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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE DELL TECHNOLOGIES INC. CLASS V STOCKHOLDERS LITIGATION	No. 349, 2023 Court Below: Court of Chancery of the State of Delaware Consol. C.A. No. 2018-0816-JTL

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NATURE OF PROCEEDINGS

Plaintiff and its counsel ("Plaintiff's Counsel") brought class claims challenging a 2018 transaction ("Transaction") in which Dell Technologies Inc. ("Dell") Class V stockholders surrendered their shares for unfair consideration. Plaintiff's Counsel first undertook books-and-records investigations and overcame motions to dismiss. Then, over more than two-and-a-half years, Plaintiff's Counsel developed and mastered a sprawling fact and expert discovery record, including reviewing nearly 2.9 million pages of documents from over 40 parties and non-parties, taking and defending 35 fact and expert depositions, developing a bespoke approach to damages for a one-of-a-kind tracking stock, and filing a 134-page pretrial brief and a motion to exclude Defendants' principal expert. Plaintiff's Counsel then prepared for, and pushed the case to the brink of trial against sophisticated and well-funded Defendants, who ultimately agreed to a Class payment of $1 billion in cash ("Settlement")—by far the largest stockholder settlement in the Court of Chancery's history, and more than the aggregate recoveries achieved in all settlements in entire-fairness cases over the last decade. Not one Class member objected to the Settlement, which the court approved.

Appellant Pentwater Capital Management, LP ("Pentwater") objected to Plaintiff's Counsel's request for a 28.5% fee award. After extensive briefing and a hearing, the court awarded 26.67% in fees in a 90-page Opinion ("Op.") that applied

all the factors set forth in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).[1] Other hedge fund Class members joined Pentwater in objecting to the 28.5% fee request below, but Pentwater alone brings this appeal challenging the court's 26.67% fee award.

In the more than 40 years since this Court decided *Sugarland*, and in recognition of trial courts' broad discretion in setting fees, this Court has never reversed the Court of Chancery's exercise of discretion in determining a reasonable fee award under *Sugarland*. Pentwater's request that this Court do so here—where the court analyzed every argument and objection and explained why the award is justified based on the case-specific facts; where Plaintiff's Counsel undisputedly expended great effort and costs, and took on substantial risk with no assurance of any recovery, to achieve a historic result for the Class; and where the fee award represents a lodestar multiplier almost an order of magnitude less than what this Court has approved—is meritless.

This Court should affirm.

[1] The amended fee opinion was lodged as Exhibit A to Appellant's corrected opening brief, and was published as *In re Dell Technologies Inc. Class V Stockholders Litigation*, 300 A.3d 679 (Del. Ch. 2023) (as amended).

SUMMARY OF ARGUMENT

1. Denied. The court thoroughly analyzed each *Sugarland* factor and acted squarely within its discretion in awarding 26.67% in fees to Plaintiff's Counsel. The court faithfully applied *Sugarland* and *Americas Mining Corporation v. Theriault*, 51 A.3d 1213, 1258 (Del. 2012)—and addressed all arguments Pentwater raised below and repeats here—in awarding reasonable fees.

(a) The court properly evaluated the "results achieved" under *Sugarland*. Pentwater does not dispute that 26.67% is similar to (if not less than) the percentage typically awarded for an eve-of-trial settlement. Nor does Pentwater suggest anything about the nature of this case or Plaintiff's Counsel's performance that would support a downward reduction. Pentwater concedes that "Plaintiff's Counsel thoroughly and effectively litigated this case nearly to trial," Corrected Opening Br. ("OB.__") 21, and that "[t]he $1 billion Settlement Fund is impressive by any standard," OB.14. Pentwater also conceded below that it would be "credibility-killing … to come in and call the [$1 billion Settlement] unimpressive," and that a $7,000 effective hourly rate—40% *higher* than the $5,000 effective hourly rate implied by the fee Pentwater now appeals—"is within the range that the Court has found reasonable." App. to Answering Br. ("B___"), B1215, B1229. The only basis Pentwater offers for a downward departure from the typical fee percentage is the size of the historic benefit Plaintiff's Counsel delivered for the Class.

(b) But Pentwater recognizes "the use of a declining percentage … is a matter of discretion and is not required *per se*." OB.24 (quoting *Ams. Mining*, 51 A.3d at 1258). Pentwater tries to dodge the deferential abuse-of-discretion standard for review of fee awards, manufacturing a supposed legal error where none exists by repeatedly mischaracterizing the Opinion. Pentwater asserts the opinion "failed … to consider the magnitude of the award," OB.12; "fail[ed] to consider how the declining percentage principle would impact the Fee Award[,]" OB.29; and "refused even to consider the declining percentage method." OB.27. In reality, the court discussed those issues extensively in exercising its discretion to reduce the fee from the requested 28.5% to 26.67%, but declining to reduce the fee further based on the Settlement's size. Op.27-72.

(c) In doing so, the court held that applying a downward reduction based on settlement size was unwarranted given the circumstances here: "[N]one of the reasons for a mega-fund reduction apply to this case" because "[t]he risk of a non-recovery in this case (at trial or on appeal) was significant, and the risk intensified as trial approached"; "[t]he recovery of $1 billion does not seem to have been the product of deal size"; "the implied rate of approximately $5,000 per hour is lower than rates this court has approved for smaller recoveries"; and "[t]he multiple to lodestar of 7x in this case would not raise a federal eyebrow." Op.52. Because of those well-reasoned and dispositive fact-specific holdings—none of

which was an abuse of discretion, and all of which Pentwater ignores—this case is the antithesis of one supporting a downward reduction simply based on the magnitude of recovery. The court therefore did not abuse its discretion.

(d) Pentwater's other arguments regarding the court's evaluation of the benefit to the Class are equally baseless. The court followed longstanding precedent, including *Americas Mining*, in awarding a percentage of the total settlement value in fees. It also appropriately considered the Objectors' own fee arrangements merely to confirm the many other "strong reasons" why a declining-percentage method was inappropriate here. Op.58. The court further correctly found that the Settlement was an outstanding result for the Class, including when accounting for the Transaction's size and likelihood of recovering damages (including the material risk of nonrecovery) at trial or on appeal.

(e) The court also properly found that, under *Sugarland*, Plaintiff's Counsel's time and effort justified the fee award. Pentwater downplays those efforts, but the court properly found this historic result derived from years of enormously complex and challenging litigation and that any recovery was far from assured. Moreover, the court correctly explained that the approximately $5,000 implied hourly rate and sub-7x lodestar multiplier align with many Court of Chancery cases—and is multiples below the $35,000 implied hourly rate and 66x lodestar multiplier that this Court approved in *Americas Mining*. Pentwater

provides no basis to disturb the court's considered judgment that these implied figures would fairly compensate Plaintiff's Counsel for the substantial risk assumed and the billion-dollar result achieved.

COUNTERSTATEMENT OF FACTS

Pentwater asserts that "the relevant facts arise out of the settlement process" and relies on the court's amended fee opinion to describe the Transaction and the litigation below preceding its objection. OB.6-9. The facts detailed below thus are uncontested on appeal.

A. Dell's Class V Transaction

Dell redeemed through the Transaction all outstanding shares of its Class V "tracking" stock (ticker: DVMT) for consideration purportedly worth $24 billion, but which Plaintiff asserted was worth far less. App. to Opening Br. ("A___"), A161-276.

