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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KATTEN MUCHIN ROSENMAN LLP, Intervenor Below/Appellant, v. MARTHA S. SUTHERLAND as Trustee of the Martha S. Sutherland Revocable Trust dated August 18, 1976, Plaintiff Below/Appellee.	)	No. 151,2016 Court Below – Court of Chancery C.A. No. 2399-VCS

REPLY BRIEF OF INTERVENOR BELOW/APPELLANT

OF COUNSEL:
KATTEN MUCHIN ROSENMAN LLP
Ted S. Helwig, Esquire
Bonita L. Stone, Esquire
525 West Monroe Street
Chicago, Illinois 60661
(312) 902-5262

Filed: July 14, 2016

KLEHR HARRISON
HARVEY BRANZBURG LLP
David S. Eagle (DE Bar No. 3387)
Sean M. Brennecke (DE Bar No. 4686)
919 Market Street, Suite 1000
Wilmington, Delaware 19801
Telephone: (302) 552-5508
Facsimile: (302) 426-9193
deagle@klehr.com;
sbrennecke@klehr.com

Attorneys for Intervenor Katten Muchin Rosenman LLP

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PRELIMINARY STATEMENT

As demonstrated in Katten's Opening Brief on appeal,[1] the Court below imposed a new requirement on attorneys seeking to establish a charging lien in Delaware: proving a causal link between those specific invoices which remain unpaid and the judgment against which the lien is sought. There is no precedent in Delaware law for such requirement. Neither this Court in *Doroshow* nor the Chancery Court in the recent *Zutrau* case suggested any additional element of this nature. To the contrary, *Zutrau* described an attorney's charging lien in the broadest terms: "[an attorney's charging lien] is an equitable right to have costs advanced and attorney's fees secured by the judgment entered *in the suit wherein the costs were advanced and the fee earned*." *Zutrau v. Jansing*, 2014 WL 7013578, at *1 (Del. Ch. Dec. 8, 2014) (citation omitted) (emphasis added).

The only requirement mentioned in *Zutrau*—that the judgment arise in the same suit as the unpaid costs and fees—is consistent with *Doroshow* and the long-standing precedents in English law and equity upon which it is founded. If an attorney's bills have not been paid, she may seek a lien against a recovery obtained *in that case*, regardless of whether the client has paid for previous work deemed to

[1]All capitalized terms not otherwise defined herein shall have the meaning ascribed them in Appellant's Opening Brief (the "Opening Brief" or "Op. Br."). Ms. Sutherland's Answering Brief is cited to herein as "Answering Brief" or "Ans. Br."

have produced the recovery. Moreover, it is beyond question that Katten's efforts as Ms. Sutherland's law firm throughout the Derivative Action yielded the $275,000 Fee Award—despite Ms. Sutherland's eleventh-hour attempt to claim otherwise. All that Delaware law requires is a beneficial judgment, unpaid fees and costs, and that such beneficial judgment, together with the unpaid fees and costs, arise in the same case. As further demonstrated in Katten's Opening Brief, Ms. Sutherland's rule would produce results that are inequitable and contrary to sound policy.

In her Answering Brief, Ms. Sutherland provides no authority for re-defining an attorney's charging lien in Delaware. Instead, she contends (a) for the very first time that the former Katten attorney who argued Ms. Sutherland's Petition for an Award of Attorney's Fees and Litigation Expenses on April 1, 2014, rather than Katten itself—which represented her continuously for 7 years in the Derivative Litigation—achieved the Fee Award; (b) that Katten should not be entitled to a charging lien because it has already been paid "millions of dollars"; and (c) that certain cases discussing attorneys' charging liens in other jurisdictions allegedly supply the legal authority which Ms. Sutherland could not find in Delaware. None of these arguments has merit and the Court's judgment should be reversed.

ARGUMENT

I. Katten's Efforts Produced the Fee Award

Ms. Sutherland claims repeatedly in her Answering Brief that "[a]ttorney Stewart Kusper, from the Kusper Law Group, petitioned for and generated an attorney's fee award for Sutherland." (Ans. Br. 1, 7, 8) This is the first time Ms. Sutherland has ever entertained such argument, including in the proceedings below in her opposition to Katten's Motion to Intervene, her Answer to the Petition for a Charging Lien, and her opposition to Katten's Motion for Summary Judgment on its Petition for a Charging Lien. The notion that the attorney who drafted the papers and stood at the lectern in support of the Fee Petition *achieved* the beneficial result for Ms. Sutherland for charging lien purposes—as opposed to the law firm which did the substantive litigation work for 7 years—is not only unprecedented under Delaware law, but it defies logic. The Court should reject Ms. Sutherland's newly-minted argument for several reasons.

