so long as [Stephen] Dalby remained a director, the chances that the company could obtain additional funding were slim to none." Op. at 2. Stephen indeed places his self-interest above Gabb's funding so he can remain the CEO Director. A clear example is Stephen intimidating Hammond prior to the December 23 vote on a proposed inside Series B financing, which led to Hammond resigning and Hawke, Stephen's brother-in-law, to sit alongside Jana (Hawke's sister).

4. The Trial Court Should Have Assessed the Primary Purpose of the Convertible Note and Not AIM Ventura's Reason for Converting

AIM Ventura requested a declaration as part of a specific performance award that the Section 2(a) conversion is as a "Next Equity Financing" under Section 1.2(c) of the Voting Agreement and a "Series B" transaction under Section 1 of the Settlement Agreement. A0715. The trial court denied AIM Ventura's request finding that the conversion did not qualify as a "Next Equity Financing" or "Series B" because its "primary purpose" was to "extinguish" Stephen's rights under the Settlement and Voting Agreement and not to raise capital for Gabb. Op. at 97. The

trial court erred in making this determination because it focused on the rationale for AIM Ventura converting and not the rationale behind the Convertible Note.

The primary purpose of the Convertible Note was indisputably to provide Gabb with capital. AIM Ventura provided Gabb with $1.5 million to prevent Gabb missing payment to a critical vendor, and in return, AIM Ventura ultimately received the Convertible Note. A0123; A1006 (514:1-7). Section 2(a) further includes a specified $80 million valuation (A0119), which, if triggered, would allow AIM Ventura to set the valuation for the "Series B" round. AIM Ventura even baked into Section 2(a) an option to invest $1 million in new money (A0112) without the need to involve Telispire. A0976 (455:12-23). The foregoing facts are largely undisputed, but were not considered by the trial court when balancing the equities or in addressing AIM Ventura's requested declaration.

Even if the "primary purpose" of AIM Ventura's conversion were relevant, it could not be to "extinguish" Stephen's rights because, as addressed *supra*, conversion does not do so. Moreover, the trial court's finding makes little practical sense. If AIM Ventura desired to "extinguish" or "vitiate" Stephen's rights through a conversion, why did it wait until January 3, 2025 to convert when it could have converted any time after August 30, 2024? And if AIM Ventura desired to "extinguish" or "vitiate" Stephen's rights, then why did Murphy refuse to push through the inside Series B transaction approved at the December 23, 2024 meeting,

which would have obviated the need for a Section 2(a) conversion? These questions, albeit rhetorical, highlight fatal flaws in the trial court's findings.

* * * * * *

The trial court abused its discretion by denying AIM Ventura's request for specific performance to remedy Gabb's breach of the Convertible Note. As demonstrated above, the trial court misapplied the balancing of the equities factor by ignoring Gabb altogether and otherwise relying on irrelevant and erroneous conclusions to justify its decision. This Court should reverse the trial court's decision and enter the award of specific performance requested by AIM Ventura.

Should this Court decide not to reverse, AIM Ventura requests that the Court remand for further proceedings to determine an appropriate remedy. In its Opinion below, the trial court denied not only AIM Ventura's request for specific performance but for all other forms of relief. Op. at 98. Thus, AIM Ventura is currently without a remedy for Gabb's breach of the Convertible Note.

II. THE TRIAL COURT ERRED IN GRANTING THE FEE PETITION AND HOLDING APPELLANTS LIABLE FOR THE DALBYS' FEES

A. Question Presented

Whether the trial court erred by granting the Fee Award and holding Appellants solely liable for the Fee Award. (Preserved at A0915-924).

B. Scope of Review

A trial court's award of attorneys' fees is reviewed for abuse of discretion. *Energy Tr., LP v. Williams Companies, Inc.*, 2023 WL 6561767, at *20 (Del. Oct. 10, 2023). A trial court's interpretation of a contractual fee-shifting provision is reviewed *de novo*. *Id.*

C. Merits of Argument

The trial court's decision to award fees to the Dalbys and hold only Appellants responsible for the Fee Award should be reversed as a clear abuse of discretion because of cascading flaws in the trial court's analysis, as discussed *infra*. Appellants are thus left to conclude that the trial court's Fee Award decision was intended to penalize Appellants for their intervention. *But see Metro Storage Int'l LLC v. Harron*, 275 A.3d 810, 886 (Del. Ch. 2022) ("Absent a statutory grant of authorization, the Delaware Court of Chancery does not have jurisdiction to assess punitive damages."); *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 7861335, at *2 (Del. Ch. Dec. 31, 2020) (declining to award fees where it "may be seen as a penalty for the party from which the fees must be paid.").

