



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	)	No. 12, 2026
MENASHA, individually and on behalf of all	)	
others similarly situated,	)	<b>PUBLIC VERSION</b>
	)	<b>FILED: April 9, 2026</b>
Plaintiffs Below-Appellees,	)	
	)	
and	)	CASE BELOW:
	)	
TIMOTHY ROTHWELL, MICHAEL WEISER,	)	COURT OF CHANCERY OF
MARK H. RACHESKY, MHR FUND	)	THE STATE OF DELAWARE
MANAGEMENT LLC, MHR HOLDINGS	)	CONSOLIDATED
LLC, MHR CAPITAL PARTNERS MASTER	)	C.A. No. 2021-0025-NAC
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.	)	
	)	

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## **NATURE OF PROCEEDINGS**

This appeal arises from the Court of Chancery's approval of a \$32 million cash settlement (the "Settlement") in an action challenging the \$1.8 billion acquisition of Emisphere Technologies, Inc. ("Emisphere") by Novo Nordisk ("Novo") and related denial of Appellant IsZo Capital Management's ("IsZo") request for a discretionary opt-out (the "Bench Ruling," Exhibit B "Ex. B" to Appellant's Opening Brief "OB at \_\_"). Defendants and Co-Lead Plaintiffs (who were selected over IsZo in a leadership dispute) agreed to this Settlement after years of litigation based on a mediator's recommendation made by former United States District Judge Layn Phillips. IsZo thinks it could have done better and sought an opt-out despite the fact that the Court of Chancery had previously certified a non-opt-out class, and IsZo had not objected to that ruling, and despite the fact that IsZo does not contest that the Settlement was fair and adequate for the Class. IsZo argues that the Court of Chancery abused its discretion in denying its opt-out request because: (1) due process requires an opt-out whenever a large stockholder such as IsZo opposes a monetary settlement; and (2) even if due process did not mandate an opt-out, an opt-out should have been granted because IsZo thinks it could secure a better result by litigating alone. IsZo is wrong on both counts.

First, as this Court held in *In re Celera Corp. Stockholder Litigation*, breach of fiduciary duty class actions are properly certified as non-opt-out classes under

Court of Chancery Rules 23(b)(1) and (b)(2), and due process does not require providing objectors with mandatory opt-out rights. IsZo claims the United States Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes* is to the contrary and requires an opt-out here, but every Delaware case (including *Celera*) that has construed *Wal-Mart* has concluded that it does not apply to stockholder breach of fiduciary duty cases. IsZo urges that this Court should change that well-established law by overruling *Celera* to provide for mandatory opt-out rights for “significant” stockholders. IsZo provides no reason for this Court to overrule decades of Delaware precedent to provide IsZo with an opt-out.

Second, the Court of Chancery did not abuse its discretion in denying IsZo a case-specific opt-out under *Celera*. Co-Lead Plaintiffs vigorously litigated this case for years. The alleged big-ticket claim in this action, that Emisphere’s controlling stockholders, affiliates of MHR Fund Management (“MHR”), sold Emisphere in an arm’s length transaction for less than fair value was conclusively refuted in discovery. IsZo concedes that securing a \$32 million cash Settlement was a fair outcome for the Class in these circumstances. That IsZo thinks it can do better for itself (while ignoring the extensive discovery record) does not provide grounds for it to opt out, particularly where, as here, allowing an opt-out would terminate the Settlement, harming the Class as a whole. The Bench Ruling should be affirmed.

## SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly applied *Celera* and other longstanding Delaware caselaw in finding that federal due process did not mandate that IsZo be provided with an opt-out right. As this Court found in *Celera*, and as numerous Delaware decisions have subsequently held, *Wal-Mart* is inapplicable to a stockholder class action that challenges fiduciary conduct in connection with a corporate transaction because, unlike in *Wal-Mart*, there are no individualized issues of liability or damages presented by such cases. There is thus no “tension” between Delaware law and *Wal-Mart*. IsZo provides no basis for overruling *Celera* and decades of Delaware precedents to provide IsZo with an opt-out.

2. Denied. The Court of Chancery correctly determined that IsZo had not demonstrated that a discretionary opt-out was required here. IsZo concedes that the Settlement was fair for the Class. IsZo’s claim that it might achieve “a better outcome” for itself than Co-Lead Plaintiffs achieved for the class is pure speculation unsupported by any facts in evidence. Nor does IsZo show that the Court of Chancery abused its discretion in distinguishing this case from *Celera* or in how it weighed the equities. Instead, the Court of Chancery correctly found that IsZo’s nitpicking at the result achieved by Co-Lead Plaintiffs does not support a discretionary opt-out.

## **BACKGROUND**

### **A. MHR Invests in Emisphere and Sells to Novo for \$1.8 Billion.**

Emisphere was a pharmaceutical company that developed oral delivery systems for injectable medicines. A177 ¶53. Though plagued by decades of failed products and abandoned partnerships, Emisphere eventually developed an Eligen carrier known as “SNAC.” A177-78 ¶¶53-54. Emisphere licensed SNAC to Novo in 2008 (the “Royalty Agreement”), and Novo used SNAC to formulate “Rybelsus,” the brand name for its oral semaglutide. A178 ¶¶54-56. Rybelsus was approved for sale in the United States in 2019. The Royalty Agreement was amended over the years, and, as of 2020, entitled Emisphere to 3% of Rybelsus sales. A178-79 ¶¶56-57. This royalty would, by contract, drop to 1% in 2027. A192 ¶¶90-91, A215 ¶145. Although Emisphere had explored arguments for why this step-down would not occur until 2031 or 2034, achieving a later royalty step-down would have required Emisphere to initiate and prevail in complex intellectual property litigation.

MHR began investing in Emisphere in 2005. A183 ¶66. MHR’s investments allowed the company to avoid bankruptcy for years while Emisphere had no revenue. A186-88 ¶¶74-80. Through its investments, MHR would come to control: (1) 70% of MHR’s economic interests through a mix of common stock, preferred stock, and convertible debt; and (2) one sixth of Emisphere’s Rybelsus royalty (*i.e.*,

0.5% to MHR and 2.5% to Emisphere) (the “MHR Royalty Stream”). A158 ¶5, A183 ¶65.

Given that Emisphere’s licensing agreement with Novo was its sole source of value, the parties had periodic discussions regarding an acquisition. In early 2020, Novo offered \$950 million to acquire both Emisphere and the MHR Royalty Stream. A159-60 ¶7. After months of hard-fought negotiations, Novo agreed to pay \$1.8 billion (“Gross Consideration”) for Emisphere and the MHR Royalty Stream. A157 ¶3. This acquisition was effectuated through two separate, contemporaneous transactions. First, Novo and Emisphere signed a Merger Agreement that saw Novo acquire Emisphere. Second, Novo and MHR signed an Asset Purchase Agreement that saw MHR’s Royalty Stream transferred to Novo. Novo paid \$1.35 billion for Emisphere, and \$450 million to MHR for the MHR Royalty Stream (the “Allocation”). *Id.* These transactions closed on December 8, 2020.

