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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES ALMOND AS TRUSTEE FOR THE ALMOND FAMILY 2001 TRUST, ALMOND INVESTMENT FUND LLC, CHARLES ALMOND, and ANDREW FRANKLIN	)	
Plaintiffs Below, Appellants	)	Consolidated No. 215, 2019
v.	)	No. 216, 2019
GLENHILL ADVISORS LLC, GLENHILL CAPITAL LP, GLENHILL CAPITAL MANAGEMENT LLC, GLENHILL CONCENTRATED LONG MASTER FUND LLC, GLENHILL SPECIAL OPPORTUNITIES MASTER FUND LLC, JOHN EDELMAN, GLENN KREVLIN, JOHN McPHEE, WILLIAM SWEEDLER, WINDSONG DB DWR II, LLC, WINDSONG DWR LLC, WINDSONG BRANDS, LLC, HERMAN MILLER, INC., and HM CATALYST, INC.	)	Court Below: Court of Chancery of the State of Delaware, C.A. No. 10477-CB
Defendants Below, Appellees	)	
and	)	
DESIGN WITHIN REACH, INC.,	)	
Intervenor and Counterclaim-Petitioner Below, Appellee	)	

CORRECTED ANSWERING BRIEF OF APPELLEES HERMAN MILLER, INC., HM CATALYST, INC., AND DESIGN WITHIN REACH, INC.

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NATURE OF THE PROCEEDINGS

This is an appeal from a portion of a final judgment of the Court of Chancery, granting relief under 8 *Del. C.* § 205 ("Section 205"). The essence of Plaintiff-Appellant Andrew Franklin's contention on appeal is that Design Within Reach, Inc.'s ("DWR" or the "Company") majority stockholder unwittingly diluted its own interests in 2010 through an improperly documented reverse stock split, that Section 205 did not empower the Court of Chancery to rectify that inadvertent self-dilution, and that as a result, the proceeds of a concededly fair 2014 merger (the "Merger") must be reallocated so that plaintiffs may receive a windfall many times larger than what they requested in the trial court. The Court of Chancery's contrary decision (*Almond for Almond Family 2001 Tr. v. Glenhill Advisors LLC*, 2018 WL 3954733 (Del. Ch. Aug. 17, 2018) (the "Opinion" or "Op.") was legally sound and amply supported by the trial record. This Court should affirm, and should also affirm the Chancellor's discretionary determination (*Almond as Trustee for Almond Family 2001 Tr. v. Glenhill Advisors LLC*, 2019 WL 1556230, at *1 (Del. Ch. Apr. 10, 2019), *judgment entered sub nom. Almond v. Glenhill Advisors LLC* (Del. Ch. 2019), *amended sub nom. Charles Almond as Tr. for the Almond Family 2001 Tr. v. Glenhill Advisors LLC* (Del. Ch. 2019) (the "Fee Opinion" or "Fee Op.") to reject plaintiffs' request for a fee award under the corporate benefit doctrine. Additionally, the Court may dismiss Franklin's appeal

in its entirety without reaching the merits, on the basis that the notice of appeal was not timely served, and that as a result this Court lacks jurisdiction.

* * *

For all Franklin's rhetoric about alleged fiduciary misconduct by DWR's directors and controlling stockholder before Herman Miller, Inc. ("HM") acquired the Company in 2014, this appeal is about relief under Section 205 in relation to an economically neutral corporate action.[1] In August 2010, DWR carried out two 1-for-50 reverse stock splits (the "Reverse Splits"), one of its common stock and one of its Series A Convertible Preferred Stock ("Series A"). Prior to the Reverse Splits, Glenhill Capital LP (with its affiliated entities, "Glenhill") held over 90% of the outstanding equity and voting power of the Company, including all of the Series A. A1668 (Stipulated Fact ("SF") ¶ 64). The Series A was convertible into common stock at the holder's option and was entitled to a mandatory paid-in-kind ("PIK") dividend at an annual rate of 9%. Op. 9-10. The certificate of designation governing the Series A set forth the terms of conversion, Op. 10-11, and provided for an anti-dilution adjustment of those conversion terms in the event of a reverse stock split of the common stock. A755-80. But the certificate did not provide for

[1] Franklin's brief frequently refers to the alleged wrongdoing of the "Defendants" before HM acquired the Company in 2014 (the "Merger"). *See* Opening Brief of Appellent Andrew Franklin ("FOB") at 1-2, 28, 34. To be clear, HM was not a DWR stockholder and had no representation on DWR's board of directors (the "Board") before the Merger. HM had no part in any actions by the Board or DWR's stockholders before the Merger.

a corresponding adjustment in the event of a reverse stock split of the Series A. As a result, when DWR carried out the simultaneous Reverse Splits in 2010, the number of common shares was reduced by a factor of 50, but the number of common shares into which Glenhill's Series A shares could be converted was reduced by a factor of 2500.

The Court of Chancery found as a fact that this dilution was inadvertent, in the sense that neither the Board nor Glenhill as majority stockholder approved the Reverse Splits with the knowledge that their actions would reduce by 98% the economic value and voting power of the Series A shares. Op. 2, 22, 24-25. Plaintiffs have *never* attempted to explain why Glenhill might have agreed to such a self-dilution knowingly, nor claimed that Glenhill gained some advantage in return for so agreeing. Franklin does not seriously dispute the trial court's factual finding that "[t]he reality is that counsel tasked with documenting these transactions botched them up unbeknownst to anyone associated with the transactions until after they had been implemented. ***There is no credible evidence to the contrary***." Op. at 50 (emphasis added).

The error that caused this accidental self-dilution matured into a problem in October 2013, when Glenhill sought to convert the Series A into common stock and the holder of a 2010 convertible note (the "Windsong Note") simultaneously sought to convert its note into common stock. Op. 14-16. DWR's issuance of

common shares upon conversion of the Series A shares and the Windsong Note (together, the "2013 Issuance") conflicted with the certificate of designation as a result of the double dilution caused by the Reverse Splits. In other words, the failure to paper the Reverse Splits correctly in 2010 became a "failure of authorization" that caused the 2013 Issuance to be a "defective corporate act," as those terms are defined in 8 *Del. C.* § 204(h)(1)-(2).

DWR did not discover the error until after the Company sold itself to HM in 2014, and after plaintiffs had initiated this suit. Op. 25. Following investigation involving Delaware counsel, the Board and post-Merger stockholder of DWR acted under 8 *Del. C.* § 204 ("Section 204") to ratify a series of defective corporate acts. A1277-1317 (the "Ratification Resolutions"). Plaintiffs objected to the Ratification Resolutions. Op. 1-2. As a result, DWR, HM and HM's merger subsidiary intervened below to seek validation under 8 *Del. C.* § 205 ("Section 205").