1. The Voting Agreement Was Not At Issue

The trial court first determined that the prevailing party fee-shifting provision found in Section 7.17 of the Voting Agreement applies in this case based on its finding that Gabb's management attempted to "vitiate" and "extinguish" Stephen's rights under the Voting Agreement. As an initial matter, and as addressed *supra*, the conclusion that Stephen's rights would have been "vitiated" is erroneous.

In any event, neither the Section 225 Complaint nor the Complaint-in-Intervention brought claims, or sought relief, under the Voting Agreement. The source of Stephen's right to be removed "for cause" is 8 *Del. C.* § 141(k) and Gabb's certificate of incorporation. The Voting Agreement did not create that standard. Rather, the Voting Agreement simply acknowledged the governing standard established by 8 *Del. C.* § 141(k) and Gabb's certificate of incorporation. Relatedly, Stephen's removal was invalidated because the stockholder solicitation omitted material facts. That does not implicate the Voting Agreement. Even if it did, the trial court's determinations about efforts to "vitiate" or "extinguish" Stephen's rights under the Voting Agreement are factual, and not legal, in nature. Prevailing on factual issues does not implicate Section 7.17 or warrant fee-shifting.

Further, the trial court's conclusion that AIM Ventura's conversion furthered an effort to "vitiate" Stephen's rights under the Voting Agreement was discussed in the context of assessing a specific performance remedy for Gabb's breach of the

Convertible Note. The Dalbys are not party to the Complaint-in-Intervention, however, nor did they "prevail" on the Complaint-in-Intervention (Appellants did). Moreover, the Convertible Note has no prevailing party fee-shifting provision.

2. Appellants Should Not Be Liable for the Fee Award

The trial court's reasoning for by holding only Appellants responsible for the Fee Award is flawed, for the several reasons addressed below.

First, Appellants were not parties to the Section 225 Complaint and, although authorized to, did not litigate Stephen's removal from the Board. The defendants in the Section 225 Complaint had their own counsel that litigated Stephen's removal case. Depositions and trial exemplified this, as counsel for Appellants questioned certain witnesses on limited issues relevant to Gabb's breach of the Convertible Note and only after the defendants' counsel questioned on issues related to Stephen's removal. Appellants similarly did not brief, pre- or post-trial, the removal case.

Second, the trial court's suggestion that Appellants' intervention expanded the scope of litigation is unfounded. *See* Ex. E, at 38:5-10. The Dalbys intended to litigate the Convertible Note and conversion as part of their case and that intention existed prior to Appellants' intervention. The Dalbys alleged that Stephen's removal was "pretextual" and lumped AIM Ventura's conversion into a "scheme" to remove him. They further alleged that Gabb could simply ignore the conversion and repay the Convertible Note at maturity. The trial court's criticism of Appellants' for not

sitting idly by while the Convertible Note and conversion were litigated flies in the face of the purpose underlying intervention.

Third, even if Appellants' appeared in the Section 225 action, Appellants are not the non-prevailing party for purposes of fee-shifting under Section 7.17 of the Voting Agreement. Again, Appellants did not litigate the removal case, and the Dalbys obtained no relief against Appellants. Rather, Appellants prevailed on their breach of contract claim against Gabb notwithstanding the trial court's denial of specific performance. *See W. Willow-Bay Ct., LLC v. Robino-Bay Ct. Plaza, LLC*, 2009 WL 458779, at *8-9 (Del. Ch. Feb. 23, 2009).

Fourth, even if Appellants appeared in the Section 225 action, they did so in an *in rem* capacity. *See Genger v. TR Investors, LLC*, 26 A.3d 180, 199-200 (Del. 2011) ("A Section 225 proceeding is not an *in personam* action. Rather, it is 'in the nature of an in rem proceeding," where the 'defendants' are before the court, not individually, but rather, as respondents being invited to litigate their claims to the *res* (here, the disputed corporate office) or forever be barred from doing so."). Appellants should not have been liable for the Fee Award for the same reason it was inappropriate for Mendez, who also appeared *in rem*, to be liable. The trial court notably offered no support for treating Appellants *in personam* for purposes of the Section 225 Action because of their *in personam* appearance in the Complaint-in-Intervention. If anything, the trial court's reliance on Appellants' *in personam*

appearance in the Complaint-in-Intervention is a tacit acknowledgement that Appellants were not party to, and did not litigate, the Section 225 Action.

