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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' REPLY BRIEF

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PRELIMINARY STATEMENT

AIM Ventura appealed the trial court's decision that denied specific performance for Gabb's breach of the AIM Note. Gabb takes no position on AIM Ventura's appeal, yet curiously defers to the Dalbys. This is improper for several interrelated reasons. First, the Dalbys are not party to the AIM Note and thus have no standing to oppose AIM Ventura's appeal as it relates to specific performance. Second, the Dalbys litigated against the Complaint-in-Intervention at the trial court level ostensibly on Gabb's behalf because the deadlock resulting from Stephen's removal left Gabb unable to take a position. Third, Gabb is no longer deadlocked or unable to take a position on AIM Ventura's request for specific performance; rather, it consciously decided to not take a position and therefore waived any opposition. Finally, the Dalbys are self-interested and conflicted because of the dilution to Stephen if specific performance is granted.

Even if the Dalbys' opposition to AIM Ventura's appeal concerning specific performance is considered, the Dalbys fail to counter AIM Ventura's arguments. The Dalbys indeed gloss over much of what AIM Ventura argued—legally and factually—in the Opening Brief. For instance, AIM Ventura argued that the trial court erred by failing to take into consideration facts relevant to Gabb when balancing the equities. Specifically, the trial court ignored altogether that Gabb would benefit from specific performance in that AIM Ventura's conversion will

eliminate tens of millions of dollars of debt from Gabb's books. The Dalbys concede that the trial court should have considered these facts and did not, but nonetheless assert the trial court's balancing was somehow sufficient. The Dalbys further overlook the factual evidence presented by AIM Ventura at trial and in this appeal that demonstrate several of the trial court's factual findings were clear error, including, for example, the fact that Stephen is not Gabb's controller.

Even where the Dalbys do have standing to oppose this appeal, as it relates to the Fee Award, their opposition does not tackle Appellants' arguments head-on. The trial court's unprecedented Fee Award is the result of several legal and factual errors, which Appellants pointed out in the Opening Brief. The Dalbys addressed almost none of Appellants' arguments in meaningful manner—a tacit acknowledgement that the Fee Award is indeed lacking and should be reversed by the Court on appeal.

ARGUMENT

I. GABB WAIVED OPPOSITION TO AIM VENTURA'S APPEAL AND THE DALBYS LACK STANDING TO LITIGATE THIS APPEAL AS IT RELATES TO SPECIFIC PERFORMANCE.

AIM Ventura and Gabb are the only parties to the AIM Note. The trial court thus correctly found that Gabb breached the AIM Note by failing to honor the conversion, but denied AIM Ventura's requested specific performance remedy. The issue on appeal is thus whether the trial court erred in denying specific performance. Only Gabb and AIM Ventura have standing to litigate the merits of that issue on appeal.

Gabb takes no position on whether the trial court erred in denying specific performance. Dkt. 27. By taking no position, Gabb waived any opposition to AIM Ventura's arguments and requested relief on appeal. *See, e.g.*, *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."); *Bocock v. INNOVATE Corp.*, 2022 WL 15800273, at *21 (Del. Ch. Oct. 28, 2022) ("A party's failure to raise an argument in its answering brief constitutes waiver of that argument.") (citation omitted). *See also Guy v. Jud. Nominating Comm'n*, 670 A.2d 1338, at *2 (Del. 1995) ("As the appellant, Guy may not waive the filing of an opening brief without the consent of the appellee and the approval of this Court. Moreover, a party to an appeal may not dictate the terms under which this Court will exercise its appellate jurisdiction.").

Notwithstanding Gabb's statement of no position, the Dalbys submitted a brief opposing that the trial court erred by denying specific performance. The Court should not consider the Dalbys' proffered arguments. As the Dalbys acknowledge, they are not party to the AIM Note and therefore lack standing to oppose AIM Ventura's appeal as it relates to the trial court's decision to deny specific performance as a remedy for the AIM Note. *See, e.g.*, *Lost in Rehoboth, LLC v. Broadpoint Constr., LLC*, 2025 WL 1483421, at *4 (Del. Super. Ct. May 22, 2025) ("As a general rule, a nonparty to a contract has no legal right to enforce it.").

