



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ISZO CAPITAL LP,

Objector Below-Appellant,

v.

STEPHEN BRANDENBURG, ROBERT K. BRENNAN, JAMES DEVILLIERS, DR. 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

CASE BELOW:

COURT OF CHANCERY OF
THE STATE OF DELAWARE
Cons. C.A. No. 2021-0025-NAC

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APPELLEES' ANSWERING BRIEF

OF COUNSEL:

ROBBINS GELLER RUDMAN
& DOWD LLP

Randall J. Baron
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

*Co-Lead Counsel for
Plaintiffs Below-Appellees*

JOHNSON FISTEL, LLP
Brett M. Middleton
501 West Broadway, Suite 800
San Diego, CA 92101
(619) 230-0063

*Additional Counsel for
Plaintiffs Below-Appellees*

DATED: March 25, 2026

FRIEDLANDER & GORRIS, P.A.
Joel Friedlander (Bar No. 3163)
Jeffrey M. Gorris (Bar No. 5012)
Christopher M. Foulds (Bar No. 5169)
David Hahn (Bar No. 6417)
1201 N. Market Street, Suite 2200
Wilmington, DE 19801
(302) 573-3500
jfriedlander@friedlandergorris.com
jgorris@friedlandergorris.com
cfoulds@friedlandergorris.com
dhahn@friedlandergorris.com

ROBBINS GELLER RUDMAN
& DOWD LLP
Christopher H. Lyons (Bar No. 5493)
1521 Concord Pike, Suite 301
Wilmington, DE 19803
(302) 467-2660
clyons@rgrdlaw.com

*Co-Lead Counsel for
Plaintiffs Below-Appellees*

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NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery’s approval of a \$32 million settlement (the “Settlement”) that was reached after the completion of fact discovery and the exchange of nine expert reports. Co-Lead Plaintiffs challenged a two-part transaction (the “Challenged Transaction”) consisting of (i) the acquisition of Emisphere Technologies, Inc. (“Emisphere”) by Novo Nordisk A/S (“Novo”) for \$1.35 billion (the “Acquisition”), and (ii) Novo’s payment of \$450 million to Emisphere’s controlling stockholder, Mark Rachesky and his private equity firm, MHR Fund Management LLC (together with its affiliates, “MHR”), for MHR’s share of a royalty stream (the “MHR Royalty Purchase”).

Objector appellant IsZo Capital LP (“IsZo”) lost a leadership contest at the outset of this case. The Court of Chancery reasoned that the pleading of Co-Lead Plaintiffs offered “more pathways for recovery” and that IsZo’s sale of more than two million Emisphere shares during the pendency of the Acquisition for less than the Acquisition price posed an “unnecessary risk” to the putative class. (A148-152.)

In November 2024, IsZo did not object to the Court of Chancery’s certification of a class (the “Class”) under Rule 23(b)(1) and 23(b)(2) (the “Class Certification Order”). A year later, the Court approved the Settlement over IsZo’s objection and determined, in the exercise of its discretion, that IsZo may not opt out from the Class.

IsZo was provided more than ample due process. IsZo was heard during the leadership contest. IsZo chose not to object to entry of the Class Certification Order. As an objector to the Settlement, IsZo was provided with the entire discovery record months in advance of the settlement hearing. IsZo could have tried to marshal arguments why the \$32 million Settlement was inadequate, and why the claims supposedly were worth, in IsZo's words, "hundreds of millions, if not billions" of dollars. (A560.) IsZo did not do so. In the words of the Court of Chancery:

In what now amounts to Monday-morning quarterbacking, IsZo attempts to raise questions about plaintiffs' litigation strategy. Plaintiffs provide ample explanation for their thinking, analysis, and strategy, and the intensity with which this matter was litigated by plaintiffs is impressive.

And plaintiffs do something that, frankly, IsZo does not: They engage with the documentary discovery record. The absence of documentary support for IsZo's critiques, despite having had ample access to the discovery record, is quite telling.

Indeed, 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.

Op. at 21.

On appeal, IsZo resorts to arguing that Delaware's system for overseeing stockholder class actions is unconstitutional. IsZo argues that stockholder class actions that are settled for post-closing monetary relief must be certified under Rule 23(b)(3) or must allow any "significant stockholder" to opt out. IsZo's proposed rule is constitutionally required, IsZo contends, because the Court of Chancery has

not approved any discretionary opt-outs after *In re Celera Corp. Shareholder Litigation*, 59 A.3d 418 (Del. 2012).

The Class was properly certified under both Rule 23(b)(1) and 23(b)(2), and that fact is fatal for IsZo’s appeal. IsZo’s opening brief glosses over Class certification under Rule 23(b)(1). IsZo focuses almost exclusively on Rule 23(b)(2). IsZo argues a variation of the same misapplication of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), an employment discrimination case, that this Court and the Court of Chancery have rejected in the past. IsZo concedes that *Wal-Mart*’s “narrow holding” is that Rule 23(b)(2) certification is inappropriate “when each class member would be entitled to an individualized award of monetary damages.” (OB 24.)

In stockholder class actions, the “rights and interests of the class members are homogeneous.” (OB at 27 (quoting *Celera*, 59 A.3d at 433 n.39).) For purposes of Rule 23(b)(1), all Class members suffered the same harm resulting from the same conduct by the same defendants and they stand to receive the same per-share recovery. IsZo’s own complaint pleaded the predicates for Rule 23(b)(1) and (b)(2) certification. (B74-75.) IsZo did not contest certification under Rule 23(b)(1) or (b)(2) at the Settlement hearing. (A680.)

The Court of Chancery did what *Celera* directed: “balanc[e] ‘whether the perceived need for these additional ... protections ... outweighs the costs and

potential undermining of unitary adjudication or settlement.” *In re Celera Corp. S’holder Litig.*, 59 A.3d 418, 435 (Del. 2012) (citation omitted). The Court of Chancery evaluated the circumstances, which included:

- (i) Co-Lead Plaintiffs’ recovery of \$32 million after “impressive” litigation efforts, Op. at 21;
- (ii) the “undisputed” fact that “any opt-out would cause defendants to walk away from the settlement,” *id.* at 23; and
- (iii) IsZo’s failure to establish that the Settlement was inadequate or that the litigation had been pursued improperly. Critically, the Court of Chancery concluded that “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.* at 30.

The Court of Chancery concluded that Co-Lead Counsel “robustly prosecuted this case” and refused to “credit IsZo’s factually unsupported speculation that plaintiffs failed to adequately investigate the Class’s claims.” *Id.* at 31. IsZo conceded the fairness of the Settlement. *Id.* at 32. IsZo is not entitled as a matter of equity or constitutional law to destroy the Settlement, opportunistically take advantage of Co-Lead Counsel’s litigation efforts, and settle identical claims for itself.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that a Rule 23(b)(1) class should be certified where all members of the Class were affected in the same manner by Defendants' conduct, the relief afforded by the Settlement would affect all stockholders pro rata, and individual prosecution of the claims could lead to inconsistent determinations. (Op. at 9-10.) The Court of Chancery properly applied this Court's precedent in determining that certification was appropriate under Rule 23(b)(2) on the basis that the action sought declaratory relief generally applicable to the Class. (*Id.* at 10-11.) IsZo received ample due process, including receipt of the entire discovery record months in advance of the Settlement hearing. (*Id.* at 13-15, 21-22.) The "particular [] circumstances" of *Celera* were not present here, such as a "barely" adequate class representative and a non-monetary settlement despite "a clearly identified and supportable claim for substantial money damages." 59 A.3d at 436. The fact that the Delaware Court of Chancery has not granted a discretionary opt-out in Rule 23(b)(1)/(b)(2) class settlement since *Celera* reflects increased vigilance by the Court of Chancery in certifying class representatives and approving settlements. *See In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016). Judicial vigilance does not imply a need to mandate opt-out rights.

