EFiled: Oct 07 2021 02:19PM EDT
Filing ID 66996304
Case Number 264,2021

IN THE

Supreme Court of the State of Delaware

SEAN J. GRIFFITH,

Objector Below-Appellant,

v.

SHIVA STEIN, derivatively on behalf of The Goldman Sachs Group, Inc., and individually as a stockholder of The Goldman Sachs Group, Inc.,

Plaintiff Below-Appellee, and

LLOYD C. BLANKFEIN, M. MICHELE BURNS, GARY D. COHN, MARK A. FLAHERTY, WILLIAM W. GEORGE, JAMES A. JOHNSON, ELLEN J. KULLMAN, LAKSHMI N. MITTAL, ADEBAYO O. OGUNLESI, PETER OPPENHEIMER, DEBORA L. SPAR, MARK E. TUCKER, DAVID A. VINIAR, MARK O. WINKELMAN, and THE GOLDMAN SACHS GROUP, INC.,

Defendants Below-Appellees.

No. 264, 2021

COURT BELOW:

COURT OF CHANCERY
OF THE STATE OF DELAWARE,
C.A. NO. 2017-0354-SG

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

The trial court approved a derivative settlement with a "forward-looking release" brokered by the nation's most itinerant intervenor in corporate affairs, Shiva Stein, plaintiff in over 170 stockholder lawsuits (and counting). She first tried to secure a zero-dollar settlement that prompted a rare stockholder objection and a denial from the Court of Chancery. Stein then collected a smattering of discovery and reached a second settlement without demanding disgorgement of supposedly excessive compensation from directors of The Goldman Sachs Group, Inc. ("Goldman"). Instead, Goldman agreed to lower future non-employee director compensation at sums still expected to exceed its U.S. peers. Stein offered a release including derivative claims that might later arise involving the amount of non-employee director compensation to be paid through the first quarter of 2024.

The trial court made two errors of law in approving this second settlement. First, Delaware does not permit settlements to release claims arising out of "operative facts that will occur in the future." *In re Philadelphia Stock Exchange, Inc.*, 945 A.2d 1123, 1146 (Del. 2008) (quotation omitted). Absent action by this Court, no Goldman stockholder will be able to challenge future compensation payments, no matter how justified by future events. Stein effectively sold litigation insurance to Goldman's directors offering more protection than this Court permits. Stockholder ratification of director compensation allows Delaware directors to invoke business judgment review. It does not, as this settlement does, allow them seek sanctions for contempt of a court order if a stockholder sues.

Second, the trial court approved the settlement without any findings on Stein's adequacy as a representative plaintiff, an "essential component" for settlement approval. *In re Infinity Broadcasting Corp. S'holders Litig.*, 802 A.2d 285, 290 (Del. 2002) (quotation omitted). The second settlement's lackluster consideration is unsurprising. In support of the first settlement (and a $575,000 fee), Stein insisted that disgorgement of past compensation provides no benefit to Goldman or its stockholders. And nonmonetary relief is a hallmark of Stein's litigation portfolio. As of the date of the settlement hearing, Objector's counsel was aware of no case among the scores that it has reviewed in which Stein's counsel were appointed lead plaintiff and Stein secured a monetary recovery. Despite compelling evidence that this settlement was secured by a plaintiff who prioritizes her many attorneys over her fellow stockholders, the trial court never addressed whether Goldman's absent stockholders were well represented by the unluckiest stockholder in the history of Delaware.

More broadly, this case presents the current nadir of a race-to-the-bottom by derivative plaintiffs leveraging *In re Investors Bancorp, Inc. Stockholder Litigation*, 177 A.3d 1208 (Del. 2017). *Investors Bancorp* limited a ratification defense concerning self-interested director compensation to votes that ratify specific awards and leave directors no further discretion. The *Investors Bancorp* plaintiffs eventually caused alleged wrongdoers to disgorge past compensation,[1] but subsequent litigants now employ the entire-fairness standard to convert lawsuits into ersatz negotiations over future salaries. The merits of these cases matter little: absent a procedural error, they always settle. Director defendants admit no wrongdoing, rarely disgorge compensation, and typically agree to lower future compensation. Plaintiffs offer increasingly expansive releases. Counsel receive six- or seven-figure fees.

These settlements are now commonplace, as plaintiffs who flooded this State's courts with meritless mergers-and-acquisitions lawsuits tack to new winds. But this case breaks new ground in post-*Investors Bancorp* giveaways. Unless this Court reverses approval of the settlement, it should expect this settlement's terms to become the new "market."

Finally, this appeal asks the Court to adopt a very narrow rule of law: that when a trial court considers a reasonable fee for an objector's counsel, it may not reduce the benefit conferred (the most important factor) because the trial court might have independently arrived at the same conclusion as the objector. Objector Sean J. Griffith was the only litigant to oppose the first settlement against two vigorous

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[1] *See Elburn v. Albanese*, 2020 WL 1929169, at *1 (Del. Ch. Apr. 21, 2020).

opponents. The trial court adopted his arguments, yet credited objector with only half of the result.

Once a trial court orders that notice be distributed, stockholders must assume that their rights are at risk. After all, a court that has recognized a flawed settlement can reject it before notice begins. Objectors will be unable to secure qualified, vigorous counsel if attorneys know that representation is a lose/lose proposition: they bear the cost of contingency representation when they lose and receive half credit if they win. Perversely, objectors will have more difficulty retaining counsel the stronger their case. Absent a reversal consistent with longstanding federal class action law, the result will be the under-litigation of valid stockholder objections.

Thus, this Court should protect Goldman's stockholders by reversing and remanding the trial court's final judgment approving the settlement, and it should encourage meritorious stockholder objections by reversing and remanding the order on Objector's fees.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by approving a settlement releasing claims arising out of unknowable future facts. Delaware law forbids settling parties from releasing claims that arise out of future operative facts or that are only tangentially related to the plaintiff's complaint. *See In re Philadelphia Stock Ex., Inc.*, 945 A.2d 1123, 1146 (Del. 2008). The settlement inappropriately releases claims based on future operative facts, some of which cannot now be anticipated. This includes claims against known non-parties, unknown future directors, and even claims based on unknown future events. Far from being necessary, as the trial court appears to have held, this represents a new, extreme form of post-*Investors Bancorp* settlement. To prevent such bargains from becoming "market," the settlement should be vacated and the case remanded for new proceedings.

2. The Court of Chancery erred by making no factual or legal findings concerning Stein's adequacy. Over Griffith's objections, the trial court declined to make *any* findings about Stein's adequacy as stockholder representative. Had the Court made the necessary findings, it would have been required to conclude that Stein is not an adequate representative. Among her flaws, Stein insisted that disgorgement—the most direct relief for excessive compensation—was of no measurable benefit to Goldman. This tainted negotiation of the settlement: Director Defendants understood that Stein posed no threat to their past remuneration. By

failing to make necessary legal and factual findings, the trial court condoned the actions of an inadequate and conflicted plaintiff. This error, too, requires reversal.

3. The Court of Chancery erred by crediting Objector with only half the benefit provided by his objection to the initial settlement. Objectors are key figures in representative litigation, without whose participation courts risk approving collusive or otherwise improper settlements. The sole Objector in this case identified fatal flaws in the first settlement, as the trial court agreed. And yet, the court discounted the benefit by half because it might have disapproved the initial settlement anyway. That legal error, left undisturbed, will deter objectors from contesting inadequate settlements. Indeed, this reasoning creates a perverse incentive for objector's counsel to reject clients with the strongest cases, as those clients hold positions likely to be found redundant. This Court should reverse the trial court's decision to protect the integrity of Delaware settlements and to ensure that Delaware law aligns with long-established federal authority crediting objectors even when a court believes it may have otherwise reached a similar result.

