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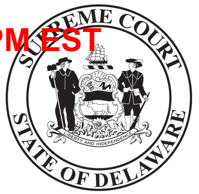

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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Dated: January 4, 2024

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PRELIMINARY STATEMENT[1]

The Court must determine whether the Trial Court's grant of $266.7 million in attorneys' fees to Plaintiff's Counsel was an abuse of discretion and contrary to applicable law. Pentwater acknowledges, as it has throughout the objection process, Plaintiff's Counsel's hard work and dedicated efforts. But Plaintiff's Counsel's efforts do not justify this extraordinary award and Pentwater[2] appeals to correct the Trial Court's (i) misapplication of *Americas Mining* and *Sugarland* by utilizing a mechanical structured percentage based on the stage of the case at settlement, and (ii) abuse of discretion by refusing to apply the declining percentage principle and improperly considering irrelevant facts like Pentwater's compensation structure.

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[1] Capitalized terms not defined herein have the same meaning as in Appellant's Corrected Opening Brief ("Opening Brief," cited "OB [page]"). Appellee's Answering Brief is referred to as "Answering Brief," and cited "AB [page]." Brief of Law Professor Amici in Support of Objector-Appellant and Reversal is referred to as "Reversal Amici Brief," and cited "RA [page]." Brief of Amici Professors Baker, Fitzpatrick and Silver in Support of Appellee and Affirmance is referred to as "Affirmance Amici Brief," and cited "AA [page]."

[2] Plaintiff states "[a]lthough seven other Class V Stockholders joined Pentwater's objection to the 28.5% award requested below … only Pentwater objects on appeal to the 26.67% award at issue." (AB 17.) Plaintiff's misguided attempt to garner an unwarranted inference about support for Pentwater's appeal lacks context. None of the other Class V Stockholders that joined Pentwater's objection were represented by counsel or formally appeared below. (A440-449.) Only Pentwater argued at the settlement hearing. (*See* BB1137-B1252.) There is no reason to infer these objectors' absence from this appeal supports Plaintiff's position or reflects anything other than convenience and cost considerations.

Plaintiff's Answering Brief does little to undermine the strength of Pentwater's appeal. Plaintiff reiterates the Opinion's misreading of *Americas Mining*. Nothing in *Americas Mining* prohibits the application of the declining percentage principle. *Americas Mining* embraced the principle and considered whether the percentage had been reduced enough. The Trial Court's refusal to consider the declining percentage principle is inconsistent with *Americas Mining* and, standing alone, warrants reversal.

Plaintiff declines to engage with many of Pentwater's arguments regarding the Trial Court's incorrect application of the first two *Sugarland* factors. The proper application of these factors justifies a substantially lower, though still generous, fee award. Pentwater acknowledges that a $1 billion Settlement Fund is impressive by any standard. (AB 3, 34.) But an impressive settlement cannot justify an excessive fee award. Delaware courts rarely consider fee awards based on settlements of such magnitude, so it is appropriate to consider other jurisdictions' experience in megafund cases. While Plaintiff acknowledges this settlement is "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" (AB 1), Plaintiff ignores the challenges of fashioning a fee award in megafund cases and directs the Court away from the only applicable judicial experience. (AB 28). Given Delaware courts' limited experience with megafund

settlements and consistent with Delaware's practice of looking to federal law for guidance, Delaware courts should benefit from federal jurisprudence on this issue.

At bottom, Plaintiff's arguments must fail because it is not 100 times more difficult to litigate a $10 billion case than it is to litigate a $100 million case and settlement size alone does not countenance a 100x multiplier of counsel's fees. (OB 24-25; RA 7.) Experienced defense counsel routinely represent clients zealously at all stages of Chancery proceedings. Contingency counsel routinely take risk regardless of their damages theories. The Trial Court did not explain, and Plaintiff never addresses how this case necessitated more work or imposed more risk justifying a windfall to Plaintiff's Counsel. For the reasons herein, Pentwater respectfully requests this Court reverse the Opinion and find the Fee Award excessive.

