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Case Number 12,2026

IN THE

Supreme Court of the State of Delaware

ISZO CAPITAL LP,

Objector Below-Appellant,

v.

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

Plaintiffs Below-Appellees,

and

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

Defendants Below-Appellees.

No. 12, 2026

COURT BELOW:

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

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APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

IsZo asks this Court to revitalize the promise of *Celera*, not reverse it.[1] *Celera* protects stockholders like IsZo who vigorously protect their investments. Before Plaintiffs appeared, IsZo sought Emisphere's records to bring light to what Rachesky took dark. OB 14. Even though Plaintiffs secured leadership, Defendants sought documents from IsZo and subjected its President to a longer deposition than all five Plaintiffs ***combined***. That deposition signaled IsZo's unwillingness to accede to a lowball settlement, so Plaintiffs filed an "unopposed" motion for class certification, without serving IsZo.

IsZo seeks to secure for its own investors, who over several years provided millions in capital to Emisphere, the opportunity to secure a better recovery. IsZo is undoubtedly "a significant shareholder prepared independently to prosecute a clearly identified and supportable claim for substantial money damages." *Celera*, 59 A.3d at 436. Yet the trial court denied a discretionary opt-out—as the Court of Chancery has to every applicant since *Celera*. This Court's promise of due process remains unfulfilled.

This Court could revitalize *Celera* in two ways. *First*, it could accept the trial court's invitation to review its decision and provide clear guidance for when opt-

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[1] *In re Celera Corp. S'holder Litig.*, 59 A.3d 418 (Del. 2012). Capitalized words not defined herein have the meaning in Appellant's Opening Brief ("OB"), Plaintiff's Answering Brief ("PAB"), or Defendants' Answering Brief ("DAB").

outs are required in stockholder litigation. Appellees disregard federal practice, recent case law, and scholarly treatises to deny the tension between the trial courts' application of *Celera* over the last fourteen years and the United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Indeed, Appellees would worsen that tension by interpreting *Celera* so narrowly that its objector could not secure an opt-out today. Tacitly, the parties agree with the trial court that the *Celera* court should have rejected the settlement as unfair rather than granting an opt-out. But opt-outs serve a different purpose. They protect individual stockholders' rights to pursue their own claims when they are dissatisfied with settlements that other stockholders may find fair.

Alternatively, the Court could grant IsZo a *Celera*-style opt-out. The equities favor IsZo: like the *Celera* investor, it stands to gain more through individual litigation than it will receive in settlement. Appellees cannot show that an opt-out threatens "defendants' desire to resolve all claims in a single proceeding." *Nottingham Partners v. Dana,* 564 A.2d 1089, 1101 (Del. 1989). Whether the case ends in a new settlement or continues below (either on a class-basis or otherwise), only one action will resolve the substantive claims against defendants. Appellees insist that IsZo should have intervened, and posted a bond, to take over the case. (Plaintiffs even suggest that the decision not to do so warrants an "ODC referral." PAB 45.) But intervention and opt-out are mutually exclusive remedies that protect

different interests. Appellees would render *Celera* a nullity by making opt-outs economically impossible for significant stockholders.

Either path to revitalize *Celera* requires reversal and remand. Respectfully, the Court should either provide the "different articulation" of *Celera* that the trial court recognized could be necessary (A743), or reverse and remand with instructions to grant IsZo an opt out.

ARGUMENT

I. THIS COURT SHOULD REVISIT *CELERA*.

"[W]here damages are at stake, the class-action device passes constitutional scrutiny only because putative class members can easily extricate themselves from the proceedings." *N. Sound Cap. LLC v. Merck & Co.*, 938 F.3d 482, 492 (3d Cir. 2019). Delaware nominally permits extrication via a "discretionary opt-out right." *Celera*, 59 A.3d at 434-36. Yet in fourteen years, no stockholder has extricated itself from a Delaware class, easily or otherwise. While *Celera* has never been tested on appeal from this Court, it is ripe for reconsideration.[2]

To this, Appellees suggest that IsZo's compliance below with *Celera* somehow contradicts its arguments on appeal. They ignore federal practice, treatise commentary, and recent authority to deny the tension between *Celera* and *Wal-Mart*. Instead, they add conditions to *Celera* that would ensure no stockholder could ever opt-out.

