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Date Submitted: October 7, 2026
Date Decided: November 18, 2026

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Re: *Freiberg v. Xonar Technology Inc.*,
C.A. No. 2026-0093-KSJM

Dear Counsel:

Plaintiff Gregory Freiberg has moved for an award of attorneys' fees and expenses.[1] The motion is denied.

I assume readers' familiarity with this action and refer to the court's Post-Trial Memorandum Opinion, dated September 15, 2026, for a fuller recitation of the issues and procedural history.[2]

To briefly summarize, in January 2026, stockholders of Defendant Xonar Technology Inc. executed written consents to remove Freiberg from Xonar's board of directors. Freiberg filed this summary proceeding pursuant to 8 *Del. C.* § 225 to challenge his removal. Freiberg alleged that Xonar's capitalization table inaccurately reflected his common stock ownership, such that the written consents were not

[1] C.A. No. 2026-0093-KSJM, Docket 160 ("Pl.'s Fee Mot.").

[2] *Freiberg v. Xonar Tech. Inc.*, 2026 WL 2719136 (Del. Ch. Sept. 15, 2026) (the "*Post-Trial Opinion*").

executed by a majority of stockholders. Xonar then obtained additional written consents from stockholders Brian and Jeff McFadden (the "McFadden Consents").

In an effort to narrow the summary proceedings, Xonar stipulated solely for the purpose of the Section 225 dispute to accept Freiberg's allegations and version of the capitalization table with two exceptions. The first was whether the court may count the McFadden Consents toward Freiberg's removal. The second was what methodology the court should use to calculate Freiberg's share ownership. Freiberg acknowledged that he needed to win on both issues to prevail in this action.

I held a trial on the papers on July 10, 2026, and, on September 15, 2026, I issued the *Post-Trial Opinion*. On the first triable issue, I concluded that Freiberg failed to establish that the McFadden Consents should not count toward the total stockholder consents supporting his removal. Because Freiberg had to win on both triable issues to prevail, I did not reach the second triable issue. I held that Freiberg failed to establish that his removal from Xonar's board was improper.

Freiberg subsequently moved for attorneys' fees and expenses, citing the corporate benefit doctrine. In Freiberg's view, although he did not prevail, his "meritorious prosecution of this Section 225 action indisputably caused the curative action that remedied the relevant defective stockholder consent and thereby produced judicial certainty regarding the composition of Xonar's board of directors."[3]

[3] Pl.'s Fee Mot. ¶ 1.

In general, Delaware follows the "American Rule" and requires each party to pay its own attorneys' fees and expenses, regardless of the outcome.[4] Delaware law, however, recognizes equitable exceptions to the American Rule, including when a stockholder party produces a "corporate benefit."[5] Under this doctrine, a plaintiff is eligible to recover fees for a corporate benefit that moots a lawsuit where: "(1) the suit was meritorious when filed; (2) the action producing benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and (3) the resulting corporate benefit was causally related to the lawsuit."[6]

Freiberg is not entitled to fees under this standard. In attempting to show a corporate benefit, Freiberg's motion overstates the *Post-Trial Opinion*'s analysis. He asserts that his lawsuit "exposed" that Xonar's capitalization table was incorrect and that the original written consents were not effective when executed.[7] But the *Post-Trial Opinion* did not reach either of those conclusions. It specifically did not address the issue of how Xonar's capitalization table should have been calculated and, therefore, did not address whether the capitalization table was incorrect.[8] As to the

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[4] *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

[5] *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012).

[6] *Hollywood Firefighters' Pension Fund v. Malone*, 2021 WL 5179219, at *6 (Del. Ch. Nov. 8, 2021) (quoting *United Vanguard Fund, Inc. v. TakeCare, Inc.,* 693 A.2d 1076, 1079 (Del. 1997)).

[7] Pl.'s Fee Mot. ¶¶ 15–16.

[8] *Post-Trial Opinion*, 2026 WL 2719136, at *1 ("Because the plaintiff failed to prove one of the two critical issues, this post-trial decision does not reach the second" issue of how to calculate Freiberg's ownership.); *see also id.* at *8–9.

consents, the *Post-Trial Opinion* found they were "effective on January 27 *at the latest*."[9] The *Post-Trial Opinion* did not conclude definitively that the McFadden Consents were necessary to "cure a deficiency in a stockholder action that [Xonar] had been treating as valid," as Freiberg now argues.[10] It is thus not certain that Freiberg conferred any corporate benefit in the first place.

