EFiled: Mar 10 2026 03:32PM EDT
Filing ID 78648354
Case Number 12,2026

IN THE

Supreme Court of the State of Delaware

ISZO CAPITAL LP,

Objector Below-Appellant,

v.

STEPHEN BRANDENBURG, ROBERT K. BRENNAN, JAMES DEVILLIERS, MICHAEL GOLDBERG, and SAMUEL MENASHA, individually and on behalf of all others similarly situated,

Plaintiffs Below-Appellees,

and

TIMOTHY ROTHWELL, MICHAEL WEISER, MARK H. RACHESKY, MHR FUND MANAGEMENT LLC, MHR HOLDINGS LLC, MHR CAPITAL PARTNERS MASTER ACCOUNT LP, MHR CAPITAL PARTNERS (100) LP, MHR INSTITUTIONAL PARTNERS II LP, MHR INSTITUTIONAL PARTNERS IIA LP, MHR ADVISORS LLC, MHRC LLC, MHR INSTITUTIONAL ADVISORS II LLC, and MHRC II LLC,

Defendants Below-Appellees.

No. 12, 2026

COURT BELOW:

COURT OF CHANCERY
OF THE STATE OF DELAWARE,
CONSOLIDATED
C.A. NO. 2021-0025-JRS

Redacted Public Version
Filed Mar. 10, 2026

APPELLANT'S OPENING BRIEF

(counsel listed on next page)

OF COUNSEL:
Brant D. Kuehn
GREENSPOON MARDER LLP
1345 Avenue of the Americas,
Suite 2200
New York, New York 10105
Phone: (212) 524-5000

Anthony A. Rickey (Bar No. 5056)
MARGRAVE LAW LLC
3411 Silverside Road, Suite 104
Baynard Building
Wilmington, Delaware 19810
Tel: (302) 604-5190
Attorney for IsZo Capital LP, Objector Below-Appellant

February 23, 2026

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Court Filings

Statutes and Court Rules

Other Citations

NATURE OF PROCEEDINGS

Through this appeal, a significant stockholder, prepared to independently prosecute a clearly identified and supportable claim for monetary damages, seeks to pursue its own action rather than be dragged into a settlement it opposes. Delaware protects such stockholders via a "discretionary opt out right" when due process demands one. *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 433-37 (Del. 2012). Yet in over thirteen years, the Court of Chancery has ***never*** granted that opt out. The trial court questioned *Celera*'s vitality and whether discretionary opt-outs are even "workable." A740-43. But if a discretionary opt-out will only be granted in *Celera*'s "unique circumstances" (Op. at 18), then Delaware's class action framework faces constitutional reckoning.[1]

For IsZo Capital LP ("IsZo"), the stakes could not be higher. When Emisphere Technologies, Inc. ("Emisphere") announced its merger to Novo Nordisk A/S ("Novo"), Emisphere stock represented about 60% of IsZo's long equity positions. A622. IsZo was Emisphere's largest unaffiliated stockholder, owning approximately 20% of the class shares—"roughly four times" Plaintiffs' stake, ***combined***. A144-45. IsZo pursued a books-and-records action even before Emisphere announced the merger, when Emisphere had delisted. A619. Unlike Plaintiffs, IsZo never needed an "incentive award": it had skin in the game.

---

[1] "Op." or "Opinion" refers to the transcript opinion in this action. Ex. B.

Yet Appellees would eliminate IsZo's supportable claims for monetary damages. In the challenged transaction, Novo agreed to pay $1.8 billion for the company and a separate royalty stream owned by Emisphere's controlling stockholder, Mark Rachesky and his private equity firm, MHR Fund Management LLC (with its affiliates, "MHR"). MHR and the individual defendants then agreed to split that $1.8 billion: $1.35 billion to the stockholders of Emisphere, and $450 million to MHR for the royalty stream. A295. Strong claims for breach of fiduciary duty, both as to the initial sale and as to the allocation of the sale price, survived a motion to dismiss.

IsZo and Plaintiffs disagree on the value of those claims. But Plaintiffs would give away IsZo's rights—worth four times their own—in exchange for $32 million, less their counsels' fee, leaving IsZo approximately $4.6 million. Appellees knew IsZo would never agree, and they excluded it from litigation and the mediation sessions. Appellees made certain that the party with the greatest interest in the outcome was not in the room.

IsZo sought the discretionary *Celera* opt-out. It did not oppose other stockholders accepting the settlement nor the fairness of the settlement ***to them***. Rather, it asked for the right to pursue its own claims, at its own expense, at the risk of recovering nothing. Plaintiffs offered 27% of the settlement fund to their counsel,

and counsel offered $15,000 "incentive awards" to each Plaintiff—amounts even the trial court found excessive. Op. at 38, 48-49.

The trial court did not simply deny IsZo's request. At the settlement hearing, it questioned whether *Celera* had "age[d] well" and would be decided the same way today. A738-39. It suggested that the answer to *Celera* might not be this Court's solution, but "to reject the settlement, not to say we're going to certify a (b)(1)/(b)(2) class and give a discretionary opt-out." A739. It speculated that, were its decision appealed, "maybe [*Celera*]'s one of those decisions that ends up getting superseded with a different articulation of how these sorts of matters should be resolved." A743.

Respectfully, this Court should accept that invitation, not to abandon *Celera*, but to reinforce it. Without such reinforcement, *Celera* is in tension with United States Supreme Court precedent. Following the United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), federal practice has protected the due process rights of stockholders with damages claims (like IsZo) by requiring certification under Federal Rule of Civil Procedure 23(b)(3), which includes a mandatory opt-out. *Celera* achieves the same aim with its discretionary opt out. But if that opt-out exists only in theory, then Delaware's paradigm for protecting due process rights—never tested on appeal from this Court—is vulnerable.

This Court could resolve the tension between *Wal-Mart* and *Celera* in two ways. First, it could revisit *Celera* and provide guidelines for when due process requires an opt-out. This need not go as far as *Wal-Mart*. For instance, the Court could hold that either (b)(3) certification or an opt-out is required when (a) a class is certified for purposes of settlement; (b) the settlement involves no class-wide equitable relief; and (c) a significant shareholder is prepared to individually prosecute claims for monetary damages. *See* Argument I, *infra*.

Alternatively, the Court could revitalize *Celera* by holding that a discretionary opt-out was required here. IsZo, the class's largest unaffiliated member, holds nearly 20% of the class shares, yet was excluded from the settlement process. An opt out would strengthen, not undermine, Delaware's policy favoring settlement by ensuring that settling parties cannot drag along larger stockholders with far more significant interests, but instead must invite them to the table before negotiating. That dynamic has not prevented parties from settling in federal court.

Either result requires reversal and remand of the Order and Final Judgment (Ex. C) approving the settlement and denying IsZo a discretionary opt-out. This Court should either provide the "different articulation" of *Celera* that the trial court recognized could be necessary (A743), or reverse and remand with instructions to grant IsZo an opt out.

SUMMARY OF ARGUMENT

1. If this Court agrees that a discretionary opt-out is not "workable" (A740), it should revisit *Celera* and provide a mandatory opt-out right in certain circumstances. The United States Supreme Court's ruling in *Wal-Mart*, stands in tension with *Celera*'s application by the Court of Chancery. In thirteen years, the Court of Chancery has never granted a *Celera*-style opt out and has limited *Celera* to its "unique circumstances." Op. at 18. If a discretionary right is never available, and may not be "workable," then this Court should provide guidance as to when opt-out rights are constitutionally mandatory. At the very least, opt-out rights should be granted where (a) a class is certified for purposes of settlement; (b) the settlement involves no class-wide equitable relief; and (c) a significant shareholder is prepared to individually prosecute claims for monetary damages.