Like the trial court, Appellees suggest that dissatisfied stockholders should object to unfair bargains and intervene to take over insufficient settlements. But opt-outs protect dissenters who view their claims, or the terms of a proposed settlement,

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[2] The United States Supreme Court once dismissed an appeal as improvidently granted because similar issues were not properly presented to the Alabama Supreme Court. *Adams v. Robertson*, 520 U.S. 83 (1997). Appellees do not, and cannot, argue the same.

differently than plaintiffs who "represent" them. The Court should revitalize *Celera* by clarifying that an opt-out must be available at settlement to significant stockholders willing and capable of pursuing their own monetary claims.

A. *Celera*'s Due Process Protections Are Less Robust Than Federal Counterparts.

Appellees fault IsZo for accurately describing the limited protections of Delaware law. *See* PAB 28-29; DAB 9, 15, 20. IsZo's counsel correctly stated that *Wal-Mart v. Dukes* does not "itself control[] this case." A682. He correctly argued that in Delaware, "certification as a (b)(1) and (b)(2) class is appropriate . . . ***if an opt out is given***." A678 (emphasis added). Likewise, IsZo's complaint pled facts consistent with a (b)(1)/(b)(2) certification—implicitly including *Celera*'s discretionary opt-out.[3] PAB 28-29; DAB 9. These statements reflect that *Celera* controls—until this Court, or the United States Supreme Court, says otherwise. 59 A.3d at 433 n.40.

But the Answering Briefs demonstrate the comparative weakness of Delaware's protection for dissenters' due process rights. Appellees rushed to certify a class without serving IsZo, aware (after Defendants' lengthy deposition of IsZo's CEO) that IsZo would contest an inadequate offer. OB 16-17; A632. Plaintiffs

[3] Of course, Appellees assume that IsZo, like Plaintiffs, would contest an opt-out sought by a much larger coalition of class members. Given that IsZo represents almost 20% of the class, that scenario was never likely.

contend that IsZo should have sought reargument—really, argument—concerning Plaintiff's "unopposed" motion. PAB 22-23. But *Celera* allows for consideration ***at settlement*** of whether "equitable claims [are] still viable and predominant." 59 A.3d at 436. IsZo's actions complied with *Celera*.

Delaware law only requires notice of a (b)(2) class action containing monetary claims "at some stage in the proceedings," often at settlement. *Nottingham Parts.*, 564 A.2d at 1099. While ostensibly the same level of protection as in federal court, Defendants' precedent illustrates that federal courts often provide earlier notice. *See Wilson v. OR Asset Hldgs., L.P.*, 2018 WL 11470391, at *5 (N.D. Tex. Aug. 24, 2018) (cited DAB 23). Appellees do not explain how it would be consistent with due process to require objections ***before*** the class is given notice.

B. *Celera* and *Wal-Mart* Remain in Tension.

Appellees obfuscate the continuing tension between *Celera* and *Wal-Mart*. *See* OB 32-33. Defendants suggest that Justice Scalia's discussion of the "serious possibility" that opt-out rights might be required whenever monetary claims are pursued concerned only "*individualized* monetary claims." DAB 26 n.2. This is hard to square with *Wal-Mart*'s closing words:

> [B]ecause the necessity of that litigation will prevent backpay from being "incidental" to the classwide injunction, respondents' class could not be certified **even assuming, *arguendo,*** that "incidental" monetary relief can be awarded to a 23(b)(2) class.

Wal-Mart, 564 U.S. at 367 (emphasis added).

Neither party confronts the McLaughlin treatise's conclusion that *Wal-Mart* "cast[s] doubt on the continuing validity" of decisions like *Celera*. OB 28 (citing 1 MCLAUGHLIN ON CLASS ACTIONS § 5:21 (22nd ed. 2025 update)). (*Celera* relied upon an earlier version of McLaughlin.) *Accord* NEWBERG § 4:37 (*Wal-Mart* "implies that the question of whether the Fifth Circuit's decision in *Allison* is still alive is an open one."); *see also* 7AA C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1784.1 (3d ed. 2025 update) ("[T]here remains some uncertainty whether any hybrid certification, which necessarily deprives the class members of the notice and opt-out protections of Rule 23(b)(3), ultimately would be approved by the Court and the safest course may be that taken by other courts, which simply have required dual certification of both claims under both Rule 23(b)(2) and Rule 23(b)(3)."). The treatises do not share Appellees' confident interpretation of *Wal-Mart*.

