IN THE SUPREME COURT OF THE STATE OF DELAWARE

ISZO CAPITAL LP,	§	
	§	No. 12, 2026
Objector Below,	§	
Appellant,	§	Court Below—Court of Chancery
	§	of the State of Delaware
v.	§	(Consolidated)
	§	
	§	C.A. No. 2021-0025
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. RACHESKSY,	§	
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.	§	

Submitted: June 17, 2026
Decided: September 14, 2026

Before **SEITZ**, Chief Justice; **TRAYNOR** and **LEGROW**, Justices.

ORDER

This 14th day of September, 2026, after consideration of the parties' briefs, the argument of counsel, and the record on appeal, it appears to the Court that:

(1) IsZo Capital LP is a New York-based hedge fund. IsZo invested heavily—approximately 60% of its long equity positions—in Emisphere Technologies, Inc., a pharmaceutical company that developed a drug-delivery technology integral to the formulation of highly successful drugs. IsZo was Emisphere's largest unaffiliated stockholder.

(2) In February 2020, Emisphere and Novo Nordisk A/S, a leading life science company, began acquisition discussions. The two companies were parties to an agreement under which Emisphere licensed its drug-delivery technology in exchange for royalty payments.[1] Royalty payments were split between Emisphere and its controlling stockholder, MHR.[2] Eventually, Novo agreed to pay $1.8 billion to acquire Emisphere and MHR's right to its share of the royalty proceeds.

(3) IsZo, along with several other stockholder plaintiffs, filed a class action challenging the fairness of the merger. IsZo alleged breach-of-fiduciary-duty claims

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[1] App. to Appellant's Opening Br. at A158, A183 [hereinafter App. to Opening Br at __].
[2] *Id.* We refer to Mark Rachesky, MHR Fund Management LLC, and its affiliates as "MHR."

against Emisphere's directors, officers, and controlling stockholder, MHR. Iszo alleged that the merger consideration was inadequate, "reflecting an unfair price and unfair process . . . [and that] MHR usurped an unfair side benefit for itself through its dominion over the Emisphere Board."[3] IsZo's complaint contained allegations in support of class certification under subsections (b)(1) and (b)(2) of Court of Chancery Rule 23. Neither of those subsections requires that class members be provided an opportunity to opt out of the class.

(4) The day after filing its complaint, IsZo moved to consolidate its lawsuit with the other lawsuits challenging the merger and sought a leadership role in the consolidated action. Although IsZo's motion to consolidate was uncontested, another group of plaintiffs moved to be appointed as the co-lead plaintiffs. The Court of Chancery granted IsZo's motion to consolidate. As to the leadership dispute, after full briefing and oral argument, the court designated the other group of plaintiffs as the co-lead plaintiffs (hereinafter "the plaintiffs"), acknowledging that the "competing applications for leadership present[ed] an unusually close call[.]"[4]

(5) The plaintiffs conducted discovery, exchanging expert reports and taking depositions. The parties also participated in several rounds of mediation. On

[3] J.A. to Appellees MHR Defendants, Michael Weiser, and Timothy Rothwell's Answering Br. at 150 [hereinafter J.A. at __].
[4] App. to Opening Br. at A152.

appeal, IsZo contends that the plaintiffs denied it "any role in the litigation or [later] settlement."[5]

(6) On November 8, 2024, the plaintiffs sought certification of the consolidated class action under subsections (b)(1) and (b)(2) of Rule 23.[6] On November 14, 2024, IsZo informed the plaintiffs' counsel that it opposed the motion[7] and that it requested that "any class certification include opt-out rights for proposed class members, as the Court [of Chancery] is permitted to grant in its discretion."[8] That same day, however, the Court of Chancery granted the plaintiffs' motion, certifying the class action under subsections (b)(1) and (b)(2).