The Section 205 claim, along with other claims, was tried before the Chancellor in November 2017. In August 2018, the Chancellor issued the Opinion, granting the request for validation under Section 205 and finding that Plaintiffs' position amounted to a request for an "inequitable windfall." Op. 53. Plaintiffs then sought a fee award under the corporate benefit doctrine, which the Chancellor denied in the Fee Opinion, dated April 10, 2019.

On appeal, Franklin eschews any claim that the Court of Chancery abused its discretion or made clearly erroneous factual findings. Rather, he attempts to frame the trial court's actions as legally incorrect and subject to *de novo* review. FOB 25, 39. That is, Franklin has chosen to frame the issue as whether the trial court had the statutory authority under Section 205 to act as it did. FOB 25.

The answer to that question is clearly yes. Franklin's argument on appeal is that the Chancellor was legally bound, regardless of circumstances or equities, to hold shares issued in 2013 in contravention of the certificate of incorporation void. FOB 2-6. Franklin dresses this claim up in terms of the "sanctity of written contracts," FOB 29, or vindicating the purported true intent of the certificate of designation, FOB 3, 5-6, 26-28, but in reality he is appealing to the rule described in *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991). That is, Franklin's position is that, *notwithstanding Sections 204 and 205*, where a purported stock issuance conflicts with the certificate, the certificate must prevail, at least in the absence of a showing of grounds for reformation of the certificate. FOB 29-30, 37.

The central problem with Franklin's thesis is that Section 205 expressly grants the Court of Chancery discretion to depart from that rule in an appropriate case, such as this one. Section 205 "operates to restore, as broadly as possible, the equitable powers of which the Court of Chancery was apparently divested in

STAAR." C. Stephen Bigler & John Mark Zeberkiewicz, *Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporate Acts*, 69 Bus. Law. 393, 417 (2014); *see also In re Numoda Corp.*, 128 A.3d 991 (TABLE), 2015 WL 6437252, at *3 (Del. Oct. 22, 2015) (*quoting* H.R. 127, 147th Gen. Assemb., Reg. Sess. (Del. 2013) ("[Section] 204 is intended to overturn the holdings in case law, such as *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991), and *Blades v. Wisehart*, 2010 WL 4638603 (Del. Ch. Nov. 17, 2010), that … stock found to be 'void' due to a failure to comply with the applicable provisions of the General Corporation Law or the corporation's organizational documents may not be ratified or otherwise validated on equitable grounds. Sections 204 and 205 "were intended to cure inequities" and are to be construed "broadly to allow the Court of Chancery to address any technical defect that would compromise the validity of a corporate action."). The Chancellor had the statutory authority to grant the relief defendants sought, and in light of Franklin's election to frame his contentions in terms of legal error, that should end the inquiry on appeal.

Even if Franklin's brief can be construed as attacking the trial court's exercise of discretion, there was no abuse of discretion. Franklin offers no substantive attack on the trial court's weighing of the Section 205(d) factors, all of which, as the Chancellor found, "overwhelmingly favor judicial validation." Op.

2. Nor has Franklin identified any true injustice to plaintiffs arising from the Chancellor's ruling. The judgment of the Court of Chancery must be affirmed.

SUMMARY OF ARGUMENT

I. Denied. Franklin's argument confuses the defective corporate acts that the trial court validated under 8 *Del. C.* § 205 with the failures of authorization that caused those corporate acts to be defective. The issuance of the shares of common stock in the 2013 Issuance was the "defective corporate act" ratified pursuant to 8 *Del. C.* § 204. The failure in 2010 -- at the time of the Reverse Splits -- to prevent the Reverse Splits from causing an unintended dilution of Glenhill's Series A preferred interest, which in turn caused the 2013 Issuance to conflict with the certificate of incorporation, constituted a "failure of authorization" that caused the 2013 Issuance to be a "defective corporate act." The trial court properly recognized this distinction, and had authority under 8 *Del. C.* § 205 to validate the defective corporate act -- the 2013 Issuance -- and properly exercised its discretion to do so.

II. Denied. The Court of Chancery did not, and was not asked to, validate invalidly issued options that were canceled and replaced with cash bonuses of equivalent value. Rather, the trial court rejected plaintiffs' contention that a breach of fiduciary duty occurred in connection with the DWR board's decision to replace the invalid options with such bonuses. Op. 73-75. Franklin's contention that shares arising from the exercise of such invalid options were improperly counted in determining whether Herman Miller owned a sufficient

number of shares to execute a merger under 8 *Del. C.* § 253 is factually incorrect and was never presented to the trial court. Further, for the reasons identified in response to Argument I, the Court of Chancery neither exceeded its statutory authority nor abused its discretion in validating all shares issued in the 2013 Issuance.

III. Denied. The Court of Chancery properly exercised its equitable discretion to deny plaintiffs' request for a fee award under the corporate benefit doctrine.

IV. Franklin's appeal should be dismissed in its entirety, without reaching the merits, for lack of jurisdiction. Franklin's notice of appeal was submitted through the File and Serve system, but was improperly submitted as "File Only." The document was not served on counsel for defendants, through the File and Serve system or otherwise, before the time to initiate an appeal expired on May 20, 2019. Accordingly, under Rules 7(a), 10.1(h) and 10.2(6)(b), Franklin's appeal was not timely commenced and should be dismissed.

STATEMENT OF FACTS

A. Parties

DWR was a Delaware corporation engaged in the business of selling modern design furnishings and accessories. Op. 4. Plaintiffs below were stockholders of DWR beginning in approximately 2009. *Id.*

In July 2014, HM acquired DWR under the terms of a stock purchase agreement, through which HM acquired over 90% of the outstanding shares of DWR and then completed a merger (the "Merger") under 8 *Del. C.* § 253. A1667-68 (SF ¶¶ 60-64). Non-dissenting stockholders of DWR were entitled to receive an amount in cash equal to $23.9311 per share, subject to certain adjustments. A1668 (SF ¶ 64). Plaintiffs either sold their DWR shares after announcement of the Merger or tendered their DWR shares for the Merger consideration. A1656 (SF ¶¶ 11-12). Plaintiffs did not seek appraisal and have never argued that the Merger consideration was unfair.

B. Glenhill's Initial Investment and the Certificate of Designation

In July 2009, DWR and an affiliate of Glenhill entered into a securities purchase agreement. A1657 (SF ¶ 16). In August 2009, DWR and Glenhill closed on that investment, as a result of which Glenhill acquired 15.4 million shares of DWR common stock at $0.15 per share and one million shares of Series A at $12.89 per share. *Id.* (SF ¶ 18).

Prior to this transaction, Glenhill owned approximately 17% of DWR's outstanding equity and had no board representation. A1654-55 (SF ¶ 4). As a result of the 2009 transaction, Glenhill became DWR's majority stockholder. Glenhill portfolio manager and investor Glenn Krevlin was appointed to the Board following the 2009 transaction. A1655 (SF ¶ 10). The validity and fairness of the 2009 investment was not challenged.