But most importantly, Appellees disregard differences in federal practice that make little sense if *Wal-Mart* can be read so narrowly.

1. Securities Litigation

Appellees attempt to distinguish securities litigation as involving individualized damages. PAB 35; DAB 21. Even in "stock drop" actions, this is dubious: determining stockholder damages will be a matter of relatively simple equations. But while Plaintiffs reference the migration of merger class actions to

federal court,[4] they disregard merger lawsuits certified under (b)(3) that settle, as here, for low-eight figure monetary recoveries distributed on a per-share basis to holders of stock on a certain date.[5] These cases are directly analogous to their Delaware brethren—yet Appellees fail to cite a ***single example*** of a federal merger settlement with a monetary recovery certified under (b)(1) or (b)(2). This omission belies Appellees' contention that *Celera* and *Wal-Mart* are in harmony.

2. ERISA Litigation

Defendants' reliance on ERISA (DAB 22) fares no better and ignores the Fourth Circuit's recent reversal of (b)(1) certification concerning a class of participants in a defined contribution pension plan. *Trauernicht v. Genworth Fin. Inc.*, 169 F.4th 459 (4th Cir. 2026). *Trauernicht* reasoned that (b)(1) certification was suitable for "defined benefit" plans, where assets are undifferentiated and held collectively in trust, because litigants sue the fiduciary "*on behalf of the Plan*" with

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[4] PAB 27. *See Anderson v. Magellan Health, Inc.*, 298 A.3d 734, 748 (Del. Ch. 2023) ("The deal-litigation diaspora spread mainly to federal courts, where plaintiffs' attorneys repackaged their claims for breach of the fiduciary duty of disclosure as federal securities claims.").

[5] *See, e.g.*, Preliminary Approval Order, *Baum v. Harman Int'l Indus., Inc.*, No. 3:17-cv-00246-RNC ¶ 2 (D. Conn. July 13, 2022) (certifying (b)(3) class) (Reply Compendium Tab 1); *id*., Ex. A-1 at 9 (monetary recovery of $28 million limited to holders of "common stock . . . on January 10, 2017"); Preliminary Approval Order, *In re Envision Healthcare Corp.*, No. 1:18-cv-01068-RGA-SRF ¶ 3 (D. Del. Oct. 16, 2020) (certifying (b)(3) class) (Reply Compendium Tab 4); *id.*, Ex. A-1 at 5 (monetary recovery of $17.4 million distributed to holders of "common stock . . . on August 10, 2018").

recoveries paid to the plan itself. *Id*. at 465. Delaware law recognizes similar claims as derivative, rendering opt-outs generally impossible. *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004) (derivative suit is "brought on behalf of the corporation, [and] the recovery, if any, must go to the corporation.").

But *Trauernicht* denied (b)(1) certification to a "defined contribution" plan, where the loss of each individual varies. 169 F.4th 459 at 467-68, 470, 471-472. Notably, while the calculation is slightly more complicated than in merger actions, damages would directly flow from a finding that the fiduciaries had failed to remove an imprudent fund from the pension plan. *Id*. at 468.

Of Defendants' precedents, one case involves a defined contribution plan, and is thus similar to a derivative action.[6] To the extent Defendants rely upon other decisions finding that *Wal-Mart* does not preclude (b)(1) or (b)(2) certification of defined contribution plans, they ignore that, to the extent such cases are comparable, *Trauernicht* apparently creates a circuit split.[7]

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[6] *See* DAB 23 (citing *Douglin v. Greatbanc Tr. Co.*, 115 F. Supp. 3d 404, 414 (S.D.N.Y. 2015) (plaintiffs ask that "defendant compensate the ESOP for its injury, even though the ultimate derivative injury to the class members may vary among them.").

[7] Obviously, they are less comparable than federal merger class actions.

3. *Wal-Mart* Applies in Both (b)(1) and (b)(2) Contexts.