2. Denied. The Court of Chancery correctly applied *Celera* and balanced whether the need for a discretionary opt-out outweighed the costs and potential

undermining of a unitary resolution of the case. *Celera*, 59 A.3d at 434. The Court of Chancery determined that Co-Lead Plaintiffs litigated vigorously before obtaining a \$32 million settlement and that IsZo failed to come forward with evidence that any unpursued claims had merit. IsZo cannot overcome the Court of Chancery's factual determinations bearing on a discretionary opt-out.

STATEMENT OF FACTS

A. The Company

At the time of the Challenged Transaction, which closed on December 8, 2020, Emisphere was functionally a holding company, with minimal operations and few personnel. (A367-70.) Emisphere's primary value was derived from an oral delivery mechanism it had developed, called SNAC, which Emisphere had licensed to Novo. (A367.) Emisphere's other intellectual property was not generating royalty income, and Emisphere was attempting to market and sell another product with limited success. (*Id.*)

Novo used SNAC as the agent for oral delivery of semaglutide, Novo's proprietary GLP-1 analog, marketed in injectable form as Ozempic and Wegovy. (*Id.*) This oral product was marketed as Rybelsus. (*Id.*) Rybelsus was approved for treatment of type-2 diabetes in the U.S. in September 2019, and in the European Union in April 2020. (*Id.*)

B. The Royalty Agreement

In June 2008, Emisphere and Novo entered into a Royalty Agreement governing Novo's use of SNAC. (A367-68.) The Royalty Agreement was later amended to provide for a 3% maximum royalty rate, which would apply as long as Novo was selling products covered by an issued patent claim as to which Emisphere

was at least a co-inventor. After that, the rate would drop to a 1% “know-how” royalty. (*Id.*)

The Royalty Agreement would remain in effect for the longer of ten years from the date of first sale of a licensed product, or the date of expiration of the last-to-expire patent covered by the agreement, in each country. (A369.) In late 2019, Novo completed its first sale of Rybelsus, triggering Emisphere’s royalty rights. (A369-70.)

C. Emisphere’s Control Structure

Emisphere’s relationship with MHR spanned numerous transactions over many years. (A370-72.) MHR initially invested in Emisphere in March 2005. (A370.) From 2005 to 2015, MHR made loans to Emisphere. (A370-72.) MHR became Emisphere’s chief lender and largest stockholder. (A370.) In December 2016, Emisphere and Novo modified their Royalty Agreement to provide that Novo would pay MHR royalties equaling 0.5% of net sales of Rybelsus (the “MHR Royalty Stream”). In exchange, MHR forgave \$7 million in Emisphere indebtedness. (A372.)

At the time of the Challenged Transaction, MHR possessed the following stakes in Emisphere’s economics:

1. sole lender to Emisphere;
2. the 0.50% MHR Royalty Stream;

3. 41,097,471 shares of Emisphere common stock; and
4. an additional 78,600,331 shares of common stock on an as-converted basis.

(A372-73.) MHR's overall equity stake was about 70% of Emisphere's fully diluted common stock and was ever-increasing due to payment-in-kind interest on Emisphere's convertible debt. (A373.)

D. The Public Narrative of the Challenged Transaction

In November 2020, Emisphere and Novo entered into a merger agreement by which Emisphere agreed to be acquired by Novo for \$1.35 billion, subject to certain adjustments, or about \$7.83 per share (the "Acquisition Consideration"). (A373-75.) Contemporaneously, Novo and an affiliate entered into an asset purchase agreement with MHR, under which Novo agreed to acquire certain royalty rights from MHR for \$450 million (the "MHR Royalty Consideration"). (A374.) The total consideration paid by Novo was \$1.8 billion (the "Gross Consideration"). (*Id.*)

On November 16, 2020, Emisphere disseminated a proxy statement (the "Proxy"). According to the Proxy, the Board negotiated the Gross Consideration with Novo, and thereafter the Board negotiated with MHR respecting the allocation between Emisphere and MHR (the "Allocation"). (*Id.*)

The Proxy failed to mention intellectual property disputes that prompted the negotiations and drove the ultimate terms of the Gross Consideration and the

Allocation, which presented a conflict between MHR and Emisphere’s public stockholders. (A374-75.) The Proxy also omitted numerous material facts concerning the Board’s independence, including one Special Committee member’s contemporaneous efforts to solicit investments from Rachesky. (*Id.*)

E. The Leadership Contest

On November 30, 2020, plaintiff Robert Brennan sent a Section 220 demand. (A375.) Brennan filed a Section 220 action and ultimately obtained nearly 2,900 pages of documents. (A375-80.)

Co-Lead Plaintiffs were each long-term stockholders with significant stakes that were significant to each of them:

Stockholder	Shares At Closing	Initial Purchase
Stephen Brandenburg	208,900	2015
Robert Brennan	685,000	2008
James DeVilliers	75,500	1993
Dr. Michael Goldberg	300,000	1990
Samuel Menasha	779,000	1992

(A380.)

IsZo filed a plenary class action complaint that pleaded the predicates for Rule 23(b)(1)/(b)(2) certification. (B74-75.) Co-Lead Plaintiffs filed a 91-page complaint. (A381.) After briefing and oral argument (A382), the Court appointed Co-Lead Plaintiffs, reasoning as follows:

Although the competing applications for leadership present an unusually close call, because the LTS Group's pleading offers more pathways for recovery, IsZo's sale of shares after the Merger was announced presents at least a risk of conflict, and both groups have more than sufficient stakes to motivate them to prosecute the action, the LTS Group has presented the more compelling application under *Hirt* and otherwise.

(A140, A152.)

F. Defendants Move to Dismiss

In April 2022, the individual defendants moved to dismiss the complaint, and MHR filed a partial motion to dismiss. (A383-84.)

On June 14, 2022, Co-Lead Plaintiffs filed the operative Verified Second Amended Class Action Complaint (the "Complaint"). (A384-85.) The Complaint alleged: (i) in Count I, that the Defendants breached their fiduciary duties in the Challenged Transaction; (ii) in Counts II and III, that the MHR Defendants breached their fiduciary duties by abusing their control of Emisphere to issue excessive amounts of stock in exchange for debt and warrants of far lesser value; and (iii) in Count IV, that defendants Rachesky, Rothwell, and Weiser breached their fiduciary duties by accelerating the vesting of two million RSUs held by Rothwell and Weiser for the primary purpose of guaranteeing stockholder approval of the Challenged Transaction. (*Id.*)

In July 2022, Defendants Rothwell and Weiser filed a partial motion to dismiss, as did the MHR defendants. (A385-86.) The MHR defendants argued that:

(a) there was nothing improper about MHR's funding; and (b) MHR was fully incentivized to pursue the highest sale price. (*Id.*)

In August 2023, the Court of Chancery denied Defendants' partial motions to dismiss as to Count I, and granted Defendants' partial motions to dismiss as to Counts II, III, and IV. (A387.) The Court dismissed all counts respecting equity issuances to MHR. (*Id.*) The Court further ruled that the vesting of RSUs did not improperly impede minority stockholders' franchise rights. (*Id.*)

G. Co-Lead Plaintiffs Engage in Extensive Fact Discovery

Fact discovery was extensive. Co-Lead Counsel obtained, reviewed, and analyzed approximately 170,800 documents (over 916,000 pages) produced by defendants and various non-parties, including Emisphere, Novo, Evercore (Novo's financial advisor), Jefferies (Emisphere's financial advisor), a former employee of Emisphere, and two wireless carriers. (A388.)

