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Case No. 2018-0816-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE DELL TECHNOLOGIES INC. CLASS V STOCKHOLDERS LITIGATION	Consol. C.A. No. 2018-0816-JTL

PENTWATER CAPITAL MANAGEMENT L.P.'S
OBJECTION TO PLAINTIFF'S COUNSEL'S FEE APPLICATION

Pentwater Capital Management L.P. ("Pentwater"), the holder or beneficial owner of approximately 1.6% of shares of Dell Class V common stock as of December 28, 2018[1] and a member of the Class,[2][3] respectfully submits this objection (the "Objection") to Plaintiff's Corrected Application In Support of Settlement and Award of Attorneys' Fees, Expenses, and Incentive Award (the "Fee Application").[4]

[1] This Objection is separately joined by Alpine Associates Management Inc., Canyon Capital Advisors LLC, Carlson Capital, L.P., Dodge & Cox, Farallon Capital Management, L.L.C., Icahn Capital LP, and P. Schoenfeld Asset Management L.P., each of which is a member of the Class or an investment manager of private investment funds that are members of the Class. As reflected in their letter of joinder, these entities collectively held or beneficially owned approximately 48,734,713 shares of Class V common stock as of December 28, 2018, and represent approximately 24.45% of the Class.

[2] Unless otherwise defined herein, capitalized terms in this letter have the same meaning as in the Stipulation and Agreement of Settlement, Compromise, and Release dated December 22, 2022.

[3] Documents demonstrating Pentwater's Class membership are annexed hereto as Exhibit A.

[4] This Objection and accompanying Exhibits are simultaneously being hand-delivered to Representative Plaintiff's Counsel and Representative Defendants' Counsel on April 4, 2023.

Although we recognize the hard work and dedicated efforts of Plaintiff's Counsel in this matter, it is our view that the attorneys' fees sought as part of the proposed settlement of this action (the "Proposed Settlement")—$285 million—are far in excess of what is appropriate in these circumstances, and would be fundamentally unfair to the Class.

The Fee Application devotes little attention to the sheer enormity of the fees sought by Plaintiff's Counsel. We urge the Court to carefully examine the Fee Application—and specifically the size of the requested fee. Rather than basing the attorneys' fee award here on a strict percentage of the Settlement Fund (as Plaintiff's Counsel advocates), we respectfully submit that a declining percentage approach is appropriate in these circumstances. This principle has previously been endorsed by the Delaware Courts and reflects that in large class settlements such as this one, an award of attorneys' fees based on a simple percentage of the recovery simply does not yield equitable results.

If awarded, the requested fee would represent a final unfairness to stockholders, following an unfair Transaction in 2018 and a settlement that falls short in meaningfully remedying the full extent of stockholders' monetary damages. We respectfully request that the Court, in its fiduciary capacity, exercise its discretion and reduce the requested fee award.

I. Simply Awarding a Percentage of the Settlement Fund, Without Consideration of the Enormity of that Fund, is Fundamentally Unfair to the Class

The size of the Settlement Fund here is massive in absolute dollar terms—as were the monetary damages borne by the Class as a result of the Defendants' transparent and extraordinary misconduct. Like the Proposed Settlement, the fee sought by Plaintiff's Counsel is massive. The enormity of Plaintiff's Counsel's $285 million Fee Application, both in absolute terms and as a proportion of the Settlement Fund, risks creating a dangerous precedent for Delaware courts.

As members (or fiduciaries of members) of the Class, we were surprised to see that the Fee Application presented only a brief discussion of Plaintiff's Counsel's fee request, did not acknowledge the enormity of the amount requested, and offered only a limited explanation of why Plaintiff's Counsel believes it to be *fair and reasonable* to the Class.