In 2016, Dell acquired EMC Corp., which owned 81.9% of publicly traded VMware, Inc., using a combination of cash and newly issued Class V tracking stock, "which would trade publicly and ostensibly track the performance of VMware['s] common stock on a share-for-share basis." Op.5. Class V stock, however, traded at a "30-50%" discount to VMware. Op.6. "One reason for the discount" was Dell's controlling stockholders' ability "to forcibly convert" Class V stock into Dell's Class C common stock "using an opaque and manipulable formula." *Id.* Investors at the time also attributed the discount to (among other things): (1) Dell's "credit risk" from its "highly leveraged, non-investment grade balance sheet";

(2) a "conglomerate discount"; and (3) the fact that "virtually every tracking stock in history had traded at a meaningful discount." Op.65.

That discount represented billions of dollars of value, which Michael Dell and Silver Lake (Dell's "Controllers") schemed to "captur[e]." Op.6. In early 2018, Dell's board authorized a Committee to represent minority Class V stockholders in connection with the negotiated redemption of Class V stock. *Id.* The Committee negotiated against the Controllers and Goldman "in the shadow of" the Controllers' and Goldman's threats to pursue alternatives—including a forced conversion—that the Committee could not block, and which would be worse for Class V stockholders. Op.7. The Committee eventually agreed to a redemption that purportedly valued Class V at $109 per share, a 32.7% discount to VMware. *Id.* When Dell announced that proposal, many influential Class V stockholders objected, and the Controllers and Goldman negotiated directly with six investment funds. *Id.* Dell agreed with those investment funds on a revised redemption purportedly worth $120 per Class V share. *Id.* The Committee rubberstamped that stockholder-negotiated deal. *Id.*

One month later, 61% of minority Class V stockholders approved the Transaction. *Id.* They did so in the same shadow of forced-conversion threats and after receiving materially misleading and incomplete proxy statements, which omitted (among other facts) the Committee's conflicts of interest and its last-minute proposal of a $125-per-share redemption price. A307-11.

The Transaction closed in December 2018. The $120-per-share headline price exceeded the highest price at which Class V stock had ever traded by more than $10 per share. A176, A343.[2]

B. Plaintiff And Its Counsel Challenge The Transaction

Plaintiff and other Class V stockholders made books-and-records demands after the announcement of the initial $109-per-share proposal. Op.8. After undertaking "[c]onsiderable effort" to review those materials—"because the transaction had been designed so that on the surface it would meet the requirements of [*Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (*MFW*)]"—Plaintiff sued to challenge the Transaction. Op.8, 74. The court subsequently granted Plaintiff and its counsel leadership. Op.8.

After Plaintiff filed an amended class complaint, Defendants moved to dismiss under *MFW*. *Id.* The court credited Plaintiff's arguments and largely denied Defendants' motions, finding Defendants had failed to satisfy *MFW*'s requirements for pleading-stage dismissal based on (among other flaws) the Controllers' coercive tactics, the Committee's conflicts, and the misleading proxy. *Id.*; *see generally In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748 (Del. Ch. June 11, 2020).

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[2] Both sides' experts later agreed that the actual value of the Transaction consideration was $104.27 per share. A342. That price was nearly identical to Class V stock's highest trading value. A176.

"For the next two-and-a-half years," "an army of skilled defense counsel" from many of the country's best firms "fought [Plaintiff] at every turn." Op.8, 74. Plaintiff obtained extensive discovery from Defendants—over Defendants' fierce resistance and potential spoliation—propounding 66 document requests, 710 interrogatories, and 179 requests for admission—to develop an "extensive record" that included roughly 2.9 million pages of documents from over 40 parties and nonparties. Op.75-76. Plaintiff's Counsel deposed 32 fact witnesses and responded to Defendants' "expansive discovery demands" on Lead Plaintiff. *Id.*

During fact discovery, Plaintiff developed strong evidence supporting an aiding-and-abetting claim against Goldman Sachs and obtained leave to amend to add that claim. A323-24. Goldman Sachs moved to dismiss but withdrew its motion after full briefing and just nine days before oral argument. *Id.*

Expert discovery was also unusually complex. Plaintiff's Counsel worked with their damages expert, Benjamin Sacks, "to develop novel valuation approaches for a transaction involving a one-of-a-kind tracking stock [(Class V)], another complex security [(VMware)], and a privately held company (Dell)"—while also tackling complex "alternative transactions like a forced conversion, and novel questions about market expectations and minority discounts." Op.76. Defendants retained Dr. Glenn Hubbard, Dean of Columbia's Business School, as their damages expert. A324. Plaintiff's Counsel also "retained two consulting experts on tax law

and policy," A325, "to analyze complicated tax issues" related to damages and to help counsel counter Defendants' tax expert, *id.*; Op.76. Plaintiff's Counsel retained a third consulting expert to help probe Dell's financial projections. A324.

The parties collectively took and defended three expert depositions. A326-27. Plaintiff's Counsel used key admissions obtained from Dr. Hubbard to move to exclude three opinions essential to his calculation that the Class suffered no damages. *Id.* The strength of Plaintiff's motion forced Defendants to submit with their opposition a last-minute affidavit from Dr. Hubbard seeking to undo his deposition admissions with trial just weeks away. *Id.*

C. Defendants Agree On The Eve Of Trial To Pay $1 Billion

After the close of fact and expert discovery, the parties engaged in a full-day mediation before the Honorable Layn R. Phillips (Ret.), but could not reach a settlement. Op.8; A327-28.

Plaintiff's Counsel thus kept preparing diligently for trial. The parties filed a 51-page pretrial order identifying nearly 2,900 exhibits. Op.9. Defendants submitted pretrial briefs totaling 91 pages. A328. Plaintiff submitted a 134-page pretrial brief. *Id.* "[U]nlike typical pretrial briefs, the parties collectively devoted nearly 40 pages to fair price and damages, drawing extensively from expert reports and deposition testimony." A334. Meanwhile, Plaintiff's Counsel prepared detailed

direct- and cross-examination outlines for a trial that expected to feature live testimony from 14 fact and 3 expert witnesses. Op.8.

Judge Phillips then asked the parties to consider a double-blind "mediator's proposal" to settle the case for $1 billion. Op.9. Both sides accepted and informed the court of their Settlement just 19 days before trial. Op.19. The $1 billion cash Settlement is the largest stockholder settlement in Delaware history by $725 million, Op.62, and, including federal cases, is the 17th-largest stockholder settlement in United States history. A332.

D. Plaintiff Moves For Approval Of The Settlement And Requests A 28.5% Fee Award

On March 20, 2023, Plaintiff sought approval of the Settlement and requested a 28.5% "all-in" fee-and-expense award for its counsel and an incentive award for itself. A007 (Dkt. 510); A280, A353-61.[3] Before the Settlement hearing, Pentwater and seven other hedge funds ("Objectors"), joined by several professors as Amici, opposed the requested 28.5% fee award. A367-81. Nobody objected to the Settlement itself.

In response, the court requested supplemental briefing on the declining-percentage method, A450-52, and asked Plaintiff's Counsel for information about their contingency agreements for the last five years. A475-77. Plaintiff's Counsel

[3] Plaintiff's incentive award was granted as unopposed below, Op.85-89, and is not at issue on appeal. OB.1.

provided detailed, *in camera* submissions, which showed that virtually all their contingency engagements did *not* apply a declining-percentage approach. A545-47; Op.56-58. Plaintiff's reply in support of its fee application addressed the court's questions and responded to Objectors' and Amici's arguments. A499-540.