Trauernicht, which involved (b)(1) certification, belies the contention that "*Wal-Mart* only applied to FRCP 23(b)(2)." DAB 19; *accord* PAB 33. This makes sense. *Wal-Mart* concerns due process risks from the aggregation of monetary claims in non-opt-out class actions. Those risks are inherent in both (b)(1) and (b)(2) actions. Thus, federal courts address (b)(1) certification while citing *Wal-Mart*. *See Clemons v. Norton Healthcare Inc. Ret. Plan*, 890 F.3d 254, 281 (6th Cir. 2018) ("[T]he due process concerns that led the [*Wal-Mart*] Court to conclude that 'individualized monetary claims belong in Rule 23(b)(3)' are similar for (b)(1) classes.").

Trauernicht also explains why "cases permitting opt-outs in (b)(1) and (b)(2) actions are few." PAB 35 (quotation omitted). After *Wal-Mart*, federal courts and practitioners are more likely to certify monetary damages claims under (b)(3).

Appellees brush aside the tension that *Wal-Mart and Trauernicht* create with *Celera*. But to the extent that Delaware's protection of constitutional due process where equitable relief predominates—the test rejected in *Wal-Mart*—is maintainable, it relies upon a meaningful opt-out right for dissenting stockholders. Yet Appellees would narrow *Celera* further, virtually extinguishing its promise.

C. Appellees' Proposed Revisions to *Celera* Worsen the Conflict.

If Appellees were correct, the *Celera* objector could not have secured an opt-out. Their arguments support the trial court's speculation that *Celera* has not "age[d] well" and that the appropriate remedy is to "reject the settlement, not . . . give a discretionary opt-out." A738-39.

Plaintiffs ascribe the absence of post-*Celera* opt-outs to the decline in Delaware disclosure settlements. PAB 27. But *contra* Plaintiff's suggestion, *In re Trulia, Inc. Stockholder Litigation* says nothing about certifying classes or representatives. *Compare* 129 A.3d 884 (Del. Ch. 2016) *with* PAB 5. It denied approval to an inadequate settlement. Similarly, Defendants insist that "[a] settlement that is fair to the Class . . . is fair to IsZo as a Class Member." DAB 33. But the *Celera* trial court, as here, found the settlement fair, and this Court did not disturb its conclusions. Yet denial of an opt-out was still an abuse of discretion.

Thus, *Celera* opt-outs cannot be contingent upon the existence of an unfair settlement. Opt-outs ***only*** make sense in the context of settlements that other stockholders—and the trial court—find fair. Defendants attempt to square this circle by arguing that opt-outs are only appropriate "when the claims of an objector . . . are sufficiently distinct." DAB 27 (quoting 59 A.3d at 435). If true, *Celera* was wrongly decided: the objector's claims for breach of fiduciary duty were identical to those of

the class.[8] *Celera*, 59 A.3d at 425, 427. The *Celera* objector was dissatisfied with the settlement consideration, but it raised claims applicable to every class member.

Finally, Appellees insist that IsZo should have posted a bond and attempted to replace lead counsel. PAB 45; DAB 42-43. The *Celera* objector—who settled its federal action for an undisclosed amount[9]—could have done the same. Appellees' policy argument echoes the trial court's post-*Celera* comment that opt-outs present "***the worst of all possible worlds for everyone***" because "the rationally apathetic people then have no one to champion their interests." DAB 29-30 (quoting *In re GFI Grp. Inc. S'holders Litig.*, C.A. No. 10136-VCL, at 48:23-49:2 (Del. Ch. Nov. 24, 2015) (Trans.)). But nothing in *Celera* (or *Wal-Mart*) suggests that stockholders' individual rights must be sacrificed, dragooning them into representing others.[10] If Appellees were correct, *Celera* should have remanded with instructions for the objector to take over the case.

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[8] *Celera* gave the existence of "sufficiently distinct" claims as an *example* of when an opt-out could be required. 59 A.3d at 435. Defendants contend it is a requirement. DAB 38 ("Only such extreme circumstances" justify an opt-out).

[9] *See* Stipulation and Order of Dismissal, *Biotechnology Value Fund, L.P. v. Celera Corp.*, No. CV-13-3248-WHA-DMR (N. D. Cal. Jan. 16, 2015) (Reply Compendium Tab 2).

[10] Such a policy would clash with the trial court's decision to appoint Plaintiffs rather than IsZo. Were this a valid policy goal, it would commend the federal presumption favoring appointment of stockholders with "the largest financial interest in the relief sought by the class"—another federal protection unavailable in Delaware. 15 U.S.C. § 78u-4(a)(3)(B)(iii).