ARGUMENT

I. THE COURT BELOW ERRED IN AWARDING EXCESSIVE ATTORNEYS' FEES

A. The Court Applied the Incorrect Standard to Grant the Fee Award

1. The Court Misapplied *Americas Mining*

Pentwater explained in its Opening Brief that the Trial Court erred by misapplying *Americas Mining*. (OB 14-16.) Plaintiff disputes this by observing that "the Opinion discussed the case at length." (AB 22.) While true, Plaintiff misses the point. Certainly, the Opinion discussed certain aspects of *Americas Mining*, but the Trial Court erred by ignoring its teachings.

Americas Mining restated Delaware's rejection of a "mechanical approach to determining common fund fee awards" and "decline[d] to impose either a cap or the mandatory use of any particular range of percentages for determining attorneys' fees in megafund cases." *Americas Mining Corporation v. Theriault*, 51 A.3d 1213, 1254, 1261 (Del. 2012). Plaintiff suggests that because the Opinion recognizes "[t]he test is not a mechanical one," the Trial Court did not misapply *Americas Mining*. (AB 22, quoting Op. 18.) But a faithful reading of the Opinion confirms that a mechanical approach is exactly what the Trial Court applied.

The Trial Court assigned formulaic percentage ranges based upon the stage of the case at settlement, and mechanically applied that structure to this case, noting Plaintiff's Counsel made it through "approximately one-third of the late-stage

tasks," and awarding a baseline percentage, which it did not adjust, of 26.67% of the Settlement Fund, "one-third of the way between 25% and 30%" – the range the Trial Court assigned to late-stage settlements. (Op. 26.) This mechanical process is exactly what *Americas Mining* counseled ***against***.

Plaintiff hardly disputes that the Trial Court's analysis was mechanical, but nevertheless contends the process is "customary." (AB 22 (arguing "[c]onsistent with *Americas Mining*, the Court of Chancery now almost always does the same.").) Plaintiff's argument is based on pages 22-25 of the Opinion, which collects and summarizes other Chancery fee awards. Unlike the Opinion, none of those earlier fee awards applied a rote, mechanical formula based on the stage of the case at settlement. Rather, the Trial Court cited those cases because "[t]he *Americas Mining* decision did not provide a guideline range for a late-stage settlement." (Op. 22.) These cases do not stand for the proposition that such analysis must or even should start by examining the stage of the case, and *Americas Mining* expressly teaches against a mechanical approach or mandatory use of any particular range of percentages.

None of the cases the Trial Court "collects" are applicable because they involve substantially smaller settlements, many of which were approved without objection. (*See* Op. 22-25, citing *In re Mindbody, Inc. S'holder Litig.*, C.A. No. 2019-0442-KSJM (Del. Ch. June 8, 2022) (TRANSCRIPT) (considering a common

fund settlement of $27 million without objections to requested attorneys' fees); *Riche v. Pappas*, C.A. No. 2018-0177-JTL, 2020 WL 5577932 (Del. Ch. Sept. 16, 2020) (TRANSCRIPT) (considering a common fund settlement of $6.5 million without objections to requested attorneys' fees); *In re Starz S'holder Litig.*, Consol. C.A. No. 12584-VCG, 2018 WL 6515452 (Del. Ch. Dec. 10, 2018) (TRANSCRIPT) (considering a common fund settlement of $92.5 million without objections to requested attorneys' fees); *In re Jefferies Gp., Inc. S'holders Litig.*, 2015 WL 3540662 (Del. Ch. June 5, 2015) (creating a common fund of $70 million with any fee award to be paid separately, gross common fund was $91.5 million after award, with only objection from defendants); *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025 (Del. Ch. 2015) (considering settlement that included payment of $275 million to the company and certain governance changes without any objections to requested attorneys' fees amount); *In re Orchard Enters. Inc. S'holder Litig.*, 2014 WL 4181912 (Del. Ch. Aug. 22, 2014) (considering a common fund settlement of $10.725 million without objections to requested attorneys' fees); *In re Rural Metro Corp. S'holders Litig.*, Consol. C.A. No. 6350-VCL, 2013 WL 6121822 (Del. Ch. Nov. 19, 2013) (TRANSCRIPT) (considering a common fund settlement of $11.6 million without objections to requested attorneys' fees); *In re TeleCorp PCS, Inc. S'holders Consol. Litig.*, C.A. No. 19260-VCS (Del. Ch. Aug. 20, 2003) (TRANSCRIPT) (pre-*Americas Mining* case considering a common fund settlement