Regarding acquisition of the MHR Royalty Stream, Novo agreed to structure the sale of the MHR Royalty Stream so that MHR could recognize its proceeds at capital gains rates, not ordinary income. A242-43 ¶¶200-01. Novo neither sought nor received any concessions from MHR for this treatment, which MHR proposed after Novo’s best and final offer. BD1-3; BD403 at 196:21-197:6. Separately, as is customary in these sale agreements, the sale agreement provided that Novo as the buyer would indemnify MHR for certain post-closing liabilities and MHR, as the

seller, would likewise indemnify Novo for certain pre-closing liabilities. MHR agreed to this indemnification proposal, which was made after the parties agreed on price and did not involve any substantive negotiations. *Compare* BD16-17, with BD51-52.

**B. Multiple Plaintiffs Sue.**

IsZo filed its complaint on June 7, 2021. IsZo alleged that Defendants failed to maximize Gross Consideration paid for Emisphere and that MHR was allocated too much of the total price for the MHR Royalty Stream. BD83-84 ¶¶20-21. IsZo's theory for why MHR, as the holder of 70% of the economic interests in Emisphere, would accept less than fair value for Emisphere was that: (a) the term of MHR's funds meant that MHR was seeking to wind down those funds and quickly exit its Emisphere investment; and (b) potential changes to the tax code incentivized MHR to complete the Emisphere sale quickly. BD76 ¶1, BD101 ¶77. IsZo pled that the action should be certified as a non-opt-out class action under Rules 23(b)(1) and 23(b)(2), not as an opt-out class under Rule 23(b)(3). BD146-48 ¶¶222-30.

The Co-Lead Plaintiffs filed their original complaint on July 2, 2021. Like IsZo, Co-Lead Plaintiffs challenged the sufficiency of the Gross Consideration and fairness of the Allocation. Co-Lead Plaintiffs identified purported tax incentives as motivating MHR to accept less than fair value for Emisphere. Additionally, Co-

Lead Plaintiffs argued that MHR’s alleged receipt of indemnification rights from Novo caused them to sell Emisphere for less than fair value.

**C. The Court of Chancery Rejects IsZo’s Bid for Lead-Plaintiff.**

Both IsZo and Co-Lead Plaintiffs sought to lead the class. Former Vice Chancellor Slights heard argument on those motions on October 13, 2021. Counsel for Co-Lead Plaintiffs articulated the question any plaintiff would need to answer in rebutting the business judgment rule as to Gross Consideration: “[W]hen you have 70 percent of the economic stake [like MHR], you have every incentive not to sell [for less than fair value], right?” BD173-74.

On December 6, 2021, Vice Chancellor Slights appointed Co-Lead Plaintiffs as lead plaintiffs. A140. The Court noted that, although IsZo owned a greater absolute stake in Emisphere, Co-Lead Plaintiffs’ “*relative* economic stake as a percentage of their portfolios far exceeds IsZo’s.” A145. Additionally, Vice Chancellor Slights observed that the fact that IsZo sold some of its Emisphere holdings after its initial Section 220 demands may render IsZo an inadequate class representative. A148. IsZo did not seek reconsideration of the Leadership Order.

**D. Co-Lead Plaintiffs Vigorously Litigate the Case.**

On June 14, 2022, Co-Lead Plaintiffs filed the Second Amended Complaint. A35. Defendants moved to dismiss Co-Lead Plaintiffs’ claim for breach of fiduciary duty related to Gross Consideration, its *Blasius* claim, as well as claims for dilution

unique to the Co-Lead Plaintiffs' complaint. The Court of Chancery dismissed the dilution claims as time-barred and the *Blasius* claim, but declined to dismiss the Gross Consideration claim, "at least not at this stage." BD286. Under the "forgiving and plaintiff-friendly" standard applicable at a motion to dismiss, the Court of Chancery found Plaintiffs' allegations of "alleged side deals with Novo" like taxes and indemnification made it "reasonably conceivable at this pleading stage that [MHR's] interests in negotiating the price for Emisphere's shares were not fully aligned with the minority stockholders." BD290-92.

The Parties then conducted substantial discovery. Co-Lead Plaintiffs sought discovery regarding each conflict they alleged caused MHR to not seek the maximum Gross Consideration, including MHR's tax planning, the tax structuring of the transaction, MHR's indemnification rights, and allegations that MHR desired to sell because its funds were expiring. *See generally* BD236 at RFPs Nos. 1-4, 7, 21, 43, 53, BD325 (Plaintiffs' Third Requests for Production).

The document productions were voluminous, with over 170,000 documents produced by, among others, MHR, Emisphere, Emisphere's board members and Co-CEOs Weiser and Rothwell, the Special Committee, Novo, and the parties' bankers. The parties took 25 fact depositions, Defendants served two opening expert reports and three rebuttal reports, and Co-Lead Plaintiffs served two opening expert reports and two rebuttal reports. A87, 89.

**E. The Court of Chancery Certifies A Non-Opt-Out Class and IsZo Does Not Object.**

On November 8, 2024, Co-Lead Plaintiffs sought certification of a non-opt-out class under Rules 23(b)(1) and (b)(2), just as IsZo had originally alleged were the proper class certification provisions. BD406. Neither IsZo nor Defendants opposed that motion. Instead, IsZo addressed a letter to Co-Lead Plaintiffs on November 11, 2024. The Court of Chancery certified the Class on November 14, 2024. A282 (“Certification Order”). The Certification Order certified the following non-opt-out class under Rules 23(a), (b)(1), and (b)(2):

All persons who held shares of Emisphere Technologies, Inc. common stock at closing of the Transaction and received consideration for such shares (the “Class”). Excluded from the Class are Defendants and any person, firm, trust, corporation, or other entity related to, or affiliated with, any of the Defendants. *Id.*

Though IsZo now claims that certifying a non-opt-out class is constitutionally suspect, IsZo did not seek reconsideration of this order or file any objection with the Court.

**F. Mediation and Settlement.**

During expert discovery, Defendants sought leave to move for partial summary judgment regarding the challenge to Gross Consideration because discovery had conclusively refuted Co-Lead Plaintiffs’ (and IsZo’s) allegations that MHR sacrificed Gross Consideration for its own interests. BD434-42. Plaintiffs

opposed this request. A90. On March 1, 2025, the Court granted Defendants' motion for leave. A92 Dkt. 304.

The parties previously held an unsuccessful mediation session with former U.S. District Judge Layn Phillips on April 20, 2023. Following document and deposition discovery, the parties mediated again on March 6, 2025. On March 10, 2025, the Parties agreed to settle remaining claims for \$32 million, after Judge Phillips made a mediator's recommendation for that amount. The parties informed the Court of Chancery on March 18, 2025. A93. When IsZo noted it was considering objecting to this settlement, the parties agreed to provide IsZo with the entire discovery record and to a schedule that allowed IsZo over two months to consider such record before determining whether to object. Co-Lead Plaintiffs filed the proposed Settlement Stipulation and scheduling order on June 27, 2025 (BD627) and IsZo filed its objection on September 26, 2025, A554-612. That objection centered on arguments that the Court of Chancery was required both under *Celera* and the U.S. Constitution to permit IsZo an opt-out.

**G. The Court Rejects IsZo's Objection and Approves the Settlement.**

The Court of Chancery held a hearing on the Settlement on October 17, 2025 and issued a bench ruling on December 8, 2025 approving the Settlement and rejecting IsZo's objection. A107-08. Although the Court of Chancery had already certified a non-opt-out class in 2024, the Court noted that "if I were to reevaluate

class certification *de novo*, I would again find certification under Rule 23(a), (b)(1), and (b)(2) appropriate.” Ex. B at 6-7. The Court of Chancery identified a long line of Delaware precedent certifying such non-opt-out classes in stockholder breach of fiduciary duty cases. *Id.* at 7-11. The Court then addressed IsZo’s due process arguments and, again following extensive Delaware precedent, including this Court’s decision in *Celera*, found that there is no due process violation in certifying breach of fiduciary duty stockholder class actions without an opt-out. *Id.* at 15-17.