Co-Lead Plaintiffs produced approximately 7,960 pages of documents, including text messages from personal devices. (A388.) Co-Lead Plaintiffs responded to three sets of interrogatories (27 interrogatories directed to each of the Co-Lead Plaintiffs, plus 19 directed to Co-Lead Plaintiffs collectively, or 154 total interrogatories, excluding subparts), and they were each deposed. (A388-89.)

Co-Lead Counsel took nineteen depositions, including six in Denmark. (A389-90.)

H. Discovery Unearths New Information About the Challenged Transaction

1. Emisphere's Conflicted Board

Discovery revealed how Emisphere's Board was conflicted (A391-94):

Rachesky controlled MHR and was incentivized to allocate the Gross Acquisition toward the MHR Royalty. (A391.)

Weiser was "partners" with Rachesky in a biotech investment vehicle. (A392.) Defendants disputed that company was material to Weiser, but it was Weiser's primary occupation. (*Id.*) Weiser made approximately [REDACTED] from it. (*Id.*) Weiser also earned [REDACTED] for a year-and-a-half of service as Emisphere's co-CEO. (*Id.*) Weiser and Rachesky are also very close on a personal level. (*Id.*)

Rothwell was a co-CEO who received the same payout as Weiser. (A392.) When Emisphere's prior management team attempted to obtain alternative financing, Rothwell told them he would not even raise it with Rachesky because he would lose his job. (*Id.*)

John Harkey is Rachesky's close friend. (A393.) Then-Vice Chancellor Strine criticized Rachesky for appointing Harkey to a special committee. *See In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *16 (Del. Ch. Sep. 19, 2008).

Discovery here unearthed deeper business connections and a friendship approaching the familial. (A393.)

Tim McInerney, a special committee member, is such close friends with Weiser that McInerney could not begin to identify the times they had met outside of Board meetings. (*Id.*) During the pendency of the Challenged Transaction, McInerney solicited an investment from Rachesky in McInerney's outside projects. (*Id.*)

Howard Draft, the other committee member, was appointed to the Board amidst discussions with Novo. Draft was close friends with Rachesky. (A394.)

2. Evolution of Discussions with Novo

Discovery revealed a series of pre-Acquisition interactions between Emisphere and Novo. (A389-98.)

In January 2018, Novo offered to acquire Emisphere and the MHR Royalty Stream for \$175 million. (A394.) MHR rejected that offer out of hand. (*Id.*)

In November 2018, Weiser discovered that Novo had published an article that Weiser believed breached the Royalty Agreement. (A394.) In April 2019, Rothwell sent a letter to Novo outlining Emisphere's position. (A395.) Novo admitted its breach but disputed that the breach was material or led to any damages. (*Id.*) Novo proposed to remedy the breach by reviewing its policies, discussing specific

monetary losses, and assisting with patent applications respecting any inventions that Emisphere believed had been disclosed. (*Id.*)

On June 18, 2019, the Board hired Rachesky's longtime law firm to pursue the "potential breach" and discussed hiring another law firm to review Emisphere's patent portfolio. (*Id.*)

By September 2019, Emisphere demanded that Novo increase the royalty rate owed to Emisphere. (*Id.*) Emisphere contended that Novo's breach permitted Emisphere to terminate the Royalty Agreement. (*Id.*) Termination of the Royalty Agreement would require a new license and royalty terms if Novo launched Rybelsus using SNAC, which Novo was planning to do. (A395-96.) Novo responded that "it want[ed] to settle this dispute" through a "purchase of Emisphere itself or its SNAC assets and intellectual property." (A396.)

On October 3, 2019, MHR and Emisphere entered into an agreement whereby Emisphere would pay 83% and MHR would pay 17% of the legal costs for suing Novo, and that they would similarly divide the proceeds from the litigation. (*Id.*) These percentages were based on their respective shares of the combined 3% royalty interest that applied at least until 2027. (Emisphere had a 2.5% interest until the rate dropped to 0.5% no earlier than 2027, and MHR had a constant 0.5% interest.) (*Id.*)

By November 2019, Weiser learned from counsel's patent review that Emisphere should have been listed as a co-inventor on three patents. (*Id.*)

According to Emisphere’s counsel, “Emisphere’s co-inventorship of these patents entitles Emisphere and MHR, collectively, to a royalty rate of 3% with respect to Rybelsus through at least their expiry in 2034.” (*Id.*) This reflected an additional seven years of collective royalties at 3%, rather than 1%. (*Id.*)

On February 20, 2020, Novo offered to settle the dispute with Emisphere by acquiring Emisphere and the MHR Royalty Stream for \$950 million. (A397.)

Novo’s board of directors gave Novo management [REDACTED] [REDACTED] to acquire Emisphere and the MHR Royalty Stream. (*Id.*) Novo’s CFO testified that paying more than [REDACTED] was a “stretch”:

we and for sure myself, [REDACTED], because looking at ... what we saw as ... a good Royalty Agreement, so ... in reality I liked the Royalty Agreement and ... the structure of that. And translating that into value ... yielded something in my book [REDACTED] [REDACTED] So ... stretching it beyond that, you know, [REDACTED]

(B218.)

On February 24, 2020, Weiser presented to the Board respecting the “pending dispute with Novo over Rybelsus” and “further advised the Board on the initial settlement proposal made by Novo.” (A397.)

On March 4, 2020, the Board appointed McInerney and Draft as members of a Special Committee “to review any [pending] proposals received from Novo in connection with the pending dispute with Novo.” (*Id.*) The Special Committee

recommended Weiser and Rachesky negotiate with Novo. (A398.) The Special Committee’s mandate required that any transaction obtain the support of a majority of Emisphere’s minority stockholders. (*Id.*)

From April to November 2020, the intellectual property disputes drove the negotiations and valuations. (A399-405.)

Beginning in April 2020, Rachesky and Weiser worked with leading outside counsel—Quinn Emmanuel and Williams & Connolly—to pursue the intellectual property disputes against Novo. (A399.) On May 13, 2020, Emisphere’s outside counsel presented to Novo. (*Id.*) On May 27, 2020, Novo’s counsel presented to Weiser and Emisphere’s lawyers. (*Id.*)

As of May 31, 2020, Emisphere’s outside counsel had a complete draft complaint ready to file. (*Id.*)

In this litigation, Defendants disclaimed any belief in Emisphere’s positions. Weiser testified that Novo’s “spectacular intellectual property attorney, [had] eviscerated all of our claims and arguments that we were inventors on both the 2031 and 2034 patents.” (*Id.*) Weiser testified, “I believed that the -- on the 2034 patents, there was zero chance and on the 2031 patents it was a Hail Mary, almost infinitesimally small chance that we could prevail.” (*Id.*)

In July 2020, Jefferies responded to Weiser’s request for a valuation model showing what the value would be if success on the inventorship dispute resulted in

extending the step down from 2027 to 2034. (A399-400.) Jefferies sent several valuation models at the request of Weiser and Rothwell reflecting different assumptions respecting royalty rates, step down timing, and the impact of generic entry. (A400.)

On July 29, 2020, Jefferies reported to the Special Committee, with Weiser in attendance, that “MHR had indicated that it would be prepared to consider supporting a possible transaction with a value of at least \$3.5 billion.” (*Id.*) Later that day, Rachesky made a \$3.5 billion counteroffer to Novo. (*Id.*)

On August 13, Novo rejected the \$3.5 billion counteroffer. (A401.) Rachesky and Rothwell then proposed [REDACTED] before consulting with the Special Committee. (A401.)