In asserting that the requested fee is "fair and reasonable," the Fee Application notes that the fee request translates to $5,268.49 per hour. (Fee Application at 65.) Of course, that calculation is based on the reported hours billed by Plaintiff's Counsel (more than 53,000, yielding an asserted $39,431,415.50 in legal fees). Efficiency concerns here are acute. Taking the estimated hours billed at face value, however, the fact that an hourly rate in excess of $5,000 has been approved by this Court in other cases does not establish that it is fair and reasonable here.

We also note that the Proposed Settlement as structured provides for attorneys' fees to come out of the recovery for the Class. Inevitably, as the percentage awarded to the attorneys grows, the net benefit available to the Class declines. As Chancellor Chandler noted, however, "the goal of fees in class action cases should be to maximize the net recovery to the class." *In re Digex, Inc. S'holders Litig.*, C.A. No. 18336-CC, at 74 (Del. Ch. Apr. 6, 2001) (Transcript). Accordingly, the Court of Chancery has previously expressed a preference for structuring settlements to provide a net recovery, in which attorneys' fees are awarded on top of the fund (sometimes called a "net fund"). *See, e.g.*, *In re Jefferies Grp., Inc. S'holders Litig.*, No. CV 8059-CB, 2015 WL 3540662, at *2 n.5 (Del. Ch. June 5, 2015). As explained in *Jefferies*,

> In a settlement structured based on an agreed-upon net payment to stockholders (or the corporation in a derivative case) without an agreement on the amount of the maximum fee award that defendants will not oppose, as occurred here, 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.

Here, because Plaintiff's Counsel negotiated the Proposed Settlement so that its fee award will be deducted from the Settlement Fund rather than negotiating a "net fund," there is little opportunity for what the Court calls "adversarial presentation." *In re*

Globe Specialty Metals, Inc. S'holders Litig., Consol. C.A. No. 10865-VCG, at 73 (Del. Ch. Feb. 10, 2016) (Transcript) (finding a net fund approach a "tremendous advantage" for the Court because it supplies a "full discussion of what the appropriate fee should be"). Thus, we are compelled—in spite of our sincere appreciation for Plaintiff's Counsel's efforts—to file this objection on behalf of members of the Class.

Our point is simple: the requested fee in absolute and percentage terms is disproportionate to the value conferred on Class members by the Settlement Fund.

II. The Court Should Use the Declining Percentage Principle in Awarding Attorneys' Fees Here

Plaintiff's Counsel notes correctly that *Sugarland* calls for an award of fees based on a percentage of benefit. (Fee Application at 58-59.) In assessing which percentage should be applied, we respectfully submit that the considerable size of the Settlement Fund necessitates application of a significantly lower percentage as a matter of equity and fairness to the Class.

Delaware has accepted the "judicial consensus that the percentage of recovery awarded should 'decrease as the size of the [common] fund increases.'" *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1048 (Del. 1996). The Court of Chancery expressly recognized in *Digex* that application of the declining percentage principle is "appropriate and reasonable." *In re Digex*, at 145.

The declining percentage principle seeks to avoid granting fees that are outsized compared to the value received by the Class. Attorneys' fee awards are meant to reasonably incentivize the attorneys taking these cases, and the amount of work, time and effort spent on a case does not grow proportionately with the transaction size—it is not a hundred times more difficult (or riskier) to litigate and try a $10 billion case than it is to litigate and try a $100 million dollar case.

This Court has invoked this "declining percentage" principle to reduce requested fee awards. In *Southern Peru*—the only Delaware case awarding a fee larger than the one requested here—the benefits achieved *at trial* for the Class were valued at $2 billion. Then-Chancellor Strine awarded fees post-judgment that were nonetheless significantly lower than those requested by plaintiffs' counsel in that case. Chancellor Strine stated: "I gave a percentage of only 15 percent rather than 20 percent, 22 1/2 percent, or even 33 percent ***because the amount that's requested is large***. I did take that into account." *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1259 (Del. 2012) (*emphasis added*). *See also In re Digex, Inc. S'holders Litig.*, C.A. No. 18336-CC, at 147 (Del. Ch. Apr. 6, 2001) (reducing requested 15% fee to 7.5% based on the declining percentage principle).