E. The Court Of Chancery Hears Argument On Settlement And Fees

The court held a Settlement hearing on April 19, 2023. B1137. The court approved the Settlement, holding that it was an "excellent" and "exceptional result" for the Class given the "major challenges" the Class would have faced at trial and on appeal to prove and sustain unfair price and damages. B1175-78. The court found that, on a risk-adjusted basis, the $1 billion Settlement "represents a substantial fraction of the likely recoverable damages." B1177. It noted other counsel likely would have settled earlier for a much smaller amount (B1249):

> Plaintiff's Counsel: You can envision so many scenarios, Your Honor, where this case in different hands, counsel responding to different incentives, rather, it's just $300 million, $400 million, $200 million.
>
> The Court: I would bet more like 150.
>
> Plaintiff's Counsel: Which was the insurance policy here, Your Honor.
>
> The Court: I would bet more 150, about eight months in, some document discovery, a couple depositions. And look, 150 is a big number, and it would not receive a lot of question. Right? So I hear you.

The court also heard extended argument from Plaintiff's Counsel, counsel for Pentwater, and counsel for Amici concerning the reasonableness of the proposed 28.5% fee award. B1178-1251. During its presentation, Pentwater all but retracted the criticisms of the Settlement contained in its written objection, acknowledging it would be "credibility-killing for us to come in and call the [$1 billion Settlement] unimpressive." B1215. Pentwater conceded the court had "discretion" to "weigh the [Class's] risk at the time of the settlement and at the time the case was taken," B1218; and that even a 28.5% fee award, when cross-checked against Plaintiff's Counsel's collective lodestar, fell "within the range of reasonable,". B1229. Pentwater represented it was "not urging the Court to dramatically change Delaware law or depart from the standards that are well known to everyone" under *Sugarland* and *Americas Mining*. B1216. Pentwater asserted courts could address the declining-percentage method within *Sugarland* by considering the size of the settlement "throughout," rather than "go through the *Sugarland* factors, make an adjustment because it is a large case, and stop there." B1220-24. Pentwater added such a reflexive approach "would do a disservice to plaintiff's counsel." B1224. Amici agreed. B1241. Summarizing Pentwater's objection, its counsel asserted that "because Pentwater did not want to overly intrude" and purportedly recognized the court's inherent discretion in setting fees, Pentwater "didn't propose a specific framework, but rather, offered thoughts for consideration." B1221-22.

F. The Court Of Chancery Awards 26.67% Of The Settlement Fund In Fees

On July 31, 2023, the court issued its 90-page Opinion awarding Plaintiff's Counsel 26.67% of the Settlement in fees ($18.3 million less than requested), while rejecting Objectors' and Amici's arguments for reducing fees. A552. The court amended its Opinion three weeks later and entered judgment. Op.1; A644 (letter explaining amendments).

The Opinion applied all the *Sugarland* factors and this Court's analysis in *Americas Mining*. Op.5 ("This decision hews to *Americas Mining* and *Sugarland*."); Op.13 (discussing standards from those cases).

The court began by examining the benefit Plaintiff's Counsel created. Op.14-15. It explained that "there is an obvious and self-quantifying benefit in the form of $1 billion in cash," and "[b]ecause the benefit is quantifiable, *Americas Mining* calls for calculating an indicative fee award as a percentage of the benefit." *Id.* In identifying a reasonable percentage, the court examined other percentages courts had been approved based on the stage of the case, noted there was a "range of 25% to 30% for a late-stage settlement," found Plaintiff's Counsel had completed "approximately one-third of the late-stage tasks" required to take a case through trial, and concluded Plaintiff's Counsel were entitled to a "baseline" fee award of 26.67%. Op.15-26.

The court then, across 45 pages of analysis, evaluated whether to apply the declining-percentage method to reduce that indicative fee award. Op.27-72. The court recognized its discretion to do so under *Americas Mining*. Op.29. It then explained why the declining-percentage method was generally problematic for Delaware M&A cases, Op.27-52, and specifically inapplicable here, as "none of the reasons for a mega-fund reduction" under the declining-percentage method "apply to this case," Op.52. The court found the declining-percentage method particularly unsuitable here because "[t]he risk of non-recovery in this case (at trial or on appeal) was significant" and "intensified as trial approached," the $1 billion recovery was not just a product of the Transaction's size, and the 26.67% baseline award was reasonable "from a compensatory perspective" on a lodestar cross-check. Op.52. The court added that this approach accorded with academic studies of *ex ante* fee agreements and the real-world agreements of Plaintiff's Counsel, which almost never use a declining-percentage method, and with Objectors' own practices with their investor clients. Op.53-62.

The court further rejected Objectors' claim that the $1 billion recovery was an unimpressive outcome for the Class on a risk-adjusted basis. Op.62-72. It began by noting the Settlement "exceeds the total of all of recoveries achieved in all of the settlements in entire fairness cases over the last decade." Op.62-63. It found that "fair price was debatable" and "damages were a wildcard," which created a material

risk of nonrecovery for the Class. Op.63-64. The court also found that the Settlement "reflected a reasonable percentage of the maximum damages sought when compared to precedent settlements," and was an "excellent outcome" when compared to the Transaction's size. Op.67-72. Plaintiff's Counsel accordingly "deserve the full percentage that the stage-of-case method supports." Op.72.

The court held that each remaining *Sugarland* factor supported the indicative 26.67% fee award. It recognized Plaintiff's Counsel "litigated on a fully contingent basis," assuming enormous risks for the Class's benefit. Op.72-73. The court also found Plaintiff's Counsel reasonably spent significant time, money, and effort to achieve the $1 billion Settlement, litigating aggressively for four years against "an army of skilled defense counsel" from the books-and-records stage through preparations for a complex trial. Op.73-76. The court further found the litigation "was challenging and complex." Op.76. And it found Plaintiff's Counsel's "standing and ability" supported the 26.67% award. Op.76-77.

G. Only Pentwater Appeals

Although seven other Class V stockholders joined Pentwater's objection to the 28.5% award requested below, A367, only Pentwater objects on appeal to the 26.67% award at issue. OB.1.

Immediately after the Court of Chancery issued its decision, Pentwater emailed *Reuters* a public statement criticizing the court as "wrong" and declaring it

"decided to take $266 million away from victims and give it to [plaintiffs'] attorneys."[4] Despite its earlier representation that it was "not urging the Court to dramatically change Delaware law or depart from the standards that are well known to everyone," B1216, Pentwater claimed the court's decision "places Delaware in conflict with federal courts" and said it would appeal.[5]

[4] Alison Frankel, *Whopper $267 million fee award in $1 billion Dell case shows why Delaware is different*, REUTERS (Aug. 1, 2023) (alteration in original), https://reut.rs/3tgRqob.

[5] Frankel, *supra*.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY EXERCISED ITS DISCRETION IN AWARDING REASONABLE FEES UNDER *SUGARLAND* AND *AMERICAS MINING*

A. Question Presented

Whether the court acted within its discretion in awarding fees equal to 26.67% of the gross Settlement Fund after weighing all the factors set out in *Sugarland* and *Americas Mining*, including by considering the Settlement's size. Op.13-85.