The Dalbys' sole basis for opposing AIM Ventura's appeal is that they were permitted at the trial court level to submit a response to and litigate against AIM Ventura's Complaint-In-Intervention. But that structure was an accommodation pending the Section 225 Action and in light of the deadlock of Gabb's Board preventing Gabb from taking a unified position regarding AIM Ventura's claims. A0647-649. The Dalbys were also litigating ostensibly on Gabb's behalf. Moreover, the circumstances have changed. Gabb's Board is no longer trapped in a stalemate. Unlike its statement at the trial court level, Gabb's statement of no position in this appeal does not state that Gabb is unable to take a position on AIM Ventura's appeal (unified or otherwise). And neither Gabb nor the Dalbys offer any explanation why Gabb cannot take positions on its own behalf in this appeal. It appears then that Gabb deliberately chose not to take a position, which is dispositive.

Gabb's apparent decision to defer to the Dalbys raises significant governance concerns for AIM Ventura—a significant Gabb stakeholder. For instance, the Dalbys appear to have a disabling conflict with Gabb as it pertains to AIM Ventura's requested specific performance remedy, which one would think would not lead to Gabb deferring to the Dalbys and their self-interested positions. The Dalbys indeed oppose conversion of the AIM Note because of the dilutive effects it could have to Stephen personally and because it could lead to Stephen having to step down as "CEO Director" despite not having been CEO since 2021. Gabb should indeed welcome the conversion notwithstanding the dilution it may cause stockholders (AIM Ventura included) as it will eliminate tens of millions of dollars in debt. The Dalbys' conflict of interest with Gabb extends to their counsel who have a financial interest in Stephen holding on to as much Gabb stock as possible given their initial fee structure tied to proceeds from a sale of Stephen's stock. Put simply, the less Gabb stock that Stephen can sell, the less potential fees available for counsel. Finally, the Dalbys, who have no standing to argue the merits of this appeal as it relates to the AIM Note, seek to recover attorneys' fees plus a 2.5x multiplier to respond, in part, to AIM Ventura's appeal. Making matters worse, the basis for the Dalbys' fee motion is prevailing party language that is not in the AIM Note, but rather a Voting Agreement and Settlement Agreement that are unrelated to the AIM Note.

For the foregoing reasons, AIM Ventura respectfully submits the Court should not consider any arguments presented by the Dalbys in opposition to AIM Ventura's appeal as it relates to the trial court's error in denying specific performance.

II. THE TRIAL COURT ERRED IN DENYING SPECIFIC PERFORMANCE BECAUSE IT FAILED TO CONSIDER GABB.

Should the Court consider the Dalbys' arguments regarding specific performance, AIM Ventura responds to the Dalbys' arguments as set forth below.

A. The Court of Chancery Abused Its Discretion By Failing to Consider Facts Relevant to Gabb When Balancing the Equities

AIM Ventura submits that the trial court erred when balancing the equities because it failed to consider "whether conversion would cause hardship to Gabb if enforced ***and*** the circumstances that led to Gabb's breach of the Convertible Note." OB 23 (emphasis added). The Dalbys do not dispute that the trial court failed to consider the conversion's impact on Gabb. To the contrary, the Dalbys implicitly concede the trial court should have considered it by arguing that the impact to Gabb is "not the only equity to be balanced[.]" AB 38-39. Much like the trial court, however, the Dalbys gloss over the economic benefits to Gabb of the conversion. OB 24-25.

The Dalbys cite *26 Capital* to suggest that impact to stockholders and party conduct are relevant factors when balancing the equities (AB 38), but nothing in that decision or any other cited by the Dalbys instructs a court to ignore the impact to the

actual counterparty to the relevant contract. The trial court could not have "balanced" equities if it failed altogether to consider undisputed facts proving a benefit to Gabb.

The Dalbys' reference to the trial court refusing to "order specific performance of a stockholder vote" (AB 39) further highlights the trial court's legal error. AIM Ventura sought a ruling as part of its specific performance request that the Dalbys should be equitably estopped from opposing the conversion because of their undisputed approval of the Board and Stockholder Consents. *See* A0892-893. Such a ruling would obviate the need for a formal stockholder vote because Stephen, AIM Ventura, and the Co-Invest Entities own more than 50% of Gabb's stock. Like the impact to Gabb, the trial court did not consider (let alone balance) that the Dalbys had knowingly approved the conversion in the Board and Stockholder Consents.