On August 19, Novo management sent Novo’s board of directors a memorandum requesting authorization for “a final offer of \$1,800m.” (B189.) Novo management’s presentation to the board “indicate[d] a fair intrinsic base case valuation of [REDACTED] representing a value of [REDACTED] for future Rybelsus® milestones and royalties and around [REDACTED] from future pipeline milestones and royalties.” (B191.) Novo management justified the remainder of the bid based on “upside scenarios” [REDACTED] [REDACTED] that it valued at [REDACTED], and an additional “Premium” of [REDACTED] based on [REDACTED]

[REDACTED]

[REDACTED] (B192.)

Novo's board authorized the bid. (A401.)

Novo's CEO testified that Novo was [REDACTED] at \$1.8 billion. (B266.) Novo's CFO testified that [REDACTED] (B244.) Novo's general counsel testified as follows:

Q. And did the Board of Directors authorize management to bid a dollar higher than \$1.8 billion on August 20, or on any other time?

A. No, they did not.

Q. And if Emisphere declined the offer or countered with a higher price, was management prepared to return to the Board and request an even higher mandate?

A. No.

(B297.)

On August 21, 2020, Jefferies sent McInerney an after-tax proceeds analysis. (A402.) The "key assumptions" included "Royalties of 3% to 2031, then 2% to 2034 (assumes settlement)." (*Id.*) McInerney forwarded it to Weiser and Rothwell. (*Id.*)

That same day, MHR proposed to the Special Committee that MHR receive 28.5% of the overall consideration, based on the assumptions (i) that Emisphere had no value apart from its 2.5% royalty interest in Rybelsus; and (ii) that the step down would occur in 2027. (*Id.*)

On August 22, Jefferies predicted that when Rachesky negotiated with Emisphere he would reverse course as compared to Emisphere's position when negotiating with Novo. (A402.) Respecting the timing of the step down, Jefferies wrote: "I bet that he's [Rachesky's] now going to argue it happens at 2027 instead of 2031 or 2034 (opposite how he's been positioning it for the past 4 months)." (*Id.*)

On August 23, the Special Committee met and resolved "to negotiate the allocation following such time (if any) that the Committee accepts Novo Nordisk's proposal." (*Id.*)

On August 24, Novo offered \$1.8 billion as the Gross Consideration. Novo indicated that \$1.8 billion was its "final" offer. (A403.)

On August 25, Jefferies prepared an Allocation analysis. (*Id.*) Consistent with the positions taken by Emisphere in the negotiations with Novo, Jefferies assumed that the 3% royalty would be paid until 2031. (*Id.*) Jefferies calculated that a 2031 step down would result in a 17.9% Allocation to MHR. (*Id.*)

On August 26, Jefferies was instructed to redo its analysis by assuming that the royalty step down would occur in 2027. (*Id.*) In other words, Jefferies was instructed to ascribe no value to Emisphere's claims against Novo. (*Id.*) This assumption contradicted contemporaneous documents indicating that Defendants believed there was "a high likelihood" of success if Emisphere "were to sue for inventorship." (*Id.*)

That same day, Rothwell requested that Novo structure the purchase of the MHR Royalty Stream so that MHR would receive capital gains treatment. (A404.)

On August 27, McInerney instructed Jefferies to “revise the valuation model assuming a \$200M tech value and resend.” (*Id.*) This instruction resulted in an implied Allocation to MHR of 19.8%. (*Id.*) That same day, McInerney provided MHR with Jefferies’ analysis and his internal discussions with Jefferies. (*Id.*)

On September 28, Rachesky wrote to McInerney and Draft, offering to “go down to 27% from 29.5%.” (*Id.*)

On October 7, the Special Committee authorized Rachesky to propose to Novo that Emisphere would drop its request for a majority of the minority vote if Novo agreed to pay Gross Consideration of \$2.25 billion. (*Id.*) Novo declined.

By October 8, Jefferies prepared “management case” projections attributing no value to Emisphere’s intellectual property claims and sent the projections to Weiser and Rothwell. (*Id.*)

On October 9, McInerney wrote to Rachesky, “we believe that a 23% allocation is more in line with proper value for your royalty.” (A405.)

On October 21, McInerney reported that “the Committee, following numerous negotiations with MHR and discussions with Jefferies, and taking into account the advice and financial analyses of Jefferies, and MHR agreed that 25% of the transaction proceeds would be allocated to MHR’s direct royalty interest.” (A405.)

3. Board Approval

On November 5, 2020, the Board approved the Acquisition and MHR Royalty Purchase. (A405.) Jefferies declined to provide a fairness opinion respecting the Allocation. (*Id.*)

Most minority stockholders voted against the Challenged Transaction. (*Id.*)

I. IsZo Does Not Object to Class Certification

The Class Certification Order was not, as IsZo contends, entered into “for purposes of settlement.” (OB at 4-5, 33-34.) On November 8, 2024, shortly before fact depositions ended, Co-Lead Plaintiffs filed an Unopposed Motion for Class Certification. (B82-95.)

On November 14, 2024, IsZo’s counsel sent a letter to Co-Lead Counsel demanding that Co-Lead Counsel inform the Court that IsZo objected to entry of the Class Certification Order, after which Co-Lead Counsel conferred with IsZo. (B96-98; A655-56.) For reasons unknown, IsZo did not file anything itself.

The Court granted the Unopposed Motion for Class Certification, certifying the following non-opt-out class pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(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.

(A282, A406.)

IsZo did not move for reconsideration or otherwise inform the Court that it objected to the certification of the Class under Rule 23(b)(1)/(b)(2).

J. The Parties Exchange Nine Expert Reports

The parties exchanged nine reports (four on behalf of Co-Lead Plaintiffs and five on behalf of Defendants). (A407-08.)

As laid out in Co-Lead Plaintiffs' expert reports, Co-Lead Plaintiffs planned to present seven methodologies for the calculation of damages. (A408-11.) The methodology that Co-Lead Counsel considered to be the most realistic and the most likely to be accepted by the Court was dubbed "Morris Calculation #5." (A410.) It assumed:

- Gross Consideration of \$1.8 billion;
- Allocation based on a modified version of a Defendants' expert valuation of the MHR Royalty Stream, with incremental value extending the royalty stepdown date from 2027 to 2031, and 87% of that incremental value attributed to Emisphere and 13% to MHR.

(*Id.*) This method calculated damages as \$0.65 per share, which equates to approximately \$26 million on a Class-wide basis. (*Id.*)

The methodology that provided the highest damages amount, dubbed "Morris Calculation #3," assumed a hypothetical renegotiation of the Royalty Agreement in

which the parties agreed to extend the royalty stepdown to 2031 and increase royalty rates from a flat 3% to a three-tiered royalty that stepped from 3%, to 4.5%, to 6%, based on annual sales (consistent with the original royalty structure), and incremental royalties above the status quo being allocated to MHR and Emisphere in the amounts of 17% and 83%. (A409.) This method calculated damages of \$3.18 per share, which equates to about \$127.2 million on a Class-wide basis. (*Id.*) Co-Lead Counsel considered this method very speculative.

K. Defendants Seek Leave to Move for Summary Judgment

On January 29, 2025, Defendants submitted letters to the Court seeking leave to file motions for summary judgment with respect to certain claims. (B99-119.) On February 19, Co-Lead Plaintiffs submitted letters in response. (B120-49.)