The Court of Chancery then addressed IsZo’s argument that IsZo must be permitted to opt-out under *Celera*. The Court of Chancery noted that *Celera* involved “unique” and “extreme circumstances” that do not resemble this case. *Id.* at 19-20. For example, the class representative in *Celera* agreed to release claims for post-closing, monetary damages in exchange for pre-closing, non-monetary consideration. *Id.* “Thus there was no risk in *Celera* that granting an opt-out to the objecting stockholder would impair other class members’ receipt of relief.” *Id.* at 20. The Settlement here saw post-closing claims released for a \$32 million monetary payment. The Court of Chancery also noted that the class representative in *Celera* was “barely” adequate because it had sold its stock “before the merger was consummated,” and there was no similar basis here to question the Co-Lead Plaintiffs’ adequacy. *Id.* at 19-21. The Court of Chancery then noted that IsZo’s desire for an opt-out was “Monday-morning quarterbacking . . . plaintiffs’ litigation

strategy” in a way that did not “engage with the documentary discovery record.” *Id.* at 21. The Court noted that “IsZo had access to the full evidentiary record, yet it does not cite a single piece of documentary evidence that shows any of the theories plaintiffs supposedly failed to develop had merit.” *Id.* The Court then identified “the harm that would accrue to the rest of the class” if an opt-out were permitted—that the Settlement would be terminated—as further supporting denying IsZo’s opt-out request. *Id.* at 23.

The Court approved the \$32 million Settlement – for the Class that included only non-MHR-affiliated stockholders and excluded Defendants – as an excellent result for stockholders. *Id.* at 30-31. Last, the Court, after applying the *Sugarland* factors, reduced the requested attorney’s fees from 27% to 23.5% and reduced the requested incentive awards from \$15,000 to \$5,000. *Id.* at 35-49. On January 6, 2026, IsZo appealed the Bench Ruling.

## ARGUMENT

### **I. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION BY DENYING ISZO AN OPT-OUT BASED ON DUE PROCESS.**

#### **A. Question Presented**

Did the Court of Chancery properly follow *Celera* and other long-standing Delaware precedents in finding that due process did not require that IsZo be provided an opt-out right, either via certification of the Class under Rule 23(b)(3) or by granting IsZo an individual opt-out as a “significant” stockholder? BD755-61.

#### **B. Scope of Review**

This Court “review[s] the Court of Chancery’s determinations on Rule 23 class certification” and “a decision to grant or deny opt-out rights to members of a 23(b) class” “for abuse of discretion.” *In re Celera Corp. S’holder Litig.*, 59 A.3d 418, 428, 435 (Del. 2012). “To the extent that the certification of the class implicates due process claims, [this Court] review[s] those claims *de novo*.” *Id.* at 428. “Under the doctrine of *stare decisis*, settled law is overruled only ‘for urgent reasons and upon clear manifestation of error.’” *Seinfeld v. Verizon Commc’ns, Inc.*, 909 A.2d 117, 124 (Del. 2006).

#### **C. Merits of Argument**

IsZo contends that federal due process requires that the trial court must have either (1) certified the Class under Rule 23(b)(3), which provides for mandatory opt-out rights, or (2) granted an individual opt-out right to IsZo. OB at 23. IsZo

claims that due process demands that a “significant” stockholder be afforded an opt-out by one of these mechanisms whenever “(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,” which circumstances it contends are present here. *Id.* at 5, 32-33.

IsZo does not dispute that the trial court correctly applied Delaware law in rejecting IsZo’s contention that due process required that IsZo be provided with an opt-out right. Instead, IsZo claims that this Court should change existing law by overruling its decisions in *Celera* and *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989), to replace the discretionary opt-out afforded by those cases with a mandatory opt-out whenever any “significant” stockholders object to a monetary settlement. IsZo claims that overruling these decisions is warranted to avoid conflict between Delaware and federal law.

IsZo is mistaken. As described below, both this Court and the Court of Chancery have repeatedly and correctly rejected the due process arguments that IsZo advances. Contrary to IsZo’s claims, there is no conflict with federal law that requires this Court to overrule its decisions in *Celera* and *Nottingham*, or the scores of Delaware cases that have relied upon them. The trial court correctly exercised its discretion in certifying a non-opt-out class and denying IsZo an opt-out.

**1. *Wal-Mart* Does Not Require That IsZo be Granted an Opt-Out.**

IsZo’s claim that due process requires that it be granted an opt-out right primarily relies on *Wal-Mart Stores, Inc. v. Dukes*. 564 U.S. 338 (2011). But as the trial court concluded, “IsZo’s arguments in support of an opt-out fall flat.” Ex. B at 15:16. Indeed, when pressed by the trial court to reconcile IsZo’s position with Delaware caselaw finding that *Wal-Mart* does not apply to stockholder fiduciary duty actions like this one, IsZo’s counsel acknowledged that “*Wal-Mart v. Dukes* obviously arose in a very different type of class action. ***I would not claim that Wal-Mart v. Dukes itself controls this case.***” A682 at 48:16-19 (emphasis added). Consistent with well-established Delaware law, *Wal-Mart* is inapplicable to this case and does not require that IsZo be granted an opt-out.

*Wal-Mart* involved a class of employees who allegedly suffered gender discrimination in violation of Title VII. *Wal-Mart*, 564 U.S. at 343. The class sought injunctive relief and monetary relief in the form of back pay. *Id.* at 345. The Court concluded that the class could not be certified under Federal Rule of Civil Procedure (“FRCP”) 23(b)(2), because FRCP 23(b)(2) “does not authorize class certification when each class member would be entitled to an ***individualized*** award of monetary damages,” such as back pay. *Id.* at 360-61 (emphasis added); *see also id.* at 362 (“individualized monetary claims belong in Rule 23(b)(3)”). *Wal-Mart* expressly

did not address whether FRCP 23(b)(2) could apply to a class seeking *non-individualized* damages. *Id.* at 360.

Regarding due process, the Court explained that the Fifth Circuit in *Allison v. Citgo Petroleum Corp.* held that “a (b)(2) class would permit the certification of monetary relief that is ‘incidental to requested injunctive or declaratory relief.’” *Wal-Mart*, 564 U.S. at 365 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). “‘Incidental damages’” are “‘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 366. The Court concluded that “[w]e 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” because the back pay claims failed to “satisfy this standard.” *Id.* As the Court explained, *Wal-Mart* was entitled to “individualized determinations of each employee’s eligibility for backpay,” and “the necessity of that litigation will prevent backpay from being ‘incidental.’” *Id.* at 366, 367.

Every Delaware decision to examine *Wal-Mart* has rejected the argument that it requires an opt-out simply because an action seeks or settles for monetary damages. In *Celera*, this Court explained that “actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2),” and “[t]he availability of potential damages

alone does not automatically require certification under Rule 23(b)(3).” *Celera*, 59 A.3d at 432-33. *Celera* found that the trial court correctly determined that *Wal-Mart* was not controlling in stockholder fiduciary duty actions because the court “generally is not making an individualized determination”; rather, “the monetary relief flows directly from a finding of liability to the class as a whole.” *In re Celera Corp. S’holder Litig.*, 2012 WL 1020471, at \*18 (Del. Ch. Mar. 23, 2012) (approved by *Celera*, 59 A.3d at 433 n.40).