(7) After another round of mediation, the plaintiffs and defendants agreed to settle the class action for $32 million. The plaintiffs then filed a proposed settlement stipulation. IsZo objected, asking the court to "decline to approve any settlement that does not permit IsZo to pursue its own claims."[9] As IsZo has acknowledged, it did not challenge the settlement itself but sought an opt-out similar to the one this Court ordered in *In re Celera Corp. S'holder Litig.*[10] IsZo argued that "Delaware law, constitutional due process, and simple fairness prevent the approval

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[5] Opening Br. at 16.
[6] Co-Lead Plaintiffs' Unopposed Mot. for Class Certification, *In re Emisphere Techs., Inc. S'holder Litig.*, No. 2021-0025 (Del. Ch. Nov. 8, 2024), D.I. 286.
[7] App. to Opening Br. at A632 ("IsZo opposes the motion at the current time.").
[8] *Id.* at A633.
[9] *Id.* at A611.
[10] *In re Celera S'holder Litig.*, 59 A.3d. 418, (Del. 2012).

of any settlement that denies [it] the opportunity to opt out and pursue its own recovery."[11]

(8) On October 17, 2025, the Court of Chancery heard oral argument on whether it should approve the settlement[12] and, afterwards, took the matter under advisement.[13] In its closing remarks, which IsZo interprets as inviting this Court "to reconsider *Celera*'s discretionary opt out,"[14] the court questioned aloud whether *Celera*'s discretionary opt-out had "age[d] . . . well" or was "workable" and speculated that the decision might one day be "superseded."[15]

(9) In a December 8, 2025 bench ruling, the Court of Chancery approved the settlement and rejected IsZo's objection. The court stated that, if it were to reevaluate class certification, it would again conclude that certification under subsections (a), (b)(1), and (b)(2) of Rule 23 was appropriate.[16] The court then determined that IsZo was not entitled to an opt-out right, citing several Court of Chancery decisions in which the court certified breach-of-fiduciary duty class

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[11] App. to Opening Br. at A560.
[12] *Id.* at A635.
[13] *Id.* at A738.
[14] Opening Br. at 20.
[15] App. to Opening Br. at A740–73.
[16] Opening Br. Ex. B at 6–7.

actions without granting an opt-out right.[17] In the court's view, the facts of this case did not warrant providing a discretionary opt-out.[18] IsZo appeals this decision.

(10) On appeal, IsZo contends that the Court of Chancery erred by approving the settlement without an opt-out right.[19] Its argument is two-fold. First, IsZo contends that the due-process protections afford by a *Celera*-style opt out "has proven illusory."[20] IsZo points to the fact that a *Celera*-style opt out has never been granted since *Celera* was decided.[21] It requests that we "revisit" our decision and "revitalize" it.[22] Second, IsZo argues in the alternative that, under the current *Celera* standard, the trial court abused its discretion in denying IsZo's request to opt out of the settlement.[23]

(11) We review the Court of Chancery's Rule 23 class-certification determination and its denial of a discretionary opt-out right for an abuse of discretion.[24] "To the extent that certification of the class implicates due process claims, we review those claims *de novo*."[25]

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[17] *See, e.g., In re Straight Path Commc'ns, Inc. S'holder Litig.*, 2022 WL 2236192 (Del Ch. June 14, 2022); *In re Del Monte Foods Co. S'holder Litig*., C.A. No. 6027-VCL (Del. Ch. Dec. 1, 2011) (TRANSCRIPT).
[18] Opening Br. Ex. B at 19.
[19] *See* Opening Br. at 36.
[20] Opening Br. at 23.
[21] *Id.* at 22–23.
[22] *Id.* at 23, 33.
[23] *Id.* at 36.
[24] *In re Celera S'holder Litig.*,59 A.3d 418, 428, 436–37 (Del. 2012).
[25] *Id.* at 428 (citing *Hercules Inc. v. Leu Trust and Banking (Bahamas) Ltd.*, 611 A.2d 476, 481 (Del. 1992)).

(12) The relevant portions of subsection (b) of Court of Chancery Rule 23 provide:

> (b) . . . A class action may be maintained if Rule 23(a) is satisfied and if
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> (1) prosecuting separate actions by or against individual class members would create a risk of:
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> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
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> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole; or
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> (3) the Court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
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> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
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> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
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> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
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> (D) the likely difficulties in managing a class action.