On March 1, 2025, the Court denied Defendants' request for leave to file for summary judgment respecting the Allocation, but granted Defendants' requests for leave to file for summary judgment respecting the Gross Consideration. (B150.) The Court removed from the calendar the trial that had been scheduled to begin on May 19, 2025. (*Id.*)

L. The Settlement Discussions

The parties periodically engaged in settlement negotiations, with extensive mediation assistance of former U.S. District Judge Layn R. Phillips. (A412-13.) After a mediation session on March 6, 2025, Judge Phillips made a mediator's

recommendation that the parties settle the claims for \$32 million. The Parties accepted that recommendation. (*Id.*)

M. Settlement Approval

Co-Lead Plaintiffs informed the Court of the proposed Settlement in March 2025. (B151-52.) Thereafter, Co-Lead Plaintiffs worked cooperatively with IsZo to elongate the standard timelines for a settlement hearing so that IsZo could review the entire discovery record. (B153-58.)

Following briefing by Co-Lead Counsel, Defendants, and IsZo (A361-431, A554-612, B301-88), the Court of Chancery held a multi-hour settlement hearing on October 17, 2025. (A635-744.) On December 8, 2025, the Court of Chancery issued a transcript ruling approving the Settlement and rejecting IsZo's request to opt-out. *See Op.*

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY CERTIFIED THE CLASS UNDER RULE 23(B)(1)/(B)(2)

A. Question Presented

Did the Court of Chancery err in certifying a Rule 23(b)(1)/(b)(2) class? (Op. at 9-11; OB, Ex. A; A282-A285.)

B. Scope of Review

This Court reviews determinations on class certification for abuse of discretion, and reviews claims respecting due process de novo, with the deferential “clearly erroneous” standard applying to findings of historical fact. *In re Celera Corp. S’holder Litig.*, 59 A.3d 418, 428 (Del. 2012).

C. Merits of Argument

1. The Court Properly Certified a Rule 23(b)(1)/(b)(2) Class

IsZo’s lead argument is based on the Court of Chancery not having exercised its discretion to grant an opt-out in a Rule 23(b)(1) or Rule 23(b)(2) class since *Celera*. According to IsZo, “*Celera*’s promise remains unfulfilled,” and this Court needs to “revitalize the promise of *Celera*” to “avoid constitutional conflict.” (OB at 28, 33, 25.) IsZo proposes that Delaware courts must certify all classes in post-closing merger cases under Rule 23(b)(3) with mandatory opt-out or provide an opt-

out under Rule 23(b)(1)/(b)(2) whenever a post-closing damages case settles for cash and a “significant” stockholder wants to pursue its own claim.

As a preliminary matter, IsZo has not demonstrated that the absence of discretionary opt-outs post-*Celera* means that “Delaware’s protection has proven illusory.” (OB at 23.) To the contrary, soon after *Celera*, the Court of Chancery became more vigilant in protecting the due process rights of absent class members by rejecting class action settlements that offered little apparent value. As Chancellor Bouchard stated in a leading opinion when rejecting a class action settlement:

Given the rapid proliferation and current ubiquity of deal litigation, the mounting evidence that supplemental disclosures rarely yield genuine benefits for stockholders, the risk of stockholders losing potentially valuable claims that have not been investigated with rigor, and the challenges of assessing disclosure claims in a non-adversarial settlement process, the Court’s historical predisposition toward approving disclosure settlements needs to be reexamined.

In re Trulia, Inc. S’holder Litig., 129 A.3d 884, 896 (Del. Ch. 2016). *See also Anderson v. Magellan Health, Inc.*, 298 A.3d 734, 746 (Del. Ch. 2023) (“Recognizing their contribution to the problem, Delaware courts reversed course and began to clamp down on disclosure-only settlements.”). The question whether to grant a discretionary opt-out only arises if the Court deems it appropriate to certify a class.

There can be no dispute, however, that stockholder class actions in merger cases have been regularly certified under Rule 23(b)(1)/(b)(2) without opt-outs:

A merger class is, with exception, a classic example of a ‘true’ class action warranting certification as a non-opt-out class under Court of Chancery Rules 23(b)(1) and (b)(2). *See, e.g., Turner v. Bernstein*, 768 A.2d 24, 40 (Del. Ch. 2000) (certifying stockholder class under Rule 23(b)(1) without opt-out rights); *Noerr v. Greenwood*, 2002 WL 31720734, at *5 (Del. Ch. Nov. 22, 2002) (certifying a stockholder class action and stating that “[w]here a class is certified under Rule 23(b)(1) or (b)(2), there are no mandatory opt out rights, and any final judgment rendered in that case operates as res judicata with respect to the entire class.” (internal quotation marks omitted)); *but see Celera*, 59 A.3d at 434–36 (affirming the Court of Chancery’s certification of a stockholder class under Rule 23(b)(2) but reversing its decision not to afford opt-out rights, citing due process concerns particular to the facts); *see also* 2 Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 12.02[c][3], at 12-32 (2d ed. 2022) (“[T]he Court of Chancery has repeatedly certified stockholder class actions pursuant to Rules 23(b)(1) or (b)(2) after a challenged transaction has closed.”).

Anderson, 298 A.3d at 754 n.102 (cleaned up). The Court of Chancery faithfully applied decades of precedent in reaching that outcome here.

IsZo ignores that paragraphs 229-230 of its own verified complaint correctly asserted that the predicates for certifying a Rule 23(b)(1) and Rule 23(b)(2) class are satisfied here:

229. Defendants have acted in a manner that affects Plaintiff and all members of the class alike, thereby making appropriate injunctive and/or corresponding declaratory relief with respect to the class as a whole.

230. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for Defendants; or adjudications with respect to individual members of the Class would, as a practical

matter, be dispositive of the interest of other members or substantially impair or impede their ability to protect their interests.

(B74-75.) IsZo’s allegations track the language of Rule 23(b)(1) and Rule 23(b)(2) almost verbatim, albeit in reverse order. IsZo also represented at the Settlement hearing that it was not contesting certification under Rule 23(b)(1) or Rule 23(b)(2). (A680.)

The Court of Chancery applied settled law in determining that the Class should be certified under Rule 23(b)(1). (*See* A282-285.) In approving the Settlement, the Court of Chancery explained why Rule 23(b)(1) certification is appropriate: “All members of this class would have been impacted in the same manner by this conduct, such that the relief afforded by the settlement ought affect all stockholders equally, while individual prosecutions of these claims could lead to incompatible determinations.” (Op. at 9-10 (citing *Aponowicz v. Cantrell*, C.A. No. 2022-0135-KSJM, tr. (Del. Ch. Apr. 18, 2023).) Numerous other decisions from this Court and the Court of Chancery are in accord. *See Celera*, 59 A.3d at 433-34; *see also, e.g., In re AMC Ent. Holdings, Inc. S’holder Litig.*, 2023 WL 5165606, at *13 (Del. Ch. Aug. 11, 2023), *aff’d sub nom. In re AMC Ent. Holdings, Inc.*, 319 A.3d 310 (Del. 2024); *In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, 2022 WL 2236192, at *9 (Del. Ch. June 14, 2022); *In re Ebix, Inc. S’holder Litig.*, 2018 WL 3570126, at *4 (Del. Ch. July 17, 2018); *Noerr v. Greenwood*, 2002 WL

31720734, at *5 (Del. Ch. Nov. 22, 2002); *Turner v. Bernstein*, 768 A.2d 24, 31 (Del. Ch. 2000); *In re Mobile Commc'ns Corp. of Am., Inc. Consol. Litig.*, 1991 WL 1392, at *15 (Del. Ch. Jan. 7, 1991).