Another decision consistent with a "declining percentage" principle is *Louisiana Municipal Police Employees' Retirement System v. Crawford*, a case with benefits valued near or over $1 billion in today's dollars. There, the Court approved

attorneys' fees of $20 million for a benefit valued anywhere from $660 million to $3 billion, in a "bump" case implicating enhanced scrutiny. C.A. No. 2635-CC (Del. Ch. June 8, 2007). In today's dollars (after adjusting for inflation), *Crawford* awarded plaintiffs' attorneys $29 million in fees for a *$957.6 million* benefit.

Delaware courts are not typically presented with fee award requests of this magnitude. Federal class action lawsuits, especially securities suits, have more frequently resulted in settlements in excess of $1 billion. Empirical studies show that as the size of federal securities class action settlements rise, the attorneys' fees awarded, as a percentage of the settlement, correspondingly decrease. A 2022 report released by Nera Consulting (Exhibit B) found that within the prior ten years, in all securities class action cases that settled for more than $1 billion, attorneys' fees and expenses averaged only **10.5%** of the settlement recovery.

Similarly, data collected by Stanford Law School in collaboration with Cornerstone Research on the top 10 largest federal securities class action settlements show that as settlement amounts rise, the percentages awarded in attorneys' fees falls. We have presented this data in Exhibit C. This data shows that the majority of fees awarded in the 10 largest securities class action settlements comprised under 15% of the settlements secured. The average of these fee awards is **9.4%**.

Plaintiff's Counsel may argue that the declining percentage principle is "economically unsound," on the theory that its use would disincentivize attorneys

from pursuing maximum relief for the class. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005); *see also, e.g., In re Southern Peru S'holder Litig.*, No. 961-CS, Transcript at 77, 83 (Del. Ch. Dec. 19, 2011) (expressing misgivings with the declining percentage principle but nonetheless reducing fees from award request due to size). But, as several federal courts have noted, including specifically in the context of settlements of $1 billion or more, that concern is overstated.

For example, the Second Circuit, in affirming a District Court's decision to reduce an attorneys' fee award from 18% to 6.5% of a multi-billion dollar settlement fund, reasoned:

> We need not dispute whether the sliding scale approach is economically rational in the context of ensuring competent and committed counsel. Public policy concerns oftentimes redefine the focus of the court. ... [T]he district court's decision in favor of protecting the instant class from an excessive fee award militates against awarding attorneys' fees based purely on economic incentives. Satisfied that its ruling would not deter plaintiffs' attorneys from pursuing similar claims, the district court remarked, "If [this fee award] amounts to punishment, I am confident there will be many attempts to self-inflict similar punishment in future cases." We agree.

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 123 (2d Cir. 2005) (antitrust context).[5] In *Wal-Mart Stores*, lead counsel for plaintiffs sought an 18% fee on a $3 billion settlement, which the district court found "excessive" and "fundamentally unreasonable." The district court awarded a 6.5% fee—or approximately $220 million. The Second Circuit affirmed, and further commented that "the sheer size of the instant fund makes a smaller percentage appropriate."

The Third Circuit has similarly endorsed this principle. In *Prudential Insurance*, the Court noted that the "inverse relationship" between rising settlement amounts and falling fee percentages arises from the idea that "[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel," and affirmed that it was appropriate to apply that principle in a case where the settlement recovery could rise to $1 billion. *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 339 (3d Cir. 1998).

[5] We note that the empirical trend of a "declining percentage principle" in the largest securities class action settlements has not appeared to slow the filing of securities class action suits and the vindication of stockholder rights. *See, e.g.*, Figure 1, NERA Report at 2 (presenting numbers of federal securities class action filings from 1996 (131) through 2021 (205)).

Although this federal precedent is not binding on this Court, we submit that the abundant empirical evidence from federal settlements may provide guidance here, given the atypically large absolute value of the settlement in this case.