Taken together, Appellees implicitly adopt the trial court's observation that *Celera* should perhaps have "reject[ed] the settlement." A738-39. Their arguments, and the statements of the trial court, explain the absence of any post-*Celera* opt-outs. But that exacerbates the continuing tension with *Wal-Mart*.

D. Revitalizing *Celera* is Consistent with Delaware Policy.

The Opening Brief recommended that this Court revitalize *Celera*, allowing stockholders to "easily extricate themselves" from settlements,[11] by requiring (b)(3) certification or an opt-out when (a) a class is certified for purposes of settlement; (b) the settlement involves no classwide equitable relief; and (c) a significant shareholder is prepared to individually prosecute claims for monetary damages. OB 33-35. Appellees' contrary arguments fall flat.

Appellees elevate form over substance to contend they did not certify the class for purposes of settlement. PAB 22; DAB 28 n.4. In November 2024, the case was on a glide path to a deal: the parties commenced negotiations in 2023 (OB 15), and little substantive litigation occurred between certification and settlement. A86-93. Shortly after IsZo's deposition, and with knowledge of IsZo's position, Plaintiffs sought certification but pointedly did not serve their "unopposed" motion upon IsZo. A632. Functionally, the class was certified for settlement. But if the Court prefers

[11] *N. Sound Cap.*, 938 F.3d at 492.

to draw a bright line, due process provides one. The Court could require an opt-out when the parties do not provide class-wide notice of certification prior to settlement. *Compare Wilson*, 2018 WL 11470391, at *5 (providing notice immediately after certification). That would encompass both settlements formally certified at settlement and the fact pattern here.

Defendants' *stare decisis* argument fares no better. DAB 24. Again, IsZo does not seek reversal of *Celera*, but a clearer rule for when opt-outs are required. Even if *stare decisis* were an issue, urgent reason exists for review. As monetary settlements of merger class actions become more common in Delaware, the conflict presented in this appeal will present itself more frequently.

Defendants rely on *Seinfeld v. Verizon Communications, Inc.*, but that case illustrates the problem. 909 A.2d 117, 124 (Del. 2006) (cited DAB 24). *Seinfeld* declined to overrule the "credible basis" requirement for books-and-records actions. But the Court noted that the requirement was not "insurmountable" because plaintiffs had satisfied it in past cases. *Id*. In over thirteen years, the same cannot be said for discretionary opt-outs.

Appellees' remaining policy arguments are no more availing. Opt-outs do not prevent a "peace premium." Indeed, Defendants' own authority discussed such

premia in the context of an opt-out class.[12] Even in federal court, opt-outs are rare. OB 34. This makes sense: few stockholders will have monetary claims sufficiently large to justify individual litigation.

Nor does objection or intervention substitute for an opt-out right. *Contra* DAB 30. Objectors oppose unfair or unlawful settlements. Opt-outs protect stockholders, like IsZo, with investments sufficient to justify non-class litigation, even when smaller plaintiffs consider a settlement fair. If *Celera* only provides the right to opt-out of unfair settlements, which could not be approved anyway, then it is no protection at all.

Stockholder claims are individual property rights. OB 22 (citing cases). Appellees suggest that Plaintiffs, who hold approximately 5% of the class (PAB 10), should be able to compel a stockholder with almost 4 times greater investment to accept inadequate consideration so that their counsel can get contingency fees and the Plaintiffs can receive "incentive awards." That nullification of property rights raised the "serious possibility," in Justice Scalia's view, that opt-out rights might be required whenever monetary claims are pursued. *Wal-Mart*, 564 U.S. at 363.

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[12] See DAB 28 (citing *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011)). *Sullivan* involved a hybrid (b)(2)/(b)(3) class, but the *en banc* opinion addressed a "peace premium" in the context of releasing potentially non-colorable monetary claims in an (b)(3) class. *Id*.

This case squarely presents the constitutional question, but this Court need not go so far. It should reverse and remand, making clear that opt-out rights are necessary in this case both to avoid constitutional conflicts and encourage fairer settlements for absent class members.