B. Scope Of Review

It is "well settled" that the "standard of review of an award of attorneys fees" is "abuse of discretion." *Sugarland*, 420 A.2d at 149. When, as here, "an act of judicial discretion is under appellate review, this Court may not substitute its notions of what is right for those of the trial judge, if [its] judgment was the product of reason and conscience, as opposed to being either arbitrary or capricious." *Ams. Mining*, 51 A.3d at 1262. Thus, "the challenge of quantifying fee awards is entrusted to the trial judge and will not be disturbed on appeal in the absence of capriciousness or factual findings that are clearly wrong." *Id.*

Below, Pentwater conceded the *Sugarland* analysis is "a discretionary assessment based on an experienced judicial officer who can factor in what is fair and reasonable, looking into all of those factors." B1224. But here, Pentwater ignores that abuse of discretion requires "capriciousness" or "clearly wrong" factual findings. Similarly, Pentwater's suggestion (OB.13-14) that this Court should

simply determine the reasonable fee itself—without suggesting how this Court should reweigh the *Sugarland* factors—defies the considerable deference afforded to the Court of Chancery.

C. Merits Of Argument

The Court of Chancery carefully examined each *Sugarland* factor: "1) the results achieved; 2) the time and effort of counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved." Op.13 (quoting *Ams. Mining*, 51 A.3d at 1254). The court found each factor supported the 26.67% fee award and found nothing supporting a lesser award. Op.12-81. "Pentwater takes no issue with the Court of Chancery's application of the third, fourth, and fifth factors." OB.17. Thus, there is no dispute on appeal that the enormous complexity of the litigation, substantial contingency risk to Plaintiff's Counsel, and standing and ability of Plaintiff's Counsel all support the award. Op.72-77.

While Pentwater disregards those factors, the court correctly weighed them in its discretionary judgment. As discussed below, the court's analysis of the first two factors was well-reasoned, well within its discretion, and further supports the 26.67% fee award.

1. The Court Of Chancery Properly Found That A 26.67% Fee Award Appropriately Reflects The Unprecedented Benefit Plaintiff's Counsel Achieved

The first *Sugarland* factor—the benefit achieved—receives "the greatest weight" because a "common fund is itself the measure of success and represents the benchmark from which a reasonable fee will be awarded." *Ams. Mining*, 51 A.3d at 1259 (cleaned up). The court found the results achieved here supported a 26.67% fee award, accounting for the stage of the case, the propriety of reducing the fee percentage based on the Settlement's enormity, evidence of arm's-length agreements, Objectors' own fee arrangements, and the Settlement's value given the Transaction's size and risk-adjusted potential damages. Op.14-72. Pentwater responds to a caricature of the Opinion, ignoring nearly all the court's meticulous analysis and its explanation of precisely why a 26.67% award was appropriate given the particular facts here.

(a) The Court Of Chancery Correctly Considered The Stage Of The Case In Setting A Baseline Fee Percentage

The court explained: "In this case, there is an obvious and self-quantifying benefit in the form of $1 billion in cash. … Plaintiff's counsel was the sole cause of the benefit: But for the litigation, the benefit would not exist." Op.15. "Because the benefit is quantifiable, *Americas Mining* calls for calculating an indicative fee award as a percentage of the benefit." *Id.*

The court properly exercised its discretion by commencing its analysis with the stage of the case. Op.15-26. Pentwater's argument to the contrary rests on a mischaracterization that the court "ignored *Americas Mining* and mechanically applied the exemplary percentages identified in that opinion." OB.14-15. Far from "ignor[ing] *Americas Mining*," the Opinion discussed the case at length, *see, e.g.*, Op.1-5, 13-34, and far from a "mechanically induced, formulaic percentage," OB.18, the court recognized "[t]he test is not a mechanical one," Op.18, and applied its discretionary judgment after examining every possible consideration at length. Op.81.

That the court began its analysis of the first *Sugarland* factor by looking to the stage of the case is customary. In *Americas Mining*, this Court looked to indicative ranges based on the litigation stage to inform its review of the fee award at issue. Consistent with *Americas Mining*, the Court of Chancery now almost always does the same. *See, e.g.*, Op.22-25 (collecting and summarizing cases).[6]

[6] *See also, e.g.*, *In re Mindbody, Inc., S'holder Litig.*, 2023 WL 7704774, at *13 (Del. Ch. Nov. 15, 2023); *In re AMC Ent. Hldgs., Inc. S'holder Litig.*, 2023 WL 5165606, at *37 (Del. Ch. Aug. 11, 2023); *In re Tesla Motors, Inc. S'holder Litig.*, C.A. No. 12711-VCS, at 14-15 (Del. Ch. Aug. 17, 2020) (TRANSCRIPT); *In re Medley Cap. Corp. S'holders Litig.*, C.A. No. 2019-0100-KSJM, at 47-49 (Del. Ch. Nov. 19, 2019) (TRANSCRIPT); *Cumming v. Edens*, C.A. No. 13007-VCS, at 19-20 (Del. Ch. July 31, 2019) (TRANSCRIPT).

Here, the court exhaustively reviewed precedent, which suggested "a range of 25% to 30% for a late-stage settlement." Op.15-26.

Pentwater ignores most of that precedent and does not dispute the court provided an accurate assessment of the range Delaware courts typically award for cases, like this one, involving eve-of-trial settlements. Rather, Pentwater wrongly insinuates the court's consideration of that precedent is somehow inconsistent with the flexible *Sugarland* analysis. As the court explained, "the use of guideline ranges promotes consistent awards so that similar cases are treated similarly. Past precedents shape future behavior, and a practice of rarely departing from guideline percentages helps create desirable incentives." Op.18-19. Pentwater cites no case holding otherwise or even remotely suggesting that the stage of the case cannot be the starting point for a fee percentage—particularly when the court underscores that the baseline stage-of-case percentage is *not* dispositive by exploring every other factor and objection to determine whether that percentage is fair under all the circumstances. The court did just that here:

> The *Sugarland* factors support a fee award of $266,700,000. The stage-of-case method endorsed by *Americas Mining* calls for a percentage equal to 26.67% of the benefit caused by the litigation. Grounds do not exist to reduce the award in this case in light of the size of the common fund. The other *Sugarland* factors fully support the award.

Op.81. None of this abused the court's discretion.

(b) The Court Of Chancery Properly Exercised Its Discretion In Refusing To Use A Declining-Percentage Method

Pentwater's argument for a declining fee percentage based on the Settlement's size (OB.23-29) conflicts with *Americas Mining* and misrepresents the court's Opinion. In *Americas Mining*, the defendants argued on appeal that the Court of Chancery "did not[ ] correctly apply a declining percentage analysis given the size of the judgment." 51 A.3d at 1252. "According to the Defendants, this Court's decision in *Goodrich v. E.F. Hutton Group, Inc.*, [681 A.2d 1039 (Del. 1996),] supports the *per se* use of a declining percentage." *Id.* at 1258. This Court held plainly: "We disagree." *Id.* Rather, even in megafund cases, "the multiple factor *Sugarland* approach to determining attorneys' fee awards remained adequate for purposes of applying the equitable common fund doctrine," and under *Sugarland*, "the use of a declining percentage … is a matter of discretion and is not required *per se*." *Id.* This Court thus "decline[d] to impose either a cap or the mandatory use of any particular range of percentages for determining attorneys' fees in megafund cases." *Id.* at 1261. Pentwater concedes the decision whether to use a declining fee percentage is discretionary and does not challenge this holding in *Americas Mining*. OB.24.

The court likewise recognized here that use of a declining fee percentage "is 'a matter of discretion' and 'not required *per se*,'" Op.29 (quoting *Ams. Mining*,

51 A.3d at 1258); it discussed the general arguments for and against a declining fee percentage in Delaware M&A litigation, Op.27-52; and it properly exercised its discretion not to do so based on this case's facts and circumstances. Op.52. The court held: "The rationales for using the declining-percentage method in federal securities litigation have not been shown to apply to Chancery M&A litigation. ***In particular, they do not apply to this case***." Op.53 (emphasis added).