*Celera* thus reaffirmed *Nottingham*, which held that “when a portion of the relief which is sought is monetary, a member of a class certified under Rule 23(b)(2) has a Constitutional due process right to notification but not a right to opt out,” 564 A.2d at 1101, finding that “[*Wal-Mart*] does not require otherwise.” *Celera*, 59 A.3d at 433 n.40.

Applying these principles, the Court of Chancery has repeatedly held that certification under 23(b)(1) and (b)(2) is appropriate in stockholder actions that challenge fiduciary conduct in connection with a transaction—even if the actions seek monetary damages or reach a monetary settlement. “*Wal-Mart* [] is not controlling” in these cases, because “[i]n *Wal-Mart*, the circumstances applicable to each individual were necessarily different.” *In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, 2022 WL 2236192, at \*10 (Del. Ch. June 14, 2022). In stockholder actions, the breaches “will be equally applicable to all stockholders” and

“any compensatory damages recovered ... will not be *individualized*.” *Id.*; *see also*, e.g., *In re Del Monte Foods Co. S’holder Litig.*, C.A. No. 6027-VCL, at 49:16-17 (Del. Ch. Dec. 1, 2011) (TRANSCRIPT) (App. Comp. Tab 5) (*Wal-Mart* did not apply because “[t]he defendants acted in a manner generally applicable to the class”); *In re Calamos Asset Mgmt, Inc. S’holder Litig.*, C.A. No. 2017-0058-JTL, at 92:5-8 (Del. Ch. Apr. 25, 2019) (TRANSCRIPT) (App. Comp. Tab 2) (“[O]ur Delaware Supreme Court squarely rejected the due process arguments that [the objector] asserts based on *Wal-Mart* ....”).

The other pre-*Wal-Mart* case on which IsZo relies, *Phillips Petroleum Co. v. Shutts*, is inapposite for similar reasons. 472 U.S. 797 (1985) (cited at OB at 24). In *Shutts*, “there were questions about the individual oil leases .... prices at which those individual oil leases were entered .... how the defendants acted in terms of their communications with each individual oil lease holder. There were, therefore, questions about individual damages.” *Del Monte*, C.A. No. 6027-VCL, at 34:12-20; *see also Nottingham*, 564 A.2d at 1099-1101 (finding *Shutts* did not mandate an opt-out from (b)(2) class seeking monetary damages). The *Wal-Mart* court recognized as much by carefully limiting its holdings only to cases involving individualized claims, which would not be necessary if *Shutts* had already decided the issue for all claims. *Wal-Mart*, 564 U.S. at 366.

The trial court thus correctly concluded—consistent with well-established Delaware precedents—that *Wal-Mart* did not require that IsZo be provided an opt-out right, whether by certification under Rule 23(b)(3) or by an individual opt-out. This case is a stockholder action challenging fiduciary conduct in connection with the Emisphere/Novo transaction. As the trial court concluded, *Wal-Mart* does not apply because the facts of the alleged breaches, unlike the individualized claims in *Wal-Mart*, ““will be equally applicable to all stockholders,”” and ““every person gets the exact same amount per share,”” ““stand[s] in the exact same place,”” and was allegedly wronged via ““the exact same conduct.”” Ex. B at 17:3-10. IsZo does not even attempt to argue that there are any individualized claims or damages in this case that could implicate *Wal-Mart*.

Finally, IsZo ignores that *Wal-Mart* only applied to FRCP 23(b)(2). *Wal-Mart* did not involve damages claims under Rule 23(b)(1), which unlike (b)(2), does not require that “final injunctive relief or corresponding declaratory relief is appropriate.” Fed. R. Civ. P. 23(b)(2). This action was certified under 23(b)(1) as well as (b)(2). IsZo fails to advance any argument or authority that due process requires an opt-out from a 23(b)(1) class that reaches a monetary settlement. Thus, even if due process prevented certification under 23(b)(2)—which it does not—IsZo fails to show that the class could not be certified under 23(b)(1). This is an independent basis to affirm the trial court’s decision to certify a non-opt-out class.

**2. IsZo Does Not Contest That the Class Meets the Requirements of Rule 23(B)(1) and (B)(2).**

IsZo's *only* challenge to the trial court's certification of the Class under 23(b)(1) and (b)(2) is on the basis that federal due process required that IsZo was provided an opt-out. IsZo does not otherwise dispute (and has never disputed) that the Class meets all the requirements for a (b)(1) and (b)(2) class and was properly certified as such.

During the settlement hearing, the trial court asked IsZo's counsel to confirm that "the objector here isn't really contesting" "that this matter should be certified, and has been certified, as a (b)(1) and (b)(2) class." A680 at 46:8-11. IsZo's counsel responded: "That is correct." *Id.* at 46:16; *see also* A678 at 44:16-18 (IsZo's counsel: "I think that certification as a (b)(1) and (b)(2) class is appropriate in this case if an opt out is given."); A679 at 45:5-8 (IsZo's counsel: "Delaware can certainly ... certify even fully monetary relief as a (b)(1) and (b)(2) class action in these stockholder cases."). Indeed, IsZo's own complaint pled that the Class should be certified under 23(b)(1) and (b)(2). B148 ¶¶230, 229; *see also* A679 at 45:1-4 (IsZo's counsel confirming that its pleading as to class certification was "correct"); Ex. B at 12:6-13 (explaining that IsZo does not challenge that the Class meets the requirements for (b)(1) and (b)(2) certification).

For all the reasons herein, IsZo has failed to show that due process required that IsZo be provided an opt-out. Accordingly, IsZo provides no basis to disturb

(and does not otherwise contest) the trial court’s conclusion that the class was properly certified under Rule 23(b)(1) and (b)(2).

### **3. Federal Practice Does Not Conflict with Delaware Law.**

Contrary to IsZo’s contention, there is no “gulf between federal and Delaware practice” regarding class certification. OB at 33. IsZo notes that federal securities fraud actions “are frequently certified under section (b)(3).” *Id.* at 25. But federal securities fraud actions are different than Delaware stockholder actions because they involve individualized issues and damages. In securities fraud actions, class members who purchased stock at different times may have relied on different fraudulent statements. Individual damages will depend on when stockholders bought and sold stock and what information was disclosed at those times. *See, e.g., Acticon AG v. China N. E. Petroleum Hldgs. Ltd.*, 692 F.3d 34, 38 (2d Cir. 2012) (“[A] defrauded buyer of securities is entitled to recover only the excess of what he paid over the value of what he got.”). Stockholders who merely held shares have no claim. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1975) (standing requires that a stockholder be “a purchaser or seller”). Defendants may raise an individualized defense that certain stockholders did not rely on market prices. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014).