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

Alternatively, requiring an opt-out for IsZo also restores *Celera*'s vitality. The Opening Brief demonstrated that IsZo's circumstances present at least as compelling a case for an opt-out as the *Celera* objector's; the equities favor IsZo's opt-out to secure a better recovery; and that opt-out is consistent with Delaware policy. OB 36-46. The Answering Briefs offer no compelling response.

A. *Celera*'s Circumstances are Present Here.

In finding an abuse of discretion, the *Celera* court emphasized that (a) the only remaining claims were for money damages; (b) the objector was a significant shareholder with a clearly identified claim for substantial money damages; and (c) there were questions concerning the plaintiff's adequacy. 59 A.3d at 436. Defendants ignore this test, focusing on ***examples*** of where ***other*** courts considered opt-outs appropriate. *Compare id*. at 435 *with* DAB 38 (declaring "only such extreme circumstances" justify opt-outs). The circumstances here favor IsZo.

1. Only Monetary Claims Remain.

While Defendants insist that "the problem in *Celera* was that the settlement was ***not*** monetary" (DAB 39), that is not *Celera*'s test. The trial court cannot "blind itself" to the reality that a settlement reached years after a merger is not "one in which the equitable claims [are] still viable and predominant." *Celera*, 59 A.3d at

436. Certification in *Celera* "occurred nearly one year after the merger" (*id*.); Plaintiffs certified this case almost four years afterwards. OB 16. Appellees cannot claim that the settlement contains equitable relief or that "viable and predominant" claims for anything but money damages remains. PAB 39-40; DAB 39-40.

Instead, Appellees insist that *Celera* applies only where a plaintiff seeks a non-monetary settlement and misses some viable monetary claim. But *Celera* did not limit itself to those facts.

2. IsZo is a Significant Shareholder.

Like the *Celera* objector, IsZo is "a significant shareholder prepared independently to prosecute a clearly identified and supportable claim for substantial money damages." 59 A.3d at 436. Plaintiffs' statement of facts buttresses the identifiable claims in the Opening Brief. *Compare* OB 37-38, 40 *with* PAB 7-21. Appellees cannot argue that the monetary claims here are not clearly identified, supportable, or substantial. Instead, they contend that an opt-out is unnecessary unless class counsel does not pursue, and is not aware of, other monetary claims. PAB 39-40; DAB 39.

Again, nothing in *Celera* requires this. From the beginning, IsZo placed more value on its claims than Plaintiffs, vigorously pursuing its interests by seeking records when Rachesky took the company dark, before Plaintiffs took any action. OB 14. IsZo has always had more skin in the game.

Defendants' protestation that "significant stockholder" is an indeterminate term crumbles with a single, pointed, example. *See* DAB 46 ("'significant' stockholder (whatever that means)"). Appellees denigrate the "modest haircut" applied to Plaintiffs' counsel's 27% fee request (PAB 44; DAB 40), which Plaintiffs approved. In other cases, a stockholder ***without*** significant ownership might seek and be awarded fees and an incentive award for increasing the recovery the class will now receive. *E.g. In re AMC Entm't Holdings, Inc. S'holder Litig.*, 2023 WL 6050452, at *4 (Del. Ch. Sept. 15, 2023). But IsZo did not seek fees for the common benefit. It didn't need an "incentive award" to hold Plaintiffs' counsel to Delaware's fee request framework: success on that argument ***alone*** increased IsZo's expected recovery by almost $213,000 (and the class recovery by nearly a million dollars). OB 19. While Appellees quibble about what "significant stockholder" means, IsZo demonstrated that it is one.

3. The Trial Court Overlooked Adequacy Issues.

Celera does not require a stockholder to prove a representative inadequate (and, thus, a settlement unapprovable). OB 40. Appellees' reliance on the "modest haircut" ignores the problem identified in the Opening Brief.[13] OB 41-42. The issue

[13] Defendants buttress Plaintiffs' adequacy by noting their relative economic stake as a percentage of their portfolios. DAB 40. Even if relevant for purposes of a leadership analysis, their relative stakes do not make Plaintiffs "significant

is not the size of the "haircut" to Plaintiffs' counsel's 27% fee request. It is that "IsZo [was] correct that *Dell*'s logic compel[led]" the fee reduction. *Id*. (quoting Op. at 38). Plaintiffs permitted a fee request exceeding guidelines recently affirmed by this Court.[14] *In re Dell Techs. Class V S'holders Litig.*, 300 A.3d 679, 695 (Del. Ch. 2023) (setting mid-stage settlement range at 15-25%), *aff'd* 326 A.3d 686 (Del. 2024). Their counsel simultaneously sought to share their fee with Plaintiffs via excessive incentive awards. OB 19. That creates economic antagonism with large class members who stood to lose out. (Of course, only a significant stockholder would have a sufficient interest to litigate the issue—which IsZo did.)

