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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, v. 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. Defendants Below, Appellees, and DESIGN WITHIN REACH, INC. Intervenor and Counterclaim-Petitioner Below, Appellee	)	Consolidated No. 215, 2019 No. 216, 2019 Court Below: Court of Chancery of the State of Delaware, C.A. No. 10477-CB

THE ALMOND APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

The Glenhill Appellees'[1] response to the Almond Appellants'[2] Opening Brief (the "Opening Brief" or"OB") is to avoid having to address directly the core aspects of the Almond Appellants' arguments. From claiming that these arguments are not properly before the Court to arguing that the Almond Appellants' arguments are barred by the findings of the Court below, the Glenhill Appellees never really address the fact that they are arguing in favor of escaping liability for what the Court below found were conflicted and deficient transactions. The Glenhill Appellees never cite to any precedent opinion from this Court or any other Delaware court that has relieved directors from potential liability under the circumstances present here.

The arguments in the Opening Brief are properly before this Court under any measure. The legal question of the Almond Appellants' standing was before the Court below and there is no requirement that an appellant make the identical argument on appeal that it made below.

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[1] Appellees Glenhill Advisors LLC, Glenhill Capital LP, Glenhill Capital Management LLC, Glenhill Concentrated Long Master Fund LLC, Glenhill Special Opportunities Master Fund LLC, Glenn Krevlin, William Sweedler, Windsong DB DWR II, LLC, Windsong DWR LLC, John Edelman, John McPhee and Windsong Brands, LLC filed a brief responding to the Almond Appellants' Opening Brief. For convenience, these appellees are referred to collectively as the "Glenhill Appellees."

[2] Capitalized terms not defined herein have the same meaning as in the Almond Appellants' Opening Brief.

The factual findings of the Court below do not bar the Almond Appellants' arguments on appeal. Those findings support the Almond Appellants' arguments, but only if the Court looks at the findings the Glenhill Appellees do not want the Court to see.

Finally, the Glenhill Appellees do not address the effect of the Court below's failure to account for the fact that the Almond Appellants never had a chance to save their claims before they lost standing under the Court's ruling. That unique fact makes this case different those relied on by the Glenhill Appellees. And even those cases relied on by the Glenhill Appellees suggest a remedy that would provide the Almond Appellants little comfort here.

The only way to achieve an equitable result in this appeal is to remand and require the Court below to conduct its entire fairness analysis. Absent that, there will be a clear path for corporate raids at the expense of minority stockholders.

ARGUMENT

I. THE ALMOND APPELLANTS' *GENTILE* ARGUMENT IS PROPERLY BEFORE THE COURT

The Glenhill Appellees first argue that the Almond Appellants waived the arguments made in the Opening Brief because they were not properly presented to the Court of Chancery. The Glenhill Appellees are wrong.

First, there is no question that the Almond Appellants' standing to bring a direct claim under *Gentile v. Rosette*, 906 A.2d 91 (Del. 2007) was argued by both sides before the Court of Chancery. "Whether a party has standing is a question of law that is subject to *de novo* review." *El Paso Pipeline GP Co., LLC v. Brinckerhoff*, 152 A.3d 1248, 1256 (Del. 2016). The United States Supreme Court has held that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise argument they made below." *Yee v. Escondido*, 503 U.S. 519, 524 (1992). And where "the question is presented is one of law, we consider it light of 'all relevant authority,' regardless of whether such authority was properly presented in the district court." *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

On appeal, the question is the same – whether the Almond Appellants have standing to assert a direct claim under *Gentile* for the transactions the Court found were the product of "a conflicted and deficient process." (*E.g.*, Op. 27.) In finding that the Almond Appellants did not have standing, the Court of Chancery articulated

a new test for standing under these circumstances that neither party addressed in their briefs below. (*See* A0222-0292; A0293-0359; B471-590; AR0422-428). It is in that context that the Almond Appellants crafted their arguments on appeal, including citing this Court's opinion in *Gatz v. Ponsoldt*, 925 A.2d 1265 (Del. 2007). An appellant cannot be barred from addressing on appeal a new test developed by the trial court that was not articulated by the appellee. And citing a new authority on a legal issue on appeal is entirely appropriate. *Dixon v. ATI Ladish LLC,* 667 F.3d 891, 895 (7th Cir. 2012) (citations omitted) (rejecting argument that appellant waived reliance on statute by not relying on it in district court because "a litigant does not forfeit a position just by neglecting to cite its best authority; it suffices to make the substantive argument.")