(13) Although Rule 23 does not specifically authorize the court to grant opt-out rights in a 23(b)(1) or 23(b)(2) class action, our case law, including *Celera*, authorizes the court to grant, in its discretion, a right to opt out of classes certified under 23(b)(2).[26] "Whether to grant a discretionary opt-out requires balancing 'whether the perceived need for these additional . . . . protections . . . . outweighs the costs and potential undermining of unitary adjudication or settlement.'"[27]

(14) The *Celera* Court recognized that where the class representative does not adequately represent the interests of particular class members, due process concerns are triggered such that opt-out rights should be granted. The Court also identified other scenarios in which courts have granted discretionary opt-out rights: "when the claims of an objector seeking to opt out are sufficiently distinct from the claims of the class as a whole and an opt out is appropriate to facilitate the fair and efficient conduct of the action."[28]

(15) Under the "particular facts and circumstances of *Celera*, which the Court described as "somewhat unique," this Court found that the Court of Chancery had erred by denying an objector's request for an opt-out right "where the policy favoring a global settlement was outweighed by due process concerns."[29] The

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[26] *Celera*, 59 A.3d at 434–35.
[27] *Id.* (footnotes omitted) (quoting Joseph M. McLaughlin, 1 *McLaughlin on Class Actions* §5:21 (8th ed. 2011)).
[28] *Id.* at 434.
[29] *Id.* at 436.

unique circumstances included: the trial court's finding that the class representative was "barely adequate," and the objector's readiness to prosecute "a clearly identified and supportable claim for substantial money damages" that the class counsel had not discovered before agreeing to settle.[30]

(16) IsZo invites us to "revisit" *Celera* because, in IsZo's view, *Celera's* protection of objecting stockholders has proven illusory. As IsZo has it, "[i]n the thirteen years since *Celera*, the Court of Chancery has ***never*** granted a discretionary opt-out."[31] It urges us to hold that "in the settlement context, (b)(1)/(b)(2) class certification is inappropriate or an opt-out is required where there is no equitable class-wide relief and the settlement releases claims for monetary damages."[32] Such a rule, according to IsZo, would bring our class-certification standards in line with the United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*.[33] We decline IsZo's invitation for the following reasons.

(17) First, it does not follow from IsZo's observation that *Celera*—a decision that turned on "unique circumstances"—was incorrectly decided. The lack of discretionary opt-outs post-*Celera* does not mean that the Court of Chancery has ignored the decision.[34] Indeed, in this case the Court of Chancery did precisely

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[30] *Id*. at 435–36.
[31] Opening Br. at 23 (italics and bold type in original).
[32] *Id.*
[33] 564 U.S. 338 (2011).
[34] *See, e.g.*, *In re MPM Holdings Inc. Appraisal & S'holder Litig.*, C.A. No. 2019-0519-NAC (Del. Ch. Apr. 10, 2025) (Trans.) (declining a *Celera* opt-out as "extraordinary treatment" available only

what *Celera* commands—it balanced the equities on the record and explained why the facts did not warrant an opt-out.

(18) It also bears emphasis that IsZo does not contest that Rule 23(a) was satisfied and does not seriously contend that Rule 23(b)(1) conditions were not met. Indeed, in its own complaint, IsZo alleged that

> [t]he 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.[35]

Hemmed in by this admission, IsZo does not challenge the court's certification of the class under Rule 23(b)(1). Instead, IsZo trains its attention on the court's certification under Rule 23(b)(2) and the United States Supreme Court's decision in *Wal-Mart*.

(19) We disagree with IsZo's suggestion that *Wal-Mart* weighs heavily in favor of adopting IsZo's favored means of "revitalizing" *Celera*—that is, a rule that requires either (b)(3) certification or an opt-out in the settlement context when the settlement releases monetary-damages claims.

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in "exceptional circumstances," because granting one "could terminate the class settlement"); *In re Calamos Asset Mgmt., Inc. S'holder Litig.*, C.A. No. 2017-0058-JTL (Del. Ch. Apr. 25, 2019) (Trans.) (declining a *Celera* opt-out after balancing the equities, and describing *Celera*'s circumstances as "unique," where the objecting stockholder had declined to participate in mediation.)

[35] J.A. at B74–75.

(20) IsZo reads *Wal-Mart* as "limit[ing] . . . courts' ability to certify non-opt-out classes where claims include monetary relief."[36] According to IsZo, "'where damages are at stake, the class-action device passes constitutional scrutiny only because putative class members can easily extricate themselves from the proceedings,' [and, thus,] the *de facto* absence of an opt-out raises constitutional uncertainty concerning *Celera*."[37] In our view, IsZo's characterization of *Wal-Mart*'s limitation on Rule 23(b)(2) class certification for monetary claims sweeps too broadly.