Celera does not require a showing of inadequacy and the trial court did not consider this antagonism. OB 42 (comparing A594 *with* Op. at 22-23). It erred by not recognizing that the circumstances compelling an opt-out in *Celera* are present here.

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stockholders" under *Celera*. Their losses were too small to pursue individual claims without reliance on contingency counsel. Small stockholders may be incentivized to take a small recovery sooner, especially if (as here) their counsel's lodestar exceeds their likely fee from a larger recovery and plaintiffs stand to receive outsized "incentive" awards that compensates for the smaller recovery.

[14] Plaintiffs' reliance on *Stein v. Blankfein* misses the mark. 2025 WL 2301390, at *4 (Del. Ch. Aug. 11, 2025), *aff'd sub nom. Griffith v. Stein*, 2026 WL 879687 (Del. Mar. 31, 2026). The *Stein* objector's fee request (based on 2x *quantum meruit*) fell within ranges this Court has approved. *Compare In re Tesla, Inc. Derivative Litig.*, 2025 WL 3689114, at *18 (Del. Dec. 19, 2025) (awarding 4x multiplier).

B. The Equities Favor an Opt-Out.

Defendants misstate the balance-of-equities test, contending "the Class's interest in a substantial monetary recovery" is a factor.[15] DAB 41. It is not: the trial court "must balance the equities of the defendants' desire to resolve all claims in a single proceeding against the individuals' interest in having their own day in Court." *Celera*, 59 A.3d at 435 (quoting *Nottingham Parts.,* 564 A.2d at 1101). Citing academic commentary, *Nottingham Partners* noted that "with respect to Rule 23(b)(2), the right to opt out is of fundamental importance to the class member, but of significance to the adverse party and judicial administration only in institutional cases." 564 A.2d at 1101 n.29 (quotation omitted).

IsZo's interest in its day in court is clear and significant: the Opening Brief described reasonable scenarios valuing IsZo's individual claim between $24 million and $73 million, even using Plaintiffs' own expert analysis. OB 37. IsZo believes greater recovery is achievable, a belief buttressed by Emisphere's recent settlement

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[15] Appellees insist that Defendants will not settle with an opt-out. This Court has heard Appellees' song before. The *Stein v. Blankfein* appellants insisted that a settlement provision—an unlawful release of claims—was integral to any bargain. *Stein*, 2025 WL 2301390, at *5 n.6. On remand, the parties swiftly settled without it.

The trial court's finding that "[i]t is undisputed that any opt-out would cause defendants to walk away from the settlement" must be error. Op. at 23. No litigant can dispute what will happen in the future. And, as in *Celera* and federal cases, class actions routinely settle even after individual investors opt out.

of a related appraisal case for an undisclosed sum.[16] Although Defendants consider this "an attack on the fairness of the settlement" (DAB 33), no attack is necessary. *Celera*'s equities test does not require a showing that a settlement is unfair: an opt-out has no relevance to an unfair, unapprovable settlement.

Whereas a *Celera*-style reversal poses no threat to this action continuing in a single proceeding. There are three likely outcomes on remand:

- Appellees stipulate to the approval of their settlement with an opt-out for IsZo, as happened in *Celera*. OB Compendium, Tab 3. IsZo litigates its claims in a single action.
- Appellees and IsZo negotiate an amended, class-wide settlement. No other class member sought to opt-out, so the trial court could approve an improved settlement without further notice to the class. *See Stein v. Blankfein*, 2024 WL 799386, at *7 n.73 (Del. Ch. Feb. 27, 2024), *aff'd sub nom. Griffith v. Stein*, 2026 WL 879687 (Del. Mar. 31, 2026).
- Appellees cannot agree on an amended settlement, and the case proceeds in a single action below.