The certificate of designation governing the Series A was filed with the Secretary of State on August 3, 2009. A1657 (SF ¶ 18). The salient features of the Series A were convertibility into common stock at the holder's option (including voting rights on an as-if-converted basis) and a mandatory 9% annual paid-in-kind ("PIK") dividend. A755-A780.

The conversion feature allowed the Series A holder to obtain a number of common shares determined by multiplying the number of Series A shares to be converted by a "Stated Value" (initially $12.69) and dividing by a "Conversion Price" (initially $0.09235). A763-766 §§ 2, 6. Thus, as of August 2009, each Series A share was convertible into approximately 137.4 shares of common stock.

The certificate of designation contained a customary backstop provision, obliging the Company to "reserve and keep available out of its authorized and unissued shares of Common Stock for the sole purpose of issuance upon conversion of the Preferred Stock and payment of dividends on the Preferred

Stock, each as herein provided … not less than such aggregate number of shares as shall … be issuable … upon the conversion of the then outstanding shares of Preferred Stock and payment of dividends hereunder. The Corporation covenants that all shares of Common Stock that shall be so issuable shall, upon issue, be duly authorized, validly issued, fully paid and nonassessable…." A768-69 § 6(c)(v).

This language underscores a key equitable problem with Franklin's position: The certificate did not entitle the Company to accept Glenhill's investment and then issue void stock upon an attempted conversion without consequence. Even apart from the Section 205 analysis, if the common shares issued in 2013 were void, then the Company faced a significant breach of contract claim by Glenhill.[2]

The PIK feature provided that Series A holders "shall be entitled to receive, and the Corporation shall pay, cumulative dividends at the rate per share (as a percentage of the Stated Value per share) of 9.0% per annum… At the option of the Holder, such dividends shall accrue to the next Dividend Payment Date, or shall be accreted to, and increase, the outstanding Stated Value."[3] A763 § 3(a)(i).

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[2] Franklin asserts, FOB 14, that the certificate "limits the issuance of common shares to conform to the number authorized by the Company." This is a mischaracterization. The relevant limitation in the certificate applies only "if the Corporation has not obtained Shareholder Approval." A768 § 6(d). "Shareholder Approval" refers to DWR stockholder approval for the transactions involved in the 2009 investment. *Id.* § 6. Plaintiffs never argued below that "Shareholder Approval" was not obtained, and in fact it was obtained in 2009. B185-282.

[3] Both the obligation to deliver valid shares upon conversion of the Series A and the obligation to pay accrued dividends are described in the certificate as

The Series A also possessed anti-dilution protections, including a provision in Section 7(a) of the certificate calling for the Conversion Price to be adjusted in the event of a forward or reverse split of the common stock. A770. However, as originally written, the section was silent as to any adjustment of the Conversion Price in the event of a forward or reverse split of the Series A itself.

C. The Windsong Note

In May 2010, DWR entered into a note purchase agreement with Windsong DWR, LLC ("Windsong"). A1658 (SF ¶ 23); B283-93 (the "Windsong Note"). Under the original terms, Windsong lent the Company $5 million and the Company promised to repay the loan with interest on October 3, 2012. B284. The note gave its holder the option to convert the note into common stock, with the number of common shares depending on the date of conversion. *Id.* § 5(a). Like the Series A, the Windsong Note possessed anti-dilution protection in the event of a reverse stock split. *Id.* § 6(a). The Company promised Windsong to "take all action necessary to have available out of its authorized and unissued shares of Common Stock for the sole purpose of issuance upon conversion of [the

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"absolute and unconditional." A767 § 6(c)(iii), A777 § 11(b). Franklin's assertion, FOB 16, that Glenhill's failure to make a written election to receive its PIK dividend in the form of shares or in the form of an accretion to the Stated Value "prevented their accrual" is incorrect, and the section of the certificate cited in support of Franklin's assertion does not say that.

Windsong] Note … not less than such aggregate number of shares of Common Stock as shall … be issuable … upon the conversion of [the] Note."[4] *Id.* § 5(c)(iv).

D. The Reverse Splits

Three months after Windsong's investment, the Company carried out the Reverse Splits. The Board recommended, and Glenhill, as the Company's majority stockholder, approved 1-for-50 reverse stock splits of the common stock and the Series A, and 98% reductions in the authorized numbers of shares, from 30 million to 600,000 shares of common stock and from 1.5 million to 30,000 shares of Series A. Op. 21. The Company's outside counsel was asked to document the Reverse Splits.

The Court of Chancery found as a fact that "although unknown to anyone at the time, there were many flaws in the implementation of the Reverse … Splits." Op. 22. As the trial court described, the "50-to-1 reverse split of the common stock triggered a 50-to-1 reduction in the number of shares of common stock into which each share of Series A could convert … and … the 50-to-1 reverse split of

[4] Franklin asserts that "the Board never approved the Windsong Note." FOB 18. Plaintiffs' post-trial brief below made a more limited factual assertion: "There is no record evidence that the Board adopted a resolution approving the Windsong Note. Rather, the record contains only an unsigned 'Officer's Certificate,' produced by a third-party that was never authenticated." A2103. Plaintiffs never identified the existence of a valid board resolution authorizing the Windsong Note as a question to be litigated, nor did they seek any relief on the basis of a contention that the Board had not adopted such a resolution. There is no dispute that Windsong actually made the $5 million investment.

the Series A Preferred itself reduced by 98% the number of shares of Series A Preferred outstanding." Op. 22. As late as the pretrial order below, plaintiffs sought to have the Reverse Splits declared invalid. A1678.

E. The October 2013 Conversion and the 2013 Issuance

In July 2012, the Company entered into a financing governed by a series of agreements. As part of this financing, Windsong agreed to convert the Windsong Note and Glenhill agreed to convert all the Series A into common stock, both on October 3, 2013. A1663 (SF ¶ 40).

The implementation of this pre-arranged conversion, like the Reverse Splits themselves, fell short of perfection. Glenhill and Windsong did not deliver conversion notices until October 22, weeks after the agreed date. A1664 (SF ¶¶ 44-46). The Company did not file a necessary certificate increasing the authorized number of shares to accommodate the conversions until October 30.[5] A1665-66 (SF ¶ 51).