Indeed, Delaware courts have long recognized that fiduciary claims are different from securities fraud claims because the former “aris[e] from the

relationship among stockholder, stock and the company.” *Urdan v. WR Cap. P’rs, LLC*, 244 A.3d 668, 677 (Del. 2020). Accordingly, “the right to assert the claim and benefit from any recovery is a property right associated with the shares” and “travels with the shares.” *In re Activision Blizzard, Inc. S’holder Litig.*, 124 A.3d 1025, 1044 (Del. Ch. 2015), *judgment entered sub nom.*, 2015 WL 2415559 (Del. Ch. May 20, 2015). A securities fraud claim “is personal to the purchaser or seller ... it does not travel with the shares.” *Id.* at 1056. As the Court of Chancery explained, “the personal nature of federal securities claims manifests itself in the fact that class certification generally must be obtained under Rule 23(b)(3). By contrast, because Delaware corporate law claims are tied to the shares themselves, they are certified under Rules 23(b)(1) and (b)(2).” *Id.*

More analogous to Delaware fiduciary claims are federal fiduciary duty claims under ERISA. In those cases, federal courts routinely certify non-opt-out classes under FRCP 23(b)(1) and (b)(2), even where the class seeks monetary damages. *See, e.g., Boley v. Universal Health Servs., Inc.*, 337 F.R.D. 626, 636-39 (E.D. Pa. 2021), *aff’d*, 36 F.4th 124 (3d Cir. 2022). In *Boley*, the court held that *Wal-Mart* was “inapplicable” to a class asserting ERISA fiduciary claims because “plaintiffs do not seek ‘individualized monetary damages,’ but recovery for losses to the [p]lans as a whole.” *Id.* at 637. Analogously here, a single monetary fund is awarded to the Class as a whole, which is allocated based on stock ownership. *See*

also, e.g., *Amara v. CIGNA Corp.*, 775 F.3d 510, 519-20, 523-24 (2d Cir. 2014) (certifying (b)(2) class because “Wal-Mart ... does not foreclose an award of monetary relief when that relief is incidental” and not ““individualized””); *Douglas v. GreatBanc Tr. Co.*, 115 F. Supp. 3d 404, 414 (S.D.N.Y. 2015) ((b)(1) and (b)(2) certification permissible where “the monetary aspect of the case does not involve any claims for relief unique to any class member”).

It is an extraordinary oversimplification for IsZo to suggest that federal courts require certification under Rule 23(b)(3) simply because a class seeks monetary damages. Instead, federal courts (like Delaware courts) recognize that non-opt-out classes are consistent with due process (and *Wal-Mart*) where class members are situated similarly and there is no need for individualized determinations. *See also*, e.g., *Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015) (certifying 23(b)(2) class releasing statutory damages under Fair Credit Reporting Act because “[f]ederal circuits, including ours, have held that mandatory Rule 23(b)(2) classes may be certified in some cases even when monetary relief is at issue” absent “the kind of individualized claims ... prohibited by [*Wal-Mart*]”); *Wilson v. OR Asset Hldgs., L.P.*, 2018 WL 11470391, at \*5 (N.D. Tex. Aug. 24, 2018) (certifying (b)(2) class

seeking statutory damages under state law because damages did not require “individualized” determinations).<sup>1</sup>

#### **4. IsZo Provides No Basis to Overrule *Celera*.**

IsZo does not dispute that the trial court correctly applied long-standing Delaware law in finding that *Wal-Mart* did not require that IsZo be provided an opt-out. Instead, IsZo contends that this Court should change that law by “revisit[ing]” or “revitalizing” *Celera* so that IsZo is provided with an opt-out. OB at 5, 33. What IsZo is asking the Court to do is overrule *Celera*, *Nottingham*, and decades of Delaware cases relying on those precedents. In place of the discretionary opt-out in *Celera* and *Nottingham*, IsZo seeks to impose a mandatory opt-out whenever a “significant” stockholder seeks to opt out from a monetary settlement. IsZo’s position lacks any valid legal basis and should be rejected.

“Under the doctrine of *stare decisis*, settled law is overruled only ‘for urgent reasons and upon clear manifestation of error.’” *Seinfeld*, 909 A.2d at 124; *see also*, *e.g.*, *Acct. v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001).

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<sup>1</sup> IsZo’s authorities are not to the contrary. The court in *North Sound Capital LLC v. Merck & Co.* was discussing a federal securities fraud action that had been certified under 23(b)(3); it did not address damages claims under 23(b)(1) or (b)(2). 938 F.3d 482, 492 (3d Cir. 2019). *Illinois National Insurance Co. v. Harman International Industries, Inc.* was an insurance dispute about a securities fraud action; the decision did not address class certification. 2026 WL 204209, at \*1 (Del. Jan. 27, 2026).

IsZo identifies no “clear manifestation of error.” As explained, *Wal-Mart* (and *Shutts*) is not in conflict with *Celera/Nottingham*. As this Court and other Delaware decisions have explained, stockholder fiduciary duty actions do not raise the due process concerns of *Wal-Mart* because they do not involve individualized claims or damages. IsZo cites no authority indicating that this Court’s decisions, and the numerous Delaware cases that have relied upon them, were wrongly decided. And it identifies no “urgent reasons” to overturn these precedents, which have guided Delaware class action practice for decades. “Mere disagreement with the reasoning and outcome of a prior case ... cannot be adequate justification for departing from precedent.” *Holifield v. XRI Inv. Hldgs. LLC*, 304 A.3d 896, 927-28 (Del. 2023).

IsZo attempts to manufacture a conflict by contending “*Celera* explicitly adopted the ‘predominance’ test that *Wal-Mart* disapproved.” OB at 27. But there is no conflict. In context, *Wal-Mart*’s statement that “even a ‘predominating request’” for an injunction did not “justify elimination of Rule 23(b)(3)’s procedural protections” was referring to the presence of individualized monetary claims. 564 U.S. at 364. Indeed, the Court carefully limited its holdings to individualized claims that were not “incidental” to equitable relief. *Id.* at 360, 366. *Celera* likewise recognized that Rule 23(b)(2) certification is only appropriate when “the rights and interests of the class members are homogeneous” —*i.e.*, not individualized. *Celera*,

59 A.3d at 433. Thus, under *Celera*, a claim for equitable relief will not “predominate” to permit 23(b)(2) certification where there are individualized instead of homogenous claims. This is consistent with *Wal-Mart*.<sup>2</sup>

IsZo also argues that *Celera*’s discretionary opt-out is inadequate to protect due process because “the Court of Chancery has never granted a *Celera*-style opt-out and has limited *Celera* to its ‘unique circumstances.’” OB at 5. But it is not surprising that *Celera* opt-outs would be rare given (1) the homogeneity among class members’ claims necessary for a 23(b)(1) or (b)(2) class, and (2) the extensive procedural protections already provided. *See Nottingham*, 564 A.2d at 1100 (explaining that due process “is satisfied” by multiple protections, including notice, an opportunity to object, and court approval of settlements).

IsZo further claims that “post-*Celera* decisions largely collapse the evaluation of a settlement’s fairness into the analysis of a discretionary opt-out,” which supposedly “reads *Celera* out of existence.” OB at 30-31. Of course, if a trial court

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<sup>2</sup> IsZo also criticizes *Celera* for supposedly embracing *Wal-Mart*’s discussion of *Allison* while ignoring *dicta* referencing a “serious possibility” that due process may require opt-out rights “where monetary relief does not predominate.” OB at 32-33 (citing *Wal-Mart*, 564 U.S at 363). These comments are also best read, in context, as concerning *individualized* monetary claims, which were the subject of the decision. Regardless, IsZo’s reliance on *dicta* and “speculat[ion]” does not establish error in this Court’s decisions. OB at 24.

finds a settlement is unfair, then an opt-out is moot.<sup>3</sup> A *Celera* opt-out would thus have practical application where a settlement is held to be fair for other stockholders, yet additional due process protection is required for the objector, such as “when the claims of an objector ... are sufficiently distinct.” *Celera*, 59 A.3d at 435. That courts have found such circumstances to be “unique” or “extraordinary” does not reflect any inadequacy in Delaware law—it shows that existing procedural safeguards in connection with settlement approval are working effectively to protect due process in the vast majority of cases. Ex. B at 18:5-6, 47:8.