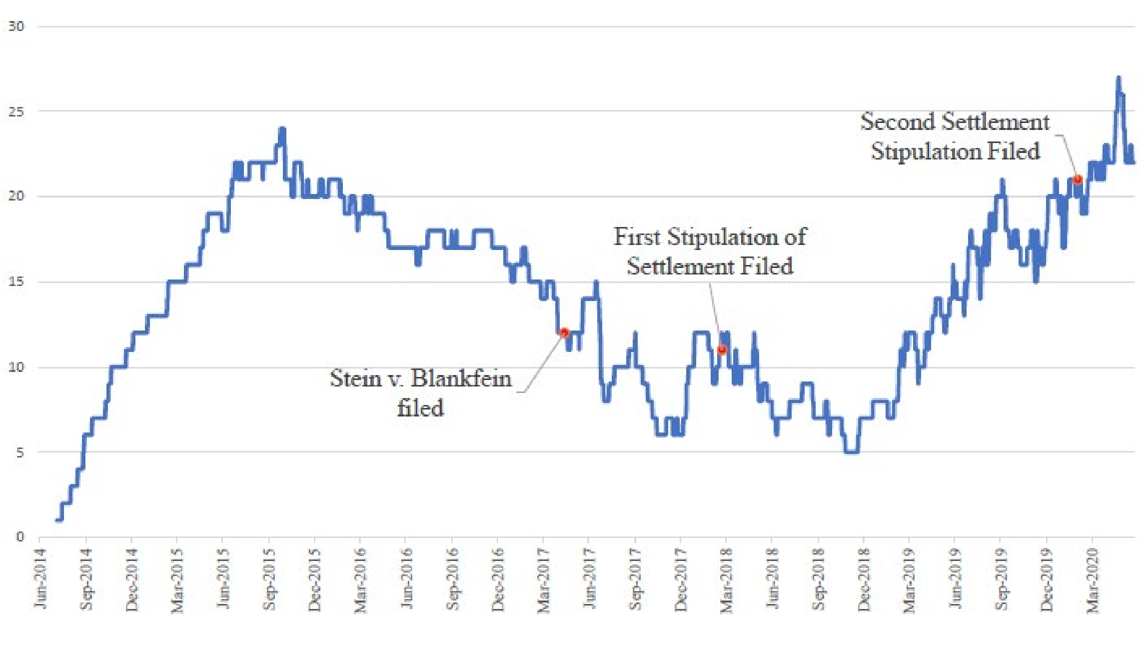
STATEMENT OF FACTS

An informed observer could have predicted that defendants would enjoy a generous settlement given that Stein led the case and a deal was almost inevitable after *Investors Bancorp*. Stein never seriously pursued her disgorgement remedy. Her first settlement translated M&A disclosure settlements into the compensation context. When that failed, she offered defendants insurance against future claims while still allowing them to remain atop the league table for compensation.

A. Stein's History of Zero-Dollar Lawsuits

Stein is almost certainly the most prolific stockholder plaintiff in this nation's history, having filed over 170 stockholder cases since 2014. A579–95. Her legal portfolio rivals a small law firm: while litigating this case, she simultaneously managed between five and twenty stockholder actions. A635.

Figure 1: Number of Active Cases Per Day (June 27, 2014 – June 19, 2020)



Stein purchased shares underlying most of these suits in June 2014, the same month she purchased Goldman stock. A522; A539. Her portfolio generates millions of dollars for her attorneys but rarely produces monetary recoveries. *See* Section II.C.3, *infra*. This track record bespeaks a litigant who prioritizes her counsels' welfare over that of stockholders. The general strategy is consistent with the case history here.

B. Stein's Initial Settlement Abandons Director Compensation as an Issue Too Small for "Economically Efficient Litigation."

Stein's complaint leveled four counts against the Director-Defendants, two derivative and two direct. A43–47. Count I alleged that certain of Goldman's non-employee directors (the "Director Defendants") received excessive remuneration between 2015 and 2017. A43–44. The complaint lacked any particularized allegations about state of mind and relied only on public information to show that Director Defendants' average annual compensation (approximately $605,000) exceeded that of Goldman's U.S. Peers between 2015 and 2016. A32–34. Count II alleged that because Goldman's stockholders approved earlier stock-incentive plans without information including, *inter alia*, disclosures related to Item 10(a)(1), these plans were void. A44–45. Count III derivatively asserted that the Goldman directors breached their fiduciary duties by issuing awards under the defective stock plan. A45–46. Finally, Count IV alleged that defendants harmed Goldman by making supposedly "partial, vague, and misleading disclosures and omissions concerning the tax deductibility of the cash-based incentive awards." A46–47.

Defendants moved to dismiss. A53. After *Investors Bancorp*, however, the parties commenced settlement negotiations. A53. Plaintiff took limited confirmatory document discovery and a non-party deposition, then settled. A53–54. This first settlement required no disgorgement of past compensation, but offered therapeutic benefits, like Goldman's agreement to continue existing compensation practices, and additional disclosures related to a new stock incentive plan in 2018. A63–65. The supposed crown-jewel of these disclosures concerned Item 10(a): Stein contended that without them, Goldman might be unable to deduct future equity-based compensation from its taxes. A112–13, 133–37. Defendants agreed to make Goldman pay Stein's counsel $575,000. A70. The Court of Chancery showed no sign of discomfort, approving a scheduling order and requiring distribution of stockholder notice. A84–95.

C. Griffith Objects to the Zero-Dollar Settlement, Which the Court of Chancery Rejects.

Griffith is a long-term investor in Goldman, having purchased 163 shares on March 3, 2016 at a total cost of $24,835.90. A599–600. He objected to the first settlement eleven days after Stein filed her opening brief. A96–158. This objection opposed the settlement's fairness, Stein's adequacy as representative of Goldman, and her otherwise unopposed fee request. A131–57. After requiring Griffith's counsel to meet an eleven-day expedited schedule, Stein immediately increased the cost of Griffith's objection by seeking an adjournment of the hearing due to a previously known illness of Stein's lead counsel. A161–67. While the trial court permitted a sur-reply to address Stein's new arguments (A170–71), the filing required more effort by Griffith's counsel.

In support of the settlement (and her attorneys' $575,000 fee), Stein stressed the immateriality of her non-employee director compensation claims. She insisted that "like in all such [non-employee director compensation] cases, the actual amounts are not terribly large in the sense that is required for economically efficient litigation." A211. Worse, concerning a disgorgement remedy, she maintained that "[i]f you were to recover the stock from the directors, it would not be of any measurable benefit to the company itself." A215. According to Stein, there were only two ways to address excessive director compensation: "One is to reduce the compensation going forward. The other is to fix it by fixing something else that's wrong. . . ." A218.

Only Griffith argued that Stein gave away "claims for which Goldman receives no consideration." A196 (quoting heading). He contended that "the Directors hope to achieve a release that includes derivative claims (largely concerning non-employee director compensation) in exchange for illusory therapeutic relief and Supplemental Disclosures that relate to Plaintiff's direct claims." A195. The trial court's subsequent opinion rejecting the first settlement echoed these words. *See* A288 ("The Director Defendants support a settlement that voids the derivative claims for damages *against them* . . . by agreeing to have *the Company* take or maintain future acts of corporate hygiene.").