As an initial matter, the Chancery Court below clearly recognized that to the extent the Derivative Litigation conferred a benefit upon Ms. Sutherland, such benefit was owing to Katten's hard work and skill over an extended period of time:

> Other factors cited in favor of [Ms. Sutherland's] award are uncontested. She was assisted by experienced and sophisticated counsel [Katten] and did face challenging legal questions which her counsel skillfully navigated. The vigor with which Defendants mounted their defense created litigation risks, increased the complexity of the

> issues Martha confronted, and certainly raised the costs for all parties involved.

(A0151).

Moreover, in its February 26, 2016 Ruling, the Chancery Court agreed with Katten that the firm achieved the benefits for Ms. Sutherland embodied in the Fee Award (but denied Katten's petition for a charging lien on other grounds). As the Court held:

> These benefits were all achieved (adopted by the boards of the family companies) by 2007, *years before Katten's departure.* * * * In seeking an award of fees, Sutherland relied upon Katten's invoices which detailed its services performed for her and its expenses incurred in her behalf. *Indeed, in making an award to Sutherland, the Court relied upon Katten's invoices as sponsored by Sutherland.*

(A1067) (emphasis added).

Therefore, the Chancery Court's findings that Katten achieved the benefit for Ms. Sutherland in the Derivative Action were never challenged by Ms. Sutherland below, and no cross-appeal of the February 26, 2016 Ruling was filed. *See Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1060 (Del. 1986) (absent a cross-appeal, the appellee may not attack the judgment of the court below with a view to enlarging its own rights or lessening the rights of its adversary). For this reason alone, Ms. Sutherland's argument in her Answering Brief should be rejected.

In addition, Ms. Sutherland's contention that the lawyer who petitioned the Court for the Fee Award achieved the benefits, rather than the firm which conducted the underlying Derivative Action on her behalf, would produce an absurd and inequitable result. First, Mr. Kusper, who was a former Katten partner, did not argue in the Fee Petition that *he* achieved the benefits in the Derivative Action which entitled Ms. Sutherland to $1.4 million in fees, but that *Katten* achieved the benefits. Thus, Ms. Sutherland's proposed rule would run contrary to her own counsel's position below. (A1067).

Second, and more fundamentally, Ms. Sutherland's argument would necessarily limit the scope of an attorney's charging lien to the fees associated with the Fee Petition itself, as opposed to the fees incurred in the underlying litigation. Such a result would flatly contradict Delaware law and policy that a charging lien is "an equitable right to have costs advanced and attorney's fees secured by the judgment entered in the suit wherein the costs were advanced and the fee earned." *Zutrau*, 2014 WL 7013578, at *1 (citation omitted).

Accordingly, there can be no question that Katten achieved the benefit for Ms. Sutherland in this case.[2]

[2] Ms. Sutherland also argues that she "paid millions of dollars for Katten's services." (Ans. Br. 1, 5). However, the proper measure of an attorney's right to a charging lien is not the magnitude of fees charged by or paid to the attorney, but whether (a) the attorney's efforts produced a beneficial result and (b) fees are still owed in the same action. While Ms. Sutherland still appears to dispute such

II. There is No Requirement to Establish a Causal Link Between Katten's Unpaid Fees and Ms. Sutherland's Fee Award

As set forth in Katten's Opening Brief, this Court's opinion in *Doroshow* supports Katten's right to a charging lien:

> An attorney has a lien on the money recovered by his client for his bill of costs; if the money come to his hands, he may retain to the amount of the bill. * * * *If he apply to the court, they will prevent its being paid over till his demand is satisfied*.

Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc., 36 A.3d 336, 340 (Del. 2012) (quoting *Welsh v. Hole*, 1 Doug. (Eng.) 238, 99 Eng. Rep. 155) (emphasis added).