(21) The Court in *Wal-Mart* addressed a scenario that is materially different from *Celera*. In *Wal-Mart*, the named plaintiffs of a 1.5-million-member class action alleged that Wal-Mart engaged in sex discrimination by denying them equal pay or promotions.[38] The *Wal-Mart* plaintiffs sought injunctive and declaratory relief in addition to backpay.[39] The class was certified under Federal Rule of Civil Procedure 23(b)(2),[40] which "allows class treatment when 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'"[41]

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[36] Opening Br. at 23 (citing *Wal-Mart*, 564 U.S. at 360).
[37] *Id.* at 33 (quoting *N. Sound Cap. LLC v. Merck & Co., Inc.*, 938 F.3d 482, 492 (3d Cir. 2019)).
[38] *Wal-Mart*, 564 U.S. at 343.
[39] *Id.* at 342.
[40] *Id.* at 347.
[41] *Id.* at 360 (quoting Fed. R. Civ. P. 23(b)(2)).

(22) The Court held that the backpay claims could not be certified under Federal Rule of Civil Procedure 23(b)(2),[42] emphasizing, among other things, that subsection (b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."[43]

(23) According to the *Wal-Mart* Court, the plaintiffs' claims for backpay "entitled [the defendant] to individualized determinations of each [plaintiff's] eligibility for backpay."[44] The Court explained that

> [w]hen the plaintiff seeks individual relief such as . . . backpay after establishing a pattern or practice of discrimination, a district court must usually conduct additional proceedings . . . to determine the scope of individual relief. At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.[45]

Here, the breach-of-fiduciary-duty claims do not require an individualized determination of each stockholder's loss, unlike the *Wal-Mart* plaintiffs' claims for backpay. The challenged conduct was a single transaction at a single price. The injury is measured by the same shortfall on every share, and the recovery is a uniform per share amount. In a word, "the rights and interests of the class members are

[42] *Id.* at 360.
[43] *Id.* at 360–61.
[44] *Id.* at 366.
[45] *Id.* at 366–67 (cleaned up).

homogenous."[46] Under such circumstances, *Wal-Mart*'s reasoning does not dictate that objecting class members be afforded a right to opt out of the class.

(24) Likewise, we are satisfied that the faithful application of the *Celera* framework, as occurred in this case, affords objecting class members constitutionally sufficient due process. Due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[47] Here, IsZo received the full discovery record, briefed its objection, was heard at length, and had its request thoughtfully considered on the merits. In short, IsZo received the process it was due.

(25) IsZo argues in the alternative that the Court of Chancery erred when it determined that the circumstances in this case did not warrant a *Celera*-style opt out. IsZo likens itself to the objecting plaintiff in *Celera* and seeks "to opt out of the class in order to pursue its individual claims for monetary damages against the defendants."[48] But the opt out in *Celera* was granted under circumstances that are not present here.

(26) Here, the Court of Chancery found that the plaintiffs "vigorously pursued this litigation" and provided "ample explanation for their thinking, analysis, and strategy."[49] The court further found that, despite having access to the full

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[46] *In re Celera S'holder Litig.*, 59 A.3d 418, 433 (Del. 2012).
[47] *Nottingham Partners v. Dana*, 564 A.2d 1089, 1100 (Del. 1989) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)).
[48] *Celera*, 59 A.3d at 422.
[49] Opening Br. Ex. B at 21.

evidentiary record, IsZo "[did] not cite a single piece of documentary evidence that shows any of the theories [the] plaintiffs supposedly failed to develop."[50] In the court's view, IsZo's suggestion that the plaintiffs "left 'billions' on the table" would have required proving that Emisphere was worth several times more than any valuation the record would support.[51] Moreover, the court determined that the proposed settlement provided "a substantial monetary recovery, obtained after impressive efforts by class counsel, in a circumstance where no evidence suggests the representation was inadequate."[52] The Court of Chancery also considered that the an opt-out right would place the recovery at risk. Given these considerations, the Court of Chancery denied IsZo the right to an opt out. The record supports its decision. We therefore conclude that there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the Court of Chancery's Order and Final Judgment be AFFIRMED.

BY THE COURT:

/s/ Gary F. Traynor
Justice

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[50] *Id.*
[51] *Id.* at 22 ("IsZo's suggestion that plaintiffs left 'billions' on the table would require proving Emisphere was worth $8.5 billion – approximately three times MHR's initial demand, five times what MHR agreed to accept, and more than eight times Novo management's 'intrinsic base case valuation of [$1 billion].' As to this, IsZo has no meaningful response beyond speculation.").
[52] *Id.* at 23.