D. The Court Awards Objector a Fee Reflecting Half the Benefit to Goldman.

The order also instructed the parties to "consult on an appropriate fee award to the Objector. . . ." A289. Unsurprisingly, given that objectors cannot give defendants any release of claims, no agreement was possible. In setting a contested fee, the trial court "credit[ed] the Objector with half of [the] fee avoidance" for preserving the $575,000 that Director Defendants agreed to make Goldman pay Plaintiff's counsel. Ex. A at 4. The Court found "an award of $100,000 to Objector's counsel to be equitable," along with $1,923.30 as costs. *Id.* at 5.

E. Stein Reaches a Second Settlement Without Disgorgement.

The Court of Chancery dismissed Counts II, III, and IV of the complaint, leaving only the non-employee director compensation claim. A464. Stein, rather than dismiss her claims, then took 766 pages of discovery, no further depositions, and reached a second settlement. A525, A479–520. Consistent with her earlier position, she did not seek to claw back past compensation. Instead, Goldman agreed to (a) reduce non-employee director compensation to $450,000 (or $475,000 for committee chairs) in 2021; (b) adopt similar compensation caps for 2021-2023 and part of 2024, to be approved in a new 2021 stock-incentive plan (the "2021 SIP"), subject to a stockholder vote; and (c) continue the governance practices in the first settlement. A499–502.

Stein, in turn, released her direct claims and derivative claims on behalf of Goldman stockholders. A502–503. The release encompassed claims arising out of "the amount of [Goldman's] non-employee director compensation to be paid or awarded pursuant to the 2021 SIP. . . ." A497–98.

Griffith objected to the fairness of the settlement and opposed a release of claims arising out of future events. A549–59. The 2021 SIP was not part of the record, and did not even seem to have been drafted when the Court of Chancery considered the settlement. A557. Griffith noted that Stein had, a few months earlier, participated in a settlement where lead counsel contended that a "release cannot, as a matter of Delaware law, reach future acts." A555. Yet she offered that bargain as lead plaintiff.

Griffith also objected to Stein's adequacy as a representative. A559–64. Among other things, he noted that Stein's settlement was brokered by a plaintiff who disavowed disgorgement as a benefit to Goldman or its stockholders. A560. Griffith suggested, based on precedent from former Chancellor Seitz, that the trial court could require defendants to disclose the pending action and give other qualified stockholders the opportunity to take over. A562–63, *quoting Hutchison v. Bernhard*, 220 A.2d 782, 784 (Del. Ch. 1965). Finally, Griffith opposed Plaintiff's $1.5 million fee and expense request. A564–77.

F. The Court of Chancery Approves the Second Settlement Without Making Findings on Adequacy.

The Court of Chancery approved the settlement in a bench ruling. Ex. C at 41-46. Concerning future claims, the court concluded that "the facts are determined here" because "the compensation sought shall be capped at an amount substantially below current compensation for next year and, if approved by the stockholders, going forward." Ex. C at 43.

As for Stein's representation, the Court held that settlement approval "obviate[d] the need to argue about Ms. Stein's fitness going forward. . . ." Ex. C at 45–46. The court made no findings about Stein's adequacy as stockholder representative. The final judgment merely states that "the Settlement is the result of arms'-length negotiations between experienced *counsel* fairly and adequately representing the interests of the respective Parties." Ex. E at 4. (emphasis added).

G. The Subsequent Fee Decisions

The bench ruling reserved decision on appropriate fees for Plaintiff and Objector's counsel. Ex. C at 46. After further briefing, the Court determined the $100,000 award to be "full compensation of the amount reasonable in equity to compensate Griffith and his counsel for the corporate benefit provided by their advocacy." Ex. D at 2–3. The same order awarded $612,500 to Plaintiff's counsel, including $50,000 for securing Goldman's agreement to continue exiting policies. *Id*. at 6, 7.

Thus, after four years, Stein's lawsuit achieved lopsided results. Director Defendants paid nothing for their supposed wrongdoing. Objector preserved claims that eventually led to an estimated $4.6 million recovery. *Id*. at 3. Stein then presented oral argument on a pending motion to dismiss and took 766 pages of discovery. Objector's counsel received $101,923.30 in fees and expenses. Stein's counsel received $612,500. Director Defendants remain more highly compensated than their peers. And unless reversed, this settlement will become the model for post-*Investors Bancorp* litigation.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY APPROVING AN OVERBROAD RELEASE.

A. Question Presented

Whether the trial court erred by approving a stockholder settlement that releases claims that are not based on the same identical factual predicate or the same set of operative facts as the underlying action. A554–59, A633–34, Ex. C. at 17–30, 39–40.

B. Scope of Review

Whether a trial court correctly applied law to fact concerning a settlement release is reviewed *de novo*. *In re Philadelphia Stock Ex., Inc.*, 945 A.2d 1123, 1145 (Del. 2008) (hereafter, "*PHLX*").

C. Merits of Argument

The settlement releases claims based on operative facts that were not, and could not have been, pursued in Stein's complaint. Her lawsuit challenged compensation paid to twelve specific directors between 2015 and 2017. A28–34. The settlement releases potential claims concerning compensation to be paid as late as 2024 to individuals that no one can yet name. This contravenes long-established Delaware law. Defendants propose an exception to the rule that settlements cannot release claims arising from operative facts that have yet to occur, but this Court has never recognized one. The Court should reverse approval of a settlement that exceeds legal boundaries as unfair, unreasonable, and inadequate as a matter of law and an abuse of discretion.

1. Challenges to Non-Employee Director Compensation Have Become Commonplace.

Investors Bancorp clarified Delaware law relating to non-employee director compensation. "When the directors submit their specific compensation decisions for approval by fully informed, uncoerced, and disinterested stockholders" defendants enjoy a ratification defense against subsequent stockholder lawsuits. *Investors Bancorp*, 177 A.3d at 1211. Absent ratification, self-interested equity awards are subject to entire fairness review. *Id*.

Delaware courts have long understood the entire fairness creates problematic incentives for plaintiffs' counsel. When directors' conduct cannot avoid this harsh standard, they rationally settle even weak cases for "not only the actual out-of-pocket costs of defense to get the case to the summary judgment stage, but the (real but harder to quantify) costs of managerial and directorial time in responding to discovery over a past transaction." *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 620 (Del. Ch. 2005). In recent years, Delaware law has adopted ratification to cleanse conflicted conduct. *See, e.g.*, *Investors Bancorp*, 177 A.3d at 1211; *In re MFW S'holders Litig.*, 88 A.3d 635, 644–46 (Del. 2014), *overruled on other grounds, Flood v. Synutra Int'l, Inc.,* 195 A.3d 754 (Del. 2018); *accord Corwin v. KKR Fin. Hldgs LLC*, 125 A.3d 304, 308–09 (Del. 2015). Without ratification, unavoidable entire fairness review leads to "ritualistic" litigation in pursuit of "substantial" plaintiff's fees, "especially when measured on an hourly basis and against the relative lack of risk that this kind of litigation entails." *Cox Commc'ns*, 879 A.2d at 621, 622.