IsZo never discusses the Court's ruling respecting Rule 23(b)(1), except for a glancing reference to there being no risk of "incompatible determinations" "in the settlement context." (OB at 34-35.) IsZo's claim that "the specter of incompatible determinations is illusory" does not withstand scrutiny. (*Id.*) IsZo assumes that if it is permitted to opt out, there will be a settlement with the rest of the Class, even though Defendants took the position below that they entered into the Settlement on the condition that the Class be a non-opt-out class, and that they would not proceed without complete peace. (Op. at 23; A672-727; B310.)

IsZo insists that Defendants would likely settle with the rest of the class because the defendants in *Celera* did (OB at 43), but the dynamic in *Celera* does not exist here. As the Court of Chancery recognized, there was no reason for the defendants in *Celera* not to go through with the settlement with the rest of the class. (Op. at 23.) In *Celera*, the defendants had already provided the non-monetary consideration called for by the settlement by the time of the settlement approval hearing. 59 A.3d at 426-27.

By contrast, the cash consideration here has not been distributed and must be refunded from escrow if the Settlement is terminated. IsZo apparently wants a

complete redo of all discovery in this case because it thinks the deposition transcripts should have been longer. (See OB at 16; B352; B367-68.) It is therefore not hard to see why Defendants and their insurers could rationally refuse to recut the Settlement and pay some members of the class, while continuing to face the time, expense, and uncertainty of litigating the same claims against IsZo.

Because Rule 23(b)(1) applies (and IsZo does not dispute that Rule 23(a) is satisfied), the Court could stop here. See *Straight Path*, 2022 WL 2236192, at *11 (“I need not address Rule 23(b)(2). Because I have found that the Rule 23(a) factors have been met by the Proposed Class and the Lead Plaintiff, and because the matter satisfies Rule 23(b)(1), the pending motion for class certification is granted.”).

That said, the Court of Chancery also correctly determined to certify the Class under Rule 23(b)(2). (See A282-285.) As the Court explained in its ruling approving the Settlement, Rule 23(b)(2) certification is “warranted ‘if the Court is asked ‘to declare that directors breached their fiduciary duties in connection with the merger’ because ‘one is issuing a declaration generally applicable to the class.’” (Op. at 11 (citing *In re Del Monte Foods Co. S’holder Litig.*, C.A. No. 6027-VCL, tr. at 49-50 (Del. Ch. Dec. 1, 2011).)

Although IsZo took the position in its own complaint that the predicates for Rule 23(b)(2) were satisfied, it now questions whether Rule 23(b)(2) certification comports with due process, whenever there are claims for monetary relief. IsZo

acknowledges that *Wal-Mart* addressed only Rule 23(b)(2) certification of a class “when each class member would be entitled to an *individualized* award of monetary damages.” (OB at 24 (emphasis added).) *Wal-Mart* addressed a proposed class that had employment claims for “individualized [] damages” about varying conduct of thousands of managers at thousands of Wal-Mart stores. *Wal-Mart*, 564 U.S. at 357, 361. As this Court explained in *Celera*, the concerns that animated *Wal-Mart* are not present in Delaware merger litigation, such as this case, because the “rights and interests of the class members are homogeneous.” *Celera*, 59 A.3d at 433 n.39.

IsZo claims that *Wal-Mart* rejected a “predominance” test for determining whether a claim for monetary damages combined with a claim for equitable or declaratory relief could be certified under Rule 23(b)(2), but *Wal-Mart* addressed a situation where the monetary claims were “individualized” claims that were not “incidental” to declaratory or injunctive relief. In *Allison v. Citgo Petroleum Corporation*, 151 F.3d 402 (5th Cir. 1998), the Fifth Circuit explained that “incidental” damages are those that “flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief,” which are “not dependent in any significant way on the intangible, subjective differences of each class member’s circumstances.” *Id.* at 415; *see also* 2 *Newberg and Rubenstein on Class Actions* § 4:13 (6th ed.) (“[B]oth the Rule and the Constitution’s Due Process Clause likely limit monetary relief to that incidental to injunctive relief

and to that which would flow to the class as a whole and not require individualized assessments.”). Here, the damages are incidental because they are class-wide, calculated on a per-share basis, flow from an inherently unitary declaration of breach of fiduciary duty, and do not depend upon class members’ individual circumstances.

Nor did *Wal-Mart* address Rule 23(b)(1) or hybrid certification under Rule 23(b)(1) and Rule 23(b)(2). The plaintiffs there sought certification under Rule 23(b)(2)—*i.e.*, the class members had “individualized” claims for damages that, without Rule 23(b)(2), would have been certified under Rule 23(b)(3) with a mandatory opt-out. In *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989), this Court quoted a leading secondary authority in stating that wrestling over whether declaratory relief “predominates” is unproductive in these situations:

Disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be avoided. If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2). Those aspects of the case not falling within Rule 23(b)(2) should be treated as incidental. Indeed, quite commonly they will fall within Rule 23(b)(1) or Rule 23(b)(3) and may be heard on a class basis under one of those subdivisions.

Id. at 1097 n.16 (quoting 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1751, at 470 (1986)). In other words, because Rule 23(b)(1) applies, it does not matter whether the declaratory relief “predominates.” We note that IsZo

tacitly admits that declaratory relief predominates because IsZo argues that it values declaratory relief as to MHR's liability, which it argues should allow for a greater monetary recovery than provided by the Settlement. (*Compare* OB at 38 *with id.* at 30-31.)

2. Any Discretionary Opt-Out Provides an Additional Equitable Safety Valve

IsZo claims that a discretionary opt-out is “never actually available,” and therefore certifications of post-closing merger challenges under Rule 23(b)(1)/(b)(2) violate due process. (OB at 31.) The Court of Chancery has not held that opt-outs are never available or that an opt-out is only available under the exact fact pattern in *Celera*. To the contrary, in each of the handful of cases cited by IsZo where the Court declined to grant an opt-out, the Court of Chancery has done what *Celera* directed and undertaken the exercise of “balanc[ing] the equit[y] 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; *see In re MPM Hldgs. Inc. Appraisal and S’holder Litig.*, C.A. No. 2019-0519-NAC, tr. at 17-19 (Del. Ch. Apr. 10, 2025); *In re Calamos Asset Mgmt., Inc. S’holder Litig.*, C.A. No. 2017-0058-JTL, tr. at 34-41, 91 (Del. Ch. Apr. 25, 2019); *In re Del Monte Foods Co. S’holder Litig.*, C.A. No. 6027-VCL, tr. at 50-51 (Del. Ch. Dec. 1, 2011). IsZo does not dispute that *MPM*, *Calamos*, and *Del Monte* were decided correctly. IsZo

distinguishes cases declining to grant an opt-out from *Celera* on their facts. (OB at 16 n.3.)

IsZo claims that there is a “gulf” between federal and Delaware practice (OB at 33), but federal courts also recognize that “the cases permitting opt-outs in (b)(1) and (b)(2) actions are few.” *Eubanks v. Billington*, 110 F.3d 87, 93 (D.C. Cir. 1997).