The trial court further failed to consider the circumstances of Gabb's undisputed breach of the AIM Note. The Dalbys' assertion that AIM Ventura "eschews" review of the circumstances leading to Gabb's breach and that the "trial court's 98-page decision evaluated those circumstances with care" (AB 38-39) is off-base. While the trial court issued a 98-page opinion, only three-and-a-half pages relate directly to specific performance and much of that focuses solely on AIM Ventura's reason for converting. Op. at 95-98. There is no discussion about Gabb's breach for failing to honor the conversion. And the facts cited by the Dalbys (AB 39) relate primarily to Stephen's removal from Gabb's Board, not Gabb's breach.

The undisputed facts demonstrate that Gabb breached the AIM Note because of the Dalbys' self-interested conduct. *See* OB 25-26. Neither the trial court nor the Dalbys grappled with these facts, which is telling. No party has ever disputed the validity of the AIM Note, the validity of the Board and Stockholder Consents signed by the Dalbys, or the right of AIM Ventura to convert under the AIM Note. The Dalbys and Hawke nevertheless refused to consider the conversion. *See id.* Stephen's removal from the Board is not a justification for Gabb's breach of the AIM Note. Especially in light of the undisputed benefits to Gabb flowing from the conversion and the fact that AIM Ventura was not involved with Stephen's removal.

B. The Trial Court's Decision is Based on Erroneous Factual Determinations

Even with the deferential standard under which the Court reviews a trial court's factual findings, the trial court's decision to deny specific performance is premised on a series of erroneous factual determinations that should be reversed.

1. AIM Ventura's Independence from Gabb's Management

AIM Ventura set forth direct evidence to contradict the erroneous factual determination by the trial court that AIM Ventura did not operate independent of Gabb's management. *See* OB 27-29. The Dalbys address none of it, and otherwise fail to put forth any direct evidence to contradict AIM Ventura's assertion.

The Dalbys instead cite to the documents relied upon by the trial court, all but one of which post-date the transformative December 2024 meeting of the Board.

See OB 28-29. One additional document cited by the Dalbys is similarly after this meeting (AB 40, B1686), while the other is a cover page for February 2025 text messages between Stephen and a non-party that are of questionable relevance (AB 40, B1951). The Dalbys further elide over the undisputed facts proving that Cole has had no role or authority at AIM Ventura since October 2023 when Cole began working as the full-time Gabb CFO. OB 29. The trial court indeed found that Cole had no decision-making authority at AIM Ventura (*see* Op. at 45, recognizing that Murphy "has sole investment decision-making authority for the AIM funds and negotiated the note on behalf of AIM"), and therefore unjustifiably attributed to AIM Ventura statements and conduct by Cole. This was clear error.

2. Conversion Would Not "Get Rid Of" Stephen.

The trial court's determination that AIM Ventura sought to "get rid" of Stephen through conversion of the AIM Note was clearly erroneous because it is impossible. Even if AIM Ventura's conversion is enforced, and even with the resulting dilution, Stephen would still be the single largest common stockholder and maintain the right to designate the two common director board seats. *See* OB 29-30. The Dalbys have no good response to this obvious argument, so they ignore it.

The Dalbys' claim that there is "substantial evidence" the conversion would accomplish AIM Ventura's purported goal to "get rid of" Stephen (AB 40) simply recites the evidence the trial court erroneously relied on to support its conclusion.

Handwritten notes from Vanessa Clayton stating that Gabb filing for bankruptcy would not "get rid of" Stephen (AB 40) are irrelevant because Clayton is Gabb's general counsel and does not represent or speak for AIM Ventura. In fact, immediately following the cite to Clayton's notes, the trial court stated, "getting rid of Dalby, rather than saving the company, was management's number one goal" (Op. at 70 n.373) and supported its statement by citing to a January 17, 2025 email from Kastner to Murphy stating that "getting rid of Dalby is the 'Exec team's seemingly more important goal than saving the company" (*id.* citing JX644).