Director compensation litigation is even more prone to ritualistic litigation than mergers-and-acquisitions lawsuits. There are fewer cases to guide corporate disclosures, and so directors can be less confident that a vote will be found to be fully informed. Thus, attempts to cleanse decisions through ratification *ex ante* may not deter lawsuits. And given the relatively minor damages compared to nine- or ten-figure *MFW*-style merger cases, it is easier for directors to settle and secure insurance against future lawsuits than litigate a vote's effectiveness.[2] The initial settlement here shows the problem: Stein alleged that Goldman's existing stock-incentive plans were invalid because the relevant proxies lacked data supposedly required under SEC regulation 17 C.F.R. § 240.14a-101, known as "Item 10(a)(1)." A34–37. The information involved is objectively trivial: in earlier proxies, Goldman disclosed its total number of "staff members," while Stein insisted that an effective

[2] This may explain why Delaware firms showed statistically significant abnormal negative returns following *Investors Bancorp*. *See* Dain C. Donelson, Elizabeth Tori & Christopher G. Yust, *The Effects of Independent Director Litigation Risk* at 23, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479341 (last updated Sept. 2, 2021) ("Overall, results are consistent with investors initially viewing *Investors Bancorp* as relatively bad news for the firms that it will most effect.")

stockholder vote required Goldman to subdivide "staff members" into "employees" (approximately 33,600) and "consultants or other service providers" (approximately 3,000). A187. Supposedly, this prevented ratification.

As presaged by *Cox Communications*, a series of risk-free lawsuits evolved. Stockholder plaintiffs sue Delaware directors whose compensation exceeds peer averages. Of course, "setting salaries above the peer average is not evidence of excessive compensation—if it were, half of all companies would be overcompensating their directors." A451–52. Still, plaintiffs surmount a "low pleading burden" with claims that are not "particularly strong" by relying on compensation league tables and some plaintiff-selected performance metrics. A452–53. As here, plaintiffs often skip books-and-records requests. Why ask questions that might find mitigating evidence?

Yet, absent procedural error, *every* post-*Investors Bancorp* challenge to non-employee director compensation resulted in a settlement and a counsel fee.[3] A601–02. This was true when Griffith challenged the settlement in this action, and it has

[3] Procedurally, one plaintiff lost standing after selling shares, and two complaints were dismissed on findings that the plaintiffs' presuit letters constituted stockholder demands. *See* A601–02; *see also Solak v. Welch*, 2019 WL 5588877 (Del. Ch. Oct. 30, 2019); *Dahle v. Pope.*, 2020 WL 504982 (Del. Ch. Jan. 31, 2020).

remained true since.[4] When a plaintiffs' firm serves a pleading, they can be confident of an eventual fee.

This repeat litigation comes largely comes from a small circle of law firms, often representing the same litigants.[5] In this context, well-policed boundaries are critical to prevent a race-to-the-bottom in post-*Investors Bancorp* settlements, where plaintiffs offer increasingly broad releases in exchange for generous fee awards. Unfortunately, that happened here. After Stein failed to engineer her first zero-dollar settlement, she offered Defendants a release encompassing unknown future conduct by presently unknowable parties. Unless corrected, this Court can expect such settlements to become "market."

2. Delaware Law Does Not Permit Settlements That Release Claims Based on Different Operative Facts from the Underlying Dispute.

"[T]he scope of a release of claims cannot be limitless, if only because of substantive due process concerns." *PHLX*, 945 A.2d at 1145. Delaware law only allows releases "based on the same identical factual predicate or the same set of

[4] In addition to the fifteen cases in the record (*see* A601–02), plaintiffs have filed at least five later non-employee director compensation cases in Delaware alone. *See Solak v. Starr*, 2020-0674-KJSM (filed Aug. 14, 2020) (ongoing); *Solak v. Sato*, 2020-0775-JTL (filed Sept. 10, 2020) (settlement approved, $300,000 fee awarded); *Schumacher v. Dukes*, 2020-1049-PAF (filed Dec. 11, 2020) (ongoing); *J&S Eppers 2005 Revocable Trust v. de Backer*, 2021-0084-PAF (filed Feb. 1, 2021) (settlement pending); *Zalvin v. Aguiar*, 2021-0395-JRS (filed May 7, 2021) (ongoing).

[5] Four of the twenty cases discussed in the previous footnote were brought by one plaintiff: John Solak.

operative facts as the underlying action." *Id*. at 1146 (internal quotation omitted). Consequently, a "release is overly broad if it releases claims based on a set of operative facts that will occur in the future. If the facts have not yet occurred, then they cannot possibly be the basis for the underlying action. . . ." *Id*., quoting *UniSuper, Ltd. v. News Corp.*, 898 A.2d 344, 347 (Del.Ch. 2006). A release is likewise overbroad if it releases claims based on a common set of tangential facts, rather than core facts. *Id*.

UniSuper, which this Court quoted extensively in *PHLX*, is directly on point. *Unisuper* refused to approve a settlement that released claims involving a rights plan set for a stockholder vote five months after the settlement hearing. 898 A.2d at 347–48. Chancellor Chandler noted that "no facts relating to the [rights plan] were alleged in the underlying action, much less were they part of the underlying action's operative facts." *Id*. at 348. Thus, the release was "overly broad in that it attempts to release claims arising from an event that has not yet happened. . . ." *Id*.

UniSuper made no "exception for future conduct arising out of, or contemplated by, the settlement itself." *Id*. *PHLX* does not directly quote this language, but it is consistent with *PHLX* and this Court should decline to adopt an exception here. To hold otherwise would allow parties to immunize future acts by incorporating future events in settlement documents.

Moreover, even if such an exception existed, the Second Settlement's release extends beyond matters required to execute the settlement itself. By its terms, Goldman must only promulgate a 2021 SIP, adopt certain total compensation caps, and put the plan to a vote. A499–500. It does not require Goldman to make future payments as such. To make the distinction clear, consider what would happen if, next year, a newly elected board decided not to pay $450,000 in compensation without revoking the 2021 SIP. Then current Goldman directors might sue to enforce their right to compensation, but neither Stein nor former directors could sue to require Goldman to make payments as part of the settlement. As explained in the next section, the release extends to claims involving compensation to be paid in the future. Those claims are not part of "executing" the settlement.

The trial court, at the parties' urging, nonetheless held "a forward-looking release" to be necessary because "the purpose of a settlement is to provide peace for the issues that are raised in the litigation." Ex. C at 42. Any supposed necessity is belied by the fact that Stein, less than three months before she offered the settlement to Goldman, participated in a similar settlement that did not offer the same comfort to Salesforce.com's directors. A555. In that case, her co-plaintiffs argued, over a stockholder objection and with Stein's silent acquiescence, that a "release cannot, as a matter of Delaware law, reach future acts." A555. If a forward-looking release was necessary for parties to achieve peace, the *Salesforce.com* settlement could not have happened.[6]

3. The Second Settlement Releases Claims Based on Future Conduct.

The trial court erred in finding that "the facts are determined" with regard to the claims in the release, limiting the operative facts to be "that the compensation sought shall be capped at an amount substantially below current compensation for next year and, if approved by the stockholders, going forward." Ex. C. at 43. The scope of the settlement's "Released Plaintiff Claims" extends much further, to all claims that:

> [A]ny other [Goldman] stockholder could have asserted *or could hereafter assert* against any of the Released Defendant Parties derivatively. . .
>
> . . .
>
> which now *or hereafter*, are based upon, arise out of, relate in any way to, or involve, directly or indirectly . . .
>
> the amount of [Goldman's] non-employee director compensation *to be paid or awarded* pursuant to the 2021 SIP as set forth in Paragraphs 2(b)-(d) of this Stipulation, excluding a claim that a non-employee director's service during the period when

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6 Throughout this litigation, Director Defendants have responded to this argument by noting that Griffith's *counsel*, on behalf of a different client, took a similar position in *Salesforce.com* as Defendants do here. *See, e.g.*, Ex. C. at 34 (referencing "the objection that Mr. Rickey's firm filed"); *id*. (discussing "the concern that Mr. Rickey had in *Salesforce*"). This is irrelevant: to the extent that *Salesforce.com* is persuasive precedent, it denied the objection.