of $47.5 million). The highest of these supposedly precedential fee awards was 27.5% of this Settlement; combined, these cases do not even sum half of the Settlement. Here, size matters because as the recovery amount goes up, without any change to the percentage being awarded in attorneys' fees, the potential for a windfall to counsel increases dramatically. *Goldberger v. Integrated Res.*, 209 F.3d 43, 52 (2d Cir. 2000) ("Obviously, it is not ten times as difficult to prepare, and try or settle a 10 million dollar case as it is to try a 1 million dollar case.") (citation omitted).

Plaintiff cites five additional cases, all similarly distinguishable. (AB 22n.6.) None of these cases approach $1 billion, some did not face objections, some were not common fund cases, and some were not the result of a settlement. *In re Mindbody, Inc., S'holder Litig.*, 2023 WL 7704774 (Del. Ch. Nov. 15, 2023) (post-trial award with a $35.5 million gross common fund); *In re AMC Ent. Hldgs., Inc. S'holder Litig.*, 2023 WL 5165606 (Del. Ch. Aug. 11, 2023) (no common fund and without meaningful objection to attorneys' fee request); *In re Tesla Motors, Inc. S'holder Litig.*, C.A. No. 12711-VCS (Del. Ch. Aug. 17, 2020) (TRANSCRIPT) (settlement payment of $60 million, not a common fund and no objections to attorneys' fee request); *In re Medley Cap. Corp. S'holders Litig.*, C.A. No. 2019-0100-KSJM (Del. Ch. Nov. 19, 2019) (TRANSCRIPT) (settlement of therapeutic benefits and possible settlement fund, valued at approximately $22 million);

Cumming v. Edens, C.A. No. 13007-VCS (Del. Ch. July 31, 2019) (TRANSCRIPT) (cash payment of $53 million, without objections to attorneys' fees request).

The Trial Court's mechanical approach and use of standard percentage ranges to award attorneys' fees ignores the teaching of *Americas Mining* and should be reversed. 51 A.3d at 1254. The decision also conflicts with the substantive holding of *Americas Mining*, which approved a post-trial fee award of 15% of the common fund where the trial court reduced the amount of the fee award from "22.5% requested by the Plaintiff to 15% based, at least in part, on its consideration of the Defendants' argument that the percentage should be smaller in light of the size of the judgment." 51 A.3d at 1259-1260, 62-63. Application of the declining percentage principle cannot conflict with *Americas Mining*, which expressly approved the reduction of the fee award to reflect the "size of the judgment." That other factors beyond size also justified a lower percentage fee award in *Americas Mining* (AB 30) does not allow the Trial Court to ignore *Americas Mining* or the size of the Settlement here. The Court of Chancery's mechanical application of the stage of the settlement percentages without proper consideration of the size of the Settlement is reversible error.

2. The Trial Court's Application of the *Sugarland* Factors was Flawed

Separately, the Trial Court misapplied the *Sugarland* factors. As discussed in the Opening Brief (OB 17), Pentwater focuses on the Trial Court's application of the

first two *Sugarland* factors. Unsurprisingly, Plaintiff argues that "the Court's analysis of the two factors was well-reasoned, well within its discretion and supports the 26.67% fee award." (AB 20.) Plaintiff's brief does not address Pentwater's arguments and this Court should reverse the Fee Award based on the Trial Court's misapplication of these two factors.

a. Factor 1: The Results Achieved do not Warrant the Fee Award Granted

The first *Sugarland* factor considers the benefits achieved in the litigation. As explained in detail in the Opening Brief, when assessing the "benefit achieved" the value of the settlement to the class members should be considered on a net basis.[3] (OB 17-18, citing (A380)); *Anthony v. Yahoo!, Inc.*, 376 Fed. Appx. 775 (9th Cir. 2010); *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *3 (S.D.N.Y. Nov. 29, 2018); *see also In re Jefferies*, 2015 WL 3540662, at *2 & n.5.