2. The trial court abused its discretion by approving a settlement without an opt-out for IsZo. A "separate, rigorous analysis is required to determine" whether a trial court abuses its discretion in denying an opt-out. *Celera*, 59 A.3d at 433. Here, the balance of equities favors IsZo, which could achieve a better outcome on its own. As in *Celera*, (a) the only remaining claims were for monetary damages, (b) IsZo was a "significant shareholder prepared independently to prosecute" its claims, and (c) questions were raised as to the Plaintiffs' adequacy. While this Court does not require each of those factors to be present, the trial court limited *Celera*'s

reach to its own "unique circumstances." Op. at 18. Further, it implied that an opt-out should be conditioned on two circumstances that apply not to dissenters who wish to opt out, but to intervenors who wish to take over a class action: an opposition to the settlement itself and a willingness to undertake a bond. Limiting and conditioning *Celera* in this fashion was error and an abuse of discretion.

STATEMENT OF FACTS

A. IsZo Makes a Long-Term Investment in Emisphere.

1. Emisphere Develops Revolutionary Technology.

Emisphere's crown jewel was its proprietary drug delivery technology Eligen, and more specifically a single compound, SNAC. A177-78, A642. SNAC made possible the oral formulation of semaglutide—the active ingredient in Novo's blockbuster drugs Ozempic, Wegovy, and the oral formulation marketed as Rybelsus. A178.

Rybelsus, the first orally available GLP-1 receptor agonist, belonged to a class of drugs that IsZo believed represents the most important medical discovery of this century. A569. GLP-1 drugs possessed transformative potential not only in diabetes, but in obesity, cardiovascular disease, and a rapidly expanding range of indications. Eligen made the oral form work. Novo's Chief Scientific Officer described delivering diabetes medication through a once-daily tablet as "a unique thing. It's never happened before, it's a little bit like a holy grail." A568.

Emisphere and Novo entered into a 2008 Royalty Agreement that gave Emisphere royalties on oral formulations of Novo's GLP-1 drugs using Eligen technology. A178-79. That agreement was amended to cover four additional classes of molecules aimed at diabetes and obesity. A180. By 2020, Rybelsus sales had

begun triggering royalties. A181-82. Even without further development, those royalties represented massive future value for Emisphere. A448-50; A501-02.

2. MHR Controls Emisphere.

MHR is a private equity fund founded in 1996 by defendant Mark Rachesky. The Court of Chancery has described MHR's business model as "taking control of distressed companies and positioning itself to reap the benefits of control for itself and its investors." *In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *1, *39 (Del. Ch. Sept. 19, 2008). Rachesky personally controls MHR and its funds. A171.

MHR engineered its control of Emisphere over fifteen years. In 2005, Rachesky made an initial equity investment and followed it with a convertible loan that provided MHR with two board seats and significant veto rights. A183-84; A570-71. Over the next decade, MHR deepened its control through a series of restructurings that repeatedly diluted other stockholders. In 2013, Rachesky consolidated his debt into instruments with a conversion rate of just $1.25 per share and 13% interest, tripling his effective equity. A158. By 2020, MHR's effective ownership had grown to approximately 70% of Emisphere's fully diluted common stock. A158.

MHR also carved out a direct share of Emisphere's revenue stream. In 2016, Rachesky engineered the transfer of one-sixth of Emisphere's royalty interest, giving

MHR a perpetual 0.5% share of its global semaglutide sales—revenue flowing directly to MHR, not to stockholders. A158-59.

By 2020 Rachesky dominated Emisphere's capital structure and board. He had installed allies, including defendants Michael Weiser and Timothy Rothwell, in senior roles, and Emisphere had stopped making SEC-mandated public disclosures. A158-59, A193, A171-73.

3. IsZo Invests the Majority of its Capital in Emisphere.

IsZo is a New York-based hedge fund that identifies companies with transformative technologies undervalued by the market. A568-69. IsZo's investment thesis in Emisphere centered on the revolutionary potential of GLP-1s, and the theory that Emisphere's technology placed it at the heart of that revolution. A569.

At the time of Emisphere's merger, IsZo held 7,843,399 shares of Emisphere common stock—approximately 20% of the class. A564; A622-23. IsZo was Emisphere's largest stockholder unaffiliated with MHR or company insiders. Emisphere was approximately 60% of IsZo's total long position when the merger was announced. A622.

4. Emisphere Fights Novo Over Intellectual Property.

By 2019, Emisphere had discovered that Novo had committed at least two breaches of trust that gave Emisphere powerful leverage to renegotiate its royalty

terms to benefit its shareholders. A193-200. First, Novo published sensitive, confidential Emisphere information in a scientific journal article without authorization. A193-200. Second, Emisphere discovered that Novo had filed several patents without disclosing Emisphere's scientists as co-inventors. A196-98.

These were not theoretical claims. Emisphere's lawyers at Quinn Emanuel and Williams & Connolly had prepared a draft complaint ready to file if Novo refused to amend the licensing agreement. A399; A433. In this litigation, Plaintiffs' IP expert acknowledged that [redacted]. A495. The financial implications were enormous. Jefferies' modelling showed valuations with a range of [redacted]. This [redacted] was largely driven by [redacted]. A440 (comparing [redacted]).

In the eventual transaction, Emisphere's conflicted fiduciaries abandoned these claims. And in this litigation, Plaintiffs initially championed them, citing them in their original complaint, their leadership brief, and their operative complaint. A120-22; A193-98.

B. MHR Pursues an Unfair and Rushed Transaction.

1. MHR Faces Unique Pressure to Sell.

By 2020, while Emisphere pressed its claims against Novo, MHR faced pressures to monetize its Emisphere investment separate from those of unaffiliated stockholders. These pressures made MHR a willing seller to Novo at a time and price that served MHR's interests, rather than the interests of other shareholders.

First, MHR was sitting on a thirteen-year-old investment. A572. The median holding period for private equity investments ranges from 3.8 to 4.5 years. A572. MHR's investors had capital locked up for far longer than typical, creating pressure to return capital. A572.

Second, MHR was focused on tax optimization. In the acquisition, MHR insisted that Novo acquire its royalty interest using a structure that would qualify the sale for long-term capital gains treatment rather than ordinary income. A162-63. The incoming Biden administration had promised to tax long-term capital gains as ordinary income for high earners—a change that could have cost MHR tens of millions of dollars if the transaction were delayed into 2021. A572. As Plaintiffs' expert later quantified, [redacted] —more than [redacted] the settlement fund.[2]

[2] A542-43 [redacted] Applied to the $450 million royalty allocation, this represents approximately [redacted].

2. Emisphere's Rushed Sale to Novo.

In February 2020, Novo made an initial bid of $950 million to acquire Emisphere. A212-13. Rachesky seized on the offer to orchestrate a sale by year end, even if it meant forcing the minority shareholders to sell at a discount.

In March 2020, Emisphere's board, controlled by Rachesky, elevated Weiser and Rothwell to serve as co-CEOs, granting them restricted stock units that would vest upon change of control. A173. Weiser's close personal and business relationship with Rachesky was extensive: he had co-founded and run a biotech investment vehicle with Rachesky's backing, earning [redacted]. A392. Weiser and Rothwell continued to lead negotiations despite their conflicted compensation packages, which strongly incentivized any transaction. A200-208; A575.

Emisphere nominally established a special committee, but its members, Howard Draft and Timothy McInerney, were likewise closely tied to MHR. A393-94. Draft had been appointed to the board just months before, when sale discussions with Novo were underway. McInerney was no more independent: while negotiating the allocation of proceeds with MHR, McInerney solicited investment from Rachesky on outside projects. As discovery revealed, [redacted] A393.