In Delaware, the next highest attorneys' fee award after *Southern Peru/Americas Mining* was granted in *Activision Blizzard*, where plaintiffs reached a $275 million cash settlement – representing approximately a 13.75% to 27.5% recovery from the total potential recovery of over $1 billion to potentially $2 billion – one month before trial. *See In re Activision Blizzard*, C.A. No. 8885-VCL, at 17-18 (Del. Ch. Mar. 4, 2015) (Transcript). There, this Court determined that a 22.7% to 24.5% fee on the cash portion of the settlement was fair. *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025, 1075 (Del. Ch. 2015). Here, the Settlement Fund is more than *four-times larger* than the cash settlement reached in *Activision Blizzard*, while the settlement represents a lower percentage of the total potential recovery presented. We respectfully submit that utilizing the declining percentage principle, a significantly lower percentage attorneys' fee award would be appropriate in these circumstances.[6]

[6] In *Activision Blizzard*, this Court theorized that using an increasing "sliding scale" with fee percentages incentivizes lawyers towards maximizing class recovery by countering the human tendency towards risk aversion. 124 A.3d at 1070-71. While a straight percentage award based on the size of the settlement fund may be appropriate for cases involving smaller transactions and correspondingly smaller absolute recoveries for the Class, we respectfully submit that the *necessity* (and

We understand that use of the "declining percentage" principle in applying the *Sugarland* factors is, of course, a matter of judicial discretion. *See Americas Mining*, 51 A.3d at 1258. We respectfully ask the Court to exercise that discretion here.

III. The "Benefit Achieved" Does Not Merit the Requested Fee Award

The first *Sugarland* factor considers the benefits achieved in the litigation. Delaware courts assign "the greatest weight" to this factor. *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012).

As the Court observed in its December 29, 2022, letter to counsel, the magnitude of the proposed settlement is notable in terms of its absolute dollar value. But as the Court also observed, a nominally large payment in the context of a "mega-deal" is not necessarily a reliable indicator of its significance. We respectfully submit that the Court's observation holds true here: when measured against the size

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marginal effectiveness) of the incentive effects of that approach in rewarding enterprising and risk-taking plaintiffs' counsel begin to break down in the case of litigation involving larger deals that correspondingly result in much larger settlements (in absolute dollars). This is particularly the case given the extreme set of circumstances presented here—a mega transaction, entire fairness review, credible allegations of coercion that undermined the Special Committee's ability to negotiate effectively, and $10.7 billion in estimated monetary damages to the Class. Plaintiff's Counsel was maximally incentivized to litigate this case even with a relatively more modest attorneys' fee award. And applying a straight percentage approach to Plaintiff's Counsel's attorney's fee award unnecessarily, and unfairly, reduces the Class' recovery in absolute terms.

of the underlying transaction and, we believe more relevantly, against the actual monetary damages suffered by the Class, the Proposed Settlement is not as significant as its absolute size might otherwise suggest.

As a threshold matter, given the presence of controlling stockholders in the conflicted 2018 DVMT transaction, defendants would have borne the burden at trial of establishing that the underlying transaction was entirely fair—the "most onerous" standard of review under Delaware law and one defendants were not likely to satisfy. The facts underlying this litigation are well presented in the Plaintiff's Counsel's complaint and Fee Application. The deeply flawed process led to a dispute where liability was seriously resisted but never seriously in doubt. As the Court acknowledged in its December 29, 2022, letter to counsel, in the context of settlement discussions, the shifting burden in controller transactions such as here often results in significant bargaining leverage for Plaintiff's counsel.