In response, Plaintiff argues that Pentwater's reliance on the federal cases is misplaced because "two of those three cases concern the net amount after deduction of expenses, not fees," a fact Pentwater noted in its Opening Brief (OB 17n.7), and that "[t]he third case held it was no abuse of discretion to consider net recovery." (AB 33-34.) Plaintiff also argues that *Jefferies* rejects the proposition that settlement

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[3] Courts differ in their definitions of net settlements, which can exclude costs, fees or both.

value should be assessed on a net basis. (AB 33.) That argument is undermined by *Jefferies* itself, which explains the policy benefit to considering settlements on a net basis. *See Jefferies*, 2015 WL 3540662, at *2 & n.5 ("In a settlement structured based on an agreed-upon net payment to stockholders. . .without an agreement on the amount of the maximum fee award that defendants will not oppose. . .defendants have an incentive to oppose fee requests viewed as unreasonable to manage their expected gross financial exposure. By contrast, defendants are usually indifferent as to what percentage of a gross settlement is awarded to plaintiffs' counsel because their exposure is capped at the gross amount. From a policy perspective, it would be beneficial in my view for fee applications to be subject to adversarial inquiry to provide the Court with a better record with which to evaluate the *Sugarland* factors, in particular the quality of the benefit achieved in the proposed settlement and the relative complexity of the case."). Plaintiff ignores this policy benefit, while attempting to distinguish *Jefferies* and the federal cases. But the *Jefferies* court's concerns are particularly apt here: $266.7 million is a lot of money to take away from the class, and while $1 billion is an enormous settlement, the class does not receive $1 billion. With the Fee Award deducted from the Settlement Fund, the "benefit achieved" for the class is $733.33 million, not $1 billion. Again, this does not diminish the results achieved, but informs the propriety of the Fee Award. The Trial Court's failure to consider the net benefit to the class is reversible error.

Even if the Trial Court properly considered the net benefit to the class, the results achieved by Plaintiff's Counsel do not justify the Fee Award. The Opinion focuses on the overall size of the Settlement Fund, without considering how the result compared to what Plaintiff could have recovered. (Op. 62; *see also* Op. 18-20.) Instead, the Trial Court should have considered how the result achieved compared to the full range of possible outcomes. *Nottingham P'rs v. Dana*, 564 A.2d 1089, 1103 (Del. 1989) (observing settlement "value and its worth must be viewed in light of the strength of the claim that is being foregone in order to settle it.") (citation omitted). That analysis should have compelled a lesser Fee Award.

Plaintiff argues that the Opinion considers this issue and concludes "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." (AB 35.) While the settlement was large, so was the transaction that drove the potential recovery. Though both the Trial Court and Plaintiff take issue with the likelihood of recovering Plaintiff's maximum $10.7 billion damages number, the Trial Court's own analysis recognizes this potential recovery and calculates that the Settlement reflects only 9.34% of the maximum potential damages. (Op. 66-69.) Applying the Trial Court's own reasoning, this settlement ranks eleventh on a list of fifteen comparables, casting doubt on the propriety of a $266.7 million Fee Award.