IsZo thus fails to show any “conflict” or “tension” between *Celera* and constitutional due process that would justify overruling this Court’s precedents. And even if IsZo had made that showing, IsZo provides no supportable rationale for adopting its proposed rule, which would mandate an opt-out right for any “significant shareholder” whenever a class is certified for purposes of a monetary settlement. OB at 33-34.

IsZo cites no legal authority requiring this rule. Delaware courts have repeatedly held that a court should consider the posture of the class at the beginning of litigation (not only at settlement), and that a class may be certified under 23(b)(2)

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<sup>3</sup> In *Celera*, because this Court granted the opt-out, it did not reach the question of the settlement’s fairness.

even after the injunction stage. *See, e.g., In re Mobile Commc 'ns Corp. of Am., Inc., Consol. Litig.*, 1991 WL 1392, at \*15 (Del. Ch. Jan. 7, 1991), *aff'd sub nom.*, 608 A.2d 729 (Del. 1992) (TABLE) (“The argument ... that once a preliminary injunction is denied a (b)(2) action should be treated as a (b)(3) action .... has been rejected.”).<sup>4</sup>

IsZo likewise provides no legal basis for requiring an opt-out for “significant” stockholders only, or any authority for determining “significance.” IsZo’s proposed rule would create an unjustified hierarchy of due process rights, where so-called “significant” stockholders (presumably often hedge funds like IsZo or wealthy individuals) have greater rights than others.

#### **5. IsZo’s Proposed Rule Would Undermine This Court’s Policy Favoring Settlement and Harm Stockholders.**

IsZo’s proposed paradigm would discourage settlements and harm stockholders. The ability to “achieve[] global peace is a valid, and valuable, incentive to class action settlements.” *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011); *see also In re Countrywide Corp. S’holders Litig.*, 2009 WL 846019, at \*10 (Del. Ch. Mar. 31, 2009) (“[S]ettlement is often not possible without granting such ‘global peace’ to the defendants.”). Under IsZo’s regime, parties will be less

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<sup>4</sup> Notably, the class here was certified a year before the settlement hearing, not for settlement purposes, so IsZo fails to meet its own criteria.

likely to enter settlements because they will not ensure global peace. Where settlements are achieved, mandatory opt-out rights will lead to lower class settlement amounts, because lead counsel will forfeit the ability to extract a “peace premium.” *See Sullivan*, 667 F.3d at 339 (“A defendant ... may be motivated to pay class members a premium and achieve a global settlement.”).

As the trial court recognized, “[i]t is extraordinarily expensive” to litigate fiduciary class actions. A703 at 69:5-6. Requiring mandatory opt-outs will incentivize stockholders to opt out to extract a larger separate settlement by “squeezing money just out of litigation costs, having nothing to do with the merits of the case.” *Id.* at 69:11-12. This will siphon funds that could be used for a class-wide settlement to individual stockholders, “leaving less for everyone else.” *Id.* at 69:13-14.

Fundamentally, allowing a “significant” stockholder to opt out simply because it prefers to litigate alone “runs contrary to the whole point of having representative litigation,” which “depend[s] on significant holders to litigate.” *In re GFI Grp. Inc. S’holders Litig.*, C.A. No. 10136-VCL, at 48:12-13, 49:23-24 (Del. Ch. Nov. 24, 2015) (TRANSCRIPT) (Ex. 1). As the Court of Chancery explained:

If there is really a wrong, it should be litigated and handled on a collective basis, not on a one-off by somebody who is large enough and fired up enough to go get the opt-out .... I think that is the *worst of all possible worlds for everyone*, because what it means is that the rationally apathetic people then

have no one to champion their interests. *Id.* at 48:15-19, 48:23-49:2 (emphasis added).

IsZo claims that mandatory opt-outs would create “competitive pressure” in settlement negotiations. OB at 34. But the threat that a significant (or any) stockholder may *object* to a settlement already “disciplines” the negotiating process. Other stockholders are disadvantaged if, instead of objecting to a settlement that it believes is inadequate, a significant stockholder abandons the class to seek more for itself.

IsZo’s paradigm would also upend the rule that class litigation should be controlled by carefully selected lead plaintiffs and lead counsel. IsZo contemplates that mandatory opt-outs will cause lead counsel to invite “significant” stockholders to participate in discovery and settlement negotiations. *Id.* at 4. But “significant” stockholders owe no fiduciary obligations to the class. The participation of parties acting for their own (rather than the class’s) interests will not benefit the class; it will multiply costs and the complexity of managing and defending litigation. Such stockholders could effectively free ride on the litigation efforts of class counsel but avoid bearing an equal share of the costs by opting out.

IsZo’s rule will also spawn duplicative litigation. IsZo claims that its rule does not risk “incompatible determinations” because “[i]n the settlement context, there is no determination on the merits.” *Id.* at 34. But if IsZo is granted an opt-out,

Defendants will terminate the settlement and continue litigation, while IsZo plans to file its own litigation on the same claims. And IsZo ignores that its rule would allow more than one stockholder to opt out, leading to multiple litigations. An opt-out paradigm that allows “prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications.” *In re MPM Hldgs. Inc. Appraisal and S’holder Litig.*, C.A. No. 2019-0519-NAC, at 11:13-15 (Del. Ch. Apr. 10, 2025) (TRANSCRIPT) (App. Comp. Tab 6). It will also burden the courts, and “devotion of scarce judicial resources to repetitive exercises of this sort ... would come at a large price to other litigants.” *Turner v. Bernstein*, 768 A.2d 24, 34 (Del. Ch. 2000).

## **II. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT ISZO A DISCRETIONARY OPT-OUT RIGHT.**

### **A. Question Presented**

Did the Court of Chancery abuse its discretion by refusing to grant IsZo the right to opt-out where it does not challenge the fairness of the Settlement, does not establish that it has any claims that are distinct from the claims of the Class, has not shown that Co-Lead Plaintiffs did not adequately represent its interest, and where granting an opt-out would result in loss of a significant monetary recovery for the Class? BD761-69.

### **B. Scope of Review**

This Court reviews the Court of Chancery’s determination regarding whether to permit an opt-out for abuse of discretion. *Celera*, 59 A.3d at 434. “To the extent that the Court of Chancery’s decision rests on a finding of fact, [this Court] will not set aside its factual findings ‘unless they are clearly wrong and the doing of justice requires their overturn.’” *Id.* at 428.

### **C. Merits of Argument**

Independent of its due process arguments, IsZo makes four arguments in support of its assertion that the trial court abused its discretion by not granting IsZo an opt-out. First, IsZo claims that opting out would allow it to “secure a better recovery” for itself because the Settlement does not appropriately value the Gross

Consideration claim (though IsZo does not challenge the adequacy of the Settlement). OB at 37-39. Second, it argues that its position parallels the *Celera* objector and thus opt-out is required under that case’s reasoning. *Id.* at 39-42. Third, it claims the Court of Chancery improperly weighed the equities in denying the opt-out. *Id.* at 42-45. Fourth, IsZo claims public policy warrants an opt-out here. *Id.* at 45-47. Each argument fails.