The simple truth is that it was not AIM Ventura's goal to "get rid of" Stephen through the conversion or otherwise. If it were, AIM Ventura would have converted immediately after the AIM Note was issued. Murphy instead decided to convert following a Board meeting in December 2024 where it became clear that the Dalbys were not interested in saving Gabb from the brink of insolvency. OB 15. Even then, Murphy attempted to work with Dalby to reach a solution that would both allow the conversion to move forward and provide benefits directly to Stephen. OB 18; A0493-496. The trial court's conclusion that AIM Ventura sought to "get rid of" Dalby, or that it was even possible for AIM Ventura to do so, was clearly erroneous.

3. AIM Ventura Could Not "Take Over" Gabb.

It is equally impossible that AIM Ventura could "take over" Gabb or its Board by converting under the AIM Note. OB 30. The Dalbys again do not tackle AIM

Ventura's specific argument, which again is telling. The Dalbys instead state, "But Gabb's outside counsel did draft such a plan," citing emails between Gabb's management and its outside counsel. AB 41. Again, Gabb's counsel does not speak for or act on behalf of AIM Ventura. Moreover, there is zero evidence to support that Kastner or Murphy were aware of "Project Exitus" prior to discovery in this matter. *See* AR019 (170:23-25). While some emails may have been forwarded later on to Murphy or Kastner, there is no evidence in the record demonstrating that AIM Ventura acted to carry out any such plan. AIM Ventura acted at all times according to what AIM Ventura believed to be best. In fact, Murphy explicitly stated in writing that he was "not going along" with plans from Gabb's management. OB 14. It was clearly erroneous for the trial court to conclude otherwise.

4. Stephen Does Not Control Gabb.

There is no dispute that Stephen owns less than 50% of the voting power of Gabb and therefore cannot unilaterally direct stockholder action. Although Stephen may appoint two directors to the Board, it is not a foregone conclusion that he exercised (or exercises) control over the Board or Gabb's business and affairs. "A stockholder is controlling if she either: (1) owns more than 50% of the voting power of a corporation or (2) owns less than 50% of the voting power of the corporation but exercises control over the business affairs of the corporation." *Frank v. Mullen*, 337 A.3d 824, 837 (Del. Ch. 2025) (quotations omitted). If a shareholder owns less

than fifty percent, then a party must plead actual control, and "pleading control is no easy task." *Id.* The trial court must then conduct an analysis of the alleged instances of control, as the court carried out in *Kahn*, the case cited by the Dalbys. Notably, no party below alleged that Stephen controlled Gabb, the issue was not litigated at trial, and the trial court offered no analysis of specific instances of control. If anything, Stephen's musical chairs approach to appointing directors was designed to obstruct Gabb's business and affairs, not control them.

C. The Trial Court Should Have Assessed the Primary Purpose of the AIM Note

The Dalbys rely exclusively on the trial court's findings that the conversion did not qualify as a Series B round of financing because the "primary purpose" of the conversion was to "vitiate" Stephen's rights. The Dalbys once again overlook AIM Ventura's actual argument that the trial court should have assessed the primary purpose of the AIM Note when it was issued in July 2024 and not the conversion. OB 32-33. The reason the Dalbys ignore the issuance of the AIM Note is because (1) it is undisputed that the primary purpose of the AIM Note was to raise capital for Gabb (OB 31-33), and (2) the Dalbys approved the AIM Note by way of the Stockholder and Board Consents (OB 10-12). In fact, the Dalbys were thankful to Murphy and AIM Ventura for stepping in to provide Gabb with $1.5 million to avoid defaulting with a critical vendor. *See* AR012 (460:22-23). Ultimately, it becomes a

distinction without a difference because AIM Ventura's primary purpose was never to "vitiate" Stephen's rights.

D. Remand is Appropriate to Determine an Alternate Remedy

AIM Ventura requested a remand to the trial court to determine the appropriate damages for Gabb's breach in the event the Court declines to award AIM Ventura with specific performance. The Dalbys claim that a remand would be inappropriate by conflating "AIM" entities. The Co-Invest Entities conditionally revoked their conversion notice in the event the trial court declined to award specific performance; AIM Ventura did not. *Compare* B705 *with* B707. AIM Ventura conditioned its revocation on an adverse ruling on appeal. *See id.* In any event, AIM Ventura's conditional revocation is a direct result of Gabb's undisputed, and continuing, breach of the AIM Note for failing to honor the conversion. It does not preclude AIM Ventura from seeking damages. If anything it mitigates AIM Ventura's damage. The Dalbys further misconstrue AIM Ventura's rationale for moving to stay portions of the trial court's implementing order pending appeal. *See* AB 43. AIM Ventura sought to maintain the status quo during the appeal to preserve its demand for specific performance and to prevent a mootness argument from Gabb in the event Gabb decided to repay the principal and interest owed under the AIM Note as supposed satisfaction of the AIM Note. B647.