Plaintiff's Counsel did not leave roughly $100 million on the table as in *Akcea* (appearing 10th in the chart on page 69 of the Opinion), Plaintiff left approximately $9.7 billion on the table. Ignoring this, Plaintiff repeats the Court's statement that "'[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.'" (AB 35-36, citing Op. 65-67.) Granting Plaintiff's Counsel $266.7 million in fees for batting .093, to use the Trial Court's baseball analogy, is not fair to the class. This Court should reverse and award attorneys' fees more reflective of the benefit obtained.

b. Factor 2: The Time and Effort of Counsel does not Justify the Fee Award

As addressed in the Opening Brief (OB 21), the Trial Court did not properly cross-check its mechanical decision to approve a pre-set percentage award based primarily on the stage of the litigation the Settlement was reached. *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1136 (Del. Ch. 2011). In response to Pentwater's argument that the Trial Court did not analyze or explain its conclusion that neither the approximately $5,000 per hour calculation, nor the seven times multiplier of Plaintiff's Counsel's customary rates was excessive, Plaintiff argues that "the court properly [reached this] conclu[sion]—based on a legion of precedent in and beyond Delaware…" (AB 42.) Plaintiff does not identify or engage with that

"legion of precedent" beyond *Americas Mining*, which Pentwater addressed above and in its Opening Brief. (OB 23.) Although *Americas Mining* is a significant outlier on the implied hourly rate and multiplier analyses, the *Americas Mining* court still reduced the percentage to reflect the extraordinary size of the common fund created. 51 A.3d at 1258-1259 ("[T]he record reflects that the Court of Chancery did reduce the percentage it awarded due to the large amount of the judgment.").

While Plaintiff further attempts to distinguish the cases cited in the Opening Brief (*see* AB 44, citing cases identified at OB 21-22), those efforts cannot change that an implied hourly rate of $5,000 and a 7x multiplier are both at the high end of Delaware fee awards. Plaintiff offers nothing to show otherwise.

B. The Court Below Erred in Failing to Consider the Declining Percentage Principle

1. The Declining Percentage Principle Applies to Chancery M&A Litigation

The Trial Court also erred by refusing to consider the declining percentage method. In refusing to apply the declining percentage method, the Trial Court held the justifications for using the declining percentage method in federal securities litigation "have not been shown to apply to Chancery M&A litigation." (Op. 53.) That sweeping conclusion, along with the Trial Court's statement that, "[t]he declining percentage method runs counter to *Americas Mining* and the incentive structure that the Delaware Supreme Court created" misconstrue this Court's prior

consideration of the declining percentage method in Delaware M&A litigation. (Op. 4.) Affirming this misapplication of *Americas Mining* will not promote the case-by-case analysis required under *Sugarland*, but rather will constrain the discretion of all Delaware courts to apply the declining percentage method in future megafund cases. *Americas Mining* requires the opposite approach and supports the reversal of the Trial Court's Fee Award.

As explained in the Opening Brief, the declining percentage method seeks to avoid windfall compensation to Plaintiff's Counsel by reducing the percentage paid to counsel as the size of the common fund increases. (OB 24.) While Plaintiff reiterates the same points that the Court set forth in the Opinion (AB 26-33), the answering papers ignore Pentwater's argument that "plaintiffs' counsel have no trouble identifying meritorious claims and the chances of success indisputably increase after surviving a motion to dismiss" is equally applicable in Delaware. (OB 28.)

Plaintiff's arguments, which parrot the Opinion, fail. First, Plaintiff argues "parties negotiating fee arrangements *ex ante* do not use declining percentages as the recovery increases." (AB 26, citing Op. 53-58.) Second, Plaintiff argues that the use of the declining percentage method is a "backdoor—and a backward looking—lodestar method" and Pentwater's citations to federal cases are inapplicable. (AB 28, quoting Op. 40.) Finally, Plaintiff argues that Pentwater omits the reasons for

the low percentage awarded in *Americas Mining*. (AB 30.) Each of these arguments fail.