[16] *See* Stipulation of Dismissal and Order, *Frank Funds v. Emisphere Techs., Inc.*, C.A. No. 2020-1101-NAC (Del. Ch. Mar. 24, 2026) (Reply Compendium Tab 3).

None of the paths threaten "defendants' desire to resolve all claims in a single proceeding." *Celera*, 59 A.3d at 435.

Appellees' arguments about the settlement's supposed fairness are beside the point. The opt-out process protects property interests of fundamental importance to the class member, weighed only against the Defendants' desire to litigate in a single forum. Appellees identify no threat to that interest here.

C. Appellees Conflate Opt-Outs with Objections.

Appellees implicitly agree with the trial court that a *Celera*-style opt-out is not "workable." A740. They insist that IsZo should have intervened and posted a bond. PAB 45; DAB 42-43. Plaintiffs even suggest that a stockholder seeking an opt-out rather than intervention could merit an "ODC referral."[17] PAB 45. This fundamentally misunderstands that intervention and opt-out are exclusive remedies and serve different purposes.

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[17] Plaintiffs' suggestion is absurd. In *Goldstein v. Denner*, unknown parties (suspected by the trial court to be defendants) offered a plaintiff $50,000 "to release his claims and drop the 220 demand." C.A. No. 2020-1061-JTL, at 46 (Del. Ch. Sept. 13, 2023). Vice Chancellor Laster speculated that "[i]f some knucklehead defense firm comes up with the idea of paying the next 220 plaintiff $250,000 . . . [that] might equate to ***some type of ODC referral***, but it's not going to equate to a $250,000 incentive fee [for the next plaintiff]." *Id*. at 47 (emphasis added). The trial court was not castigating Goldstein's fellow stockholders for seeking to assert claims under *Celera*, *Wal-Mart*, Delaware or Federal Rule 23, or any provision remotely relevant here. An opt-out is not a hostile act against the class; it is the exercise of a property right personal to a stockholder. Threatening counsel with disciplinary referrals will only chill zealous advocacy.

Intervention protects small class members from ***unfair*** settlements. An objector, often represented by contingency counsel, may challenge an inadequate plaintiff or a sub-optimal settlement. In that context, a bond makes sense: the intervenor replaces the original plaintiff and gains the right to assert the claims of others. A bond ensures that absent stockholders will do at least as well under their new representative as the old.

Opt-outs may only pursue their ***own*** claims: they may not both opt out and object to a settlement. NEWBERG § 13:23. An opt-out only protects, and is only meaningful to, stockholders who believe they can individually achieve greater value than plaintiffs ***when a settlement is otherwise fair to the class***. (Otherwise, the settlement could not be approved.) Significant stockholders, who may not require contingency counsel, can achieve superior results outside the class context even when a settlement is fair. *See* John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice,*" 30 CARDOZO L. REV. 407, 414-17, 426-27 (2008) (comparing recoveries of between 2-3% of investor losses in securities class action settlements to recoveries for institutional investor opt-outs, often 10-50 times what they would receive in the class).

While Appellees endorse the trial court's suggestion that opt-outs should bond settlements, that would render opt-outs economically impossible. Suppose that the trial court had permitted IsZo an opt-out but imposed a $32 million bond. If IsZo

recovered a judgment worth over ***four times*** the settlement value, it would still lose out. Its own recovery would be less than the cost of bonding the class to whom it would no longer belong and on whose behalf it could not recover. Such a result would be constitutionally dubious and anathema to due process and fairness. *See Marie Raymond Revocable Tr. v. MAT Five LLC*, 980 A.2d 388, 408 (Del. Ch. 2008) (noting that (b)(3) class "requires the opportunity to opt out without requiring the relinquishment of anything of value"), *aff'd sub nom. Whitson v. Marie Raymond Revocable Tr.*, 976 A.2d 172 (Del. 2009). But even if constitutionally permissible, a bond would render the *Celera*-style opt-out nonviable.

The trial court erred by considering that "IsZo has not offered to post a bond" in denying an opt-out. Op. at 23. By emphasizing a bond requirement that does not apply to opt-outs, and ***makes no economic sense for them***, the opinion would drive significant stockholders to intervention even when an opt-out should be available. This explains the absence of post-*Celera* opt-outs, but cannot be consistent with due process and fairness.

The Court should reverse and remand so that IsZo may opt out of the settlement.

CONCLUSION

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

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