The question of whether the Almond Appellants have standing is properly before the Court.

II. THE ALMOND APPELLANTS' ARGUMENT FITS WITH THE COURT OF CHANCERY'S FINDINGS

Not only is the Almond Appellants' argument properly considered, it is the correct application of *Gentile*. The Glenhill Appellees argue that the Almond Appellants' argument is undermined by the Court of Chancery's factual findings. Not so.

The Glenhill Appellees do not deny that Glenhill, and in particular its controller Krevlin, was the controlling stockholder of DWR. Nor do they really contest the notion that nothing happened at DWR without Krevlin's consent and approval. An example of this is the Brands Grant, where Sweedler testified that he wanted 10% of DWR for his restructuring efforts, but Krevlin, acting as Chairman of the Board, agreed to only 1.5%. (AR0469 ("It would have been reached with Glenn as chairman of the board").)

Krevlin's total domination of companies he controlled is further evidenced by his disparate treatment of the Long Fund and Overseas Fund. Krevlin was the single largest investor in the Long Fund, but the Overseas Fund had many other investors.[3]

[3] Although Krevlin admitted he was the largest investor in the Long Fund, at trial and in his deposition he claimed not to know whether he owned a majority of the Long Fund. (AR0464-AR0465; AR0471) It is simply not credible for someone who claimed to have at one time managed roughly $2 billion for others (AR0463) not to know whether owned a majority interest in the Long Fund. This type prevarication was typical of Krevlin's testimony and, in part, explains why Krevlin took DWR dark to avoid disclosure requirements. (*Compare* AR0459 (Krevlin testifying that the Board kept minutes of its quarterly meetings) *with* AR0468 (Krevlin claiming

Krevlin justified delegating negotiation of the Windsong Note and 2012 Financing to his subordinate, Shapiro, because the Overseas Fund was going to be diluted the same amount as the minority stockholders. (AR0460, AR0462, AR0466.) Although Shapiro "negotiated" on behalf of the minority, in fact, Shapiro never had any decision-making authority (AR0467), and the Overseas Fund never invested in the either transaction. (AR0461, AR0505-AR0519) In both instances, Krevlin actually benefitted by causing the Long Fund, in which he held the single largest interest, to invest at the expense of the Overseas Fund and the minority stockholders of DWR. Krevlin was able to avoid the consequences of dilution on a personal level even though "Glenhill" may have been diluted overall.

The ineluctable conclusion from these facts is that Krevlin exercises complete control over entities he controls and would never take any action that did not benefit him personally. Viewed through this lens, it is clear that Krevlin used DWR to satisfy his personal goals and obligations: Sweedler helps out Krevlin with restructuring DWR, so Krevlin pays him back in DWR stock; Sweedler, Edelman and McPhee want to own a piece of DWR, so instead of selling them some of his own shares, Krevlin allows them to participate in the expropriation of economic and voting power away from the minority; make a side promise to Sweedler, Edelman

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not to know whether taken between August 2009 and May 2014) *and* Op. 27 ("There are no minutes reflecting the Board's consideration of the 2012 Financing").

and McPhee that their interest in DWR won't be diluted, just grant them shares in DWR to cover Krevlin's never memorialized promise. Krevlin's actions are all part of a continuous attempt to fleece the minority shareholders of DWR so that Krevlin could extract as much benefit for himself, whether he kept that benefit for himself or used it to satisfy promises he made to others. That is the basis for this Court's holding in *Gentile*. Finding that *Gentile* applies here does not "extend" that holding in any way.