Plaintiff's first argument, that *ex ante* fee arrangements do not use declining percentages as the recovery increases, relies on an article by Professor Fitzpatrick titled *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L.REV. 1151 (2021). This article, and anecdotal reliance on the parties' *ad hoc* submission of fee agreements for a small subset of the plaintiff's bar, much of which were submitted *in camera* on an expedited schedule, and exempted from discovery and adversarial testing, cannot establish a market. Even if it could, as the Reversal Amici Brief points out, Professor Fitzpatrick's article is based solely on Antitrust litigation (RA 22), and the analysis is flawed for several reasons. The Reversal Amici Brief emphasizes: (1) "Antitrust plaintiffs may not reach *ex ante* agreements because they already enjoy a *de facto* declining percentage"; (2) excessive fees may not be problem in this context as "the largest lodestar multiplier was slightly over 4x"; (3) [a]ntitrust cases typically allow for treble damages; and (4) the settlements in the *Judge's Guide* nearly all included large incentive awards to the representative plaintiff. (*See* RA 22-23.) At best for Plaintiff, the small subset of *ex ante* fee arrangements submitted to the Court and referenced by Professor Fitzpatrick offer a weak argument against applying the declining percentage method to all megafund cases; they do not justify ignoring it altogether in Delaware litigation.

As to Plaintiff's second argument that the declining percentage method is a "backdoor—and a backward looking—lodestar method" (AB 28, quoting Op. 40), Plaintiff does not explain how the application of the declining percentage method is any different than using the lodestar as a "cross-check" against windfalls. *Hollywood Firefighters' Pen. Fund. v. Malone*, 2021 WL 5179219, at *11 (Del. Ch. Nov. 8, 2021) ("To prevent granting of windfall awards, this Court has historically considered hours worked as a 'crosscheck.'"). Nor does Plaintiff show how using the declining percentage method as a cross-check against excessive fee awards would adversely affect the fee award process – especially where *Americas Mining* expressly condones its application.

As part of its second argument, Plaintiff asserts that the federal cases Pentwater relied on are inapplicable, and instead points to a number of cases (AB 29-30n.9) it suggests are more instructive. Plaintiff's cases all involve antitrust claims that suffer from the same issues addressed above. Ironically, the first case Plaintiff cites ***endorses*** the use of the declining percentage principle. In *Alaska Elec. Pension Fund*, 2018 WL 6250657 (S.D.N.Y. Nov. 29, 2018), the court stated "[t]he size of 'the requested fee in relation to the settlement,' however gives the Court pause." 2018 WL 6250657, at *2 (citations omitted). Going further, the court observed that "the Second Circuit itself has endorsed a sliding-scale approach, noting that, in cases with larger settlements, 'courts have traditionally awarded fees

... in the lower range of what is reasonable' because 'economies of scale could cause windfalls.'" *Id.* While Plaintiff cites to Professor Fitzpatrick's affidavit submitted in that case as support for not applying the declining percentage principle, the court in *Alaska Elec. Pension Fund* responded to Professor Fitzpatrick's arguments with the following:

> Professor Fitzpatrick criticizes the purported trend of courts "slash[ing]" fees "simply because settlements are large," arguing that it produces disincentives for attorneys to take on these types of cases. (Fitzpatrick Decl. ¶ 19). The impetus for reducing awards in these cases, however, is not a mechanical aversion to large numbers, but rather a "recogni[tion] that economies of scale could cause windfalls," which is to say, *unreasonable* fee awards.

Id. at *3n.5 (citations omitted). In deciding to award 26%, the court noted it was using its "very broad discretion" and given the "extraordinary complexity of the case," which the court described as "one of the most complicated — if not the most complicated — that this Court has handled," and the 158,000 billable hours lead counsel dedicated to the case that resulted in a 1.41x lodestar multiplier, which the court used to ensure there was no windfall. *Id.* at *1-*4.