Jefferies, the company's and the Special Committee's financial advisor, modeled multiple scenarios, initially valuing the company as high as $2.935 billion, or $17.17 per share, reflecting the value of the license agreement and the royalties owed by Novo should Emisphere successfully press its IP claims. A440.

On August 24, 2020, Novo authorized its board to bid up to $1.8 billion. A228, A230-31. After rushed negotiation in which Rachesky took a leading role despite his self-interest, the Committee accepted. Plaintiffs characterized the result as "an absurdly low total price" driven by Rachesky's "motivations in pushing for and agreeing to" a rushed transaction. A128-30. To sanitize agreement to this offer, McInerney instructed Jefferies to redo the analysis, including by assuming a 2027 step-down (ascribing no value to, and contradicting months of positioning on, the IP disputes), then shared this revised analysis with MHR before the Committee even formally accepted Novo's offer. A403-04; A446. With the groundwork laid for a quick sale, the offer was accepted and the deal set to close in 2020.

The allocation of consideration within the deal further reflected Rachesky's domination. Of the $1.8 billion Gross Consideration, $450 million, fully 25%, was carved out for MHR in exchange for its 0.5% royalty stream. A233-34. As Plaintiffs' Complaint alleged, this allocation was grossly disproportionate. A162-63, A233-34. Jefferies' initial analysis implied MHR should have received, at most, 17.9% of the total. A403.

At the same time, MHR and Rachesky secured extraordinary protections for themselves. First, they negotiated a side arrangement with Novo that structured the sale of the royalty rights to qualify for long-term capital gains treatment—a perk not available to any other stockholder. A242-45. Second, they extracted indemnification against liabilities arising from the sale of those rights. A245. These provisions insulated MHR from risk while incentivizing it to disregard the interests of unaffiliated stockholders.

Plaintiffs, before they sought to settle, described the merger consideration as "an absurdly low total price." A129. IsZo agrees.

C. Plaintiffs Control the Litigation and Reach an Undervalued Settlement.

1. IsZo Investigates Emisphere's Wrongdoing.

Even before Defendants announced the transaction, IsZo demanded to inspect Emisphere's books and records, targeted at ascertaining the value of Emisphere's unlisted common stock and the prospect of Emisphere's return to making SEC-mandated disclosures. A576-78. After Emisphere announced the acquisition, IsZo promptly made a second demand. A577-78. When Emisphere proved slow to comply, IsZo filed an expedited complaint under 8 *Del. C.* § 220. A578. IsZo negotiated for the production of more than 520 documents running nearly 2,700 pages that, as the trial court would later recognize, "substantially benefited the entire class." A151; A578.

2. Plaintiffs Take Control of the Litigation.

Between January and July 2021, four complaints were filed challenging the Merger, and two groups vied for leadership: IsZo, supported by two other plaintiffs, and the "LTS Group" (the Plaintiffs here). A140-41.

Despite selecting Plaintiffs to lead the case, the trial court recognized that IsZo held "almost 20% of the potential class," or "roughly four times the shares owned by" the LTS Group. A144-45. It complimented IsZo's vigorous pursuit of documents and acknowledged that IsZo's efforts "more substantially benefitted" the entire class than the LTS Group's efforts. A151. While the trial court considered it a "close call," it appointed the LTS Group after finding its complaint "simply more comprehensive" because it included "dilution and *Blasius* claims." A151-52.

On April 20, 2023, while motions to dismiss were pending, the parties held their first mediation session, without including IsZo. A332. On August 3, 2023, the trial court dismissed Counts II, III, and IV, including the *Blasius* claim, whose inclusion had been the principal basis for appointing the LTS Group over IsZo. *Compare* A150-51 *with* A281. Claims related to the acquisition itself survived, including both the claims challenging the total consideration received for Emisphere (the "Total Consideration Claims") and the claims challenging the allocation between Emisphere stockholders and MHR for its royalty stream (the "Allocation Claims"). A281; A583.

Throughout this period, despite IsZo's regular requests that Plaintiffs' counsel keep it updated concerning the litigation, Plaintiffs refused. A584; A632-34. Plaintiffs denied IsZo any role in the litigation or settlement.[3] Yet the parties recognized IsZo's potential dissatisfaction with the outcome of the case: Defendants' deposition of IsZo's President, Brian Sheehy, lasted longer than any deposition of any plaintiff or defendant, and nearly twice as long as Plaintiffs' deposition of Rachesky. A583; A628-30. Although Plaintiffs would eventually seek $15,000 "incentive awards" in recognition of their participation, they made no such offer to IsZo.

3. Plaintiffs Seek "Unopposed" Certification of the Class.

On November 8, 2024, Plaintiffs filed an "unopposed" motion for certification of a non-opt-out class under Court of Chancery Rules 23(b)(1) and (b)(2). A86. Despite IsZo's requests for updates, the motion was not served on IsZo, nor did the class receive notice. A632. IsZo discovered the motion on its own and on November

[3] This action thus differs from recent cases where objectors sought similar opt-outs. There, objectors had either taken meaningful part in litigation or been invited (and declined) to participate in mediation. *See In re Calamos Asset Mang., Inc. S'holder Litig.*, C.A. No. 2017-0058-JTL, at 88:2-9 (Del. Ch. Apr. 25, 2019) (objector declined to participate in mediation despite invitation); *In re MPM Holdings Inc. Appraisal and S'holder Litig.*, C.A. No 2019-0519-NAC, at 18 (Del. Ch. Apr. 10, 2025) (objector "led the charge" as co-lead plaintiff for significant portion of litigation).

14, 2024 wrote Plaintiffs' counsel noting that it objected to a non-opt-out class and asked Plaintiffs' counsel to so inform the trial court. A632-34. The trial court granted Plaintiffs' "unopposed" motion that same day, apparently without Plaintiffs' counsel notifying the trial court. D287.

4. Plaintiffs Settle Before Litigating Summary Judgment.

After exchanging expert reports, the parties reached an agreement to settle based on a mediator's recommendation. A328, A332. Appellees excluded IsZo from mediation proceedings. A675-76, A689.

The expert reports revealed how Plaintiffs had narrowed their claims to support a settlement. Plaintiffs' damages expert prepared his analysis under assumptions provided by Plaintiffs' counsel that constrained damages to a fraction of Jefferies' projections. In two damages scenarios, Plaintiffs' expert assumed that the $1.35 billion payment was adequate. A485-86. In the third scenario, Plaintiffs instructed their own expert to make assumptions that valued Emisphere at only $1.881 billion—despite the contemporaneous evidence that Emisphere's own financial advisor valued Emisphere at over a billion dollars more than Plaintiffs assumed. A486. In other words, Plaintiffs demanded that their expert leave more than 55% of Emisphere's clearly-demonstrated value on the table. A478, A485-86, A490-91, A600-604. That damages analysis also failed to account for the strong

liability opinion issued by Plaintiffs' IP expert, [redacted]. A495.

Plaintiffs settled solely for monetary relief: a $32 million cash fund. A334-35. Using Plaintiffs' estimate of 40 million class shares, the class-based per-share recovery adds only $0.80 to the $7.83 acquisition price—before fees and expenses. A335. This barely increased recovery over a deal price Plaintiffs once described as "absurdly low." A129-30.

Plaintiffs permitted their counsel to seek 27% of the fund in fees, plus expenses, while Plaintiffs' counsel offered their clients separate $15,000 "incentive awards." A350, A358. As the Opinion would later concede, both offers exceeded levels typically approved in Delaware. Op. at 38, 46.