> compensation was paid pursuant to the 2021 SIP served no corporate purpose whatsoever. . . .

A495–98 (emphasis added).

The settlement text resonates with terms invoking the unknown future: it encompasses potential claims that a stockholder may "hereafter assert" that "hereafter" involve the amount of compensation "to be paid or awarded" under the 2021 SIP. Operative facts that were not, and could not have been, included in Stein's complaint are easy to list. For instance, the settlement effectively releases derivative claims against future directors whose identities cannot be known, and even *known* non-parties like Drew Faust and Jan Tighe, directors who were board members when the 2021 SIP was approved. They are not directly defined as "Released Defendant Parties." A494–95. But Goldman, which is released, is an indispensable party to any derivative lawsuit against them. *See* A494; *Sternberg v. O'Neil*, 550 A.2d 1105, 1124 (Del. 1988), *abrogated on other grounds by Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016); 12B FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5908, Westlaw (last updated Sept. 2021) ("The corporation is not merely a formal party, but is an indispensable party to the action.").

Likewise, the settlement releases claims arising out of future events between now and 2024 that cannot be known. While infinite hypotheticals are possible, a few examples suffice.

- This Court reverses *Investors Bancorp*, eliminating a stockholder ratification defense. Alternatively, the General Assembly or the United States Congress accomplishes the same legislatively.
- Goldman's U.S. Peer compensation plummets to levels that make Goldman's compensation shockingly high.
- The United States Congress or the General Assembly change tax law, rendering Goldman's 2021-2024 director compensation disadvantageous to stockholders.
- Goldman is once again embroiled in international controversy like the 1Malaysia Development Berhad ("1MDB") scandal. A637–38. A foreign government maintains that Goldman's director compensation should be cut, but the directors refuse.[7]

A stockholder challenge based on any of these facts would fail, no matter how legally viable, because relief would necessarily "involve, directly or indirectly . . . the amount of [Goldman's] non-employee director compensation to be paid or awarded pursuant to the 2021 SIP. . . ." A495–98. Defendants did not have to seek, and Stein certainly did not have to permit, such expansive immunity, up to and including contempt sanctions against future potential plaintiffs.

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[7] Notably, the Goldman board determined it appropriate, as a result of the 1MDB scandal, that "compensation for certain past and current members of senior management be impacted." A637–38.

If the parties had wished to limit the release to the decision to approve the settlement or set certain compensation limits they could have done so. Or they could have amended the release "to limit its scope to claims that were or could have been asserted through the date of the settlement hearing," as the Court of Chancery found compatible with *PHLX* in an earlier settlement. *See* A556, citing *In re Medley Capital Corp. S'holders Litig*, C.A. No. 2019-0100-KSJM at 38–39 (Del. Ch. Nov. 19, 2019) (TRANSCRIPT). Either option constrains the release to parties and causes of action knowable in 2020. The need to go further than *Salesforce.com* stems from Stein's willingness to permit Goldman's future compensation to exceed its peers, raising the risk of a viable future lawsuit. As Stein's counsel admitted at the settlement hearing with regard to peer compensation, "there's no telling what's going to happen over the next five years." Ex. C at 50.

Through the settlement, Stein offered more than protection from her claims. She offered insurance against unknowable future events. That insurance is not permissible under *PHLX* and requires reversal.

4. The Second Settlement Exceeds *Investors Bancorp*'s Protections.

These examples contradict Director Defendants' contention that the release "merely mirror[s] the protections that [Goldman's] directors will receive under *Investors Bancorp*. . . ." A622. *Investors Bancorp* does not bar stockholder lawsuits. Instead, it gives corporate directors the benefit of business judgment deference. *See* 177 A.3d at 1211. If Director Defendants were correct, the release would be redundant.

Instead, the settlement threatens stockholders with serious consequences. In the examples above (or innumerable unforeseen future possibilities), a stockholder may still bring an action consistent with Delaware law and legal ethics, and could even challenge Director Defendants' compensation by offering a "nonfrivolous argument for the . . . reversal of" *Investors Bancorp* itself. Ct. Ch. R. 11(b)(2). Under the settlement, however, a stockholder faces sanctions, no matter how meritorious the lawsuit, for defying a court injunction. Ex. E at 10. *Investor Bancorp* offers no similar relief.

Nor does the settlement track *Investors Bancorp*: the waste carve-out is too narrow. When Defendants wished to broadly release waste claims, they used straightforward language: "waste of corporate assets." A496. One page later, purportedly to replicate *Investors Bancorp's* waste exception, Defendants instead specify "a claim that a non-employee director's service during the period when compensation was paid pursuant to the 2021 SIP *served no corporate purpose whatsoever*. . . ." A497–98 (emphasis added). Rather than the standard, this language describes an extreme example of a waste claim. *See, e.g.*, *White v. Panic*, 783 A.2d 543, 554 (Del. 2001) ("[F]or example, where the challenged transaction served no corporate purpose or where the corporation received no consideration at all."); *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000) ("Most often the claim is associated with a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received." (quoting *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997))).

Delaware's waste standard is strict, but it is comparative, not absolute. A transaction constitutes waste if it is "so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid." *Feuer ex. rel. CBS Corp. v. Redstone*, 2018 WL 1870074, at *10 (Del. Ch. Apr. 19, 2018), quoting *Grobot v. Perot*, 539 A.2d 180, 189 (Del. 1988), *rev'd on other grounds*, *Brehm*, 746 A.2d 244. The settlement's language likely responds to *Feuer*, which sustained a waste claim where compensation was paid in recognition of a director's past services (and thus of some, though small, corporate purpose). *Feuer*, 2018 WL 1877074, at *16. Otherwise, the Parties could have repeated language they used one page earlier.

The trial court erroneously considered this distinction "of no moment" because the parties supposedly made clear that "what they're attempting to do is import the Delaware waste standard" and that, consequently, a "judicial estoppel would arise" if Defendants later tried to apply their more restrictive definition of "waste." Ex. C at 43–44. Even assuming this were a permissible way to fashion a settlement—stockholders will have no notice of any estoppel without scrutinizing the hearing transcript—it is incorrect, or at least legally dubious. "Judicial estoppel applies when a litigant's position contradicts another position that the litigant previously took and that the Court was successfully induced to adopt in a judicial ruling." *Motors Liquidation Co. DIP Lenders Tr. v. Allstate Ins. Co.*, 191 A.3d 1109 (Del. 2018) (TABLE) (internal quotation omitted). As noted above, the release effectively eliminates derivative claims against unnamed parties through its application to Goldman. But it is unclear whether parties never named in this action would be estopped from taking a position raised by others.

Defendants did not need to contort the definition of waste to secure *Investors Bancorp*'s protections. Simply submitting the 2021 SIP for approval, without mentioning it in the stipulation, would have sufficed. Defendants bargained for, and Stein acquiesced to, greater protection.

5. Reversal is Necessary to Prevent Overbroad Releases from Becoming "Market."

That the settlement not only pushes but exceeds the envelope is unsurprising. Challenges to non-employee director compensation are now endemic in Delaware, and the parties to this action are repeat players. Corporate defendants will always seek "a release to the broadest extent possible under law." *PHLX*, 945 A.2d at 1137. Plaintiffs like Stein will sell settlement insurance, just as they sold "deal insurance" in mergers-and-acquisitions cases. *In re Trulia, Inc. S'holders Litig.*, 129 A.3d 884, 892 (Del. Ch. 2016). Thus, it is critical that this Court police the "broadest extent" acceptable under Delaware law.