The damages theory proffered by Plaintiff's Counsel in its Pre-Trial Brief—the difference in value between what Dell received in the underlying transaction ($31.5 billion), and what Dell gave up ($20.8 billion)—was based in part on simple arithmetic, is well supported by expert analyses, and would entail an award of **$10.7 billion** in damages to the Class. (Pl. Pre-Trial Br. at 90-94.) Such a recovery would equate to a $54 per share premium to the actual deal price for the Class—from $104 to approximately $158—an approximately 52% increase. The Proposed Settlement,

on the other hand, translates to just a $5.01 per share increase to the Class or, as Plaintiff's Counsel notes, only a 4.8% premium. (Fee App. at 49.) Stated in starker terms, the Proposed Settlement equates to **only 9.3%** of the Class's total potential recovery (as proffered by Plaintiff's Counsel)—and on a net basis, if Plaintiff's Counsel's Fee Application is granted, the value of the Potential Settlement to the Class ($715 million) is an even smaller fraction of the $10.7 billion damages suffered by the Class.

This yield percentage of potential recovery—9.3%—compares ***very unfavorably*** against the yield percentage of potential recoveries in the 24 entire fairness cases identified by Plaintiff's Counsel in its "Settlement Metrics Case Collection" provided to the Court on March 27, 2023. As noted in Plaintiff's Counsel's case compendium, for all identified settlements since 2012, the average settlement value as a percentage of total potential recovery was nearly 35%, and for settlements in cases with deal sizes above $1 billion, the average settlement value as a percentage of total potential recovery decreased slightly to approximately 30%.

In their Fee Application, Plaintiff's Counsel describe their own view as to the significance of the $1 billion Proposed Settlement (notwithstanding that they were prepared to seek ***10 times*** as much at trial) by referring to their assessment of the risk that the Court might reject their damages expert or discount his proffered damages computation. According to Plaintiff's Counsel, potential alternative

damages calculations could result in a damages range of between $400 million to $3.1 billion. (Fee App. at 46.) Based on this risk analysis, Plaintiff's Counsel asserts that the Proposed Settlement actually reflects a yield percentage of between 33% to 250% of the Class's "most plausible damages outcomes." (Fee App. at 49.) Plaintiff's Counsel does not explain why these lower alternative damages theories are suddenly – in the context of the fee application in the Proposed Settlement – more "plausible" than the damages theory actually proffered by Plaintiff's Counsel in its Pre-Trial Brief and supported by their damages expert which, if accepted, would have resulted in a $10.7 billion damages award to the Class. The credibility of the expert, the inputs used, and the damages theory presented – were all controlled by Plaintiff's Counsel. It is difficult to reconcile the idea that Plaintiff's Counsel performed exceptionally well with the idea that Plaintiff's Counsel's expert was exceedingly vulnerable. Both positions may well be exaggerated in order to justify the advocated result.

We submit that because the fees awarded to Plaintiff's Counsel will be deducted from the Settlement Fund, when assessing the "benefit achieved" for the Class under *Sugarland*, the value of the settlement to the Class should be considered on a net basis. Specifically, as noted above, if Plaintiff's Counsel's Fee Application is granted, the proposed $1 billion settlement would equate to only $715 million in value awarded to the Class. This is a significant sum in absolute dollars, but it is

even a smaller fraction of the $10.7 billion potential recovery that Plaintiff's Counsel was prepared to advocate for at trial.

CONCLUSION

Accordingly, we respectfully urge that the attorneys' fees awarded to Plaintiffs' Counsel should reflect the facts and principles set forth herein. We appreciate the Court's attention to this matter.

Dated: April 4, 2023

/s/ Stephen B. Brauerman

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CERTIFICATE OF SERVICE

I, Stephen B. Brauerman, do hereby certify that this day of April 4, 2023, a copy of the Dell Technologies Class V Class Members' Objection to Plaintiff's Counsel's Fee Application was served upon the counsel listed below by hand-delivery:

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Additionally, I do hereby certify that this day of April 4, 2023, a copy of the Dell Technologies Class V Class Members' Objection to Plaintiff's Counsel's Fee Application was served upon the counsel listed below by File & Serve*Xpress*:

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