Plaintiff's third argument asserts that Pentwater "largely omits the reasons for that relatively low percentage" awarded in *Americas Mining.* (AB 30.) The existence of other factors supporting a lower percentage does not negate that *Americas Mining* approved the reduction of the fee award to reflect the "size of the judgment." *Americas Mining*, 51 A.3d at 1259-1260, 62-63. Notably, Plaintiff does

not—because it cannot—respond to the argument that attorneys' fee awards are meant to incentivize attorneys to bring meritorious cases, and the amount of work, time, effort, and risk does not increase proportionately with the transaction size—it is not 100 times more difficult (or risky) to litigate a $10 billion case than it is to litigate a $100 million case. *Goldberger*, 209 F.3d at 52. Consequently, the fees earned by Plaintiff's Counsel should not increase proportionally with transaction size. Plaintiff does not dispute this proposition, nor does Plaintiff explain why this case justified such a windfall payment. As explained in the Opening Brief and cited to in the Reversal Amici Brief, empirical studies demonstrate that as the size of federal securities class action settlements increase, the attorneys' fees awarded, as a percentage of the settlement, correspondingly decrease. (OB 26-28; RA 8-14.) If nothing else, the federal precedent provides useful guidance and relevant data points to the Court of Chancery, which rarely deals with megafund settlements in excess of $1 billion. While Plaintiff argues that "Pentwater and Amici also skew that average by looking at cases with a $1 billion value or more" (AB 30n.10), that comment ignores the obvious relevance of those cases insofar as this case settled for $1 billion. Nevertheless, despite having these informative data points, the Trial Court refused to consider federal precedent in granting the Fee Award. This Court should find that the Trial Court's refusal to employ the declining percentage method constitutes reversible error.

2. The Court Should Disregard the Affirmance Amici Brief

The Affirmance Amici Brief is significantly flawed. The more glaring issues include:

First, the Affirmance Professors argue "[s]etting declining marginal percentages is a tricky business." (AA 2.) This argument does not explain why setting "declining marginal percentages" is more difficult or even different than setting the increasing marginal percentages the Trial Court advocates in the Opinion.

Second, the Affirmance Professors argue that attorneys who are paid more will work harder than those who are paid less. (*See* AA 3.) This argument ignores attorneys' ethical obligations requiring them to zealously advocate for clients regardless of compensation. Notably, judicial officers, public defenders, prosecutors and public interest lawyers work extremely hard for fractions of what the private bar receives. Even if this observation were true, and reasonably considered, taken to its logical extension could eviscerate any limits on fee awards and conflicts with *Sugarland's* mandate to balance any fee award against the benefit obtained to determine fair compensation for counsel without providing a windfall at the expense of the class.

Third, the Affirmance Professors suggest that the Reversal Professors argue for a return to the lodestar. (AA 15-20.) They are wrong. Both the Reversal Professors and Pentwater suggest, as Delaware law has long recognized, the use of

lodestar as a "cross-check" against windfalls. *Hollywood Firefighters'*, 2021 WL 5179219, at *11.

Finally, the Affirmance Professors stress a fee award should "mimic the market" (*see* AA 6), and even say "we have *never* seen a [declining percentage] fee agreement." (AA 19.) Just because three academics claim not to have seen something does not establish market practice and the Affirmance Professors' statement is contradicted by the declaration of Charles Silver, cited in the Affirmance Amici Brief at page 13. Professor Silver observes that "sophisticated clients sometimes use scales of percentages" and references a fee agreement with a sliding scale that initially goes up, but then goes back down as the recovery gets larger. (*See* Declaration of Charles Silver, ¶ 53, *In re Takata Airbag Product Liability Litigation (Economic Loss Track Cases Against Honda and Nissan)*, No. 15-md-02599 (S.D. Fla. Jan. 24, 2018), at ¶ 47.)

The Affirmance Professors also reference that the Seventh Circuit "makes the market rate the sole determination in awarding class fees." (AA 6n.3.) The Seventh Circuit recently held in considering market evidence, "this court has never categorically rejected consideration of bids with declining fee scale award structures" and acknowledged that "that such a fee structure can present certain advantages." *In re Broiler Chicken Antitrust Litig.*, 80 F.4th 797, 803 (7th Cir. 2023). The Affirmance Professors' suggestion that the market rejects declining fee

agreements is wrong and none of the Affirmance Professors' arguments counsel against using the declining percentage principle with discretion.