Absent reversal, corporate defendants will insist on similar releases going forward, in non-employee director compensation cases and others. This will undermine not only the rationale of *PHLX*, but the policy underlying *Investors Bancorp*. Consider the incentives confronting Delaware directors yet to be sued who currently receive rewards at the top of their league table. Why moot the question with a vote on a revised incentive plan? Doing so abandons a bargaining chip that plaintiffs like Stein will exchange for both a pass on disgorgement of past compensation *and* insurance against unforeseen future liabilities. The incentive to adopt the reforms contemplated in *Investors Bancorp* will be weakest in the firms that need it most.

Meanwhile, this case presents an ideal vehicle to reaffirm *PHLX* and the boundaries of an appropriate release. If this settlement secured disgorgement of past compensation, reversal might cost something. Because it includes no recovery of past compensation, that risk disappears. The 2020 compensation has already been paid, and Goldman's stockholders have approved the 2021 SIP, which is not contingent on this appeal. At worst, Goldman might discontinue therapeutic compensation practices like the use of a compensation consultant. But Goldman adopted these practices before Stein filed her suit, and there is no sign of an intent to terminate them. This "benefit" was always illusory. No consideration will flow back to Goldman's directors if the settlement is reversed, so a decision consistent with Delaware law and good policy will cost Goldman's stockholders nothing.

The Court should emphasize the bright line in *PHLX*, forbidding plaintiffs from releasing claims that were not, and could not have been, part of an operative complaint. For this reason alone, the judgment should be reversed and the case remanded.

II. THE COURT OF CHANCERY ERRED BY APPROVING THE SETTLMENT WITHOUT FINDINGS CONCERNING PLAINTIFF'S ADEQUACY.

A. Question Presented

Whether the Court of Chancery erred by omitting an essential component of the settlement approval process: findings as to the adequacy of a plaintiff's representation. A148–52, A199-202, A559–64, A635.

B. Scope of Review

Whether a trial court improperly fails to inquire into or determine the adequacy of a representative plaintiff is reviewed *de novo*. *PHLX*, 945 A.2d at 1143. Findings of fact are reviewed to determine whether they are supported by the record and a product of an orderly and logical reasoning process. *Id*.

C. Merits of Argument

The requirement of adequate stockholder representation is "required by Court of Chancery Rule 23(a)(4) and implied in Rule 23.1." *In re Infinity Broadcasting Corp. S'holders Litig.*, 802 A.2d 285, 290–91 (Del. 2002), citing *Goodrich v. E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1045 (Del. 1996). Griffith contested Stein's adequacy in both objections. A148–52, A199-202, A559–64, A635. Yet the trial court said nothing about Stein's fitness as plaintiff, and certainly made no factual or legal findings sufficient for review. This omission requires reversal as a matter of law.

1. A Representative's Adequacy is an Essential Element of Derivative Settlement Approval.

A determination of Stein's adequacy was "an 'essential component' of the settlement approval process. . . ." *Infinity Broadcasting*, 802 A.2d at 290–91 (quotation omitted). The question has a constitutional and a practical dimension: adequate representation is required as a matter of due process and necessary for a derivative settlement to preclude later collateral attacks. *See Cal. State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 850–51 (Del. 2018).

Stein avoided the stockholder protections in the class-action rules by pleading class-based claims individually. "*[I]n every class action settlement*, the Court of Chancery is required to make an explicit determination on the record of the propriety of the class action," including adequacy of representation. *Prezant v. De Angelis*, 636 A.2d 915, 925 (Del. 1994) (emphasis in original). The determination is critical because "if, in fact, there was no adequate class representative, the entire settlement process was tainted." *Id*. This Court explicitly rejected the idea that settlement approval constitutes "implicit determination" of a named plaintiff's adequacy. *Id*. at 924. Instead, every settlement must rest on explicit findings concerning adequacy, and when a "settlement is challenged as not complying with one of the Rule 23 requirements, the Court of Chancery *shall articulate on the record its findings*" regarding adequacy of representation "in order to facilitate possible appellate review." *Id*. at 925 (emphasis added).

Stockholder plaintiffs should not be permitted to circumvent *Prezant*'s protections by filing individual claims, especially when they seek class-based fees for counsel. Count II and IV of Stein's complaint were class claims in all but name: they sought relief, including a new stockholder vote, on behalf of all stockholders. Asserting claims individually merely allowed circumvention of Rule 23. As for derivative claims, *Infinity Broadcasting* effectively resolved whether an adequacy analysis is required in derivative actions.

2. The Court of Chancery Made No Findings Concerning Stein's Adequacy.

Griffith challenged Stein's adequacy in both objections. Yet the trial court never made *any* factual or legal findings concerning Stein herself:

1. Because the trial court agreed with Griffith that the first settlement was not fair, it never reached his adequacy arguments. A278–89.
2. Director Defendants did not raise adequacy as a ground for dismissal, so the motion to dismiss contains no relevant findings. A431–63.
3. The bench ruling on the second settlement contains no relevant findings. Ex. C at 41–46. It merely held that settlement approval "obviates the need to argue about Ms. Stein's fitness going forward, I think." *Id* at 45.
4. The final judgment says only that the Settlement was "the result of arms'-length negotiations between experienced *counsel* fairly and

> adequately representing the interests of the respective Parties." Ex. E at 4 (emphasis added). It says nothing about Stein herself. (Notably, because Stein did not bring her claim as a class action, Goldman's absent stockholders do not themselves fall within the definition of "Parties" who received representation. A479–80.)

This silence distinguishes this appeal from *PHLX*, which upheld a challenge to a class plaintiff's adequacy based on a provisional class certification. *PHLX*, 945 A.2d at 1144. Stein's individual causes of action never triggered that determination.

3. Stein is an Inadequate Plaintiff.

The trial court's error was not harmless. Both Stein's specific tactics and her general track record of sue-and-settle litigation render her unfit to represent Goldman or its stockholders.

Delaware law recognizes that "an adequate representative, vigorously prosecuting an action without conflict and bargaining at arms-length, may present different facts and a different settlement proposal to the court than would an inadequate representative." *Prezant*, 636 A.2d at 925, citing *Dierks v. Thompson*, 414 F.2d 453, 456 (1st Cir. 1969). Here, Stein's position as plaintiff ensured that Director Defendants never faced a serious threat to their past compensation. Stein believes that disgorgement of past compensation "has no beneficial effect on the company at all." A267. She maintained that Item 10(a) claims, which supposedly provided $1.4 billion in value to Goldman's stockholders, were the heart of her case. A220–21. Potential damages from director compensation were, she maintained, "not terribly large in the sense that is required for economically efficient litigation." A211. Her second settlement reflects her assessment of efficiency: after the trial court denied the motion to dismiss, she received only 766 pages of discovery and took no further depositions before settling. A525.