Fifth, Gabb should have been liable for the Fee Award. Gabb indisputably appeared *in personam* in the Section 225 Action. *See Genger*, 26 A.3d at 200 ("The one exception is the corporation itself, which is the entity that embodies the '*res*,' and is [the] only party before the Court in its 'individual' capacity."). The trial court overlooked Gabb's *in personam* appearance by holding that it would be inappropriate for Gabb to be liable for the Fee Award because it did not litigate the Section 225 Action. *See* Ex. E, at 49. But, as addressed above, neither did Appellants. Moreover, the primary actors in the trial court's determinations about efforts to "vitiate" Stephen's rights were the "non-neutral management" of Gabb. Op. at 97. Gabb, and not Appellants, should bear responsibility for their actions. Appellants did not "work with" Gabb's management, as addressed *supra*.

3. A Contingency Fee Arrangement with a Fee Multiplier in a Section 225 Proceeding is Neither Customary Nor Reasonable

Delaware courts apply the factors listed in Delaware Rule of Professional Conduct 1.5(a) when analyzing the reasonableness of attorneys' fees and expenses under a contractual fee-shifting provision. *See In re Facchina Constr. Litigs.*, 2021 WL 1118115, at *2 (Del. Super. Ct. Mar. 24, 2021). Rule 1.5(a) instructs that attorneys should not charge an unreasonable fee, considering the fee customarily charged in similar litigation, the amount at issue, and whether the fee is fixed or

contingent. The latter includes "whether it is reasonable to charge any form of contingent fee." *See* Cmt. to Rule 1.5(a). The trial court never referenced Rule 1.5(a) in its transcript ruling or addressed the custom or reasonableness of RAM's contingency fee arrangement in the context of the Section 225 Action. The record is notably devoid of support that a contingent fee arrangement (with or without a fee multiplier) is reasonable or customary for a Section 225 proceeding. It is not.

The trial court relied on two decisions to support the general proposition that contractual fee shifting provisions may be enforced with respect to contingency fee arrangements. *See* Ex. E, at 67-68 (referencing *Energy Transfer*, 2023 WL 6561767, and *S'holder Representative Servs. LLC v. Shire US Holdings, Inc.*, 2021 WL 1627166, at *1 (Del. Ch. Apr. 27, 2021), aff'd, 267 A.3d 370 (Del. 2021)). But Appellants submit that is not the precise issue the trial court needed to decide. The relevant question is whether a contingent fee arrangement is reasonable in a Section 225 proceeding. Section 7.17 of the Voting Agreement indeed limits awards to "reasonable attorneys' fees," which implicates Rule 1.5(a). "Contingent fees are reasonable when they utilize a reasonable lodestar multiple and are limited to a reasonable percentage of the recovery." *Energy Transfer*, 2023 WL 6561767, at *21. Because Section 225 proceedings are summary in nature they do not, as a matter of law, allow monetary damages awards. *See Genger*, 26 A.3d at 200. Thus, there is no "recovery" to base a contingent fee arrangement. Nor is there a general

entitlement to attorneys' fees for success in a Section 225 action that might otherwise lend itself to a contingency fee arrangement. *See Keyser v. Curtis*, 2012 WL 3115453, at *19 (Del. Ch. July 31, 2012), *aff'd sub nom.*, *Poliak v. Keyser*, 65 A.3d 617 (Del. 2013). Here, RAM's contingency fee arrangement is not based on a reasonable percentage; rather, it applies a 2.5x fee multiplier upon success in the Section 225 Action.

The trial court was critical of the parties to the Voting Agreement, including Appellants, for not excluding awards of attorneys' fees incurred in connection with a contingent fee arrangement. *See* Ex. E,, at 64. But no reasonable or objective third-party would expect a contingency fee arrangement in a Section 225 proceeding or interpret Section 7.7 of the Voting Agreement to authorize fee-shifting in a Section 225 proceeding where the representation is a contingency fee arrangement.

The *Energy Transfer* and *Shire* decisions referenced by the trial court are poor analogs for the specific issue raised in this case and, if anything, support reversal of the trial court's Fee Award. Neither *Shire* nor *Energy Transfer* were Section 225 actions. The contingency fee arrangements in *Shire* and *Energy Transfer* were reasonable in part because they involved common contingency fee percentages of the client's monetary recovery. *See Energy Transfer*, 2023 WL 6561767, at *10; *Shire*, 2021 WL 1627166, at *1. And in both *Shire* and *Energy Transfer*, the relevant representations started as a standard hourly billing arrangement before switching to

a contingency fee arrangement. *Energy Transfer*, 2023 WL 6561767, at *9; *Shire*, 2021 WL 1627166, at *1. In fact, the billing arrangement in *Energy Transfer* switched to contingency concomitant with the plaintiff switching its requested relief from a non-monetary award to money damages. *Energy Transfer*, 2023 WL 6561767, at *9.