Glenhill received 3,936,571 shares of common stock upon conversion of the Series A shares. There is no serious dispute that this was the correct number of

[5] Franklin asserted below that the trial court should not have granted relief under Section 205 permitting the effective date of this certificate to be changed retroactively so as to prevent the 2013 Issuance from being an "overissue" within the meaning of Section 204(h)(3)(a). B375. Franklin mentions that the certificate of amendment was not filed until October 30, but does not appear to argue that the trial court lacked authority to make the increase in the authorized number of shares effective before the 2013 Issuance. FOB 46-47. The Court of Chancery clearly did possess such authority. *See* 8 *Del. C.* § 205(b)(4).

shares, assuming correction of the inadvertent double-dilution and credit for the PIK dividend. Glenhill's 1,000,000 pre-Reverse Split Series A shares became 20,000 post-Reverse Split Series A shares. Converting each share at the original 137.4 common shares per Series A share ratio yielded approximately 2.748 million common shares. The 9% annual PIK dividend, compounded from issuance in August 2009 to conversion in October 2013, increased that number by approximately 43%. Franklin's claim, FOB 19, that the 20,000 post-Reverse Split Series A shares should have converted into only 54,965 shares of common stock assumes *both* that the double-dilution is not corrected *and* that Glenhill should not have received the economic benefit of the PIK dividend.

Windsong received 1,414,868 shares of common stock upon conversion of the Windsong Note.[6] A1664 (SF ¶ 44).

F. The Merger and the Invalid Options

In November 2013, the Company retained an investment bank, Financo. Op. 31. Financo ran a process that resulted in a letter of intent with HM in late May 2014. A1666 (SF ¶¶ 53-54). On July 17, 2014, HM, DWR and certain DWR stockholders entered into a definitive Stock Purchase Agreement, under which HM agreed to acquire DWR for an enterprise value of $183 million, subject to certain adjustments. A1667 (SF ¶ 60).

[6] Franklin's claim that Windsong received a lesser number, 1,414,168 shares, FOB 43, 45 n.94, is inaccurate. A915, A1664 (SF ¶ 44), Op. 30.

During due diligence relating to the Merger, DWR discovered that it had issued a greater number of options to its employees than its option plan authorized. Op. 32. The Company resolved this issue through settlement agreements with the employees in question, under which the employees received the cash equivalent of what they would have received had they exercised their options (and had those options been valid) upon the change of control.[7] Op. 32-33; *see also* Op. 73-75 (rejecting fiduciary duty claim in relation to settlement of claim relating to Invalid Options); A1667-68 (SF ¶¶ 61-62). At no time were the Invalid Options exercised or purportedly exercised, nor were shares purportedly issued upon exercise of the Invalid Options.

The transactions contemplated by the Stock Purchase Agreement, including the Merger under 8 *Del. C.* § 253, were completed on July 28, 2014. Op. 32.

G. This Litigation and The Ratification Resolutions

Plaintiffs initiated litigation in December 2014 and filed amended complaints in March 2015 and November 2015. Op. 33-34. The November 2015

[7] Franklin asserts that this solution caused DWR's minority stockholders to "bear the *pro rata* burden of paying the" bonuses. FOB 21. That is true, but DWR was already responsible for issuing the options, and the minority stockholders were already bound to suffer their *pro rata* share of the dilution from such an issuance. Had the Company declined to make the option-holders whole, and forced them to litigate, the minority stockholders also would have suffered their *pro rata* share of the cost of that litigation (and any adverse judgment). As the Chancellor correctly found, the Company's solution to the problem of Invalid Options was "zero-sum" and "beneficial to the Company (and all of its stockholders)." Op. 74-75.

complaint added for the first time claims for invalidity of the Merger and added HM as a defendant. *Id.* 34. The Company promptly retained Delaware counsel to investigate.

On February 10, 2016, the board of directors of DWR adopted the Ratification Resolutions, A1277-1317, under 8 *Del. C.* § 204 ratifying several pre-Merger transactions that had been determined to be defective corporate acts, including the Reverse Splits and the 2013 Issuance. Op. 35-36. DWR's stockholder (an HM subsidiary) approved, adopted and confirmed the Ratification Resolutions. *Id.* Certificates of validation contemplated by the Ratification Resolutions were filed on February 11, 2016. *Id.* 35-37.

On April 29, 2016, the parties filed a stipulation that, *inter alia*, permitted DWR to intervene for the purpose of asserting a counterclaim for relief under Section 205 and provided that plaintiffs' consent to the stipulation would satisfy the requirement of 8 *Del. C.* § 205(f) that an action challenging the validity of the Ratification Resolutions be brought within 120 days of notice of such resolutions. A1670.

ARGUMENT

I. THE CHANCELLOR'S ORDER UNDER 8 *DEL. C.* § 205 SHOULD BE AFFIRMED

A. Question Presented

Whether the Court of Chancery acted within its authority in granting relief under Section 205, through which it, *inter alia*, declared the 2013 Issuance valid.[8]

B. Scope of Review

This Court reviews "the Court of Chancery's conclusions of law *de novo* and its factual findings with a high level of deference. [It] will not set aside a trial court's factual findings unless they are clearly wrong and the doing of justice requires their overturn." *DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago*, 75 A.3d 101, 108 (Del. 2013).

[8] Franklin does not expressly contend that the Court of Chancery committed legal error in declaring the Merger valid under Section 205. FOB Ex. B ¶ 4. Assuming *arguendo* that he intends to raise such a challenge on appeal, the challenge lacks merit. There is no question that a merger is among the acts or transactions that may be "defective corporate acts" within the meaning of 8 *Del. C.* § 204(h)(1) and no question that DWR purported to undergo a Merger in 2014. A1668. To the extent the Merger originally was invalid under 8 *Del. C.* § 253(a) because the acquirer did not own at least 90% of the then-outstanding valid stock, there was a "failure of authorization" within the meaning of 8 *Del. C.* § 204(h)(2), and consequently the trial court had discretion under 8 *Del. C.* § 205(a)(3) to declare the Merger valid. No basis exists to claim that the trial court exceeded its statutory authority in validating the Merger. No challenge to the trial court's exercise of discretion has been raised on appeal. The validity of the Merger also follows as a necessary consequence of the validation of the 2013 Issuance and the other acts validated by the Court of Chancery.

Although this Court has not squarely determined the standard of review for orders granting relief under Section 205, the statute (which grants the Court of Chancery discretion to take a broad variety of specified actions and to "make such other orders regarding such matters as it deems proper under the circumstances," *see* 8 *Del. C.* § 205(b)(10)) and this Court's order in *Numoda* suggest that the appropriate standard of review for such orders is for abuse of discretion. *See In re Numoda Corp.*, 128 A.3d 991 (Del. 2015) (TABLE), 2015 WL 6437252, at *4 ("Section 205 gives the Court of Chancery substantial leeway to shape an appropriate remedy. We perceive no abuse of discretion in the Court of Chancery's careful conclusion…") (hereinafter "*Numoda*"); *see also Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1272 (Del. 2014) ("The standard of review this Court applies to the Court of Chancery's exercise of statutorily conferred discretion is highly deferential."). "Judicial discretion is the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused." *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

C. Merits of Argument

The judgment of the Court of Chancery was clearly within the broad statutory authority conferred by Section 205, and should be affirmed for the reasons stated in the Opinion. Franklin nowhere argues that the Court of Chancery committed any abuse of discretion or made any clearly erroneous findings of fact. *See, e.g.,* FOB 38 (arguing that the Chancellor should not have considered the Section 205(d) factors at all). This Court's analysis therefore may properly end once the Court determines (as it should) that the trial court had authority under Section 205 to grant the relief it granted. Alternatively, the Court of Chancery did not abuse its discretion.