The court explained that a declining-fee-percentage would be particularly inappropriate here because Plaintiff's Counsel shouldered enormous risk, achieved an extraordinary result for the Class, and would receive a meaningful but unremarkable lodestar multiplier:

> Turning from the general to the specific, none of the reasons for a mega-fund reduction apply to this case. The risk of a non-recovery in this case (at trial or on appeal) was significant, and the risk intensified as trial approached. The recovery of $1 billion does not seem to have been the product of deal size. It is rather a landmark settlement that dwarfs the aggregate recoveries in all other settlements in entire fairness cases since *Americas Mining*, which total $642 million. … Reducing the requested award is not necessary from a compensatory perspective, because the implied rate of approximately $5,000 per hour is lower than rates this court has approved for smaller recoveries. The multiple to lodestar of 7x in this case would not raise a federal eyebrow.

Op.52 (citations omitted). In short, whatever the merits or failings of a declining fee percentage generally, it has no application in a case like this. Indeed, Pentwater cites no precedent—not even from federal courts—applying a declining fee percentage

under these circumstances. At a minimum, there is no abuse of discretion in the court's decision not to do so here.

Ignoring this dispositive, fact-specific holding, Pentwater attempts to manufacture a legal error by asserting that the court did not "consider" the award's size or whether to use a declining fee percentage. OB.14, 27. To the contrary, the Opinion considered these issues at length across *45 pages*. Op.27-72. Pentwater does not even try to show why a declining percentage would be appropriate (let alone required) *here*. Thus, Pentwater is left with a generic argument that a discount should be reflexively applied—exactly what *Americas Mining* rejected and exactly what Pentwater conceded below "would do a disservice to plaintiff's counsel, quite frankly, and the class, who deserve a more reasoned analysis." B1224.

Regardless, Pentwater sidesteps the court's explanation for why courts should be cautious in applying a declining fee percentage to Delaware M&A litigation.

First, the court explained that parties negotiating fee agreements *ex ante* do not use declining percentages as the recovery increases. Op.53-58. A detailed study of fee agreements found that "sophisticated clients consistently opt for a percentage-of-the-benefit model, 'either with fixed percentages or escalating percentages as litigation matures.'" Op.38 (quoting Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees In Class Actions*, 89 FORDHAM L. REV. 1151, 1160 (2021)).

The declining-percentage method, by contrast, "is unheard of in the marketplace." Op.39 (quoting Fitzpatrick, *supra*, at 1169).

The court also found that real-world evidence from Plaintiff's Counsel confirms the point: they typically use fixed percentages at or above the percentage awarded here; sometimes use percentages that increase along with the stage of the case and size of recovery; and almost never use decreasing percentages. Op.56-58.[7] The reason is simple: clients do not want to discourage their attorneys from achieving the best possible result by encouraging quick, cheap settlements; and counsel do not want to assume the greater risk of proceeding deep into litigation without a potentially commensurate reward.

As one commentator aptly explained, "if courts were to ask what fee structure an informed, sophisticated client would use to compensate his attorney when close monitoring is not feasible, they would at least have focused on the correct question." John C. Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 697 (1986). And "[i]f judges want to do what

[7] The firms' affidavits provide additional detail, B1093-1132, and the firms submitted further detail to the court for *in camera* review because it contained privileged and competitively sensitive information, A475-76 (ordering "summar[ies]" of certain data "for *in camera* review"). Plaintiff's Counsel are prepared to provide that information for this Court's *in camera* review as well, should this Court so direct.

rational absent class members would want to do, then they should not" use a declining fee percentage. Op.39 (quoting Fitzpatrick, *supra*, at 1167).

The court found this "provide[s] persuasive evidence against any downward reduction." Op.58. While Objectors and Amici "encouraged the court to look to these sources" (*i.e.*, private fee arrangements), Op.53, they now ignore these findings and do not challenge that market evidence supports this fee award. Nor do they explain why a fee consistent with what a competitive market among sophisticated parties would produce *ex ante* is unfair, let alone an abuse of discretion.

Second, the federal cases using a declining percentage are inapplicable. As the court explained (and Pentwater ignores), "federal courts seem to be using the declining-percentage method as a backdoor—and backward looking—lodestar method." Op.40. This Court "rejected the lodestar approach," and Delaware courts thus "should not be deploying the declining-percentage methodology to undermine that decision." *Id.* And even if this backdoor lodestar method were permissible, it would be inappropriate here, where the lodestar multiplier is unexceptional under federal and Delaware precedent. *See infra* § C.2.

The court also distinguished federal precedent because "the mega-settlements achieved in federal securities actions have often benefited from criminal or regulatory investigations" and "[s]ecurities class actions almost never go to trial, and many settle prior to discovery,"—whereas "in Chancery M&A litigation[,]

Plaintiff's counsel can only secure a large settlement by conducting a detailed investigation before filing suit, surviving a motion to dismiss, building a strong case through discovery, then being prepared to litigate through trial" and appeal. Op.44-45. The federal securities cases Pentwater references here and cited below, *see* OB.26, only confirm these observations: all involved far earlier-stage settlements than this Settlement or piggybacked on government investigations (and, in most cases, both).[8]

Indeed, in federal cases where there was substantial risk in bringing the case and counsel made substantial efforts to achieve a great result for the class, courts award fee percentages similar to or greater than the award here.[9] Thus, the

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[8] *See, e.g.*, *Goldberger v. Integrated Res.*, *Inc.*, 209 F.3d 43, 45 (2d Cir. 2000) (SEC investigation and settlement after "consolidated action was automatically stayed"); *In re Synthroid Mktg. Litig.*, 264 F.3d 712 (7th Cir. 2001) (multistate investigation and settlement after class actions were consolidated); *Ark. Tchr. Ret. Sys. v. State St. Bank & Tr. Co.*, 512 F. Supp. 3d 196 (D. Mass. 2020) (SEC investigation and settlement after denial of motion to dismiss); *In re Stericycle Sec. Litig.*, 35 F.4th 555, 566 (7th Cir. 2022) (SEC investigation and settlement while motion to dismiss was pending); *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (settlement just after denial of summary judgment); *Aranda v. Caribbean Cruise Line, Inc.*, 2017 WL 1369741 (N.D. Ill. Apr. 10, 2017) (FTC and multistate investigations).

[9] *See, e.g.*, *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *3 (S.D.N.Y. Nov. 29, 2018) (awarding 26% of $500 million settlement "given the extraordinary complexity of this case and the sheer amount of work that counsel did in obtaining substantial relief on behalf of the class"). Many additional cases are described at paragraph 20 of Professor Fitzpatrick's Affidavit in *Alaska Elec. Pension Fund v. Bank of Am. N.A.*, No. 14-cv-7126 (S.D.N.Y. Sept. 28, 2018)

percentage awarded below is fully consistent with the federal cases that evaluate fees in comparable factual circumstances. Pentwater and Amici offer no argument for why this fee award should be limited to the *average* award in federal court,[10] when the court found that this case was anything but average: an unprecedentedly large Settlement in an especially complex and risky case, with no government investigation to piggyback off, and where other plaintiffs' counsel might have settled for a fraction as much. B1249.