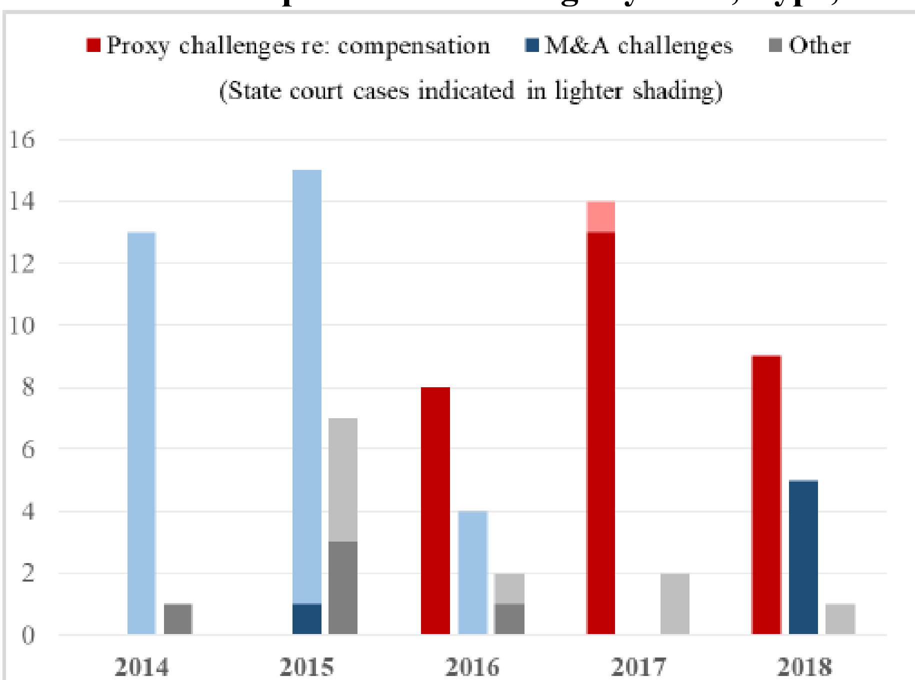
Goldman's stockholders would almost certainly disagree as to whether disgorgement (and resulting non-dilution) is a benefit. And "[u]nless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs." *Prezant*, 636 A.2d at 924, quoting *Nat'l Ass'n of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340, 46 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

Stein's litigation portfolio, however, shows an overwhelming preference for nonmonetary relief. She is almost certainly the most prolific stockholder plaintiff in history, having filed over 170 cases across the country as of mid-2020.[8] A579–95.

[8] Stein's litigiousness continues unabated. Recently, she filed four complaints in three separate jurisdictions in a single day, May 5, 2021. *See Stein v. Liang*, 3:21-cv-03357 (N.D. Cal.); *Stein v. Support.com, Inc.*, 1:21-cv-00650 (D. Del.); *Stein v. Loral Space & Commc'ns, Inc.*, 1:21-cv-04018 (S.D.N.Y.); *Stein v. Nuance Commc'ns, Inc.*, 1:21-cv-04034 (S.D.N.Y.).

In 2016, following a crackdown on disclosure settlements, Stein drifted away from M&A cases towards proxy challenges concerning compensation.[9] *See* Figure 2, *infra* (A122). In either scenario, Stein's involvement rarely heralds a monetary recovery. Griffith's counsel could not find a single settlement (before this one) in which (a) Stein's counsel were appointed to leadership and (b) stockholders received monetary consideration.

Figure 2: Plaintiff's Representative Filings by Year, Type, and Forum



By pursuing individual federal actions, Stein circumvents the Private Securities Litigation Reform Act's limitations on "professional plaintiffs." *See* 15 U.S.C. § 78u-4(a)(3)(B)(vi) (restricting "professional plaintiffs" to leadership in more than five securities class actions in any three-year period). And the record may

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[9] Figure 2 includes only the cases filed before Griffith's first objection.

understate her litigiousness: she has attempted to avoid scrutiny in non-employee director cases by privately demanding attorney's fees from companies, without filing a lawsuit, after seeking supplemental disclosures. A596–98.

Griffith raised other concerns with Stein's adequacy, including her misrepresentation of Delaware law in sister courts when advocating for disclosure settlements. A561, A605. And yet the record contains no factual findings or legal conclusions about Stein's adequacy as a representative stockholder.

Such findings are critical in a post-*Investors Bancorp* world, where derivative lawsuits have a 100-percent settlement rate so long as plaintiffs make no procedural errors. A601–02. In this context, stockholder value is hammered out at the settlement table. Adequate representation ensures that this process is not "tainted." *Prezant*, 636 A.2d at 925.

The first inadequate settlement was sufficient indication of taint as to warrant a factual finding. *Cf. In re Walgreen Co. S'holder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016) ("A class representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain [no benefit] . . . is not adequately protecting the class members' interests." (quotation omitted)). The Court can take no assurance that the second settlement is not similarly tainted, particularly given the overbroad release. *Infinity Broadcasting* should have made clear that factual findings are as necessary in the derivative context as they are in class actions. But even if it were not, the record lacks detail sufficient for meaningful appellate review. Reversal and remand is required so that the trial court may make findings essential to the protection of Goldman's stockholders and the viability of the settlement against collateral attack.

III. THE COURT OF CHANCERY ERRED BY REDUCING AN OBJECTOR'S FEE BASED BECAUSE IT REACHED THE SAME CONCLUSION.

A. Questions Presented

Whether this Court should, consistent with long-standing federal law, disallow fee penalties to objectors because a reviewing court might have independently reached the same result? A295–96, A471–72.

B. Scope of Review

Fee awards are reviewed for abuse of discretion, but the legal principles applied in reaching a fee award decision are reviewed *de novo*. *Alaska Elec. Pen. Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010).

C. Merits of Argument

The public policy underlying attorneys' fees is to "encourage wholesome levels of litigation." *In re Xoom Corp. S'holder Litig.*, 2016 WL 4146425, at *5 (Del. Ch. Aug. 4, 2016). Fee awards compensate contingency counsel for "lost opportunity cost[,] … the risks associated with the litigation, and a premium." *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *12 (Del. Ch. Aug. 30, 2007). To be sure, this Court allows trial courts considerable discretion in setting fees. *See Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980). The award in this case, however, rests on the conclusion that the objection—which undeniably presented the only arguments against the first settlement—was unnecessary to protect stockholder rights. Consequently, the trial court credited Objector with only one-half of the benefit to Goldman stockholders.

Objector asks this Court to adopt a narrow rule of law applied in other jurisdictions: that in setting fees on a shareholder objection, a court may not reduce the benefit conferred (the most important factor) because it might have arrived at the same conclusion independently. The decision leaves objectors facing a one-way ratchet that reduces their counsel's fees when their objections are strongest. The result will be fewer, weaker, objections in representative actions. That is precisely the opposite of the incentives this Court should create.

1. The Court of Chancery Improperly Credited Objector with Only Half the Value of Avoiding the $575,000 Fee that Defendants Agreed to Pay Stein.

One thing is undeniable: Objector provided the first and *only* arguments against the first settlement. The briefs and opinions below show the importance of his intervention. Griffith argued that:

> Directors hope to achieve a release that includes derivative claims (largely concerning non-employee director compensation) in exchange for illusory therapeutic relief and Supplemental Disclosures that relate to Plaintiff's direct claims.

A195. The Court echoed this conclusion:

> The Director Defendants support a settlement that voids the derivative claims for damages *against them* . . . by agreeing to have *the Company* take or maintain future acts of corporate hygiene.

A228. Both Stein and Directors Defendants argued vociferously for their unfair settlement, although Director Defendants later admitted that Objector corrected this "mistake." A421, A426. Without Objector's work, no one would have presented the key arguments against the first settlement.

Despite agreeing that the settlement was improper, and relying on the Objector's arguments to reach that conclusion, the trial court nonetheless credited Objector with only half of the benefit that Objector created:

> With respect to the first amount, if I attribute the entire avoided fee request to the Objector's actions and consider a one-third contingency fee, that would imply, at most, a fee of $192,000. That would be the outer limit of the equitable fee in that regard. If I credit the Objector with half of that fee avoidance, which I find reasonable, that maximum amount drops somewhat below $100,000.

Ex. A at 4. Assigning half credit transformed Objector's legal victory into economic defeat for his counsel, who dedicated $156,850.00 in litigation time against multiple, well-funded adversaries. A297. In short, the Court of Chancery (a) heard Objector's arguments; (b) *agreed* with Objector over the parties' vigorous opposition; but then (c) failed to give Objector full credit because the Court might have reached the same conclusion without Objector's participation.