5. IsZo Seeks an Opt-Out.

Plaintiffs' settlement and fee proposal would have released IsZo's claims for approximately $4.6 million. For IsZo, the difference between this inadequate settlement and a meaningful recovery is not theoretical. Even achieving Plaintiffs' artificially depressed highest damages valuation—$127.2 million—would bring

IsZo an eight-figure increase in potential recovery.[4] IsZo reasonably believed a better result was possible. *See* Section II.C.1, *infra*.

IsZo thus sought an opt-out similar to that granted by this Court in *In re Celera Corp. Shareholder Litigation*, 59 A.3d 418 (Del. 2012). IsZo retained non-contingency counsel to pursue its own litigation. And while it "[c]andidly . . . did not believe that the settlement consideration is sufficient to justify settlement approval," it did not challenge the settlement itself. A606.

IsZo also challenged Plaintiffs' counsels' excessive fee request. Plaintiffs' differing perspective on fees shows how IsZo's financial interest—which dwarfs that of any Plaintiff—creates different financial incentives. A307; A605-06. For three plaintiffs, the value of their proposed $15,000 "incentive award" exceeded what they stood to gain from opposing a higher fee.[5] For IsZo, the difference was material: if it could not opt-out, simply lowering Plaintiffs' counsels' fee in line with this Court's recent precedent would increase its recovery by almost $213,000.[6]

---

[4] IsZo held ~19.6% of approximately 40 million class shares. A564; A327. The settlement fund of $32 million, less the expenses ($996,830.09) and Plaintiffs' fee ($7,285,744.93), yields a class recovery of $23,717,425, and $4,648,615 for IsZo. Had plaintiffs achieved $127.2 million less expenses and a 23.5% fee, the remaining fund would be $96,545,425, or $18,922,903 to IsZo—an increase of over $14 million.

[5] *See* note 19, *infra*, and text accompanying.

[6] The $1,085,111 in fee savings (see note 19, *infra*) distributed pro rata to IsZo's 7,843,399 shares (approximately 19.6% of the class) yields an increased recovery of approximately $212,752.

6. The Trial Court Approves a Non-Opt-Out Settlement While Questioning *Celera*'s Vitality.

IsZo argued for an opt-out based on this Court's decision in *Celera* and the United States Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). A563-67, A587-606; A635-743. At the settlement hearing, the trial court offered several observations on *Celera*'s continuing vitality. Questioning whether the concept of an opt-out had "age[d] well," the trial court mused whether, when faced with a problematic settlement as in *Celera*, the correct result might be "to reject the settlement, not to say we're going to certify a (b)(1)/(b)(2) class and give a discretionary opt-out." A739. Indeed, the trial court questioned whether "a discretionary opt-out, in the context of a (b)(1)/(b)(2) class settlement, [is] really workable as a practical matter for internal affairs corporate litigation." A740.

The trial court invited this Court to reconsider *Celera*'s discretionary opt-out:

> [I]t just occurred to me, as we've been sitting here, that I question whether *Celera*, if it was decided today, whether it would come out the same way. And I would have questions as to whether, if it went up on appeal—you know, maybe the decision stands and that's the law; or maybe that's one of those decisions that ends up getting superseded with a different articulation of how these sorts of matters should be resolved.

A742-43.

Ultimately, the trial court approved the settlement and denied IsZo's opt-out request. Op. at 49. Yet it agreed with IsZo that this Court's precedent "compel[led] giving plaintiffs' requested fees for this mid-stage settlement a modest haircut,"

cutting the fee from the requested $8,370,855.88 to $7,285,744.93. Op. at 38, 49. It also reduced Plaintiffs' incentive award from the requested $15,000 to $5,000. *Id*.

This appeal followed.

ARGUMENT

I. THIS COURT SHOULD ACCEPT THE TRIAL COURT'S INVITATION TO REVISIT *CELERA*.

A. Question Presented.

Is "a discretionary opt-out, in the context of a (b)(1)/(b)(2) class settlement, really workable as a practical matter for internal affairs corporate litigation," given that the Court of Chancery has never granted a discretionary opt-out in the 13 years since this Court's decision in *Celera*? (Preserved: A587-90; A674-75; A678; A740.)

B. Scope of Review.

To the extent that class certification implicates due process claims, those claims are reviewed *de novo*. *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 428 (Del. 2012).

C. Merits of Argument.

Monetary claims are property interests subject to due process protections.[7] Delaware and federal law currently protect those due process interests differently.

---

[7] *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) ("A cause of action is a species of property protected by the Due Process Clause."); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("[A] class settlement generates property interests. Each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves."); *see also Palkon v. Maffei*, 311 A.3d 255, 283 (Del. Ch. 2024) ("Stockholders are widely regarded as possessing three fundamental rights: to sell, vote, and sue."), *rev'd on other grounds*, 339 A.3d 705 (Del. 2025).

The United States Supreme Court has made clear that the Due Process Clause limits federal courts' ability to certify non-opt-out classes where claims include monetary relief. *Wal-Mart*, 564 U.S. at 360. Delaware, distinguishing *Wal-Mart* based on its *dicta*, permits the certification of non-opt-out classes in most stockholder class actions. Dissenting stockholders' due process rights are instead protected by a trial court's ability to provide a "discretionary opt-out right." *Celera*, 59 A.3d at 434-36.

However, Delaware's protection has proven illusory. In the thirteen years since *Celera*, the Court of Chancery has ***never*** granted a discretionary opt-out. Op. at 18. The trial court questioned whether an opt-out right is "workable" in stockholder class actions. A740. This Court should accept that invitation to revisit *Celera* and hold that, at least in the settlement context, (b)(1)/(b)(2) class certification is inappropriate or an opt-out is required where there is no equitable class-wide relief and the settlement releases claims for monetary damages.

1. *Wal-Mart* Limits the Certification of Monetary Claims.

In *Wal-Mart*, the United States Supreme Court reversed class certification of an action brought by female employees alleging unlawful discrimination in violation of Title VII. *Wal-Mart* held that claims for monetary relief cannot be certified under Rule 23(b)(2), without notice and an opportunity to opt out, where a class includes claims for monetary relief, at least where "the monetary relief is not incidental to the injunctive or declaratory relief." 564 U.S. at 359-360.

Wal-Mart followed earlier United States Supreme Court authority holding that "[i]n the context of a class action predominantly for money damages . . . absence of notice and opt out violates due process." *Id*. at 363 (citing *Shutts*, 472 U.S. at 812). Thus, Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id*. at 360-61.

Wal-Mart addressed two arguments relevant to Delaware practice. First, it explicitly rejected a "predominance test," permitting non-opt-out certification where claims for injunctive or declaratory relief predominate over monetary damages. *Id*. at 363-64. Nor may a Rule 23(b)(2) class be certified where a monetary award is "equitable in nature," because the rule speaks not of "'equitable' remedies generally but of injunctions and declaratory judgments." *Id*. at 365.

While *Wal-Mart*'s holding is narrow, in *dicta* it questioned whether broader restrictions on (b)(2) certifications could be necessary. For instance, although it noted the absence of United States Supreme Court precedent holding that lack of an opt-out violates due process where "the monetary claims do not predominate [*i.e.*, in equitable actions], ***the serious possibility that it may be so*** provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here." *Id.* at 363 (emphasis added). Similarly, the decision speculated that a (b)(2) class might "appl[y] *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all." *Id.* at 360.

In other *dicta*, however, the opinion discussed a Fifth Circuit opinion concluding that "a (b)(2) class would permit the certification of monetary relief that is 'incidental to requested injunctive or declaratory relief,' which [the Fifth Circuit] defined as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.'" *Id*. at 365-66 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). However, *Wal-Mart* did not adopt *Allison*'s holding.[8]

After *Wal-Mart*, it is unlikely that this case could be certified under Federal Rule 23(b)(2). As a leading treatise notes, *Wal-Mart* suggests that monetary damages "will rarely be available in (b)(2) class actions." NEWBERG AND RUBENSTEIN ON CLASS ACTIONS §4:37 (6th ed. 2025) ["NEWBERG"]. The question of *Allison*'s vitality "is an open one" and it is at best "***plausible*** that [*Allison*-style monetary] damages ***could*** be available after *Wal-Mart.*" *Id*. (emphasis added).