Finally, as to the 15% awarded in *Americas Mining*, Pentwater largely omits the reasons for that relatively low percentage. As this Court explained, "the Court of Chancery noted that the record could justify a much larger award of attorneys' fees, but it ultimately applied a 'conservative metric because of Plaintiff's delay.'" 51 A.3d at 1257. In particular, then-Chancellor Strine "encouraged the plaintiffs to

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(Dkt. 698), https://bit.ly/3mt8C6H. *See, e.g.*, *Dahl v. Bain Cap. P'rs, LLC*, No. 1:07-cv-12388-WGY (D. Mass.) (Dkts. 1051, 1095) (awarding 33% of $590.5 million); *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358, 1367 & n.40 (S.D. Fla. 2011) (awarding 30% of $410 million where counsel developed their own claims and noting "courts nationwide have repeatedly awarded fees of 30[%] or higher in so-called 'megafund' settlements[,]" and collecting federal cases); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1216-17 (S.D. Fla. 2006) (awarding 31.33% of $1.075 billion where counsel acted as "private attorney[s] general" to investigate and pursue claims they developed); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10-11 (D.D.C. July 16, 2001) (awarding 33% of $365 million where "counsel completed a substantial portion of their investigation prior to … any government investigation").

[10] Pentwater and Amici also skew that average by looking at cases with a $1 billion value or more.

be conservative in their application" because the "plaintiffs were slow" in prosecuting their claims, taking six-plus years to reach trial, which prejudiced the nominal-defendant company by, among other things, preventing substantially higher damages. *Id.* at 1262. Pentwater also ignores that unlike this $1 billion cash recovery—which entirely benefits the Class of minority Class V stockholders—the *Americas Mining* recovery was derivative and paid to a nominal defendant *81%*-owned by the controlling stockholder and primary defendant. *Id*. at 1264; Op.63 (noting same). Although the plaintiffs' counsel's lack of diligence in *Americas Mining* had potentially deprived stockholders of a larger recovery and the judgment would be enjoyed mostly by the primary defendant, the court still awarded a fee of 15%, which amounted to $304.7 million, a *$35,000* hourly rate, and a *66x* lodestar multiplier. *Ams. Mining*, 51 A.3d at 1252, 1257-58.

Here, by contrast, Plaintiff's Counsel prosecuted this case vigorously and without delay; the billion-dollar recovery is all-cash and goes directly to the Class; the implied hourly rate is approximately $5,000/hour (a seventh of that in *Americas Mining*); and the lodestar multiplier is approximately 6.76x (a tenth of that in *Americas Mining*). Plus, actual hourly rates have meaningfully climbed in the last decade, making the implied $35,000 rate in *Americas Mining* even more supportive of a $5,268.49 implied rate here.

These differences at least make it *permissible*, as a matter of discretion, to award significantly more than 15%. Indeed, treating 15% as a limit on all fee awards in megafund cases would distort the *Sugarland* test by ignoring all the remaining factors. For that reason, while then-Chancellor Strine considered the size of the judgment in awarding a 15% fee in that case, he *rejected* an "automatic declining percentage" because "the incentive system that it creates" would not "be a healthy one" and counsel should be awarded for achieving more after taking on more risk. *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, C.A. No. 961-CS, at 77 (Del. Ch. Dec. 19, 2011) (TRANSCRIPT) ("*S. Peru* Tr."); *id.* at 72-73 (courts must be "careful" when applying such a rule to avoid creating perverse incentives). Thus, the award here conforms to both the reasoning and outcome of *Americas Mining*.

Pentwater's reliance on *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025 (Del. Ch. 2015) (cited OB.25 n.9), is equally misplaced. There, the court rejected the argument that fees should decrease based on the large common benefit, holding "[t]he incentive effects of the sliding [fee] scale apply equally to large and small settlements." 124 A.3d at 1071. While the court awarded fees of 22.7% to 24.5%, it did so in part because the defendants agreed not to oppose an award below 24.5%. *Id.* at 1075. Further, the $9,685 implied hourly rate in *Activision* was nearly double the rate implied here. *Id*., 2015 WL 751783 (Del. Ch. Feb. 18, 2015) (BRIEF).

Amici likewise err in citing *Police & First Retirement System of the City of Detroit v. Musk*, a pending case where the settlement's value—and plaintiff's counsel's causal contributions thereto—remain disputed. *See* C.A. No. 2020-0477-KSJM, at 67-68, 81-84 (Del. Ch. Oct. 13, 2023) (TRANSCRIPT) (cited Br. of Law Profs. Amici ("AmiciBr.__") 9-10).

(c) The Court Of Chancery Correctly Looked At The Total Settlement Value In Determining A Fee Percentage

Pentwater argues incorrectly that when assessing the "benefit achieved" for the Class under *Sugarland*, the Settlement's value should be considered on a net basis—*i.e.*, minus attorney's fees. OB.17-18. The only Delaware case Pentwater cites for that argument explicitly rejects it: "this Court traditionally has granted fee awards in common fund settlements based on a percentage of the gross settlement value." *In re Jefferies Grp., Inc. S'holders Litig.*, 2015 WL 3540662, at *2 (Del. Ch. June 5, 2015). As in *Jefferies*, Pentwater identifies not "a single case in which [the Chancery] Court made a considered judgment to award a fee based on a percentage of the net recovery." *Id.* at *2. As the court noted here, "[t]he *Americas Mining* percentages are framed" in terms of gross value, and "[t]hat is the general method that courts have long used." Op.77-78 & n.33 (tracing history "back to the nineteenth century"); *see also supra* § C.1.A (collecting stage-of-the-case precedents using gross figures). Pentwater's resort to federal caselaw is equally

misplaced. Two of those three cases concern the net amount after deduction of expenses, not fees. *See Anthony v. Yahoo!, Inc.*, 376 F. App'x 775 (9th Cir. 2010); *Alaska Elec.*, 2018 WL 6250657, at *3. The third case simply held it was no abuse of discretion to consider net recovery. *See Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000).

Moreover, the use of net rather than gross proceeds is ultimately irrelevant because, to do an apples-to-apples comparison with the precedent percentages in other cases (which were all calculated on a gross basis), one must convert those percentages to net. Op.80-81. One would then have to perform some kind of iterative process, subtracting the potential fee from the settlement value to determine the ultimate fee. *Id.* In short, "framing a settlement that way simply means that [the court] ha[s] to do more math." Op.77. There is no basis in logic or precedent to do so.

(d) The Court Of Chancery Correctly Found That The Settlement Was An Outstanding Result For The Class

Pentwater presents no basis to second-guess the court's conclusion that the $1 billion Settlement was an outstanding result for the Class. Not one of the many sophisticated and litigious hedge funds in the Class challenged the Transaction, nor did any object to the Settlement itself. Indeed, Pentwater concedes the Settlement "is impressive by any standard." OB.14.

The court detailed the flaws in Objectors' argument that the $1 billion Settlement was "not as good as it seems." Op.62-72. Still, Pentwater suggests the court "focuse[d] on the overall size of the Settlement Fund, without considering how the result compared to what the Court could have awarded." OB.19. Pentwater again mischaracterizes the Opinion, which carefully considered that very question, concluding that the $1 billion recovery was extraordinary not only in absolute terms, but also compared to what might have been achieved at trial and sustained on appeal. Op.62-72. As the court noted during the Settlement hearing, other plaintiffs' counsel might have settled this case for only $150 million, which "would not [have] receive[d] a lot of question." B1249.