III. THE OVERPAYMENT TRANSACTIONS RESULTED IN TRANSFER OF ECONOMIC AND VOTING POWER

The Glenhill Appellees' argument that the Almond Appellants do not contest the Court of Chancery's finding that the Almond Appellants had not satisfied the second prong of Gentile, i.e., the expropriation of economic and voting power from the minority, is simply incorrect. For the reasons discussed above, the Court of Chancery incorrectly focused solely on whether Glenhill was diluted by these transactions. Focusing narrowly on Glenhill's dilution obscures the real effect of the transaction, which is that Glenhill used its power and control over DWR to take economic and voting power away from the minority to spread it around his confederates. Thus, whether Glenhill was diluted is irrelevant to the analysis under *Gatz*. Indeed, in *Gatz* the controller ended up with no shares in the subject company. Thus, comparison of the controller's ownership before and after the challenged transaction is not the proper basis to determine whether the controller expropriated economic and voting power from the minority.

IV. THE GLENHILL APPELLEES MISUNDERSTAND THE EFFECT OF THE COURT'S COMMENTS ABOUT RISK

Finally, the Glenhill Appellees argue that the Court below's comment about acceptance of risk was correct, and that the Almond Appellants' parade of horribles is contrary to established Delaware law. Neither argument addresses the issues raised by the Almond Appellants.

The Glenhill Appellees' argument that the Court's comment that the Plaintiffs below assumed the risk makes no sense. Every putative derivative action is subject to being extinguished by a merger. There is no more risk than any other plaintiff who can lose standing under continuous ownership rule by a merger during pendency of action. While the Glenhill Appellees trumpet the fact that they interposed a standing defense in their answer, they fail to acknowledge that they never articulated their theory of standing until their pre-trial brief. They even acknowledged that they could have raised this issue earlier, but chose not to do so purportedly because the law on *Gentile* was unclear prior to this Court's decision in *El Paso Pipeline GP Co., LLC v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016). Of course, the Glenhill Appellees have no explanation for why they answered the two complaints filed *after* this Court's opinion in El Paso, or why it was the Plaintiffs

below who assumed any risk due to the defendants' failure to raise this case dispositive issue from the start.[4]

Even if the Glenhill Appellees are correct about the meaning of the Court's statement, that does not solve the problem that the Court of Chancery never included a critical fact in any part of its analysis – under the Court's ruling, standing was lost before the Plaintiffs below ever knew about their claims. That context makes this appeal different from the cases relied on by the Glenhill Appellees to support their argument. Both cases cited by the Glenhill Appellees involved stockholders of publicly traded companies whose already filed derivative actions were extinguished by a subsequent merger. *See Lewis v. Anderson*, 477 A.2d 1040, 1042-43 (Del. 1984) (stockholder filed complaint in July 1981 challenging pre-merger actions of board that resulted in merger consummated in September 1981); *Bokat v. Getty Oil Co.*, 262 A.2d 246 (Del. 1970) (holding that 1967 merger extinguished stockholder derivative claims filed in 1961 and 1964).

Not so here. Here, Krevlin bought a majority interest in DWR, took it dark to avoid reporting requirements, then continually expropriated economic and voting power from the minority without any disclosure until announcing that the Company

[4] (AR0566-AR0567)(The Court: So the argument you're making to me now, it should have been evident when the complaint walked in the door, if I am to believe your position that they had no standing, the plaintiffs had no standing, to litigate these claims. You answered the complaint; right? Ms. Ward: That's correct. The Court: Didn't file a motion to dismiss? Ms. Ward: That's correct, Your Honor.")

had merged and, under the ruling of the Court below, extinguished the right of Plaintiffs' below to bring any claim against these directors. Unlike the plaintiffs in *Lewis* and *Bokat* who were had notice in advance of the merger that extinguished their claims to enjoin or seek other relief to preserve their claims in an already active case, Plaintiffs below had no idea any of the interested transactions were going on until *after* they learned of the Merger. The Glenhill Appellees cite to no decision of this Court or any policy of this State's jurisprudence in place for 50 years or even one year which would justify barring plaintiffs from holding to account fiduciaries who committed their malfeasance in private, without disclosure, until it was too late to stop them.