As the Court explained, "[c]ourts both of law and equity have now carried it so far, that [an attorney can] stop his client from receiving money recovered in a suit *in which he has been employed for him*, till his bill is paid." *Id*. (quoting *Wilkins v. Carmichael*, 1 Doug. (Engl.) 101, 105) (emphasis added). This Court further recognized that "[b]oth *Welsh* and *Wilkins* have been cited in Delaware cases and incorporated into our common law." *Id.* In short, Katten was employed

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matters as "the terms of Katten's engagement" and the "reasonableness" of Katten's fees (Ans. Br. 4), those issues were decided against her below and have been waived. (A1068) ("Sutherland has raised no issues of material fact as to Katten's contention that she owes the firm at least $275,000, the amount of the fee award. There may have been disagreements between Katten and Sutherland, but Sutherland has not offered a factual basis for concluding that she was 'overbilled' by an amount that would reduce the amount she owes below the fee award.").

by Sutherland in the Derivative Action; incurred fees and costs that are unpaid; and performed the work that resulted in the Fee Award.

In her Answering Brief, Sutherland asserts that selected passages from *Doroshow* somehow refute Katten's entitlement to a charging lien. First, Sutherland quotes from the Court's opinion that a charging lien is "'the right of an attorney at law to recover compensation for his services *from a fund recovered by his aid*, and also the right to be protected by the court to the end that such recovery might be effected.'" *Id.* at 340 (emphasis added in Ans. Br. 11) (quoting 2 Edward Mark Thornton, *A Treatise on Attorneys at Law* § 578 (1914)). However, there is nothing in the Court's statement to support the proposition advanced by Ms. Sutherland that, in addition to the law firm having performed services that aided in obtaining the recovery, the firm's unpaid invoices must specifically and causally relate to the recovery. In this case, as explained above and in the Chancery Court's ruling below, there can be no question that Katten's services aided in generating the Fee Award.

Similarly, Ms. Sutherland purports to rely on the Court's statement that "attorneys have a right to compensation for *funds recovered by their efforts*." *Id.* at 343 (emphasis added in Ans. Br. 11). Again, however, the Court's language does not address the distinction espoused by Ms. Sutherland between unpaid invoices versus paid invoices. Indeed, both of the above-quoted statements underscore

Katten's position that it is entitled to a charging lien because its efforts in connection with the § 220 litigation and the Special Litigation Committee process generated the Fee Award. *Doroshow* imposes no additional burden.

Finally, in order to manufacture the supposed distinction between unpaid invoices versus paid invoices that is nowhere to be found in *Doroshow* or elsewhere in Delaware law, Ms. Sutherland relies heavily on the following quotation: "Because Doroshow represented Acosta on a contingent fee basis, the law firm had not been compensated before its work produced the funds. Therefore, Doroshow was entitled to assert an attorney's charging lien against the settlement fund." *Id.* at 342. Ms. Sutherland seeks to extrapolate from this passage that since Katten was partially compensated under its hourly fee arrangement prior to the Fee Award, the firm is not entitled to assert a charging lien for the unpaid balance. (Ans. Br. 13.) This is a misreading of *Doroshow*.

It is quite clear from the context of the passage that the Court in *Doroshow*, after canvassing English precedent and Delaware authority and concluding that the law firm was entitled to a charging lien, was simply reciting a fact: that the firm's charging lien would attach to the settlement fund in the full amount of its fees because, given the contingent fee arrangement between the firm and its client, payment to the firm had not yet occurred. The Court defined *the amount* of the

lien based on the non-payment of fees to date—a proposition with which Katten entirely agrees.

In a contingency case like *Doroshow*, the law firm will be entitled to a charging lien against the settlement fund or verdict in the full amount of its fees, because no interim fee payments have been made by the client before the firm's efforts have reached fruition. As the opening words of the above-quoted passage make clear: "Because Doroshow represented Acosta on *a contingent fee basis*…." *Id.* (emphasis added). Ms. Sutherland fails to address this critical language in her Answering Brief. By contrast, in an hourly fee case like the present one, the client will typically make interim fee payments to the law firm before the beneficial outcome is achieved—as Ms. Sutherland did here prior to the Fee Award—thereby resulting in a dollar-for-dollar reduction of the lien amount.[3]

It would be reading far too much into *Doroshow*, however, to conclude that the Court was announcing a rule to be followed in all subsequent hourly fee cases: that the client's payment of invoices for services that are linked to the ultimate recovery, despite the existence of other unpaid invoices in the same case, operates as a *per se* bar to a charging lien. Had the Court intended to circumscribe the law

[3] In the present case, Katten's unpaid fees exceed the amount of the Fee Award. However, if the firm's fees in the Derivative Litigation net of payments made by Ms. Sutherland had been less than the Fee Award, then Katten's charging lien would be limited to the amount of its unpaid fees. No other conclusion may be drawn from the quoted language in *Doroshow*.

of charging liens in this manner, it would have done so explicitly. Rather, the above-quoted passage from *Doroshow* is wholly consistent with Katten's entitlement to a charging lien in this case. Like the law firm in *Doroshow*, Katten was not compensated in full before the July 2014 Fee Award. Therefore, Katten is entitled to assert a charging lien for the amount of its unpaid balance.