Pentwater relies on the $10.7 billion maximum damages Plaintiff's Counsel sought, OB.19-20, while ignoring why the court appropriately discounted that figure. "To obtain the full amount, both [the Court of Chancery] and the Delaware Supreme Court would have had to believe that the Company's credit risk was nearly zero and that virtually all of the DVMT discount was attributable to the controllers[' corporate governance records]," even though Dell "had a highly leveraged, non-investment grade balance sheet," "virtually every tracking stock in history has traded at a meaningful discount," and "[i]nvestors contemporaneously attributed some of the DVMT discount to credit risk and a conglomerate discount." Op.65. In short, "[t]o reach $10.7 billion, the plaintiffs would have needed to pitch a perfect game at trial,

then repeat that performance on appeal," and ultimately obtain "what would be the largest class action judgment in Delaware history by more than an order of magnitude." Op.65-67.

The court therefore properly considered the "risk-adjusted recovery." Op.65; *see also* Op.65-66 ("Assuming the plaintiff had a one-in-five chance of success, then the risk-adjusted recovery would fall to $2.14 billion, and the settlement would represent 46.7% of the likely damages. … Might a one-in-five estimate … be putting the odds a bit high?"). It also properly considered lower, alternative damages figures—"between $400 million and $3.1 billion"—that Plaintiff's Counsel presented in its pretrial brief precisely because of the difficulties in recovering (and sustaining) a $10.7 billion judgment. Op.66-67. Contrary to Objectors' suggestion (OB.19-21 & n.8), the Settlement value as a percentage of the risk-adjusted potential recovery and of the alternative damages figures is at the very high end of Delaware settlements. *See* Op.66-67. And as a percentage of the deal, this Settlement for 5% of the deal value far exceeds the 1-2% recoveries generally achieved in other large cases. *See* Op.67-72. Thus, even accounting for deal size, the Settlement was an outstanding achievement.

The court also debunked Pentwater's suggestion (OB.21-22) that the risk here was not that great, especially as the litigation progressed:

> No one who is actually familiar with litigation in this court could think that. They had a strong case that the defendants did not follow a fair process, but fair price was debatable. If this court or the Delaware Supreme Court concluded that the defendants had proved that the price was sufficiently fair to carry their burden on entire fairness, then the class would lose. Plus, damages were a wildcard.

Op.64. Pentwater suggests that the very fact of the Settlement shows Defendants "face[d] significant risk at trial." OB.20. But as the court explained, both sides faced risk. Op.64-65. Regardless, Pentwater's *ex post* oversimplification misses the point. Plaintiff's Counsel assumed the risk that, as the case progressed—and as Plaintiff's Counsel incurred millions of dollars in costs and almost $40 million worth of attorney time—the facts might not support its theories, its expert might not survive vigorous cross-examination, its bespoke damages theory might have flaws, and Defendants might choose not to settle (especially considering they recently took a high-value case through trial and appeal[11]). Op.64-65.

In short, Plaintiff's Counsel embraced "true contingency risk," lacked "a ready-made exit or obvious settlement opportunity," and risked "a serious possibility that [they] would lose and receive nothing." Op.73. Plaintiff's Counsel succeeded despite those risks—while facing more than 100 lawyers from many of

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[11] *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017).

the country's top defense firms—obtaining $1 billion for the Class. Op.73-76. The fee award reflects this historic result in the face of substantial risk, which the court was uniquely positioned to evaluate. *See Ams. Mining*, 51 A.3d at 1261 ("In determining the amount of a fee award, the Court of Chancery must consider the unique circumstances of each case.").

(e) The Court Of Chancery Acted Within Its Discretion In Considering Objectors' Fee Arrangements

Pentwater also errs in asserting that the court abused its discretion by considering that Pentwater's and the other Objectors' "fee arrangements" with their investor clients do not use a declining-percentage approach. OB.30-33. Courts abuse their discretion when they "give[ ] significant weight" to "an irrelevant or improper factor," *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005) (citation omitted), "to the apparent exclusion" of the relevant factors, *Calder v. Calder*, 588 A.2d 1142, ¶ 4 (Del. 1991) (TABLE).

Here, the court did not give significant weight to Objectors' fee arrangements and certainly did not exclude consideration of other factors. Rather, it examined Objectors' fee arrangements as a "cross-check," A450-52, and took three-and-a-half pages of a 90-page opinion to note that Objectors' fee arrangements conformed with all of the *other* "*strong reasons* for rejecting the declining-percentage method," Op.58-62 (emphasis added). The court merely noted the "irony" of Objectors' insistence on a declining-percentage method that they themselves shun solely as

reinforcement for its detailed explanation of why the declining-percentage method is unwarranted given the particular facts here. Op.58-62. That is hardly grounds for reversing the fee award as an "arbitrary or capricious" abuse of discretion. *Ams. Mining*, 51 A.3d at 1262.

Indeed, this Court's precedent recognizes that consideration of Objectors' fee arrangements is not an abuse of discretion. In *Southern Peru*, then-Chancellor Strine analogized class counsel's fees to investment bankers' fees to highlight the declining-percentage method's faulty premises:

> [T]here's an idea that when a lawyer or law firms are going to get a big payment, that there's something somehow wrong about that, just because it's a lawyer. I'm sorry, but investment banks have hit it big, a lot bigger th[an] plaintiffs' lawyer firms have hit it big. … I'm sure that people will envy the law firms who get awarded this fee. … But that's not rational.

S. Peru Tr. at 82.[12] On appeal, notwithstanding Justice Berger's dissent criticizing the trial court for considering "bankers' compensation," 51 A.3d at 1263, this Court affirmed the fee award and found no abuse of discretion. That properly reflects *Americas Mining*'s rejection of "mechanical approach[es] to determining common fund fee awards." *Id.* at 1254.

[12] Many other Delaware decisions have made similar analogies when determining fee awards under *Sugarland*. Op.34 n.15, 62 n.30 (collecting cases).

The court's reference to Objectors' fee structures also reflects Objectors' and Amici's suggestion for "the court to look to" "privately negotiated contingency fee agreements." Op.53. That Objectors do *not* provide for fees that decline as returns increase is at least a relevant data point to consider when assessing how sophisticated parties choose *ex ante* to reward and encourage the best possible outcomes. Op.58-59 (market for "financial professionals" should not differ from market for "financially savvy lawyers" in not using the declining-percentage method). Thus, it was not improper—let alone an abuse of discretion—to consider Objectors' fee arrangements with their investor clients. Nor is there support for Amici's assertion that "[e]ncouraging comparisons to a stockholder's own compensation arrangements … risks deterring meritorious objections" because of "concern about criticism of their own compensation." AmiciBr.25-26. *Southern Peru*'s analogy is a decade old, yet neither Pentwater nor Amici offer any evidence that objections have decreased over that time.

For similar reasons, the court also did not err in mentioning Objectors' "interest or willingness to litigate this case" themselves. OB.31. The court correctly noted Objectors "could have stepped up and chose not to"—and several affirmatively supported the Transaction—while "plaintiff and its counsel [ ] pursued the litigation and generated the results." Op.61. It was no abuse of discretion—particularly where no other Class members objected—to consider these

"sophisticated" and "highly litigious" funds' decision "to free ride" off Plaintiff's Counsel's efforts as added support for its assessment of the case's complexities and the reasonableness of the fee award. *Id.*

2. The Court Of Chancery Properly Found Plaintiff's Counsel's Time And Effort Justified The Fee Award

The court correctly found that "[t]he time and effort expended by counsel supports the indicative award." Op.73-76. While Pentwater says little about Plaintiff's Counsel's efforts, the court found them significant: "the filing of a Section 220 demand"; "prepar[ing] a strong complaint that survived a motion to dismiss" even though "the transaction had been designed so that on the surface it would meet the requirements of *MFW*"; "adeptly advanc[ing] arguments to negate the *MFW* structure"; facing "an army of skilled defense counsel [that] fought the plaintiffs at every turn"; "develop[ing] an extensive record that included nearly 2.9 million pages of documents from over forty parties and non-parties"; taking "thirty-two fact depositions, four of which lasted two days"; and engaging in extensive expert discovery and analysis. *Id.*

The court also correctly found that the $5,005.44 hourly rate and 6.76x lodestar multiplier implied by this 26.67% fee award are reasonable. Op.52; *see* B91-92 ¶ 7 (Plaintiff's Counsel expended 53,281.95 hours equating to $39,431,415.50 in billable contingency time). Pentwater mischaracterizes the Opinion in asserting it "did not properly cross-check" its fee award against the

implied hourly rate and multiplier, "[w]ithout analysis or explanation … that neither is excessive." OB.21.