To counsel's knowledge, that rule has *never* before been adopted in Delaware representative litigation to reduce an objector's compensation. Notably, the trial court credited Plaintiff with the entire benefit created by the second settlement, though that benefit also exists only because the trial court rejected Stein's first effort. Ex. D at 3–4. If sustained, the opinion will prevent objecting stockholders from retaining experienced counsel, however meritorious their objection.

2. Objections Provide Significant Benefits in Representative Litigation.

The Court of Chancery's ruling speaks softly but carries a big stick for Delaware stockholders. Objectors are vital to a well-functioning representative litigation system. Class actions and shareholder suits can be useful tools to protect stakeholder interests, but when every case leads to settlement, courts "rarely receive[] any submissions expressing an opposing viewpoint." *Trulia,* 129 A.3d at 893. "[L]egally assisted objectors are rare." *In re Caremark Intern. Inc. Deriv. Litig.*, 698 A.2d 959, 961 (Del. Ch. 1996). They remain rare despite persistent warnings from litigants that, if encouraged, "'professional' objectors with nefarious strike-suit motives will pop up like mushrooms after a two-day rain." *In re Riverbed Tech., Inc. S'holders Litig.*, 2015 WL 5458041, at *2 (Del. Ch. Sept. 17, 2015).

The truth is the opposite: more adversarial advocates for Delaware stockholders would benefit this State's corporations and its law. One need look no further than the M&A settlements that for a decade produced "nothing of substance" for Delaware stockholders, prompting *Trulia*. *See KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, n. 97 (Del. 2019). As the Court of Chancery predicted, stockholders like Stein responded to *Trulia* by leaving this State's courts. *See Trulia*, 129 A.3d at 899; Jessica Erickson, *The Lost Lessons of Shareholder Derivative Suits*, 77 WASH. & LEE L. REV. 1131, 1157 (2019) (noting that 91% of deals in 2018 were challenged in federal court rather than Delaware); Figure 2, *supra*. Yet a full six years after *Trulia*, Objector remains unaware of any court that has adopted the *Trulia* standard without an objector first introducing the case in that jurisdiction. *See, e.g.*, *Walgreen*, 832 F.3d at 725 (adopting *Trulia* following stockholder objection); *Griffith v. Quality Dist., Inc.*, 307 So. 3d 791, 799–800 (Fla. 1DCA 2018) (same). Even unsuccessful objections have changed the course of Delaware law: this Court's footnote in *Isaacson v. Niedermayer* prompted the Court of Chancery to give greater scrutiny to incentive awards. *See* 200 A.3d 1205, n. 1 (Del. 2018) (TABLE); Charles R. Korsmo & Minor Meyers, *Lead Plaintiff Incentives in Aggregate Litigation*, 72 Vand. L. Rev. 1923, 1941–42 (2019) (describing post-*Isaacson* scrutiny of an incentive award).

Timely and well-reasoned objections have also benefitted representative litigation in other jurisdictions. Due to an objection, incentive awards are currently unavailable in 11th Circuit. *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1260–61 (2020) (en banc review pending). Other examples of objectors providing significant positive benefits abound. *See, e.g In re Bluetooth Headset Prod. Liab. Litig.*, 2012 WL 6869641, at *10 (C.D. Cal. July 31, 2012) (reducing counsel's fee award by 75% after objection because fee resulted from a collusive agreement);

Eubank v. Pella, 753 F.3d 718, 728 (7th Cir. 2014) (overturning settlement, based on objectors' argument, previously approved by district court despite "almost every danger sign").

In short, Objectors "have played a crucial role in keeping all the players honest." Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 440-41 (1999). Reversal will preserve that important role for future Delaware litigation.

3. This Court Should Encourage Adversarial Review of Settlements by Preventing Unjustified Reductions of Fees.

Objectors who raise strong arguments reflected in the Court's ultimate settlement decision should be truly compensated for the full value of those arguments. None of this is to say that trial courts will not retain broad discretion to apply the *Sugarland* factors. Of course they will. Reversal will, to the contrary, make sure that *Sugarland* is not vitiated by a trial court's conclusion that it might have arrived at the right answer even without the objector's participation.

In doing so, this Court would bring Delaware in line with longstanding federal authority, which has recognized that because "objectors must decide whether to object without knowing what objections may be moot because they have already occurred to the judge," a court should not deny objectors a fee in those circumstances. *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 288 (7th Cir. 2002).

See also, e.g., *Green v. Transitron Elec. Corp.,* 326 F.2d 492, 499 (1st Cir. 1964) ("We think it unfair to counsel when, seeking to protect his client's interest and guided by facts apparent on the record, he spends time and effort to prepare and advance an argument which is ultimately adopted by the court, but then receives no credit therefor because the court was thinking along that line all the while. . . ."); *accord White v. Auerbach*, 500 F.2d 822, 829 (2d. Cir. 1974) (agreeing that it is "unfair to counsel" when counsel spends "time and effort" preparing an argument but receives no credit (quoting *Green*, 362 F.2d at 498-99)).

In fact, even without the rule in this case, trial courts often undercompensate objectors. The academic literature shows that "[t]he odds of actually getting a fee" are not very high. William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435, 1448-49 (2006). A prevailing objector's counsel lacks leverage to negotiate a fee: unlike plaintiffs, objectors cannot terminate cases. Thus, although the trial court asked the parties to negotiate an objector's fee, it was not possible. A289. The same defendants who acquiesced to Plaintiff's $575,000 fee demand for an unfair settlement nonetheless insisted that the objector who cured their "mistake" deserved $10,000. A311–12, A426. As the trial court noted, "litigating over legal fees of colleagues is not a very pleasant experience." A426. But for objectors, negotiating is often futile.

This structural undercompensation ensures most settling parties negotiate without concern for an objector's appearance. *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1550 (2004) (showing the median number of objectors in securities class actions between 1993 and 2003 is zero). Thus, plaintiff waited to adjourn the first settlement hearing until after she knew an objector had appeared. A161–75. Without the unexpected intervention, any of Stein's dozens of lawyers could have handled an unopposed hearing.

The fee award here will exacerbate matters by promoting misaligned incentives between objectors and their counsel. The trial court creates a "goldilocks" problem for objector's counsel: they receive no fees if they unsuccessfully challenge a reasonable settlement, but below-lodestar fees if they challenge a settlement that is so unreasonable that a court rejects it anyway. Objectors will find it difficult, and perhaps impossible, to retain counsel: perversely, the more unfair a settlement is, the less likely a stockholder will be able to persuade an attorney to take a contingency case and risk that a trial court will dismiss the attorney's efforts as "helpful" rather than crucial. Worse, courts in other jurisdictions may be guided by the trial court's ruling, diminishing the incentive for objectors to bring critical Delaware case law to the attention of foreign courts when plaintiffs like Stein take their cases outside this State.

As a policy matter, if the trial court believes that a settlement is unreasonable, it can make that decision ***before*** sending it to stockholders—or at the very least indicate to stockholders that the trial court has already reached a decision. Once the trial court approves the distribution of notice to stockholders, it should not be able to tell stockholders that their rights were never really at any risk because the settlement was always unfair. Left undisturbed, the inevitable consequence of this decision will be a dearth of well-counseled objections to settlements.

CONCLUSION

For these reasons, both the Court of Chancery's order approving the settlement and the order awarding Objector's fee should be reversed and remanded.

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DATED: October 7, 2021