**1. IsZo Cannot Show the Settlement Is Unfair Such That an Opt-Out Is Required.**

IsZo claims that the Settlement does not account for “reasonable scenarios” whereby a post-trial verdict would have caused IsZo to receive more money than in the Settlement, and thus IsZo should be permitted an opt-out so it can pursue this recovery. *Id.* at 37. But, as the Court of Chancery recognized, this argument is an attack on the fairness of the settlement, not a reason to permit a discretionary opt-out. Given that IsZo has disavowed that it is challenging the fairness of the Settlement (Ex. B at 32), IsZo’s bald assertion that it could have secured a better recovery than Co-Lead Plaintiffs carries no weight. IsZo does not contend that it has any distinct claims that Class members could not equally have asserted. A settlement that is fair to the Class—as IsZo concedes—is fair to IsZo as a Class member. IsZo’s mere unfounded assertion that maybe it could get more on its own does not justify a discretionary opt-out.

Regardless, IsZo is wrong that the Gross Consideration claim was not reasonably valued in the Settlement. IsZo states that “[t]he crux of [its] 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.” OB at 38. But, after surveying the record, the trial court concluded that IsZo had failed to provide any evidentiary support for its theories. Ex. B at 30. Contrary to IsZo’s contentions, the trial court found that “the evidence ... did not provide strong support for the gross consideration claim. Instead, discovery suggested that Emisphere and MHR *appeared aligned* in their interest to maximize transaction compensation; and, quite importantly, Novo Nordisk would not pay above \$1.8 billion.” *Id.* (emphasis added).

The key problem with IsZo’s theory is that, as owner of 70% of the economic interests in Emisphere, MHR would have *always* been better off with a higher total sale price. *See In re Morton’s Restaurant Grp., Inc. S’holders Litig.*, 74 A.3d 656, 666 (Del. Ch. 2013) (“the presumption is that a large blockholder, who decides to take the same price as everyone else, believes that the sale is attractive, and thus is a strong indication of fairness and that judicial deference is due.”). For example, IsZo argues that Emisphere should have been sold for the Jefferies “Case 2B” valuation of \$2.935 billion. OB at 37. But MHR was fully incentivized to pursue this higher amount. Allocating only 16.67% of that amount to the MHR Royalty Stream and

83.33% to stockholders, as IsZo alleges was appropriate, would have resulted in MHR receiving \$2.201 billion—*\$806 million more* than it actually received.<sup>5</sup>

Both Co-Lead Plaintiffs and IsZo have asserted various theories for why MHR had conflicting interests with other stockholders that allegedly would cause it to forgo the significant value it would have received by selling Emisphere for a higher price. IsZo focuses on MHR’s alleged desire to obtain liquidity by selling Emisphere, MHR’s alleged focus on “tax optimization,” and indemnification rights MHR allegedly obtained from Novo. OB at 11-12. But Co-Lead Plaintiffs vigorously pursued discovery regarding these purported “side deals” that could have caused MHR to “accept[] a lower overall price.” BD291. That discovery disproved IsZo and Co-Lead Plaintiffs’ theories and showed that MHR never strayed from its economically rational interest in maximizing the total consideration paid for Emisphere.

First, IsZo points to no evidence—none—that MHR sought a rapid sale of Emisphere because the funds through which it held interests in Emisphere were reaching the end of their life cycle. OB at 11. There is thus no reason for the “Court to make an extraordinary inference: that rational economic actors have chosen to

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<sup>5</sup> In this scenario, MHR would have received \$489 million for the MHR Royalty Stream and \$1.712 billion for its 70% ownership, for a total of \$2.201 billion. MHR actually received \$1.395 billion

short-change themselves.” *Larkin v. Shah*, 2016 WL 4485447, at \*16 (Del. Ch. Aug. 25, 2016); see *Firefighters’ Pension Sys. of Kansas City, Missouri Tr. v. Presidio, Inc.*, 251 A.3d 212, 258 (Del. Ch. 2021) (private equity life cycles are “not so formulaic and structured that the cycle itself would support an inference of a liquidity-based conflict”).

Second, there is no evidence that MHR caused Emisphere to accept a lower deal price to satisfy its tax-structuring objectives. Instead, MHR first informed Novo of its desired tax structure *after* Novo made its August 21, 2020 best-and-final-offer. See BD1-3. Novo accepted this proposal because it cost Novo nothing. BD4, BD6, BD403 at 196:21-197:6. No negotiations regarding the tax structuring occurred, let alone a *quid pro quo* that saw MHR agree to a lower sale price to satisfy tax objectives. MHR’s alleged receipt of indemnification rights *also* came after the parties had agreed on price. Indeed, these rights were proposed by Novo, not MHR. BD16-17. The indemnification terms were never negotiated and remained unchanged from Novo’s initial proposal. Compare BD16-17, with BD51-52.

Third, discovery showed that MHR never sought to sacrifice the total deal price in exchange for a larger allocation of that price for the MHR Royalty Stream. As former Vice Chancellor Glasscock observed in similar circumstances, just because a controller “knew he was going to receive disparate consideration,” does not mean “he lacked an incentive to extract the highest price” because “to the extent

that [the controller] secured a higher overall price, there would be a bigger pie from which [the controller] could cut an outsized slice. *See In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232, at \*14 (Del. Ch. Mar. 6, 2012). The same logic applied here. MHR was always incentivized to seek the highest deal price because it both would receive 70% of each extra dollar a buyer would pay via its ownership stake and because a “bigger pie” would mean it could sell the MHR Royalty Stream for a larger “slice.” *Id.*

Fourth, regardless of MHR’s non-existent conflicts, the evidence is clear that Novo was unwilling to ever pay more than its \$1.8 billion best-and-final offer. Novo would have “walk[ed] away if Emisphere did not accept its 1.8 billion best and final offer.” BD347 at 64:1-3; *see also* BD403 at 197:11-22 (“1.8 was the fixed maximum.”).

Last, IsZo’s claim that it should be permitted to opt-out because it wants an “answer” regarding whether Defendants breached their fiduciary duty cites to no authority and should be rejected. OB at 38. IsZo’s idiosyncratic desires do not justify an opt-out from a concededly fair settlement.

IsZo had access to the full discovery record for months. “The absence of documentary support for IsZo's critiques, despite having had ample access to the discovery record, is quite telling.” Ex. B at 21. IsZo fails to show any inadequacy

in the Settlement at all, let alone such inadequacy that could warrant a discretionary opt-out right.

**2. None of the Considerations Motivating the Court in *Celera* Are Present Here.**

IsZo also argues that it must be granted a discretionary opt-out under this Court's decision in *Celera*. OB at 39-42. As *Celera* explained, a discretionary opt-out may be appropriate where “the class representative does not adequately represent the interests of particular class members,” “the claims of an objector seeking to opt out are sufficiently distinct,” and “to facilitate the fair and efficient conduct of the action.” 59 A.3d at 435. Only such extreme circumstances justify the costs of undermining the policy and efficiency goals advanced by “unitary adjudication or settlement.” *Id.* The Court of Chancery did not abuse its discretion in holding that “the facts here are nothing like the extreme circumstances in *Celera* and IsZo is not entitled to a discretionary opt-out.” Ex. B at 20.