The post-*Doroshow* decision of the Chancery Court in *Zutrau*, which involved an hourly fee arrangement like the present case, is highly instructive. In that case, Ms. Zutrau sued her former employer and its CEO, alleging that her minority equity interest in the company was undervalued in connection with a reverse stock split. The company immediately offered Ms. Zutrau $495,779 for her shares, which she rejected. *Zutrau*, 2014 WL 7013578, at *2. Ms. Zutrau argued that since the law firm's efforts did not result in the company's initial offer, it could only assert a charging lien on the amount of her recovery *beyond* that sum. In framing the issue on the law firm's motion for a charging lien, the Vice Chancellor made a convincing case for construing the law broadly in hourly fee engagements:

> [The law firm's] fees were not contingent on the recovery and it would be owed the same amount of money whether Zutrau won or lost. It is no secret that litigation is expensive and that the costs of prosecution easily can exceed the recovery. Here, Zutrau was, and remains, obligated to pay [the law firm's] fees. That the cost of prosecution

> conceivably could exceed the recovery does not excuse Zutrau from paying those fees.

Id. at *2.

The Court granted the law firm's motion for a charging lien, but did not ultimately decide the issue of whether the lien applied to an hourly fee arrangement in which the firm had not produced the entire recovery. "I need not answer the question, seemingly one of first impression in Delaware, of whether [the law firm] could assert a charging lien in excess of the partial amount of the judgment that resulted from the law firm's efforts." *Id.* at *3.[4] However, the logic of the Court's analysis in *Zutrau* as applied to the hourly fee context, which Ms. Sutherland ignores in her Answering Brief, undermines her proposed rule that Katten's unpaid invoices must bear a causal link to the Fee Award.

Where, as here, there is no doubt that Katten's efforts generated the beneficial result, *Doroshow* and *Zutrau* provide even stronger support for the imposition of a charging lien in Katten's favor.

[4] Given that the Chancery Court in *Zutrau* perceived the question of whether the law firm's efforts contributed to all of the judgment to be an issue of first impression in Delaware, clearly the Court did not believe *Doroshow* previously held that the firm's unpaid bills must be causally related to its contribution to the judgment. That is because *Doroshow* does not stand for this proposition.

III. Ms. Sutherland's Rule Would Have Negative Effects Beyond the Confines of the Present Dispute

Katten pointed out in its Opening Brief (Op. Br. 17-19) that requiring attorneys to link their unpaid invoices to the contribution they provided to the outcome of the case, even when they unquestionably provided services in the same case that have not been paid, would create incentives and expand fee litigation in ways that are not consistent with sound policy. First, the rule would provide unscrupulous litigants with a stratagem to avoid the equitable remedy of a charging lien by paying down only those invoices which covered the "beneficial" services.[5] Second, the rule would needlessly expand and complicate attorneys' fee disputes—further draining the parties' and the Courts' resources—by generating sub-litigation over which unpaid invoices, and which time entries within such invoices, actually created the benefit for the client.

In response, Ms. Sutherland argues that "an attorney may move to withdraw from a case if a client chooses not to pay certain bills." (Ans. Br. 14.) This proposed solution, however, not only does not fix the problem of the open-invoice rule, but creates another equally unsound incentive: that attorneys who suspect that they may lose the benefits of a charging lien will be quick to withdraw from

[5] In the present case, if Ms. Sutherland had been awarded the full $1.4 million she sought in her Fee Petition, her law firm would have no recourse under her theory to the fund it created to satisfy her approximately $766,000 obligation in the Delaware Litigation.

their representations, rather than endeavoring to work with their clients as long as possible (as Katten did) and maintaining continuity in the litigation. These are outcomes that our State judicial system certainly does not wish to encourage.[6]

IV. Ms. Sutherland's Reliance on Case Law from Outside Delaware is Unavailing

Ms. Sutherland devotes five pages of her Answering Brief to the law of charging liens in other jurisdictions. (Ans. Br. 14-19.) All of the cases cited are inapposite and do not stand for the proposition she urges this Court to adopt and, even if they were relevant, are not binding on this Court.