1. The Chancellor Had Authority to Grant Relief Under Section 205

Despite much confusion of issues in Franklin's brief, the specific relief challenged on appeal is the validation of the 2013 Issuance, *i.e.*, the validation of an issuance of common shares upon conversion of the Series A and the Windsong Note.[9] Op. 53-54. There is no claim that the 2013 Issuance was not a "corporate act" within the meaning of Section 204(h)(1). Franklin agrees that the 2013 Issuance conflicted with the certificate of designation when it purportedly occurred. FOB 3, 9, 23, 28. He therefore necessarily must concede that there was

[9] Plaintiffs waived below their challenges to several other defective corporate acts that were ratified through the Ratification Resolutions. Op. 41; A2179-2188; A2507; *see also* Op. 38.

a "failure of authorization" within the meaning of Section 204(h)(2) that rendered the 2013 Issuance a "defective corporate act" within the meaning of Section 204(h)(1). After DWR ratified the defective corporate act (*i.e.*, the 2013 Issuance) under Section 204, the Court of Chancery was asked to, and did, validate the act under Section 205. That relief was within the trial court's statutory authority, and Franklin does not argue that it was an abuse of discretion. FOB 38. For that reason alone, the Chancellor's judgment should be affirmed.

Franklin instead attempts to redirect the Court's attention to several subsidiary issues. He asserts that the Court of Chancery "validated DWR's failure to amend the COD [*i.e.*, before the Reverse Splits] as an independent defective corporate act." FOB 28. That is an inaccurate reading of the Opinion. The trial court correctly identified the failure to amend the certificate in 2010 (*i.e.*, to prevent the Reverse Splits from diluting the Series A's voting and economic rights by 98%) as the "failure of authorization" that caused the 2013 Issuance (which was carried out under the assumption that the Series A had not been diluted in 2010) to be a "defective corporate act."[10] Op. 45-47. The trial court was not asked to and

[10] Franklin argues that the trial court erroneously "permit[ted] Defendants to retroactively re-write the COD through its post-Merger ratification of the 2013 Issuance," FOB 25, and on the very next page argues that "it was improper for the trial court to retroactively amend the COD in order to validate the 2013 Issuance." FOB 26. This confusion of the end (validity of the 2013 Issuance) and the means (amendment of the certificate of designation, retroactive to 2010, so as to ensure that the 2013 Issuance would be valid) pervades Franklin's brief.

did not validate "the failure to amend" the certificate. Franklin's leading argument thus mischaracterizes the trial court's decision.

Franklin's assertion that "there was no corporate act" capable of validation, FOB 31, is therefore wrong. This argument is incorrectly aimed at the absence *in 2010* of an attempted amendment of the certificate of designation, *i.e.*, at the "failure of authorization" that caused the 2013 Issuance to be a "defective corporate act."[11] Sections 204 and 205 are intended precisely to enable a corporation or the Court of Chancery to remedy failures of authorization that cause corporate acts to be defective. Franklin's claim -- that if the corporation failed to attempt to do the act the absence of which constitutes a failure of authorization, then the trial court cannot grant relief under Section 205, FOB 5 -- is a misreading of *Nguyen v. View Inc.*, 2017 WL 2439074 (Del. Ch. June 6, 2017). Franklin's

[11] Franklin's counter-factual world, in which a 2010 amendment preventing the 2013 Issuance from being defective would have had to be "negotiated," and Glenhill would have had to give DWR "consideration" for it, FOB 32, makes no sense. The Reverse Splits were not an economic transaction in which DWR and Glenhill mutually agreed to exchange valuable consideration; they were intended to be economically neutral as among DWR and its stockholders. Glenhill as majority stockholder of DWR and sole holder of the Series A had an absolute right to veto the Reverse Splits if it found the arrangement unsatisfactory. *See* 8 *Del. C.* § 242(b)(1) (stockholder vote required to amend certificate of incorporation); A774 § 9(c) (certificate of designation could not be amended "in any manner that materially and adversely affects the rights of the Holder" without consent of Series A holders). The Chancellor properly found as a fact that the problem in 2010 was a paperwork error, not that Glenhill engaged in economic bargaining in which it failed to secure protection against a 98% dilution of its preferred interest. Op. 49-50.

argument is also circular reasoning that, if followed, would eliminate the utility of the statute.

2. The Chancellor Did Not "Rely on Mistake"

The Chancellor did not, as Franklin claims, "rel[y] on mistake as a basis to grant ratification [sic]," FOB 28, or "in essence … convert[the] Section 205 counterclaim into an unpleaded claim for reformation of the COD." FOB 37. Nor was the trial court's decision "predicated on its erroneous conclusion that the COD failed to reflect the parties' intent."[12] FOB 27. DWR was not required to demonstrate grounds for reformation of the certificate of designation (*e.g.*, mistake) in order to obtain relief under Section 205. The statutory text imposes no such obligation on a party seeking validation of a defective corporate act and there is no basis to graft such an obligation on to the statute.

On the contrary, the statutory definition of "failure of authorization" demonstrates that no such showing can be required as a *per se* matter. Section 204(h)(2) defines "failure of authorization" in relevant part as "failure to authorize or effect an act or transaction in compliance with … the certificate of incorporation

[12] The parties' subjective intentions or states of mind are relevant to the Section 205(d) analysis as of the time the defective corporate act is approved or effectuated, not as of the time of the failure of authorization. *See* 8 *Del. C.* § 205(d)(1). The statutory focus is on 2013 (when the defective corporate act occurred), not 2010 (when the failure of authorization occurred) or 2009 (when the certificate of designation was put in place). A1586-A1596; A1597-A1639.

or bylaws of the corporation."[13] If a corporate act may be "defective" *precisely because* the act conflicts with the certificate, and the Court of Chancery nevertheless possesses discretion under Section 205 to grant validation of such an act, then it follows that the Court has discretion to determine that the act that the corporation attempted to carry out should prevail over the terms of the certificate disallowing the act. The Chancellor properly exercised that discretion in this case.

3. This Is Not a "Contract Case"

The foregoing disposes of Franklin's claim that this is a "contract case" to which Section 205 cannot apply. FOB 29-31. That argument is in reality a repetition of the assertion that, where a purported corporate act clashes with the certificate, the certificate must control over the attempted inconsistent corporate act, and the act therefore cannot be validated.[14] But Section 205 expressly grants

[13] Franklin's assertion, FOB 33 n.79, that "the 2013 Issuance's failure to comply with the COD does not render it a defective corporate act" fails in the face of this statutory definition.