IsZo’s reliance on federal securities cases being certified as Rule 23(b)(3) classes is misplaced. Federal securities cases typically involve individualized determinations of damages and the statements upon which any particular investor relied, based on when an investor purchased or sold securities. *See, e.g., Allegheny Cnty. Empls.’ Ret. Sys. v. Energy Transfer LP*, 623 F. Supp. 3d 470, 483-509 (E.D. Pa. 2022). IsZo’s reliance on a stipulated order in *Baum v. Harman International Industries, Inc.*, No. 3:17-cv-00246-RNC (D. Conn. July 13, 2022), certifying a Rule 23(b)(3) class in one federal securities case that involved a merger is likewise misplaced because the Court did not deny certification under Rule 23(b)(1) or Rule 23(b)(2). (OB at 25-27.) Parties can structure a settlement class under Rule 23(b)(3), if the requirements of Rule 23(b)(3) are met. As this Court observed in a follow-on case to *Harman* concerning a coverage dispute, it was not clear whether the federal class comprised a uniform group of stockholders who all owned stock as of the closing of the merger. *See Ill. Nat. Ins. Co. v. Harman Int’l Indus., Inc.*, --- A.3d ----, 2026 WL 204209, at *13 (Del. 2026).

In *Nottingham*, this Court explained that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” 564 A.2d at 1100 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). “Due process is satisfied if the procedures which are followed are ‘tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard,’ to insure that they are given a meaningful opportunity to present [its] case.” *Nottingham*, 564 A.2d at 1100 (quoting *Eldridge*, 424 U.S. at 349).

In *Nottingham*, this Court followed federal authority and held that an objector was afforded due process because he “was able to challenge each of the Court of Chancery’s rulings in this Court,” including that the named plaintiffs and their counsel were adequate, the objector was provided with notice of the proposed settlement, and the objector was provided with an opportunity to object. *Id.* (citing *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981).) This Court also observed that a discretionary opt-out provided an additional equitable escape valve: “the Court of Chancery has discretionary power, under its Rule 23(d)(2) to provide for an opt out right and to require that notice thereof be given, if it believes that an opt out right is necessary to protect the interest of absent class members.” *Id.* at 1101.

The Court of Chancery provided IsZo with much more than a “meaningful opportunity to present [its] case.” *Nottingham*, 564 A.2d at 1100. IsZo applied for

class leadership at the outset. IsZo had notice of the application for class certification and could have filed an objection to entry of the Class Certification Order, but for reasons unknown did not do so. Op. at 13. IsZo did not seek reconsideration. IsZo then had extraordinary opportunities to object to the Settlement. Op. at 14-15. IsZo was provided with the entire discovery record. Op. at 21. Co-Lead Plaintiffs agreed to amend the scheduling Order to elongate the time for IsZo to present its objections. (B159-87.) The Court of Chancery heard IsZo's request for an opt-out at a multi-hour hearing.

The mere fact that the Court of Chancery disagreed with IsZo that an opt-out was warranted does not amount to a due process violation. The Court applied *Celera* and, in the exercise of its discretion, determined that no opt-out was warranted under these circumstances, as explained below.

II. THE COURT OF CHANCERY PROPERLY DECLINED TO GRANT ISZO’S REQUEST FOR A DISCRETIONARY OPT-OUT

A. Question Presented

Did the Court of Chancery err by not granting IsZo a discretionary opt-out?

(Op. at 18-24.)

B. Scope of Review

“Because the settlement class was certified under Court of Chancery Rules 23(b)(1) and (b)(2), any opt-out right was entirely a matter of judicial discretion. A challenge to a trial court decision to grant or deny an opt-out right under these rules is reviewed for abuse of discretion.” *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1136-37 (Del. 2008).

C. Merits of Argument

The trial court did not abuse its discretion in declining IsZo’s request to opt out of the Settlement. The Court of Chancery found that “this case is far afield from the unique circumstances of *Celera*. This is a settlement providing a substantial monetary recovery, obtained after impressive efforts by class counsel, in a circumstance where no evidence suggests the representation was inadequate.” (Op. at 22-23.) IsZo failed to support its claim that the likely recovery is “hundreds of millions, if not billions” (A560), and IsZo offers no protection to the Class.

1. The Court Correctly Determined that IsZo Failed to Demonstrate that Co-Lead Plaintiffs Ignored or Forwent Valuable Damages Claims or Were Otherwise Inadequate

In *Celera*, this Court held that “[w]hether to grant a discretionary opt-out requires balancing ‘whether the perceived need for these additional ... protections [of an opt-out] outweighs the costs and potential undermining of unitary adjudication or settlement.’” *Celera*, 59 A.3d at 435. The Court of Chancery did just that, and deference to that exercise of discretion is warranted.

As this Court and the Court of Chancery has repeatedly observed, *Celera* involved “somewhat unique circumstances.” *Celera*, 59 A.3d at 436; *In re MPM Hldgs. Inc. Appraisal and S’holder Litig.*, Consol. C.A. No. 2019-0519-NAC, tr. at 17-18 (Del. Ch. Apr. 10, 2025); *In re Columbia Pipeline Grp., Inc. Merger Litigation*, Consol. C.A. No. 2018-0484-JTL, tr. at 90-91 (Del. Ch. June 1, 2022); *In re Calamos Asset Mgmt., Inc., S’holder Litig.*, Consol. C.A. No. 2017-0058-JTL, tr. at 90-91 (Del. Ch. Apr. 25, 2019). In *Celera*, the Court focused not just on the fact that the “claims realistically being settled” were “for money damages,” but also that those claims were being released for zero monetary payment, while there had previously been “a *de facto* settlement of [the] equitable claims without formal court approval,” in the form of “various ‘therapeutic’ benefits” provided before the settlement hearing. *Celera*, 59 A.3d at 426, 436.

The *Celera* objector contended it was “fundamentally unfair” for the class representative “to ‘drag’ the significant stockholder with significant monetary claim ... into a class action, settle that action for non-monetary consideration, and then seek millions of dollars in attorney’s fees.” *Id.* at 435. The relevant consideration in *Celera* was not merely that the objector was a “significant stockholder,” but that it “was a significant shareholder prepared independently to prosecute a clearly identified and supportable claim for substantial money damages,” which class counsel did not pursue and was not even aware of when it entered the settlement. *Id.* at 436; *see also In re Celera Corp. S’holder Litig.*, 2012 WL 1020471, at *4-5 (Del. Ch. Mar. 23, 2012) (opinion below, explaining that error on which objector based claim was “not discovered until after the parties entered into the MOU”).

By contrast, IsZo has identified no viable claim or valuation angle that Co-Lead Plaintiffs did not pursue vigorously and consider. As the Court of Chancery noted, this failure “is quite telling. Indeed, 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.” *Op.* at 21.

The \$32 million settlement is an excellent recovery on the facts of this case. (*See* A334-42; A365-66.) The Court of Chancery found that the Allocation Claim was “decent,” but there was no 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 would not pay above \$1.8 billion.” Op. at 30. The recovery exceeds what Co-Lead Plaintiffs considered to be the most likely damages figure if Co-Lead Plaintiffs had succeeded on the Allocation Claim (without pre-judgment interest). (A408-411.)

IsZo claims that it is “confident it will be able to establish a significantly higher valuation for Emisphere,” but IsZo failed to support its claimed ability to procure “a higher recovery” with any expert or other detailed analyses of the damages that IsZo claims Co-Lead Plaintiffs left “on the table,” as other successful objectors have done. *See In re Rural/Metro Corp. S’holders Litig.*, C.A. No. 6350-VCL, tr. at 98-110 (Del. Ch. Jan. 17, 2012) (discussing objector’s valuation expert’s affidavit and analysis).

IsZo instead cites a \$2.935 billion valuation generated for negotiation purposes by Emisphere’s financial advisor, Jefferies, but provides zero evidence to support its characterization of that number as “clearly-demonstrated.” (OB at 17, 37.) In reality, that valuation was based on a series of assumptions that nobody appears to have credited in real time. In the trial court, IsZo hypothesized a recovery in the plural “billions,” which would have required proving Emisphere was worth at least an additional \$8.545 billion. (A560.) IsZo thus seems to fault Co-Lead Plaintiffs for failing to prove that Emisphere was worth over \$10.3 billion, approximately three times MHR’s initial demand, five times what MHR agreed to

accept, and more than ten times Novo management’s “intrinsic base case valuation of [REDACTED]” (B191.)