Instead, the cases to which Ms. Sutherland cites stand for various propositions, including: that in Ohio an attorney's lien has priority over those of general creditors of the plaintiff (*Cohen v. Goldberger*, 141 N.E. 656 (Ohio 1923)); that in North Carolina an attorney discharged with or without cause can recover only the reasonable value of his services as of that date (*Covington v. Rhodes*, 247 S.E.2d 305 (N.C. Ct. App. 1978)); that in North Carolina no right to an attorney's charging lien exists when an attorney working pursuant to a contingent fee agreement withdraws prior to judgment being entered (*Mack v. Moore*, 418 S.E.2d

[6] *El Paso Nat. Gas Co. v. Amoco Prod. Co.*, 1994 WL 728816, at *6 (Del. Ch. Dec. 16, 1994) (cited at Ans. Br. 14), does not help Ms. Sutherland because it was decided under a Texas statute, did not involve an attorney's charging lien, and underscored the difficulty of allocating fees between claims. Similarly, the Court in *Dreisbach v. Walton*, 2014 WL 5436868, at *7 (Del. Super. Oct. 27, 2014) (Ans. Br. 14) did not attempt to parse the prevailing party's legal bills and agreed that the fees "cannot be determined with mathematical precision."

685 (N.C. Ct. App. 1992); that attorneys in North Carolina are not authorized to file a charging lien before a final judgment is entered (*Wilson v. Wilson*, 644 S.E.2d 379 (N.C. Ct. App. 2007)); that in Connecticut a valid charging lien is not dependent on the existence of a contingency fee agreement (*D'Urso v. Lyons*, 903 A.2d 697 (Conn. App. Ct. 2006)); that in Connecticut a charging lien relates back to the point in time at which the attorney began performing services (*Intercity Dev., LLC v. Rose*, 2010 WL 1006098 (Conn. Super. Ct. Feb. 11, 2010)); that in Connecticut a charging lien brought in relation to one matter cannot be used by the attorney to collect all outstanding fees from unrelated matters (*Butterworth & Scheck, Inc. v. Cristwood*, 1999 WL 549369 (Conn. Super. Ct. June 18, 1999)); and that in New Mexico an escrow account consisting of funds generated from the client's own resources regardless of which party wins the lawsuit does not constitute a valid recovery fund upon which an attorney's charging lien could be imposed (*Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc.*, 687 P.2d 91 (N.M. 1984)).[7]

[7] Ms. Sutherland cites to a Florida case, *Walther v. Ossinsky & Catchart, P.A.*, 112 So.3d 116, 117 (Fla. Dist. Ct. App. 2013) for the proposition that, in order for a charging lien to attach, "the services that secured the benefit must remain unpaid or disputed." (Ans. Br. 15). However, the Florida court's opinion does not contain such statement or indicate that the client's payment of beneficial services was at issue in the case. *Walther* is further distinguishable because, unlike here, the law firm did not allege that its services produced the fund for the client.

Ms. Sutherland has provided no authority for the restriction on attorneys' charging lien that she asks this Court to adopt as the law in Delaware. Accordingly, the judgment of the Court below should be reversed.

CONCLUSION

For the foregoing reasons and those set forth in the Opening Brief, the Chancery Court's judgment should be reversed. On remand, the Chancery Court should be instructed to place an attorney's charging lien in favor of Katten against the Fee Award in the amount of $275,000.

OF COUNSEL:
KATTEN MUCHIN ROSENMAN LLP
Ted S. Helwig, Esquire
Bonita L. Stone, Esquire
525 West Monroe Street
Chicago, Illinois 60661
(312) 902-5262

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KLEHR HARRISON HARVEY BRANZBURG LLP
/s/ David S. Eagle
David S. Eagle (DE Bar No. 3387)
Sean M. Brennecke (DE Bar No. 4686)
919 Market Street, Suite 1000
Wilmington, Delaware 19801
Telephone: (302) 552-5508
Facsimile: (302) 426-9193
deagle@klehr.com;
sbrennecke@klehr.com

Attorneys for Intervenor Katten Muchin Rosenman LLP