And although the Glenhill Appellees argue that the Almond Appellants would have had a remedy by asserting a claim against the Individual Defendants that the merger price was not fair value because it did not adequately account for the value of the derivative claims belonging to the corporation, the Glenhill Appellees fail to cite any case in which that strategy was successful. Indeed, there is scant evidence that this type of challenge will be successful. First, caselaw suggests that only derivative claims known to the directors at the time of the merger should be considered. *Oliver v. Boston University*, 2006 WL 1064169, at *19 (Del. Ch. Apr. 14, 2006) (finding that although directors failed to consider value of derivative claims, the claims had no value). As the Individual Defendants all testified that they

had no idea they had done anything wrong in connection with any of the transactions at issue, Plaintiffs below could not have met this threshold test.

Second, even if Plaintiffs below could have met the test, Glenhill Appellees cite to no case in which a plaintiff was successful in proving that the merger price was unfair due to failure to consider a derivative claim. *See, e.g.*, *Oliver*, 2006 WL 1064169, at *25 (finding that although directors failed to consider value of derivative claims, the claims had no value); *Onti, Inc. v. Integra Bank*, 751 A.2d 904, 931-32 (Del. Ch. 1999) (finding that no additional value should be ascribed to company as a result of derivative litigation against company's directors).[5] None of the cases cited by the Glenhill Appellees in support of their argument are post-trial decisions actually evaluating derivative claims in the context of a merger. *In re Primedia, Inc. Shareholders Litig.*, 67 A.3d 455 (Del. Ch. 2013), described by the Glenhill Appellees as "analyzing a post-merger direct claim," was a decision on a motion to dismiss, not after a trial.

The real problem with asserting this type of claim in the context of a challenge to the merger price is that the focus is no longer on the actions of the directors in

[5] The treatment of the derivative claim in *Cavalier Oil Corp. v. Hartnett* is unique because of the parties' agreement to include the derivative claim for future valuation purposes. 564 A.2d 1137, 1142 (Del. 1988). Further, this Court held that these claims were "more personal than derivative … in view of [Harnett's] status as the sole minority shareholder whose claims of fraud are directed against the two controlling shareholders." *Id.* at 1143.

connection with the actionable wrongs alleged, but instead the negotiations of the merger price where a completely different standard of review may apply. Where, as here, the merger is with a third party and the directors profess not to have known of the claims during negotiations, rather than the entire fairness standard that applied to the challenged transactions, the Board could argue that the business judgment would apply. Moreover, the Court will never consider the actual facts of the underlying claims, only a cold, after-the-fact assessment of their value, if any, to the company in the merger and whether that value was even material. *See, e.g., Onti, Inc.*, 751 A.2d at 931-32 (finding derivative claim had zero value after discounting claims for chances of success, offsets, and attorneys' fees); *Oliver*, 2006 WL 1064169, at *25 (holding that although directors failed to consider value of derivative claims, because claims had no value, "the only harm suffered by the Plaintiffs was a procedural one.")

Put simply, the ability to challenge a merger as unfair because it ascribed no value to a derivative claim that was not even pending at the time of the merger is no remedy at all. Where, as here, all of the bad acts took place under the cover of darkness and the merger occurred before anyone even knew of the potential claims, unless the Court permits the Almond Appellants to pursue their claims, the directors truly will have avoided liability and shown others how to do so as well.

CONCLUSION

For all of the reasons set forth in the Opening Brief and above, the Court should reverse the standing ruling of the Court below and remand with instructions for the Court of Chancery to conduct the entire fairness analysis.

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