Federal practice has not embraced the *Allison* exception. Federal securities and merger-related settlements are frequently certified under section (b)(3).[9] This

---

[8] *Id.* at 366 ("We need not decide in this case whether there are any forms of 'incidental' monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause.").

[9] *See* NEWBERG § 22:78 ("Because most securities class actions seek monetary damages, courts typically will reject certification under Rule 23(b)(2)."); *id*. § 22:75 ("Almost all securities class actions are pursued under Rule 23(b)(3), that is, for monetary damages."); Wright & Miller, FEDERAL PRACTICE & PROCEDURE, § 1781.1 (describing use of Rule 23(b)(3) for securities fraud cases).

Court's recent decision relating to a $28 million settlement of post-closing damages in a merger settlement provides one example. *Ill. Nat. Ins. Co. v. Harman Intern. Indus., Inc.*, ___ A.3d ___, 2026 WL 204209 (Del. Jan. 27, 2026). The underlying lawsuit, prosecuted by one of the plaintiff-side firms in this case, was certified under Federal Rule 23(b)(3).[10]

As the Third Circuit describes, "where damages are at stake, the class-action device passes constitutional scrutiny only because putative class members can easily extricate themselves from the proceedings." *N. Sound Cap. LLC v. Merck & Co.*, 938 F.3d 482, 492 (3d Cir. 2019). In theory, Delaware provides a different avenue for extrication.

2. Delaware Protects Dissenting Stockholders by Permitting a Discretionary Opt-Out.

For over thirteen years, Delaware law has diverged from federal practice. When the Court of Chancery first confronted *Wal-Mart*, it reasoned that "monetary relief for a breach of fiduciary duty" does not generally involve "making an individualized determination of each shareholder's loss." *Celera*, 2012 WL 1020471, at *18 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part*, 59 A.3d 418 (Del. 2012). (Of course, the federal recovery in *Harman* would not require that

[10] Order Prelim. Approving Settlement and Providing for Notice, *Baum v. Harman Intern. Indus., Inc.*, No. 3:17-cv-00246-RNC ¶ 3 (D. Conn. July 13, 2022) (Compendium, Tab 1).

determination, either.) Relying on *Wal-Mart*'s dicta concerning *Allison*, the Court of Chancery held that *Wal-Mart* did not overturn existing Delaware precedent. *Id*. This Court agreed with, and affirmed, that ruling. *Celera*, 59 A.3d at 433 n.40.

Thus, this Court reaffirmed *Nottingham Partners v. Dana*, which held that certification under Rule 23(b)(2) is appropriate where "the rights and interests of the class members are homogeneous." *Celera*, 59 A.3d at 433 & n.39 (Del. 2012) (citing 564 A.2d 1089, 1096 (Del. 1989)). When a Delaware court certifies a class under Rule 23(b)(2), and a portion of the relief is monetary, "a member of a class . . . has a constitutional due process right to notification but not a right to opt out." *Id*. at 435 (quoting *Nottingham Parts.*, 564 A.2d at 1101).

Celera explicitly adopted the "predominance" test that *Wal-Mart* disapproved. *Compare Celera*, 59 A.3d 418, 433 (Del. 2012) ("A Rule 23(b)(2) class may seek monetary damages in addition to declaratory or injunctive relief, so long as the claim for equitable relief predomina[tes].") *with Wal-Mart*, 564 U.S. at 364 ("We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an injunction.").

However, *Celera* recognized dissenting stockholders' due process concerns and, in fact, reversed the Court of Chancery's approval of a non-opt-out settlement. This Court taught that "when fairness and equity demand it," the Court of Chancery

has discretionary power—and, indeed, an obligation—to grant an opt-out right. *Celera*, 59 A.3d at 435. While discretionary, this Court will reverse the denial of opt-out rights to members of a 23(b) class "if it constitutes an abuse of discretion under the facts and circumstances presented."[11] *Id*. (quoting Joseph M. McLaughlin, 1 MCLAUGHLIN ON CLASS ACTIONS § 5:21 (8th ed. 2011)). In determining whether to grant an opt-out, the Court of Chancery must balance "whether the perceived need for these additional . . . protections . . . outweighs the costs and potential undermining of unitary adjudication or settlement." *Id*.

Thirteen years later, *Celera*'s promise remains unfulfilled. The Court of Chancery has ***never*** granted a "discretionary" opt-out to an objecting stockholder.

3. The Court of Chancery Confines *Celera* to Its Facts.

The Opinion and Appellees cite numerous cases since *Celera* that have certified Delaware classes with monetary claims under Rule 23(b)(2). *See* Op. at 16-17. The trial court has repeatedly held that "the *Wal-Mart* case is not controlling" in stockholder suits because the relevant facts "will be equally applicable to all stockholders." *Id*. (quoting *In re Straight Path Commc'ns Inc. Consol. S'holder*

---

[11] Notably, the current edition of the McLaughlin treatise describes *Wal-Mart* as "cast[ing] doubt on the continuing validity" of numerous decisions, including *Celera*, because under *Wal-Mart* "an otherwise impermissible (b)(2) certification cannot be facilitated by the expedient of authorizing notice and opt out rights." Joseph M. McLaughlin, 1 MCLAUGHLIN ON CLASS ACTIONS § 5:21 (22nd ed. 2025 update).

Litig., 2022 WL 2236192, at *10 (Del. Ch. June 14, 2022)). *See also In re Del Monte Foods Co. S'holders Litig.*, C.A. No. 6027-VCL, at 48-50 (Del. Ch. Dec. 1, 2011) (Trans.).

Yet while these cases embrace *Wal-Mart*'s discussion of *Allison*, they do not confront its contrary speculation that even 23(b)(2) classes may be constitutionally questionable without an opt-out.[12] Indeed, the trial court has described the "idea that a damages class has to be a (b)(3) class" among federal practitioners as "almost like an article of faith" rather than a reflection of *Wal-Mart*.[13] *In re Columbia Pipeline Grp., Inc. Merger Litig.*, C.A. No. 2018-0484-JTL, at 32 (Del. Ch. June 1, 2022) (Trans.).

Yet if the Court of Chancery has adopted *Celera*'s policy with respect to class certification, it has nullified this Court's accompanying protection: "no decision in

---

[12] Compare *Wal-Mart*, 564 U.S. at 360 (speculating that a (b)(2) class might "not authorize the class certification of monetary claims at all.") *with Straight Path*, 2022 WL 2236192, at *9 ("notably, the Supreme Court did not foreclose the possibility that FRCP 23(b)(2) could still apply where a singular judgment would provide relief to each member of the class, even though the relief sought was purely monetary"); *Del Monte*, C.A. No. 6027-VCL, at 49 ("[W]hat the Supreme Court is really worried about there is that there isn't the type of action generally applicable to the class that is required for 23(b)(2) certification.").

[13] The Court of Chancery has likewise suggested that the federal practice of certifying classes (such as *Harman*) under Rule 23(b)(3) is "based on an overly cramped and unpersuasive reading of *Shutts* and *Wal-Mart*." *Del Monte*, C.A. No. 6027-VCL, at 48-49. The thesis that federal practitioners have been misreading United States Supreme Court precedent remains, however, untested.

the 13 years since *Celera* has granted a discretionary opt-out." Op. at 18. Instead, *Celera* has been confined to its supposedly "unique circumstances." *Id*. (quoting *Calamos*, C.A. No. 2017-0058-JTL, at 35). The Court of Chancery considers a *Celera* opt-out to be "extraordinary treatment" favoring an objector, only available in "exceptional circumstances." *MPM Holdings*, C.A. No 2019-0519-NAC at 18. Notably, suitable circumstances have never occurred outside *Celera*.