[14] Franklin asserts as a variant theory that "complying with the plain terms of a third-party contract cannot be a predicate failure of authorization." FOB 35. Franklin offers no citation to the record or the law to support that assertion. The claim in any event is no more than a different phrasing of the argument that Section 205 does not permit the Court of Chancery to validate a corporate act that is defective because it conflicts with the certificate or a "third-party contact" (by which Franklin in this case means the certificate of designation governing the Series A). No such limitation exists in the statute and the existence of such a limitation would be inconsistent with the purpose of the statute. *See Restoring Equity*, 69 Bus. Law. at 420-27.

the Court of Chancery discretion to depart from that rule in appropriate circumstances. The Chancellor properly exercised that discretion here. B462-66.

There is no merit to Franklin's assertion that Section 205 was not designed to protect parties like the appellees, FOB 33-35. There is no dispute that Section 205(a) authorized DWR and the defendants below to seek relief under Section 205. Franklin's real claim is that the Chancellor should have denied relief (and allowed plaintiffs to recover what the Chancellor called "an inequitable windfall," Op. 53) because DWR's fiduciaries allegedly engaged in misconduct unrelated to the Reverse Splits or the 2013 Issuance. The trial court correctly determined that validation of the 2013 Issuance would not inflict any harm on plaintiffs that they would not have suffered had the 2013 Issuance been carried out correctly in the first place, and that Section 205(d)(3) excludes consideration of any such harm.[15] Op. 51.

Section 205 vests the Court of Chancery with broad discretion. The trial court is allowed to "validate and declare effective *any* defective corporate act," 8 *Del. C.* § 205(b)(2) (emphasis added), and to do so with retroactive effect, 8 *Del. C.* § 205(b)(8). The Court of Chancery has a broad, catch-all power to "make such

[15] The assertion that DWR's pre-Merger fiduciaries engaged in unrelated misconduct for which they should have been punished through a denial of validation of the 2013 Issuance, or imposition of conditions upon such validation, was at best an argument under Section 205(d)(5), but one that plaintiffs never forthrightly presented below.

other orders regarding such matters as it deems proper under the circumstances." 8 *Del. C.* § 205(b)(10); *see also Numoda*, at **3-5. The action at issue in this appeal -- validation of the 2013 Issuance -- was well within the Court of Chancery's statutory power under Section 205 and well within its equitable discretion. The Chancellor's judgment should be affirmed.

II. FRANKLIN'S REMAINING CRITICISMS OF THE CHANCELLOR'S JUDGMENT ARE MISPLACED

A. Question Presented

Whether the Court of Chancery acted within its discretion in (i) dismissing a breach of fiduciary duty claim arising out of payment of bonuses in lieu of issuance of options that exceeded the limits set forth in DWR's option plan; (ii) including in its order validating the 2013 Issuance validation of the shares attributable to the PIK dividend; and (iii) including in its order validating the 2013 Issuance shares issued upon conversion of the Windsong Note.

B. Scope of Review

See Section I.B., *supra.*

C. Merits of Argument

Franklin's second main argument is an unfocused list of complaints about the trial court's judgment, many of which were not presented to the Court of Chancery. There is no attempt to identify and describe either any legal error or any abuse of discretion. To the extent there is a unifying theme, it appears to be the assertion that the Chancellor "validat[ed] a series of additional equity issuances … for which DWR never even sought ratification," FOB 39, and that but for this purported error the Merger would have been "illegal" because Herman Miller did not exceed the 90% ownership threshold required under 8 *Del. C.* § 253, FOB 39-45. This argument fails for numerous reasons.

At the outset, Franklin never presented this alternative claim to the trial court and he should not be allowed to present it on appeal. *See* Rule 8. Plaintiffs argued below that the Merger was illegal under 8 *Del. C.* § 253 on the assumption of denial of all validation relief under Section 205. Op. 80 fn.266. That assumption fails because the Chancellor properly granted Section 205 relief. Op. 53-54; *Numoda*, at **3-5. Plaintiffs never argued below that the trial court should have declined specifically to validate the shares issued upon conversion of the Windsong Note, or those attributable to the PIK dividend, as distinct from the other shares issued as part of the 2013 Issuance. Nor did plaintiffs ask the trial court to impose as a condition on validation that some of the validated shares not be counted for purposes of determining compliance with the 90% threshold. Moreover, defendants below squarely asked the Chancellor to validate both the 2013 Issuance and the Merger, and the trial court did so. Op. 2, 53-54, FOB Ex. B. That order was within the trial court's statutory authority, as discussed above, and there was no abuse of discretion.

1. The Trial Court Dealt Appropriately With the Invalid Options

What plaintiffs actually argued below with respect to the Invalid Options was that the Company's replacement of the Invalid Options with cash bonuses arose from a breach of fiduciary duty. A2156-57, A1672-73. The Chancellor properly rejected that theory, Op. 73-75, and Franklin asserts no error in that

determination.[16] Franklin's claim that the trial court implicitly "validated" or "ratified" shares in relation to the Invalid Options, FOB 1, 28, is untrue, because no shares were ever issued or purported to be issued in respect of the Invalid Options. The assertion, FOB 40, that the "options … were still counted toward the Merger" was never presented below, lacks record support and is too vague to merit a response.[17]

2. The Trial Court Dealt Appropriately With Common Shares Issued Upon Conversion of the Windsong Note and Attributable to the PIK Dividend.

Franklin contended below that Glenhill had failed to elect formally whether to receive its PIK dividends in the form of Series A shares or in the form of a change to the conversion terms. A2114-15. But plaintiffs presented these

[16] Franklin's complaints regarding the effect of replacement of the Invalid Options with cash bonuses on the per-share Merger consideration and regarding the disclosures relating to the Merger, FOB 41, are vague and do not identify any legal or equitable problem with the Chancellor's rulings on those issues. Op. 73-78. Franklin's contention that "the court impliedly ratified the Invalid Options simply by including them in DWR's fully-diluted share count for the Merger" FOB 40, does not characterize the Chancellor's decision accurately; the trial court's opinion says nothing about "DWR's fully-diluted share count for the Merger."

[17] Franklin reproduces a partial quotation of a portion of the Stock Purchase Agreement, FOB 41, quoting A993 at § 1.5(e), but the full quotation makes clear that optionees who accepted cash bonuses in lieu of Invalid Options would be treated as if they held valid options for certain purposes. In what significant way this means that the "shares" (none of which were ever issued) "counted" for purposes of the Merger is left unexplained. There is no forthright claim that the treatment of the Invalid Options resulted in an issuance of putative stock or that putative shares so issued were counted in determining whether Herman Miller owned 90% of the outstanding shares. Simply, no such theory was raised below.

assertions as partial support for their contention that the trial court lacked statutory authority to grant DWR's request for Section 205 relief with regard to the 2013 Issuance. A2189-98. (That contention is wrong, as explained above.) Plaintiffs never argued below that the Chancellor's ability to validate the common shares attributable to the PIK dividend stood on a different footing than his ability to validate other shares issued in the 2013 Issuance. Franklin should not be heard to raise such an argument now.