There is also no law or facts in the record to support fee-shifting of a contingency fee arrangement that includes a fee multiplier in a Section 225 proceeding. *Shire* and *Energy Transfer* do not address (let alone support) the imposition of a fee multiplier. Rather, as is customary, the contingency fee amount was a percentage of the monetary recovery, and the reasonableness for that fee amount was checked against a lodestar multiple. *See Energy Transfer*, 2023 WL 6561767, at *10; *Shire*, 2021 WL 1627166, at *1. The fee multiplier exemplifies the trial court penalizing Appellants and is an obvious windfall to RAM.

4. The Trial Court's Valuation Exercise to Assess the Reasonableness of the Fee Multiplier Lacks any Support

The trial court engaged in an impromptu and unsupported valuation exercise to assess the reasonableness of the 2.5x multiplier that was, at best, an abuse of discretion, and, at worse, arbitrary and capricious. *See* Ex. E, at 69-74.

The value of Gabb was not litigated at trial. Neither the Section 225 Complaint nor the Complaint-in-Intervention raised the issue of Gabb's value. No party presented evidence to establish the value of Gabb at any point in time. The

fact that no valuation experts testified at trial or provided reports is proof positive that the Gabb's value was not relevant to or litigated in the case below. Appellants therefore were not reasonably put on notice that the value of Gabb would be an issue the trial court would decide. Had Appellants known that the value of Gabb would be an issue, they would have had the opportunity to develop and present a defense.

The evidence relied on by the trial court to set a $275 million valuation of Gabb underscores Appellants' concerns. *See* A0101. They are the notes of Brandon Ball reflecting a call with Cole—and indisputable double-hearsay. The notes indicate the call occurred on June 10, 2024—seven months before Stephen's removal and almost a year before trial. It is highly unlikely that Gabb's value in June 2024 was $275 million as (i) Gabb had failed to close on a Series B financing at a $275 million valuation only a few months prior and (ii) less than a month after Cole's call with Ball, AIM Ventura had to step in to provide $1.5 million to Gabb so it would not miss a payment to a critical vendor, which led to the Convertible Note and an $80 million valuation. Gabb's financial condition also deteriorated throughout 2024, and Gabb missed payroll and twice overdrew its bank account just prior to Stephen's removal in January 2025. None of the foregoing was accounted for by the trial court when arbitrarily selecting a $275 million valuation to assess the reasonableness of the fee multiplier.

Moreover, the trial court's finding that Stephen's "recovery" was his retaining control of Gabb suffers a fatal flaw: Stephen does not control Gabb. *See supra* at 30. Stephen's "recovery" would be illusory in any event. Stephen was never diluted because Gabb breached the Convertible Note. Even if the conversion occurs, Stephen will only be diluted if the Convertible Note qualifies as a "Series B" under the Settlement Agreement or "Next Equity Financing" under the Voting Agreement. According to the trial court it did not, thus there was no "recovery" to value.

Finally, the trial court appears to have taken the analysis utilized in the context of a fee award under the "corporate benefit doctrine" and grafted it onto this case to assess the reasonableness of a fee multiplier under a contractual fee-shifting provision where a litigant questionably achieved a non-monetary personal benefit through litigation. *See Dover Historical Soc., Inc. v. City of Dover Planning Com'n*, 902 A.2d 1084, 1090 (Del. 2006) (describing the "corporate benefit doctrine" as allowing "a litigant to recover fees and expenses from a corporation where the litigation has conferred some other (non-monetary) valuable benefit upon the corporate enterprise or its shareholders"). Notably, the trial court did not offer any support for this. Rather, Gabb was found to have breached the Convertible Note. Further, Gabb did not obtain the additional $1 million that AIM Ventura committed to invest, overdrew on its bank account, and was unable to eliminate up to $17

million in debt and fix its balance sheet. Tellingly, the Dalbys do not contend that Gabb received any benefit.

CONCLUSION

For the foregoing reasons, the trial court's decisions to deny specific performance and grant the Fee Petition should be reversed.

Dated: January 5, 2026

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