III. THE TRIAL COURT'S RULING ON THE DALBYS' FEE PETITION WAS AN ABUSE OF DISCRETION.

The Fee Award itself and the trial court's decision to hold only Appellants responsible for the Fee Award was an abuse of discretion for the reasons stated in Appellants' Opening Brief, and the Dalbys failed to counter these arguments.

A. Appellants Were Not Parties to the Section 225 Action

The Dalbys assert that intervention resulted in Appellants becoming parties to the litigation.[1] However, the Dalbys cite no authority that intervening in the litigation resulted in Appellants becoming parties to the Section 225 claims. Especially for purposes of allocating responsibility for a contractual fee-shifting award. Appellants intervened in the litigation below to protect their interests regarding the note conversion, which the Dalbys placed at issue in their Section 225 Complaint, and to avoid duplicative litigation and discovery. Appellants certainly participated in both discovery and litigation, but Appellants' actions were limited to the scope of their breach of contract claim against Gabb. For example, Appellants' questioning of witnesses during depositions and trial were limited to the breach of the contract. The Dalbys do not dispute these facts.

[1] The case cited by the Dalbys is inapposite. In *Giammalvo*, a class member desired to file its own brief on appeal due to uncertainties about the class representative's ability to litigate the appeal. *Giammalvo v. Sunshine Min. Co.*, 644 A.2d 407, 408 (Del. 1994). The Supreme Court determined that this was not a motion to intervene and instead utilized the same standard applicable for a motion to participate as an *amicus curiae*, ultimately denying the motion. *Id.*

B. Appellants Are Prevailing Parties for Breach of Contract Claims

The trial court held Appellants responsible for the Dalbys' fees for the Dalbys' success in the Section 225 Action without consideration or regard to Appellants' success on the Complaint-in-Intervention. Either Appellants were not parties to the Section 225 Action, and thus the Dalbys can seek to recover fees against the actual parties to that action, or, the Dalbys' success must be measured against the litigation below in its entirety, including the Complaint-in-Intervention where Appellants prevailed on their breach of contract claim. The Dalbys cannot have it both ways.

Just like the Dalbys' Section 225 claims, Appellants' intervention did not result in the Dalbys becoming parties to Appellants' claims for breach of contract. The order cited by the Dalbys permitted Appellants' intervention and allowed the Dalbys to litigate against Appellants' Complaint-In-Intervention as a stand-in for Gabb because Gabb's Board was deadlocked during the pendency of the Section 225 Action. This accommodation to allow the Dalbys to assert Gabb's defense did not transform the Dalbys into parties to Appellants' breach of contract claim but instead permitted them to preserve Gabb's legal position. If it were otherwise, Appellants could look to the Dalbys to recover damages for Gabb's undisputed breach.

Appellants are unquestionably the prevailing parties for their breach of contract claim. The Dalbys mischaracterize the nature of Appellants' claims, asserting that Appellants' claims were for "specific performance and declaratory

relief, which the Court rejected." AB 46. This is incorrect. Appellants brought two counts in their Complaint-In-Intervention: Count I for breach of the convertible note and Count II for declaratory judgment. A0609-610. The trial court found in Appellants' favor regarding Count I, concluding that Gabb breached the AIM Note but ultimately declined to award specific performance. Op. at 92-98. In a breach of contract action, the prevailing party is the party who succeeds on the substantive breach of contract claim, even if specific performance or other forms of damages are not awarded. *See W. Willow-Bay Ct., LLC v. Robino-Bay Ct. Plaza, LLC*, 2009 WL 458779, at *9 (Del. Ch. Feb. 23, 2009) ("There can be no question West Willow prevailed in this matter. It prevailed on the substantive breach of contract claim….[W]hether a party prevailed is determined by reference to substantive issues, not damages."]; s*ee also Winklevoss Cap. Fund, LLC v. Shaw*, 2024 WL 3888757, at *21 (Del. Ch. Aug. 21, 2024) ("Delaware law is clear that in the usual case, and absent contractual language to the contrary, whether a party has prevailed is determined by looking at the outcome of the substantive issues, not damages.") (quotation and citation omitted). The Dalbys do not meaningfully dispute this.