Worryingly, the Opinion includes among *Celera*'s "unique" facts its settlement's "nonmonetary consideration." Op. at 19-20. Delaware "law has shifted" to encourage cases with monetary damages and settlements, "and appropriately so." *Calamos*, C.A. No. 2017-0058-JTL, at 90-91. Non-monetary M&A disclosure settlements have largely migrated to federal court. *See Anderson v. Magellan Health, Inc.*, 298 A.3d 734, 748 (Del. Ch. 2023). Nothing in *Celera* limits its teachings to non-monetary settlements; but if the Court of Chancery only applies *Celera* to fact patterns that now largely occur outside Delaware, its protections are further diminished.

Indeed, post-*Celera* decisions largely collapse the evaluation of a settlement's fairness into the analysis of a discretionary opt-out. *Celera* mandated an opt-out for a significant stockholder ***without finding that the underlying settlement was otherwise unfair***. Post-*Celera* rulings stress the potential for loss of class recovery over a dissenting stockholder's individual rights. *See, e.g.*, *Del Monte*, C.A. No.

6027-VCL, at 50-51; *MPM Holdings*, C.A. No 2019-0519-NAC, at 19 (refusing opt-out because "[i]t could terminate the class settlement"). This reads *Celera* out of existence: so long as a monetary settlement is fair, no dissenting stockholder could ever receive an opt-out.

This conclusion is consistent with the trial court's statement at the settlement hearing that, under *Celera*'s facts, "maybe the answer is to reject the settlement, not to say we're going to certify a (b)(1)/(b)(2) class and give a discretionary opt-out." A739. The absence of any post-*Celera* opt outs suggests that the trial court believes that *Celera* would be decided differently today. This Court should accept the invitation to revisit whether a "discretionary" opt-out that is never actually available complies with *Wal-Mart* or due process. Respectfully, *Celera* is ripe for reconsideration to avoid pushing Delaware class action practice into conflict with the Due Process Clause.

4. Revisiting *Celera* is Consistent with this Court's Policy Favoring Settlement.

Revisiting *Celera*'s treatment of non-opt-out certification, at least in the settlement context, has two advantages. It avoids potential conflict with the U.S. Constitution and federal precedent while being consistent with Delaware policy in favor of settlement.

a. Celera *Remains in Tension with* Wal-Mart.

To IsZo's counsels' knowledge, the United States Supreme Court has never spoken to *Celera*'s conclusions regarding opt-out settlements and due process. *Celera* foreclosed further appeal: after it ruled in favor of the objector, the parties revised their settlement. Similarly, a recent appeal from the Court of Chancery settled before this Court could rule.[14] IsZo's counsel are aware of only one petition for certiorari from this Court, but that case did not involve a significant stockholder capable of pursuing her own action.[15] *See In re AMC Entm't Holdings, Inc.*, 319 A.3d 310 (Del.) (Table), *cert. denied sub nom. Izzo v. AMC Entm't Holdings, Inc.*, 145 S. Ct. 285 (2024).

But *Celera* and *Wal-Mart* reach undeniably opposite conclusions about the role of the Due Process Clause in constraining the release of a plaintiff's monetary claims and its access to the courts. *Celera*'s "predominance" test is explicitly rejected by *Wal-Mart*. *Compare Celera*, 59 A.3d at 433 *with Wal-Mart*, 564 U.S. at 364. *Celera* relies upon *Allison*'s reasoning, but that case was discussed, not adopted, in *Wal-Mart*. And *Allison* sits uneasily with *Wal-Mart*'s speculation that

---

[14] *See* Docket, *Mangrove Parts. Master Fund Ltd. v. Schechter*, No. 191, 2019 (Del. 2019) (docket).

[15] The United States Supreme Court once accepted a certiorari petition on this issue, but dismissed it as improvidently granted. *See Adams v. Robertson*, 520 U.S. 83 (1997) (*per curiam*).

there is a "serious possibility" a lack of an opt-out may be a denial of due process even in cases where monetary relief does not predominate. *Wal-Mart*, 564 U.S. at 363.

The doctrinal differences between *Wal-Mart* and *Celera* have led to a gulf between federal and Delaware practice. As discussed above, and illustrated by *Harman*, monetary recoveries in securities classes tend to be certified as (b)(3) classes, even in merger cases where damages would be based on per-share ownership. In Delaware, the opposite is true.

In *Celera*, this Court attempted to mitigate the tension between Delaware practice and the Due Process Clause, as interpreted by *Wal-Mart*, by recognizing the discretionary opt-out right. But if "where damages are at stake, the class-action device passes constitutional scrutiny only because putative class members can easily extricate themselves from the proceedings,"[16] then the *de facto* absence of an opt-out raises constitutional uncertainty concerning *Celera*.

b. Revitalizing Celera *is Consistent with Delaware Policy Favoring Settlement.*

This Court should resolve the tension between *Celera* and *Wal-Mart*, and revitalize the promise of *Celera*, without holding that an opt-out is required wherever a class pursues monetary claims. It would be sufficient to find that where, as here,

---

16 *N. Sound Cap. LLC.*, 938 F.3d at 492.

(a) a class is certified for purposes of settlement; (b) the settlement involves no class-wide equitable relief; and (c) a significant shareholder is prepared to individually prosecute claims for monetary damages, then (b)(3) certification or an opt-out is required.

Such a ruling would not preclude settlements, as federal practice demonstrates. Opt-out rates in federal class actions average less than 1% of class members. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1532–33 (2004). The availability of opt-out rights in federal practice has not produced the parade of horribles invoked by opponents, and at times the Court of Chancery. Indeed, the existence of opt-outs can strengthen settlement outcomes. As Professor John Coffee has explained, the ability of large institutional investors to opt out of class settlements creates competitive pressure that improves outcomes for ***all*** class members, because the threat of exit disciplines the negotiating process itself. *See* John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice,"* 30 CARDOZO L. REV. 407, 411–12 (2008) ["Coffee, *Accountability*"].

Nor does such a rule risk "lead[ing] to incompatible determinations." Op. at 10 (quotation omitted). In the settlement context, there ***is*** no determination on the merits. At most, providing an opt-out to a significant stockholder creates the

possibility that a merits decision ***may*** take place. But it cannot be "inconsistent" with a settlement's non-determination of liability. Where a settlement seeks only monetary damages, and there is only one opt-out, the specter of incompatible determinations is illusory.

Finally, the proposed rule recognizes that in a purely monetary settlement, the monetary relief is not "incidental" to equitable relief at all. While this might be true in a post-trial judgment—if the trial court issued a declaratory judgment—as this Court recently recognized in *Harman*, monetary consideration in a merger settlement may not even represent an increase in deal consideration, but may be "based upon the cost of continuing the litigation." *Harman*, 2026 WL 204209, at *14.

In sum, revisiting *Celera* and affirmatively requiring an opt-out in settlements such as this one would avoid constitutional conflict and encourage fairer settlements for absent class members. The Court should reverse the decisions of the trial court below and provide clearer guidance for future litigants.

II. THE TRIAL COURT ERRED BY APPROVING A NON-OPT-OUT SETTLEMENT OPPOSED BY THE LARGEST CLASS MEMBER.

A. Question Presented.

Did the trial court err by approving a class settlement without permitting an opt-out for a significant stockholder prepared to prosecute a clearly identified and supportable claim for substantial money damages? (Preserved: A563-65; A587-606; A694.)