C. The Court Erred by Considering Pentwater's Compensation Structure

As Pentwater set forth in its Opening Brief, the Trial Court improperly gave significant weight to the irrelevant fact that Pentwater and the other objectors are investment managers. (Op. 58.) Plaintiff responds by stating the court "examined the Objectors' fee arrangements as a 'cross-check.'" (AB 38, quoting Op. 38.) The irony of Plaintiff's complaints about using a lodestar as a cross-check, while defending the consideration of Pentwater's inapplicable compensation structure for the same purpose, should not be lost on the Court. Regardless, unlike the declining percentage method, the application of which could prevent a windfall to Plaintiff's Counsel and protect the class, consideration of Pentwater's compensation structure cannot. Even if Pentwater's compensation rose with the size the returns it generates for investors – arrangements that are governed by highly negotiated contracts and exempted from judicial review in the absence of a potential fiduciary conflict – that would not justify a windfall to Plaintiff's Counsel. Pentwater's compensation structure is irrelevant, and the Trial Court erred by considering it.

Even if consideration of Pentwater's compensation structure had any bearing on the *Sugarland* analysis, which it does not, it ignores that the class is composed of diverse stockholders, not just private equity and hedge funds. Any reduction in the

Fee Award will increase the recovery to the entire class—not just Pentwater. With a diverse class of public stockholders of all stripes, justifying an excessive Fee Award on the irrelevant compensation structure of a class member with the resources to pursue an objection ignores *Sugarland's* mandate: to balance any fee award against the benefit obtained to ensure adequate compensation for class counsel without providing a windfall. Pentwater's compensation structure, for investment management services, cannot inform the market for compensating class counsel for a successful recovery.

The Reversal Amici Brief also states that "[e]ncouraging comparisons to a stockholder's own compensation arrangements … risks deterring meritorious objections" because of "concern about criticism of their own compensation." (RA 25-26.) In response, Plaintiff argues that "neither Pentwater not Amici offer any evidence that objections have decreased over time." (AB 40.) Objections are rare, given their associated costs and the discretion afforded to the Trial Court. Reasonable potential objectors will re-consider pursuing an already expensive and challenging objection, if it will result in criticism of their own compensation or subject them to unwarranted public disclosures.

Plaintiff's criticism that Pentwater did not seek to litigate this case by engaging in an already crowded leadership fight, when it sometimes pursues representative litigation affirmatively, does not justify an excessive Fee Award. Nor

does it support an excessive fee award because this case was so risky no one else would pursue it. To the contrary, the contested leadership fight suggests that this case was less risky than the Trial Court or Plaintiff's Counsel claimed to justify the Fee Award. Pentwater's pursuit of its objection below and this appeal counters the Court of Chancery's free rider theory—Pentwater has incurred substantial expense pursuing an objection and this appeal to ensure that the Fee Award comports with Delaware law and denies a windfall to Plaintiff's Counsel. Plaintiff does not offer any meaningful response. The Trial Court abused its discretion by giving these irrelevant and improper facts significant weight in its analysis.

D. The Court Can Decide the Amount of Fees to Award.

Plaintiff takes issue with Pentwater's argument that this Court may determine a reasonable fee on its own. (AB 19-20.) Plaintiff argues this "defies the considerable deference afforded to the Court of Chancery." (AB 20.) Plaintiff offers no support that this Court is not able to reverse the Opinion and set an appropriate Fee Award, and this Court has already determined it can. *Sugarland*, 420 A.2d at 151 ("Sugarland has taken the position that if the Court reduces the fee award, we should, in the interest of justice and judicial economy, determine the appropriate fee. We conclude that it is appropriate for us to do so in this case."). Pentwater respectfully suggests that if this Court reverses, the Court should, in the name of

judicial efficiency, determine the fee itself to avoid further time-consuming and costly proceedings, which might again be subject to appellate review after remand.

CONCLUSION

For the foregoing reasons and those set forth in the Opening Brief, Pentwater respectfully requests that this Court reverse the Fee Award.

BAYARD, P.A.

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