The Dalbys go further, however, claiming that Appellants sought to avoid being repaid and that "[p]revailing parties do not appeal and move to stay the very relief they supposedly 'prevailed' on." AB 46. Nowhere do Appellants claim they prevailed in obtaining the relief sought in the Complaint-In-Intervention. That is the

very purpose of this appeal, as Appellants prevailed on their substantive claim and now seek appropriate relief. As noted above, Appellants only sought to stay portions of the trial court's implementing order to avoid losing their right to convert during the pendency of this appeal. Moreover, simple repayment of the AIM Note principal plus accrued interest is not representative of Appellants' damages because it fails to account for the value of the conversion that Gabb failed to honor. To ignore the conversion for purposes of assessing damages would render the conversion illusory.

C. The Voting Agreement Was Not At Issue

There should be little dispute that the Voting Agreement was not the basis for any claim in the underlying litigation. Although the parties and the trial court referenced both the Voting Agreement and the Settlement Agreement, these were relevant only to set the stage for the Gabb's governance structure and the ongoing disputes between Gabb and the Dalbys. Moreover, the trial court's decision was not premised on those agreements, nor was there any judicial determination of rights or obligations under those agreements, so the fee-shifting provisions are not implicated.

D. The Dalbys' Contingency Fee Arrangement Is Unreasonable

Neither the trial court nor the Dalbys cite any authority supporting the reasonableness of a contingent fee arrangement in a Section 225 action, much less a contingency fee award with a 2.5x fee multiplier in a Section 225 action. Both equally failed to evaluate the contingent fee arrangement according the Delaware

Rules of Professional Conduct. *See* OB 38-41. The Dalbys only cite to *Shire*, which, as explained in Appellants' Opening Brief, holds only that a contractual fee-shifting provision can cover a contingent fee award. AB 47; OB 40-41. That is not the issue before the Court. The issue is whether the contingent fee arrangement between the Dalbys and RAM, inclusive of a 2.5x fee multiplier, is reasonable in the context of the Section 225 Action where no monetary recovery was available. It is not.

The Dalbys' claim that Appellants provide no authority that a contingent fee is impermissible in a Section 225 action is unpersuasive. The Dalbys bear the burden of demonstrating the reasonableness of their contingent fee, yet they provide no example of a contingent fee representation in a Section 225 action, let alone authority permitting a fee-shifting recovery for a contingent fee in a Section 225 action. The Dalbys lack of exemplar support indeed suggests that contingent fees for Section 225 actions are not customary in the legal services marketplace. *See* Del. Lawyers' R. Prof'l Conduct 1.5(a) (listing factors to be considered in determining the reasonableness of a fee). In addition, the Dalbys assertion that their contingent fee is reasonable because the Section 225 Action "was combined with a plenary suit for specific performance…" (AB 47) is a red-herring. The Dalbys and RAM entered into the contingent fee arrangement *before* Appellants intervened when the only suit contemplated was the Section 225 Action. On February 9, 2025, the same day the Dalbys file the Section 225 Action, the Dalbys and RAM entered into "Addendum

#2 to Engagement Agreement with Ross Aronstam & Moritz LLP." See AR027-028. The addendum states, "Ross Aronstam's compensation for its work on the Section 225 Litigation shall be contingent on prevailing in the Section 225 Litigation, or on the occurrence of a settlement, buyout, or other liquidity event, as further set forth below." AR027. Appellants did not intervene until February 14, and their motion to intervene was not granted until February 20. Moreover, the Complaint-in-Intervention does not include a prevailing party fee-shifting provision. Thus, Appellants' Complaint-in-Intervention has no bearing on whether the contingency fee arrangement between the Dalbys and RAM is reasonable.