*Celera* involved “somewhat unique circumstances” and “particular facts.” 59 A.3d at 436. In *Celera*, a plaintiff sought to enjoin a merger. *Id.* at 426. The parties reached a preliminary settlement whereby the plaintiff agreed to drop the injunction request in exchange for purely therapeutic, non-monetary benefits for the class—reduced deal protection measures and supplemental disclosures. *Id.* The merger then closed, with the plaintiff having sold all their shares before closing. *Id.* at 426-427. Four months later, the parties agreed to a final settlement whereby the class

representative agreed to a total release in exchange for no monetary recovery for the class. *Id.* at 427. A party objected, and while this Court affirmed the Court of Chancery’s ruling that the class was properly certified under Rules 23(b)(1) and (b)(2), it found the Court of Chancery had abused its discretion by not granting the objector a discretionary opt-out. *Id.* at 432-37.

In so-finding, this Court emphasized that the class representative was “barely adequate” because it had a “small amount of stock” that was sold before the closing—meaning that the class representative itself had no post-closing monetary claims—and was forcing a “significant stock holder with [a] significant monetary claim” to settle for “non-monetary consideration.” *Id.* at 435-36. The Court then noted that the “somewhat unique circumstances” that the class representative settled a request for injunctive relief for therapeutic benefits, then settled the remaining claims for monetary relief nearly a year later for no consideration, presented due process concerns and warranted allowing an opt-out. *Id.* at 436.

None of those circumstances are present here and IsZo’s attempts to analogize the two cases make little sense.

First, IsZo’s assertion, OB at 39, that the monetary nature of the Settlement supports a discretionary opt-out is meritless—the problem in *Celera* was that the settlement was *not* monetary yet the class representative released claims for monetary damages. Here, Co-Lead Plaintiffs agreed to settle legal and equitable

claims for a highly favorable monetary settlement. That IsZo asserts (with no evidence) that it could have done better does not warrant an opt-out.

Second, IsZo cannot show Co-Lead Plaintiffs were inadequate. IsZo relies on its status as the largest non-MHR stockholder, OB at 40, but ignores that Co-Lead Plaintiffs held 2 million Emisphere shares and had “relative economic stake as a percentage of their portfolios [that] far exceed[] IsZo’s.” A145. And though IsZo attacks one Co-Lead Plaintiff for his breaches of fiduciary duty in an unrelated case, it acknowledges that the Court of Chancery considered this fact during the leadership fight and *still found* that Co-Lead Plaintiffs were better suited to lead the class than IsZo. A152. IsZo did not challenge that ruling at the time and cannot do so now.

IsZo then claims the fact that the Court of Chancery gave Co-Lead Plaintiffs’ counsel “a modest haircut” from the 27% requested fee award to 23.5% and reduced the Co-Lead Plaintiffs’ requested incentives from a “slightly excessive” \$15,000 request to \$5,000 means there was “economic antagonism” between Co-Lead Plaintiffs and the Class. Ex. B at 38, 42, 46, OB at 41. IsZo goes so far as to accuse Co-Lead Plaintiffs of being willing “to offer an outsized fee in exchange for excessive incentive awards.” OB at 42. IsZo offers no evidence whatsoever of any improper *quid pro quo* between the size of the requested incentive awards and attorneys’ fees. And IsZo’s apparent claim that discretionary opt-outs should be

granted whenever the Court of Chancery reduces requested fee and incentive awards is supported by no caselaw and is logically incoherent.

### **3. The Equities Favor A Settlement.**

The equities also decisively weigh against a discretionary opt-out. None of the “[o]ccasions where courts have granted discretionary opt-out rights” are present here. *Celera*, 59 A.3d at 435. IsZo’s claims are identical to, not “distinct from,” *id.*, the Class. IsZo just asserts, without any evidentiary support, that it could have done a better job than Co-Lead Plaintiffs. IsZo provides no basis to conclude that Co-Lead Plaintiffs did not “adequately represent” its interests. *Id.* Nor would allowing an opt-out “facilitate the fair and efficient conduct of the action.” *Id.* It would do the opposite by terminating the Settlement. It would also “likely create a risk of inconsistent judgments,” because “the pertinent facts here”—whether the Gross Consideration was sufficient and the Allocation was fair—“will be equally applicable to all stockholders.” *Straight Path*, 2022 WL 2236192, at \*10.

Balanced against IsZo’s non-cognizable interests are the Class’s interest in a substantial monetary recovery, as well as Defendants’ ability to ““resolve all claims in a single proceeding.”” *Celera*, 59 A.3d at 435. The Court of Chancery correctly followed this Court’s precedents and other Delaware cases by finding this balance weighed against an opt-out. *See, e.g.*, Ex. B at 19-24; *Calamos*, C.A. No. 2017-

0058-JTL at 92; *MPM*, C.A. No. 2019-0519-NAC at 19; *GFI*, C.A. No. 10136-VCL, at 47-49.

Significantly, the class in *Celera* had ***already received*** the benefits of the settlement before the settlement was approved. *Celera*, 59 A.3d at 436. There was thus no risk that permitting an opt-out would deprive the class of value, which weighed the equities in the objector's favor. *Id.* The opposite is true here. Allowing an opt-out will terminate the Settlement. This is not theoretical as IsZo claims, but instead an express provision in the Settlement Agreement. BD668. IsZo hypothesizes that a new settlement can be reached after IsZo opts out, but this is pure speculation not evidence. Defendants will only settle for global peace.

The conduct of the parties in *Celera* and *Stein v. Blankfein*, 2025 WL 2301390 (Del. Ch. Aug. 11, 2025) has no bearing on this case and does not support IsZo's speculation. In *Celera* the benefits of the settlement ***had already been implemented*** before the settlement was presented for approval. *See Celera*, 59 A.3d at 426-27. And *Blankfein* did not even involve an opt-out, but instead a revised class-wide settlement after initial settlements were rejected by the Court. 2025 WL 2301390, at \*1. IsZo is not seeking to have the Settlement rejected. It wishes to opt-out.

IsZo glosses over the fact that it never objected to the fairness of the Settlement nor offered to post a bond so that it could substitute itself for Co-Lead Plaintiffs by simply claiming it was not required to do so. OB at 43-44. This misses

the point. IsZo's gripe is that the Settlement was not for enough money. If it truly believed that, it could have objected to the fairness of the Settlement or attempted to replace the Co-Lead Plaintiffs after posting bond under Court of Chancery Rule 23(f)(4)(C). But IsZo instead sought to obtain upside for itself while imperiling (and delaying) class-wide recovery.

#### **4. Public Policy Compels Against an Opt-Out.**

As discussed above, IsZo's proposed opt-out regime for any "significant" stockholders (whatever that means) would discourage settlements and harm stockholders. IsZo's only specific complaint as to this case is that it was not included in Settlement negotiations, and that allowing an opt-out might grant it a seat at the table for a future settlement. OB at 45. This does not come close to showing that public policy concerns are so compelling as to require an opt-out. As noted, there are sound reasons for placing control of litigation in the hands of lead plaintiffs and lead counsel, without the requirement of involving all "significant" stockholders in the litigation and settlement process. And there is no question that allowing an opt-out here would lead to duplicative litigation of the same claims, increasing costs, burdening the court, and jeopardizing the Class's recovery.

At bottom, IsZo's claim is that an opt-out is required because it is a large stockholder who believes it might have achieved a better result than Co-Lead Plaintiffs. No Delaware court has ever found that these circumstances required an

opt-out. The Court should not disrupt decades of precedent by permitting IsZo an  
opt-out here.

## **CONCLUSION**

The Court of Chancery's Bench Ruling should be affirmed.

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