To the contrary, the court properly concluded—based on a legion of precedent in and beyond Delaware—that those implied figures fell well within the range of reasonableness and did not warrant reducing the fee award "from a compensatory perspective." Op.52 & n.26. As the court explained, "the implied rate of approximately $5,000 per hour is lower than rates this court has approved for smaller recoveries" and "[t]he multiple to lodestar of 7x … would not raise a federal eyebrow." *Id.* (collecting cases); *see also, e.g.*, *Kane Cnty., Utah v. United States*, 145 Fed. Cl. 15, 19-20 (Fed. Cl. 2019) (approving 6.13x multiplier; collecting cases approving or referencing multipliers between 5.39x-19.6x). And at the Settlement hearing, the court further considered the reasonableness of the implied hourly rate and lodestar multiplier for the requested 28.5% fee award even after excluding time from staff, paralegals, and contract attorneys. B1244 (excluding those billers' time, the requested 28.5% award implied hourly rate of $6,268.13 across 44,783.55 hours).

Pentwater also wrongly claims the figures implied here are "at the high end of Delaware fee awards." OB.21-22. In *Americas Mining*, for example, this Court approved an implied hourly rate ($35,000) and lodestar multiplier (66x) far greater than those implied here. 51 A.3d at 1259-60. Pentwater calls *Americas Mining* an "outlier." OB.23. But if a $35,000 implied hourly rate (which is much more in

today's dollars) and a 66x lodestar are reasonable—even in a case where counsel's performance prejudiced stockholders, *see supra* § C.1.B—then a $5,000 rate and 6.7x lodestar are especially reasonable where Plaintiff's Counsel's performance was undisputedly exemplary. A mountain of precedent confirms the point. *See* Op.52 & n.26.[13]

Indeed, Pentwater's counsel *conceded* at the Settlement hearing that an implied hourly rate of $7,000—*i.e.*, $2,000 higher (40%) than that implied here—would be "certainly within the range of reasonable that the Court has found in other

[13] *See also, e.g.*, *In re Versum Mat'ls, Inc. S'holder Litig.*, C.A. No. 2019-0206-JTL, at 83 (Del. Ch. July 16, 2020) (TRANSCRIPT) & 2020 WL 639486 (Del. Ch. Feb. 5, 2020) (BRIEF) ($10,676.15/17.7x); *City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. Foley*, C.A. No. 2020-0650-KSJM, at 55 (Del. Ch. June 21, 2022) (TRANSCRIPT) ($8,700/14x); *Franchi v. dMY Tech. Grp., Inc. IV*, 2023 WL 2402644 (Del. Ch. Mar. 7, 2023) (ORDER) & 2022 WL 15329145 (Del. Ch. Oct. 20, 2022) (BRIEF) ($8,669.57/12.3x); *In re Medley Cap. Corp. S'holders Litig.*, C.A. No. 2019-0100-KSJM, at 67-68 (Del. Ch. Nov. 19, 2019) (TRANSCRIPT) ($5,989; noting 6x or 7x multiplier "is well within the range that this Court has awarded over the years."); *Tera v. HC2 Hldgs., Inc.*, 2020 WL 2322963 (Del. Ch. May 6, 2020) (BRIEF) & 2020 WL 4718112 (Del. Ch. Aug. 12, 2020) (ORDER) ($5,760.57/8.8x); *Okla. Firefighters Pension & Ret. Sys. v. Foley*, C.A. No. 2020-0801-KSJM, at 43-44 (Del. Ch. June 8, 2023) (TRANSCRIPT) ($5,750.06/7.9x); *In re Clear Channel Outdoor Hldgs., Inc. Deriv. Litig.*, 2013 WL 4833702 (Del. Ch. Sept. 10, 2013) (ORDER) & 2013 WL 4505077 (Del. Ch. Aug. 19, 2013) (BRIEF) ($5,702.22/10.5x); *In re Genentech, Inc. S'holders Litig.*, C.A. No. 3911-VCS, at 7-8 (Del. Ch. July 9, 2009) (TRANSCRIPT) ($5,400/11.3x); *Hollywood Firefighters' Pension Fund v. Malone*, C.A. No. 2020-0880-SG, at 24-27 (Del. Ch. Oct. 5, 2021) (TRANSCRIPT) & 2021 WL 4863103 (Del. Ch. Oct. 18, 2021) (ORDER) ($5,093.61/9.0x).

cases." B1229. And the cases Pentwater cites (OB.21-22) with lower hourly rates and lodestar multipliers are not remotely comparable to this case.[14]

In sum, the court did not abuse its discretion in finding that Plaintiff's Counsel's implied hourly rate and lodestar multiplier were reasonable. And since courts apply the declining-percentage method only when necessary to bring those figures within more-acceptable ranges, Op.34-35, this further shows how the court acted well within its discretion here in refusing to apply the declining-percentage method to reduce those figures.

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[14] *See S'holder Representative Servs. LLC v. Shire US Hldgs., Inc.*, 2021 WL 1627166, at *1-3 (Del. Ch. Apr. 27, 2021) (awarding fees under "contractual fee-shifting provision" and private "contingent fee arrangement"—which entitled counsel to a flat "one-third"—and conducting lodestar "cross-check" solely to determine fee award did not "result in an unethically excessive fee"); *Sciabacucchi v. Howley*, 2023 WL 4345406, at *5-6 (Del. Ch. July 3, 2023) ("litigation did not present true risk" because "little time was invested[,]" "few expenses were incurred[,]" and "case offered a ready-made settlement opportunity and was filed with an obvious and well-marked exit in sight" (internal quotations omitted)); *In re El Paso Corp. S'holder Litig.*, C.A. No. 6949-CS, at 37-38 (Del. Ch. Dec. 3, 2012) (TRANSCRIPT) & 41 A.3d 432, 452 (Del. Ch. 2012) (awarding full 25% fee requested; case settled shortly after court declined to enjoin transaction); *LAMPERS v. Crawford*, C.A. No. 2635-CC, at 8-13 (Del. Ch. June 8, 2007) (TRANSCRIPT) (plaintiff settled quickly after failing to get preliminary injunction; price bump was largely due not to plaintiff's counsel but "other factors," including "another bidder" that applied upward pressure); *In re AXA Fin., Inc. S'holders Litig.*, 2002 WL 1283674, at *7 (Del. Ch. May 22, 2002) (similar, and noting "there was nothing notably difficult or novel" about litigation); *Seinfeld v. Coker*, 847 A.2d 330, 338 (Del. Ch. 2000) ("[N]o heroic efforts characterized counsels' performance. Nor was this lawsuit a particularly hard fought, cost-intensive suit. … The risk premium, therefore, should not be particularly large.").

CONCLUSION

The Court should affirm the judgment.

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