IsZo continues to ignore that MHR had a strong incentive to push the Gross Consideration up—MHR would have received approximately 70% of the additional value—and that MHR repeatedly tried to increase the Gross Consideration. (A337-38.) If the Gross Consideration had been \$2.935 billion (*i.e.*, \$1.135 billion more than the ultimate Transaction), MHR would have pocketed about \$795 million of that additional cash for its Emisphere shares, and (assuming none of the additional consideration went to the MHR royalty, notwithstanding the cost and proceeds sharing agreement) the Class would have received about an additional \$266 million. (B357-62.) As noted above, Rachesky initially demanded Gross Consideration of \$3.5 billion. The assumptions Rachesky relied upon in making that demand included not only [REDACTED] per year of Rybelsus sales (significantly more than Novo projected and about three times the actual peak post-Acquisition sales), but also that the royalty rate would stay at 3% through 2034 (*i.e.*, total Emisphere victory on inventorship), *plus* application of a *zero-percent* discount rate to those royalties, *and* a separate [REDACTED] to account for broader harm to Novo that could have resulted from Emisphere/Novo litigation (even though that harm would have hurt Emisphere as well). (*See* A400.) Co-Lead Counsel did not expect a valuation based on any of those assumptions to withstand judicial scrutiny.

IsZo repeatedly cites to allegations in the Complaint respecting the Gross Consideration Claim (OB at 10, 13), but the Court of Chancery signaled that the Gross Consideration Claim’s viability was in doubt (i) at the hearing on the motion to dismiss, (ii) when granting Defendants’ request to brief summary judgment on the Gross Consideration Claim, and (iii) in its ruling approving the Settlement. (A414-17; B150; Op. at 30). As the Court observed, after a complaint is filed, “then you go and take discovery and you figure out if there’s a case there.” (A720-25 (“And plaintiffs counsel don’t get to make things up. They’re stuck with the facts.”).) Co-Lead Plaintiffs nevertheless continued pressing the Gross Consideration Claim to obtain the \$32 million Settlement, a figure that exceeds the \$26 million in damages Co-Lead Plaintiffs viewed as the most reliable calculation for the Allocation Claim, assuming 100% success. (A417-19.)

IsZo’s accusation on appeal that the Court provided reason to question Co-Lead Plaintiffs’ or Co-Lead Counsel’s adequacy is meritless. (OB at 40-42.) In reality, the Court found that Co-Lead Plaintiffs vigorously and impressively litigated the money damages claims:

Unlike in *Celera*, where the “class representative was ‘barely’ adequate,” plaintiffs vigorously pursued this litigation, and [the trial court has] zero doubts as to their adequacy based on the record before [it]. ... Plaintiffs provide ample explanation for their thinking, analysis, and strategy, and the intensity with which this matter was litigated by plaintiffs is impressive.

Op. at 20-21; *see also id.* at 12 (“[I]t is clear to me that plaintiffs and their counsel have amply demonstrated adequate representation.”). IsZo focuses on the Court’s decision to give Co-Lead Counsel’s fees “a modest haircut,” along with the requested incentive awards, but the Court did so while complimenting Co-Lead Plaintiffs and Co-Lead Counsel for their “impressive efforts.” Op. at 23, 38. IsZo cannot seriously argue that a “modest haircut” to a fee request is suggestive of inadequate representation. *See, e.g., Stein v. Blankfein*, 2025 WL 2301390, at *4 (Del. Ch. Aug. 11, 2025) (haircutting stockholder-objector counsel’s fee request from \$509,220 to \$50,000).

2. The Court of Chancery Properly Weighed the Harm in Granting an Opt-Out

There is nothing “worrying” (OB at 30) about the Court of Chancery taking into consideration “the harm that would accrue to the rest of the class” from awarding an opt-out in a situation where there is a significant monetary fund at risk. Op. at 23. *Celera* specifically instructs Delaware courts to consider the “costs and potential undermining of unitary adjudication or settlement” caused by allowing an opt-out. 59 A.3d at 435. The Court found that this litigation “has been going on for a long time, and there is a very substantial monetary recovery on the table for the class that would be lost if [the Court] grant[ed] IsZo the opportunity to opt out.” Op. at 23. The Court correctly observed that “[t]his is yet another difference between

this class and *Celera*, where, as discussed, the nonmonetary settlement consideration had already been provided and would not be impaired by any opt-out.” *Id.*

IsZo complains that it was not selected to lead the Class, but now offers no protection to the Class. IsZo declined to intervene and to post a bond under Court of Chancery Rule 23(f)(4)(C), which could have allowed IsZo to pursue the “hundreds of millions, if not billions” of dollars in damages it claims, while protecting the Class. *See* Pls.’ Op. Br. Supp. Settlement, Fee App., and Incentive Award, *In re ORBIT/FR, Inc. S’holders Litig.*, C.A. No. 2018-0340-JTL, 2025 WL 3729041 (Del. Ch. Dec. 19, 2025) (explaining that stockholder objected to an \$825,000 settlement, agreed to take over the case, and recovered \$17,850,000). Here, the Court of Chancery did not require IsZo to post a bond, but balanced the harm to the Class in granting an opt-out that would terminate the Settlement. IsZo’s contention that the Class claims are worth “hundreds of millions, if not billions,” invites the question of why IsZo does not want to protect the Class. (*See* A702-704.)

Logically, an opportunistic individual stockholder can obtain a better recovery for itself by abandoning the rest of a class. *See Goldstein v. Denner*, C.A. No. 2020-1061-JTL, tr. at 47 (Del. Ch. Sept. 13, 2023) (noting prospect that attempted individual settlement with prospective class representative “might equate to some type of ODC referral”). Co-Lead Plaintiffs and Co-Lead Counsel faithfully

prosecuted this action on behalf of the entire Class. IsZo should not be permitted to leverage the work of Class representatives to extract a non-pro-rata benefit for itself.

CONCLUSION

For all the foregoing reasons, Plaintiffs/Appellees respectfully request that the Court affirm the Court of Chancery's Order and Final Judgment.

FRIEDLANDER & GORRIS, P.A.

/s/ Christopher M. Foulds

Joel Friedlander (Bar No. 3163)
Jeffrey M. Gorris (Bar No. 5012)
Christopher M. Foulds (Bar No. 5169)
David Hahn (Bar No. 6417)
1201 N. Market Street, Suite 2200
Wilmington, DE 19801
(302) 573-3500
jfriedlander@friedlandergorris.com
jgorris@friedlandergorris.com
cfoulds@friedlandergorris.com
dhahn@friedlandergorris.com

OF COUNSEL:

ROBBINS GELLER RUDMAN
& DOWD LLP
Randall J. Baron
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

*Co-Lead Counsel for
Plaintiffs Below-Appellees*

JOHNSON FISTEL, LLP
Brett M. Middleton
501 West Broadway, Suite 800
San Diego, CA 92101
(619) 230-0063

*Additional Counsel for
Plaintiffs Below-Appellees*

ROBBINS GELLER RUDMAN
& DOWD LLP

/s/ Christopher H. Lyons

Christopher H. Lyons (Bar No. 5493)
1521 Concord Pike, Suite 301
Wilmington, DE 19803
(302) 467-2660
clyons@rgrdlaw.com

*Co-Lead Counsel for
Plaintiffs Below-Appellees*

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