Nor is there any equity to such an argument. Franklin's position amounts to a claim that Glenhill should have been required to forfeit the economic benefit of the PIK dividend that it bargained for in 2009, merely because it failed to make an election in writing as to the mode of receiving the benefit. But the PIK dividend was mandatory and the Company's obligation to pay it was "absolute and unconditional," A777 § 11(b), as was its obligation to issue valid common shares upon conversion of the Series A. A767 § 6(c)(iii). Failure to make a paperwork election is no reason to deprive Glenhill of the fruit of its bargain, and Franklin has never explained (below or here) why it should be.

Similarly with regard to the shares issued upon conversion of the Windsong Note in 2013, plaintiffs presented the claim below as one for breach of fiduciary duty in connection with the 2012 agreement to enter into the Windsong Note. A2145-49. The Chancellor rejected that claim, Op. 57, 72, and Franklin does not

challenge that determination (although Almond does, in No. 215, 2019). The trial court did not "impliedly ratif[y]," FOB 44, the Windsong Note. Plaintiffs did not contend below that the Windsong Note had not been validly authorized in conformity with the General Corporation Law, as they now seek to do. FOB 43 ("the Windsong Note was never duly adopted"). Nor did they assert below that any order granting relief under Section 205 should exclude the shares issued upon conversion of the Windsong Note, nor that the shares issued upon conversion should not count toward the 90% threshold of 8 *Del. C.* § 253.[18]

In any event, there is no dispute that the Chancellor was asked to validate all the common shares issued as part of the 2013 Issuance, including both the shares attributable to the PIK dividend and the shares issued upon conversion of the Windsong Note. Plaintiffs had the opportunity to raise their points as a basis for resisting relief under Section 205, or as a basis for limiting the form of relief. But plaintiffs either failed to raise such arguments or did not persuade the trial court to exercise its equitable discretion in their favor. To the extent Franklin is allowed to raise such points on appeal, he has failed to demonstrate any abuse of discretion or defect in the Chancellor's legal analysis.

[18] Franklin's assertion, FOB 43, that "Defendants never produced … a valid board resolution authorizing the Windsong Note" is misleading. The resolution was produced in the litigation by a third party, it was introduced into evidence at trial over plaintiffs' authenticity objection, and it was discussed in Mr. Krevlin's trial testimony. B283-93; A1702-04.

For this reason, there is no occasion to consider Franklin's argument for a rescissory damage award, FOB 45, which the Chancellor properly rejected, Op. 80 n.266. It suffices to note that Franklin's claim that the minority lost $131 million in value, FOB 45, is facially incredible. That figure is more than 75% of the equity value for which Herman Miller agreed to buy DWR in a concededly fair transaction. Op. 31. It is also more than three times the *maximum* damage calculation that plaintiffs presented to the trial court for the first time after trial, which assumed both (i) that the large majority of the Company's common shares were void, and (ii) that the Company incurred no monetary liability for having issued void shares. A2076-2168; B489-92, B531-35. And it is over thirteen times the $9-10 million figure plaintiffs presented in response to a question from the Chancellor at the conclusion of the trial. A2043-44.[19]

The undisputed economic reality of this case is that Glenhill acquired a greater-than-90% ownership of DWR in 2009 in the transaction that resulted in the issuance of the Series A. Plaintiffs never challenged the validity or fairness of that

[19] Franklin's attempt to demonstrate that a "proper" order under Section 205 would have resulted in Herman Miller lacking the required 90% ownership to complete a short-form merger, FOB 45 n.94, lacks citation to the record and several of his numbers are incorrect. Op. 29, 30; A164-65. No such calculation was presented to the trial court. Moreover, Franklin's new theory of damages assumes, as did his different theory in the post-trial briefing, that invalid shares simply vanish and that the owners of void stock would have had no monetary claim against DWR for issuing them void shares when valid shares were promised and paid for. Even before Section 205, that was never the law.

transaction. Between 2009 and the Merger in 2014, Glenhill never sold any shares, and DWR never issued more shares, other than to the Company's officers and employees. There is no equity to the claim that any Section 205 analysis should have any result other than confirming that the pre-Merger fiduciaries owned, and sold to Herman Miller, a greater-than-90% interest. The ultimate result of the Section 205 portion of the case -- validation of the Merger without reallocation of Merger proceeds in favor of plaintiffs -- was clearly the equitable result, and it was well within the Chancellor's discretion.

The judgment of the Court of Chancery should be affirmed.

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY REJECTING PLAINTIFFS' DEMAND FOR AN AWARD OF ATTORNEYS' FEES

A. Question Presented

Whether the Court of Chancery in the Fee Opinion abused its discretion in declining to award attorneys' fees to plaintiffs in relation to their challenges to the defective corporate acts ratified under Section 204 and/or validated under Section 205.

B. Scope of Review

"The allowance of fees is a discretionary act on the part of the Chancellor and, as such, it is reviewed by this Court solely to determine if the Chancellor has abused his discretion." *Chrysler Corp. v. Dann*, 223 A.2d 384, 389 (Del. 1966); *see also Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010) ("We review a denial of an application for attorneys' fees and costs for abuse of discretion, but we review *de novo* the legal principles applied in reaching that decision.").

C. Merits of Argument

The Chancellor in the Fee Opinion properly exercised his equitable discretion to reject a fee-shifting award under the corporate benefit doctrine. Franklin's assertion that the trial court "creat[ed] a new exception to the corporate benefit doctrine," FOB 46, is incorrect. So are his contentions that the Court of Chancery "punish[ed] Plaintiffs for having pursued their claims through trial,"

FOB 47, or relied on a principle that "a party loses its entitlement to fees solely by taking viable claims to trial."[20] FOB 7, 48. The Chancellor never said or did any of those things. Franklin's argument entirely fails to deal with the factual and equitable grounds on which the trial court denied the fee request.