The Dalbys further point to text messages between Randle (Gabb's CEO) and Cole (Gabb's CFO) to support the purported need for a contingent fee arrangement. But as Appellants have repeatedly asserted, statements made by Gabb's management are not attributable to Appellants nor do they convey Appellants' thoughts. Text messages among Gabb's management also do not change the fact that a contingency fee is not reasonable because a Section 225 action never includes a monetary award. Moreover, the Dalbys intimation that a contingent fee was necessary because of a strategy by Gabb's management to remove Stephen is belied by the fact that the Dalbys initially retained RAM on a contingency fee basis in January 2024 (AR001-008)—before any effort to remove Stephen and while Gabb was actively being marketed for sale by Moelis. Text messages sent several months later are irrelevant.

E. The Trial Court's Valuation of Gabb is Unsupported by Evidence

The Dalbys do not dispute that the value of Gabb was not at issue or litigated at trial below. No evidence was presented at trial for the purpose of establishing the value of Gabb at any point during the relevant time period because the value of Gabb was not germane to the Section 225 Action or the Complaint-in-Intervention. AIM Ventura was thus not reasonably put on notice that the value of Gabb would be an issue for the trial court to decide when determining the relevance of evidence, including the evidence cited by the Dalbys. AB 48. If AIM Ventura had notice that valuation was a litigable issue, it certainly would have presented a valuation expert.

Because no party presented financial evidence or expert opinions to value Gabb, the trial court relied solely on a non-party's notes from a phone call to conclusively establish Gabb's value at $275 million for purposes of assessing the reasonableness of the Fee Award inclusive of the 2.5x multiplier. *See* Ex. E, at 73:12-74:7 (citing JX164). The trial court offered no support for its decision to use an informal valuation from June 2024 and rationalized the double-hearsay statements in the non-party's notes as reliable because Cole, the declarant, was Gabb's CFO and therefore should know Gabb's value. But as Appellants pointed out in the Opening Brief, $275 million is the same value that Gabb was marketed at a few months prior in a failed sales process led by Moelis. Moreover, the trial court ignored the financial difficulties that Gabb faced starting in June 2024, including

almost defaulting on a payment to a critical vendor that necessitated AIM Ventura providing Gabb with $1.5 million in early July 2025 and led to the AIM Note. Gabb's financial issues continued throughout 2024 and remained at the time of trial.

The Dalbys assert that the trial court's valuation was reasonable because the court "*did not* simply use" the numbers but "pressure-tested its analysis by conservatively assuming valuations *50% lower*…." AB 48 (emphasis in original). But this simply emphasizes the trial court's unreasonable valuation approach. Not only did the trial court select an arbitrary value at an arbitrary point in time and provide no opportunity for the parties to establish Gabb's actual value at the relevant time, but the trial court also haphazardly cut that value in half as a purported precaution against over-valuing Gabb. This is a tacit acknowledgment that the trial court's valuation "methodology" was unreliable from the outset and likely inaccurate. Indeed, the AIM Note, issued a few weeks after the non-party's phone call with Cole, valued Gabb at $80 million, which is 30% of $275 million.

F. Stephen Was Not Entitled to A Control Premium

As demonstrated above, whether Stephen was a controller of Gabb was not at issue in this litigation and was not litigated below. *See supra* at 16-17. A control premium is only relevant when a party has demonstrated actual control. *See In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232, at *15 (Del. Ch. Mar. 6, 2012) ("[A] controlling stockholder is, with limited exceptions, entitled under Delaware

law to negotiate a control premium for its shares."). Because this issue was not litigated or decided, and it is not obviously clear, the trial court abused its discretion by including a control premium when assessing the reasonableness of the Fee Award.

G. The Fee Award Penalized Appellants

The trial court below awarded the Dalbys the unprecedented Fee Award that was (1) based on an unreasonable contingent fee arrangement in a Section 225 action, (2) measured against an arbitrary and unsubstantiated valuation methodology, (3) imposed against Appellants who were not parties to the Section 225 claims and who prevailed on their own breach of contract claims, and (4) not awarded against the actual party-in-interest, Gabb. The only rational conclusion that Appellants can make is that the Fee Award was outcome driven and intended to be punitive.

CONCLUSION

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

Dated: February 9, 2026

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