Further, the "decision as to whether to award attorney's fees is committed to the Court's discretion."[11] The "prerequisites to a fee award" under the corporate benefit doctrine are "necessary but not sufficient."[12] "The equitable nature of the remedy means that even if a litigant technically satisfies the requirements, the court may still decline to award fees and expenses."[13] "Put differently, there are circumstances where a litigant will have filed a meritorious action and played a causal role in creating a benefit . . . and yet still not be awarded fees and expenses for the effort."[14]

"When declining to award fees and expenses to a litigant who otherwise meets the requirements of the common benefit doctrine, Delaware courts have considered

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[9] *Id.* at *10–11 (emphasis added).

[10] Pl.'s Fee Mot. ¶ 18.

[11] *Frank v. Elgamal*, 2011 WL 3300344, at *3 (Del. Ch. July 28, 2011) (citing *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990)).

[12] *In re Orchard Enters., Inc. S'holder Litig.*, 2014 WL 4181912, at *3 (Del. Ch. Aug. 22, 2014).

[13] *Judy v. Preferred Commc'n Sys., Inc.*, 2016 WL 4992687, at *14 (Del. Ch. Sept. 19, 2016).

[14] *Orchard*, 2014 WL 4181912, at *3.

the potential for the litigant's interests to diverge from those that the litigant purported to benefit or represent," as well as "whether a fee award would serve public policy goals."[15] "Consistent with the purpose of the common benefit doctrine, a plaintiff lacks standing to seek and obtain a fee award if the litigant's primary purpose was to advance its personal interests."[16] Accordingly, in a Section 225 action, "the general rule" is that the benefit conferred "is typically to the individuals seeking to confirm their board seats and fees and expenses should ordinarily not be awarded."[17]

Keyser is instructive. There, the plaintiffs sought—and received—a declaration under Section 225 that a written consent validly elected them to the company's board of directors.[18] The plaintiffs also sought an award of their fees and costs, arguing that they achieved a benefit for the company.[19] The court agreed that the company benefited from the certainty of a judicial opinion stating who owned its shares and that its Series B share issuance was invalid.[20] The court reasoned,

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[15] *Judy*, 2016 WL 4992687, at *14 (citing *Orchard*, 2014 WL 4181912, at *10–11; *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 789 A.2d 1216, 1227, 1230–31 (Del. Ch. 2001), *aff'd sub nom. Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959 (Del. 2003); *Dunkin' Donuts*, 1990 WL 189120, at *9–10).

[16] *Id.* at *16.

[17] *CCSB Fin. Corp. v. Totta*, 302 A.3d 387, 406 (Del. 2023) (citing *Keyser v. Curtis*, 2012 WL 3115453 (Del. Ch. July 31, 2012), *aff'd on other grounds sub nom. Poliak v. Keyser*, 65 A.3d 617 (Del. 2013)).

[18] *Keyser*, 2012 WL 3115453, at *1.

[19] *Id.* at *19.

[20] *Id.*

however, that the plaintiffs who sued to vindicate their election to the board—and not the company—were "the principal beneficiaries" of the Section 225 action.[21] The court denied the plaintiffs' request for fees on this basis, although the court did award the plaintiffs costs because they were the prevailing party.[22]

Like the *Keyser* plaintiffs, "in bringing this action, [Freiberg] was principally motivated by a desire to benefit himself, not a desire to benefit [Xonar]."[23] That much is evident from Freiberg's litigation strategy: he aggressively pursued expansive discovery beyond the scope of this summary action and refused to stipulate to his own version of the capitalization table when Xonar offered to streamline proceedings. Like the *Keyser* plaintiffs, Freiberg sued in hopes of confirming his board seat. As the court observed in *Keyser*, "[t]here is nothing wrong with that, but it does not present the type of situation that calls out for an award of attorneys' fees."[24]

Freiberg's motion for an award of attorneys' fees is denied. Freiberg is not entitled to an award of his costs; he was not the prevailing party in this action.

Sincerely,

/s/ Kathaleen St. J. McCormick

Chancellor

cc: All counsel of record (by *File & ServeXpress*)

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[21] *Id.*

[22] *Id.*

[23] *See id.*

[24] *Id.*