All parties agreed below, and the Chancellor found, that plaintiffs' claims of invalid corporate acts were meritorious when filed, that the Court's subsequent validation of them (as well as its validation of the Merger itself) conferred a benefit on DWR, and that plaintiffs' filing of their claims was a link in the causal chain leading to that benefit. Fee Op. 1-2. But as the Chancellor explained, "the granting of a fee award is not automatic just because the three basic elements of the corporate benefit doctrine have been satisfied.… [T]he corporate benefit doctrine is rooted in the application of equitable principles, and there are circumstances where it would be inappropriate or inequitable to award attorneys' fees even when the

[20] Franklin also contends in a footnote that the Chancellor's fee ruling "referenced the fact that Plaintiffs pursued claims only on their own behalf," rather than for a class. FOB 48, n.101. Franklin fails to draw a conclusion from this statement, but appears to argue by implication that the Chancellor incorrectly ruled "that the corporate benefit doctrine does not apply to individual claims." *Id.* On the contrary, the Chancellor expressly recognized: "To be sure, individual stockholders have standing to seek an award of attorneys' fees under the corporate benefit doctrine as a general matter." Fee Op. 17-18. However, the Chancellor then noted that plaintiffs' decision not to pursue litigation on a representative basis "suggests that these plaintiffs—who paid their counsel on a non-contingent basis—needed no additional incentive to pursue this litigation because their motivation was to serve their personal interests and not the interests of DWR or any of its other stockholders." *Id.* 18.

basic elements of the doctrine ostensibly have been satisfied." *Id.* 12-13. Franklin does not take issue with this correct formulation of the law. *See, e.g., In re Orchard Enters., Inc. S'holder Litig.*, 2014 WL 4181912, at *3 (Del. Ch. Aug. 22, 2014).

The Chancellor determined that plaintiffs "did not seek to extend the benefits of their efforts to other stockholders of DWR in any meaningful sense," Fee Op. 17, and Franklin does not contend otherwise. Plaintiffs did not propose to the trial court, and do not propose to this Court, any precedent in which the Court of Chancery has awarded fees in similar circumstances. Fee Op. 19. Most significantly for purposes of the Chancellor's analysis, the "benefit" -- the validation relief granted under Section 205 -- was not relief that plaintiffs obtained through their litigation efforts. Rather, plaintiffs fought that relief every step of the way, and they continue to fight it on appeal, in the hope of obtaining an economic windfall.

Neither is this a case in which the Defendants below took some action that secured the relief in question and thereby mooted plaintiffs' claims. DWR *attempted* to moot plaintiffs' claims of statutory invalidity through the Ratification Resolutions under Section 204. As Defendants acknowledged to the trial court, had plaintiffs foregone objection to the Ratification Resolutions, the analysis of a

fee award might well be different.[21] B636. But plaintiffs' objection to those resolutions ensured that the benefit for which plaintiffs now claim credit (while continuing to argue that the Court of Chancery lacked authority to grant it) could be conferred only through litigation to a final judgment under Section 205, both below and in this Court. B326-34; *compare Crothall v. Zimmerman*, 94 A.3d 733, 736 (Del. 2014) (holding that stockholder who abandoned claim before favorable interlocutory decision became final had not created a benefit for purposes of corporate benefit doctrine).

The Court of Chancery determined as a discretionary matter that there was no equity in allowing plaintiffs to reap a fee award where they litigated the entire case based on the contention that the trial court had no ability to grant the relief that plaintiffs now claim as a benefit. That is not the same thing as "penaliz[ing] plaintiffs for pressing their claims." FOB 47. The vast majority of plaintiffs' litigation efforts created risk and uncertainty, not a benefit, for the Company and its stockholders. *Compare Crothall*, 94 A.3d at 733-35. It makes no sense to reward plaintiffs for doing that. The judgment of the Court of Chancery denying the fee request should be affirmed.

[21] Of course, had plaintiffs declined to challenge the Ratification Resolutions, their potential damages for the remaining fiduciary duty claims (the derivative character of which is the subject of Almond's appeal) would have been at significantly smaller. *See* B404-09 (claiming $12 million to $38 million in damages assuming absence of validation relief) *with* B410-11 (claiming $1.1 million in damages for breach of fiduciary duty claims).

IV. FRANKLIN'S NOTICE OF APPEAL WAS NOT TIMELY SERVED

A. Question Presented

Whether Franklin failed timely to perfect an appeal by causing his notice of appeal to filed through the File & Serve system, but not served on counsel for the other parties.

B. Scope of Review

This is a question of application of this Court's rules, not an issue of review of the trial court's ruling.

C. Merits of Argument

Franklin's notice of appeal was filed via the File & Serve system on May 17, 2019. However, the notice was submitted as a "File Only" document and was not served on counsel for any of the parties to the action below, as required by Rules 7(a) and 10.1(h). B658, 659, 665. Because the notice of appeal was not served on counsel before being filed with this Court (or as part of the filing transaction), Franklin's notice of appeal was not duly filed. Accordingly, under 10 *Del. C.* § 145, this Court lacks jurisdiction to hear Franklin's appeal, and should dismiss it on that basis.[22]

[22] Almond's notice of appeal, filed approximately an hour before Franklin's, was properly served. B655-57. The Court's order consolidating the appeals preserved the parties' ability to raise "any evidence, argument, objection, motion or defense, otherwise properly presented under the Rules of this Court, concerning the Consolidated Appeal or either constituent appeal." Trans. ID 63515737.

"An appeal shall be commenced by a notice of appeal. The notice of appeal shall be served in duplicate upon an attorney of record for each party to the proceeding below… Immediately following such service, such appellant shall file with the Clerk of this Court such notice, in duplicate, together with proof of service as provided in these Rules." Rule 7(a). This action is subject to eFiling. *See* Rule 10.1(b). The notice of appeal was therefore required to be, and was, submitted to the Court by eFiling. *See* Rule 10.2(3) ("Each document which must be filed in a case subject to eFiling under the Rules shall be eFiled unless otherwise ordered by the Court.").

However, the eFiling rules of this Court do not excuse a party from serving the notice of appeal upon counsel for the other parties. On the contrary, "Every document that is eFiled shall be served upon every other party." Rule 10.1(h). "An eFiled document is deemed served **only upon selection of participants to be served and submission according to the File & Serve procedures.** Participants shall make service of all eFiled documents upon all participants capable of receiving online service through the LexisNexis File & Serve system." Rule 10.2(6)(b) (emphasis added). Counsel for appellees were and are capable of receiving online service via File & Serve.

Rule 10.2(6)(b) further provides: "The associated filing receipt will list the participants selected for service and give proof of date, time and method of service.

No other certificate of proof of service shall be required for eFiled documents." The filing receipt for the notice of appeal reflects that the notice of appeal was not served upon any of the parties to the action below. B659. Thus, the notice of appeal was defective and the time to file a new notice of appeal (or otherwise correct the failure to serve the notice, assuming such a correction is possible) has expired. *See* 10 *Del. C.* § 145 ("No appeal from a final judgment … of the Court of Chancery shall be received or entertained in the Supreme Court unless the … notice of appeal is duly filed in the office of the Clerk thereof within 30 days after the date of the judgment….").

"The power of an appellate court to exercise jurisdiction rests upon the perfecting of an appeal within the time fixed by statute." *Giordano v. Marta*, 723 A.2d 833, 837 (Del. 1998) (quoting *PNC Bank, Delaware v. Hudson*, 687 A.2d 915, 916 (Del. 1997)). Franklin's failure to serve the notice of appeal as required by the Rules should result in dismissal of his appeal for lack of jurisdiction.

CONCLUSION

For the reasons set forth above, the Court of Chancery decision should be affirmed.

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