B. Scope of Review.

To the extent that class certification implicates due process claims, those claims are reviewed *de novo*. *Celera*, 59 A.3d at 428. Even if it is assumed that a non-opt-out-class was legally permissible, a "separate, rigorous analysis is required to determine" whether the trial court abused its discretion. *Id.* at 433.

C. Merits of Argument.

Alternatively, if this Court does not revisit *Celera*, reversal of settlement approval would revitalize its holding and make clear that dissenting stockholders are entitled to a discretionary opt-out outside of *Celera*'s "unique circumstances." Op. at 18. This Court instructs that the Court of Chancery "must balance the equities of the defendants' desire to resolve all claims in a single proceeding against the individuals' interest in having their own day in Court." *Celera*, 59 A.3d at 435 (quotation omitted). As in *Celera*, the equities favor IsZo.

1. An Opt-Out Would Give IsZo an Opportunity to Secure a Better Recovery.

The stakes for IsZo are high. At the time of the merger, Emisphere stock made up approximately 60% of IsZo's total portfolio. A622. Yet even after the reduction in Plaintiffs' counsels' fee, IsZo stands to receive only about $4.65 million from the settlement (before administrative costs). *See* n.4, *supra*. Under reasonable scenarios, IsZo stands to recover much more.

- Jefferies' internal assessment valued Emisphere at $2.935 billion or $17.17 per share. Even at that valuation, which understates Emisphere's true value and IsZo's true damages, IsZo's share of a potential recovery would be over $73 million.[17]

- Even Plaintiffs' pessimistic valuation, prepared for settlement, concedes a potential upside of $127.2 million in class-wide damages, or approximately $3.18 per share, before fees and expenses. A330. At that level, IsZo's share of the gross recovery would exceed $24 million.[18]

Ironically, much of the difference between Plaintiffs' evaluation of the case and IsZo's revolves around the vitality of the "Gross Compensation Claim," or the theory Emisphere and the royalty stream was worth more than the $1.8 billion Novo paid. A336-37. During the leadership contest, Plaintiffs touted their aggressive pursuit of

---

[17] A $2.935 billion valuation (A440) over 170.9 million fully-diluted shares (A270) is approximately $17.17 per share, or $9.34 more per share than the merger closing price. IsZo's 7,843,399 shares (A622-23) would entitle IsZo to an additional ~$73.3 million recovery. At trial, IsZo is confident it will be able to establish a significantly higher valuation for Emisphere and its technology and intellectual property.

[18] 7,843,399 shares x $3.18 per share ≅ $24.9 million.

the Gross Compensation Claim, along with a *Blasius* claim, as justification for their appointment. A131-33; A151. By the time they settled, each of these claims had either been dismissed by the trial court or functionally abandoned by the Plaintiffs.

Yet all but one of Plaintiffs' expert's damage analyses make the same assumption: that the maximum total consideration for Emisphere and the royalty stream was $1.8 billion. A329-31. This assumes that disinterested directors would have agreed to a transaction without being driven by Rachesky's self-interested side deal with Novo, rather than holding out for greater value (from Novo or from another buyer), or simply deciding not to sell the company at all. The crux of IsZo's individual case lies in the contention that Rachesky undersold Emisphere to secure his side deal and monetize MHR's Emisphere investment in 2020, and the damages are not confined to the allocation of $1.8 billion.

Finally, an individual action would permit IsZo to secure consideration on which the trial court put ***no*** value: an answer. MHR and Rachesky are serial defendants whose conduct has been questioned in other cases. *See Loral*, 2008 WL 4293781, at *39. A settlement provides no answer concerning MHR and Rachesky's liability here—it merely reveals the price Plaintiffs were willing to accept to forgo an answer. For IsZo, knowing whether Rachesky's conduct comports with Delaware law is worth more than $0.80 per share (less Plaintiffs' counsels' fees).

2. IsZo's Interest in Its Own Day in Court Exceeds the *Celera* Objector's.

Not only is IsZo's financial interest significant, but the concerns in *Celera* are also present here: (a) the only claims subject to settlement after the merger closed were for money damages; (b) the objector "was a significant shareholder prepared independently to prosecute a clearly identified and supportable claim for substantial money damages;" and (c) there were questions concerning the plaintiff's adequacy. *Celera*, 59 A.3d at 436. Of course, nothing in *Celera* suggests that these are the ***only*** conditions under which an opt-out is required, or that all three conditions must be met. Nonetheless, all are present.

a. Only Monetary Claims Remain.

A trial court cannot "blind itself . . . and treat the settlement as one in which the equitable claims [are] still valuable and predominant." *Id*. at 436. "[T]he only claims realistically being settled" at the time of certification, and now, are "for money damages." *Id*. And as here, any monetary claims in *Celera* derived from actions by defendants that, if true, would apply to all stockholders in the same manner. *Id*. at 427 (objector asserted that "passive drug royalties" were "grossly undervalued" in the merger); *Biotechnology Value Fund, L.P. v. Celera Corp.*, 2014 WL 988913, at *9 (N.D. Cal. Mar. 10, 2014) (sustaining claims for breach of fiduciary duty arising out of merger).

b. IsZo is a Significant Stockholder Prepared to Prosecute Supportable Claims for Money Damages.

The trial court faulted IsZo for "rely[ing] heavily on its status as the largest class member" and "not explain[ing] why that impacts the opt-out analysis." Op. at 18. But IsZo did argue that *Celera* offers the existence of a "significant shareholder" as a reason to grant an opt-out, and that IsZo was not only the largest stockholder but sufficiently invested to make a lawsuit driven by non-contingency counsel worthwhile. A591-92. IsZo, holding approximately one-fifth of the class shares, far exceeds the 12% class ownership of the *Celera* objector. A591-92. Moreover, IsZo's investment in Emisphere was by far its largest long position, giving IsZo an overwhelming incentive to dedicate resources to litigate its claims. It does not need an "incentive award" for motivation.

And IsZo undoubtedly possesses supportable claims. They have survived a motion to dismiss, and even Plaintiffs tout the strength of their Allocation Claim. A336. IsZo believes the claims are more valuable, but they are unquestionably ***supportable***.

c. The Opinion Offers Reason to Question Plaintiffs' Adequacy.

Celera does not require a dissenting stockholder to prove a representative inadequate under Rule 23(a)(4): otherwise, *Celera*'s settlement could not have been confirmed. At the leadership stage, the trial court expressed concerns about Dr.

Goldberg, noting that a previous finding of contempt of court for violating a *status quo* order and a finding that he "had violated his duty of loyalty" would likely have been disqualifying in the absence of the other proposed Plaintiffs. A146-48.

But the Opinion itself demonstrates an "economic antagonism[] between representative[s] and class"—including the other Plaintiffs—that is an indicator of inadequacy. *Youngman v. Tahmoush*, 457 A.2d 376, 380 (Del. Ch. 1983) (quotation omitted). The Opinion agreed with IsZo that Plaintiffs permitted their counsel (who were facing a negative lodestar) to seek a 27% fee, higher than warranted under this Court's recent guidance. Op. at 38. Plaintiffs' counsel, in turn, offered each Plaintiff an above-market "incentive award" that for Goldberg, DeVilliers and Brandenburg more than compensated for what they would lose by permitting the outsized fee.[19] Defendants, who benefit from the non-opt-out settlement, offered no resistance. This arrangement shortchanged only non-plaintiff class members. But while the trial court conceded that "IsZo is correct that *Dell*'s logic compels" reducing the fee award, and that $15,000 incentive awards were excessive (Op. at 38, 48-49), it did not address the straightforward economic conflict arising from Plaintiffs'

[19] The trial court reduced Plaintiffs' counsels' fee by $1,085,110.95, from $8,370,855.88 to $7,285,744.93. Op. at 49. Assuming a 40,000,000 share class size (A327), a plaintiff would need to hold approximately 553,000 shares for their share of the additional class recovery to exceed a $15,000 "incentive award." ($15,000 = $1,085,110.95 * (552,939/40,000,000)). Brandenburg, DeVilliers and Menasha all held considerably less. A307.

willingness to offer an outsized fee in exchange for excessive incentive awards. (IsZo had raised this issue. *Compare* A594 *with* Op. at 22-23.) This should have, but did not, give weight to IsZo's criticisms of Plaintiffs' litigation of the case. A593-604.

To these arguments, the Opinion answers that the facts of this case are not precisely those of *Celera*, where the plaintiff was "barely" adequate, the settlement did not involve monetary damages, and the settlement consideration had been provided by the time of the settlement hearing. Op. at 18-21. But again, nothing in *Celera* limits this Court's teachings to those specific facts. Yet after more than a decade, it appears that no facts apart from *Celera*'s "extreme circumstances" (Op. at 20) will ever justify an opt-out from the Court of Chancery, absent further guidance from this Court or the U.S. Supreme Court.

3. The Trial Court Erred in Holding that the Balance of Equities Favors the Defendants.

Against IsZo's interest in a better recovery, the trial court weighed "the harm that would accrue to the rest of the class" from an opt-out. Op. at 23. But while the Opinion considers it "***undisputed*** that any opt-out would cause defendants to walk away from the settlement," (*id*., emphasis added), that cannot be a finding of fact. A defendant's self-interested statement that their settlement is an all-or-nothing proposition is a prediction, not a promise. And that result is historically

unprecedented. Twice this century, this Court has reversed settlement approval following an objection, and twice disappointed parties promptly revised their bargains. *See* Order, *In re Celera Corp. S'holder Litig.*, C.A. No. 6304-VCP (Del. Ch. Feb. 1, 2013) (Compendium, Tab 3) (preserving settlement while stating objector not bound thereby); *Stein v. Blankfein*, 2025 WL 2301390, at *5 n.6 (Del. Ch. Aug. 11, 2025) (noting that parties amended settlement on remand despite maintaining before appeal that overbroad release had been "a critical component of the settlement."). Neither the trial court nor the parties offered facts, as opposed to protestations, to support a deviation from this historical norm.

Two other criticisms in the Opinion fail to distinguish between a *Celera*-style opt-out and the forms of relief that the trial court appears to believe are superior alternatives to this Court's teachings. First, the Opinion criticizes IsZo for not objecting to the overall fairness of the settlement. Op. at 32. But IsZo sought what this Court granted in *Celera*: an opt-out that would not require ruling that the settlement is unfair to other class members (removing any possibility that they could freely accept what IsZo declined). The trial court's musing that *Celera* is "unworkable" makes sense if an opt-out is ***only*** available to a stockholder who believes that a settlement is unfair to everyone. But such an objection would not secure an opt out: it would nullify the settlement.

Second, the trial court's observation that IsZo had "not offered to post a bond" (Op. at 23) is not only legal error but raises troubling constitutional issues. *See also* Op. at 40. The rule cited by the trial court, first promulgated in 2023, does ***not*** require a bond from stockholders seeking *Celera*-style opt-outs. It applies to intervenors who would "substitute as a representative party." Ct. Ch. R. 23(f)(4)(C). This Court has never suggested that *Celera*'s discretionary opt-out right, preserving individual claims, is contingent upon a stockholder providing security to the class it would leave. Nor did the trial court or Appellees cite any precedent for such a requirement, in this Court or any other.[20] Were it so, conditioning the exercise of an individual right on that basis would only exacerbate the due process problems identified above. *See* Section I.C.4, *supra*.

In short, *IsZo*'s claim to an opt-out exceeds that of the *Celera* objectors. Denying that opt-out eliminates the opportunity for Emisphere's largest independent stockholder to vindicate viable, valuable claims.

---

[20] Requiring replacement ***representative*** parties to bond a settlement might make sense: they accept class-wide downside risk with upside opportunity. The same is not true of opt-outs, who are entitled to pursue only their own claims. By *sua sponte* creating a bond requirement, the trial court implicitly held that a dissenting stockholder's only economically rational choice is to take over as a representative litigant rather than opt out.

4. An Opt-Out is Consistent with Delaware's Policy Favoring Settlements.

Finally, a reversal of the decision below with an instruction to provide an opt-out for IsZo is consistent with Delaware's policies favoring settlement, for reasons additional to those set forth above. *See* Section I.C.4.b, *supra*. The *Celera* opt-out right is a structural feature strengthening the adversarial process, not merely a remedy for dissenting class members. When settling parties know that sophisticated institutional investors with substantial stakes can opt out, the dynamics of negotiations change. The opt-out functions as a market check, the same kind of competitive discipline that animates Delaware corporate law throughout. *See* Coffee, *Accountability*, 30 CARDOZO L. REV. at 411–12; John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 309 (2010) (opt-outs "induce[] competition, which can also discipline the class attorney").

Indeed, an opt-out might not eliminate a class-wide settlement in ***this case***. As IsZo's counsel explained at the settlement hearing, "an opt-out requires the parties to invite large holders like IsZo to the settlement discussions" rather than, as here, excluding them. A684. On remand, the parties could either (a) seek a class-wide settlement with IsZo's participation; (b) grant IsZo an opt-out but secure the

benefits of the settlement for the rest of the class; or (c) try the case. Of these, the lattermost is historically least likely.

Again, federal practice is illustrative. Securities class actions are frequently certified as (b)(3) damages actions. Attorneys advise clients, including sophisticated investors, regarding when it is in their interest to opt out.[21] Yet securities class actions almost never go to trial, while settlements are the norm.[22]

Celera did not end settlements. A revitalized *Celera* will not do so, either. Rather, it will permit significant stockholders prepared to prosecute identifiable claims for money damages to pursue the claims that are their property rights, strengthening the adversarial process. Denying IsZo the opportunity to do so was an abuse of discretion.

---

[21] *See, e.g.*, Coffee, *Litigation Governance*, at 311-314 (describing superior recoveries of opt-out litigants in securities actions); Berman Tabacco, *Practical Matters: When Should Funds Opt Out of a Class Action*, https://www.bermantabacco.com/articles/practical-matters-when-should-funds-opt-out-of-a-class-action/ (Feb. 4, 2010).

[22] *See* Cornerstone Research, Securities Class Action Filings: 2025 Year in Review 16 (2025), https://www.cornerstone.com/wp-content/uploads/2026/01/Securities-Class-Action-Filings-2025-Year-in-Review.pdf (only 0.4% of "core" (non M&A cases) went to trial between 1997 and 2025).

CONCLUSION

For the reasons set forth above, this Court should reverse the decisions of the trial court and remand with instructions that IsZo be provided an opt-out to the Settlement.

MARGRAVE LAW LLC

By: */s/ Anthony A. Rickey*
Anthony A. Rickey (Bar No. 5056)
3411 Silverside Road
Baynard Building, Suite 104
Wilmington, Delaware 19810
Tel: (302) 604-5190
Fax: (302) 258-0995
arickey@margravelaw.com

Attorney for IsZo Capital LP
Objector Below-Appellant

OF COUNSEL:

Brant D. Kuehn
GREENSPOON MARDER LLP
1345 Avenue of the Americas,
Suite 2200
New York, New York 10105
Phone: (212) 524-5000

DATED: February 23, 2026

Redacted Public Version
Filed Mar. 10, 2026