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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BROOKFIELD ASSET MANAGEMENT, INC., ORION US HOLDINGS 1 L.P., BROOKFIELD BRP HOLDINGS (CANADA) INC., BRIAN LAWSON, HARRY GOLDGUT, RICHARD LEGAULT, SACHIN SHAH, and JOHN STINEBAUGH, Defendants-Below, Appellants/Cross-Appellees, v. MARTIN ROSSON and CITY OF DEARBORN POLICE AND FIRE REVISED RETIREMENT SYSTEM (CHAPTER 23) Plaintiffs-Below, Appellees/Cross-Appellants.	)	No. 406, 2020 Court Below: Court of Chancery of the State of Delaware, Consolidated C.A. No. 2019-0757-SG

APPELLANTS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

SUMMARY OF CROSS-APPEAL ARGUMENT 4

ARGUMENT 5

I. PLAINTIFFS' CLAIMS ARE EXCLUSIVELY DERIVATIVE UNDER *TOOLEY* 5

A. *Gentile* Cannot Be Reconciled With *Tooley* And Ought To Be Overruled 7

1. *Tooley* Did Not "Liberalize" The Test For Direct Standing 8

2. *Gentile*'s "Expropriation" Analysis Upset The Settled Expectations Created By *Tooley* 10

3. Plaintiffs' Claims Are Not "Dual-Natured" 15

a. *Gentile* Created The Concept Of "Dual-Natured" Standing 16

b. *Gentile* Violates Delaware's Longstanding Bar On Stockholder Recoveries For Corporate Harms 18

4. That Plaintiffs Have Otherwise Lost Standing To Pursue Their Claims Is Not A Basis To Uphold *Gentile* 22

B. *Stare Decisis* Does Not Bar The Court From Overruling *Gentile* 24

II. PLAINTIFFS' CROSS-APPEAL SHOULD BE DISMISSED 29

A. Question Presented 29

B. Scope Of Review 29

C. Merits Of The Argument 29

CONCLUSION 36

TABLE OF AUTHORITIES

Cases **Page(s)**

Agostino v. Hicks,
845 A.2d 1110 (Del. Ch. 2004) 6, 9, 11, 19

Ark. Tchr. Ret. Sys. v. Countrywide Fin. Corp.,
75 A.3d 888 (Del. 2013) 23

Avacus P'rs, L.P. v. Brian,
1990 WL 161909 (Del. Ch. Oct. 24, 1990) 6, 31

Baker v. Sadiq,
2016 WL 4375250 (Del. Ch. Aug. 16, 2016) 18

Behrens v. Aerial Commc'ns Inc.,
2001 WL 599870 (Del. Ch. May 18, 2001), *overruled by Gentile v. Rossette*, 906 A.2d 91 (Del. 2006).....6

Benihana of Tokyo, Inc. v. Benihana, Inc.,
891 A.2d 150 (Del. Ch. 2005) 31

Brinckerhoff v. Enbridge Energy Co., Inc.,
159 A.3d 242 (Del. 2017), *as revised* (Mar. 28, 2017) 28

Carsanaro v. Bloodhound Technologies, Inc.,
65 A.3d 618 (Del. Ch. 2013) 12, 13, 14, 21

Caspian Select Credit Master Fund Ltd. v. Gohl,
2015 WL 5718592 (Del. Ch. Sept. 28, 2015).....11

Citigroup Inc. v. AHW Inv. P'ship,
140 A.3d 1125 (Del. 2016) 10

Calma ex rel. Citrix Sys., Inc. v. Templeton,
114 A.3d 563 (Del. Ch. 2015) 32

In re Coca-Cola Enters., Inc. S'holders Litig.,
2007 WL 3122370 (Del. Ch. Oct. 17, 2007), *aff'd sub nom. Int'l Bhd. Teamsters v. Coca-Cola Co.*, 954 A.2d 910 33

Daugherty v. Dondero,
2019 WL 4740089 (Del. Ch. Sept. 27, 2019) 6, 12, 14

Dohmen v. Goodman,
234 A.3d 1161 (Del. 2020) 18

El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff,
152 A.3d 1248 (Del. 2016) (Stine, C.J., concurring) ..... *passim*

In re El Paso Pipeline Partners, L.P. Derivative Litigation,
132 A.3d 67 (Del. Ch. 2015), 132 A.3d 67 (Del. Ch. 2015) ..... *passim*

Feldman v. Cutaia,
951 A.2d 727 (Del. 2008) 19

Firefighters' Pension Sys. of City of Kan. City, Mo. Tr. v. Presidio, Inc.,
2021 WL 298141 (Del. Ch. Jan. 29, 2021) 9

Gatz v. Ponsoldt,
925 A.2d 1265 (Del. 2007) 20, 21

In re Gen. Motors (Hughes) S'holder Litig.,
897 A.2d 162 (Del. 2006) 35

Gentile v. Rossette,
906 A.2d 91 (Del. 2006) ..... *passim*

Glidepath Ltd. v. Beumer Corp.,
2019 WL 855660 (Del. Ch. Feb. 21, 2019) 32

Grimes v. Donald,
673 A.2d 1207 (Del. 1996), 673 A.2d 1207 (Del. 1996), *overruled sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) 16, 17, 18

Hercules Inc. v. AIU Ins. Co.,
783 A.2d 1275 (Del. 2000) 29

Hindlin v. Gottwald,
2020 WL 4206570 (Del. Ch. July 22, 2020) 31

In re J.P. Morgan Chase & Co. Shareholder Litigation,
906 A.2d 766 (Del. 2006) 18, 19

In re Loral Space & Commc'ns, Inc. Consol. Litig.,
C.A. No. 2808-VCS (Del. Ch. Feb. 15, 2008).....20

In re Loral Space & Commc'ns Inc.,
2008 WL 4293781 (Del. Ch. Sept. 19, 2008).....19, 20

In re New Valley Corp. Deriv. Litig.,
2004 WL 1700530 (Del. Ch. June 28, 2004).....22

In re Nine Systems Corp. S'holders Litig.,
2014 WL 4383127 (Del. Ch. Sept. 4, 2014), 2014 WL 4383127
(Del. Ch. Sept. 4, 2014) 12, 13, 21

In re Primedia, Inc. S'holders Litig.,
67 A.3d 455 (Del. Ch. 2013) 22, 23, 24

In re Tri-Star Pictures, Inc. Litig.,
1992 WL 37304 (Del. Ch. Feb. 21, 1992),
1992 WL 37304 (Del. Ch. Feb. 21, 1992), *aff'd in part, rev'd in part by* 634 A.2d 319 (Del. 1993).....*passim*

IRA Tr. FBO Bobbie Ahmed v. Crane,
2017 WL 7053964 (Del. Ch. Dec. 11, 2017) 30

Klein v. H.I.G. Cap., L.L.C.,
2018 WL 6719717 (Del. Ch. Dec. 19, 2018) 12, 13, 14

Lewis v. Anderson,
477 A.2d 1040 (Del. 1984).....23

Loral Space & Commc'ns, Inc. v. Highland Crusader Offshore P'rs, L.P.,
977 A.2d 867 (Del. 2009).....21

Malpiede v. Townson,
780 A.2d 1075 (Del. 2001).....29

Markusic v. Blum,
2020 WL 4760348 (Del. Ch. Aug. 18, 2020).....12, 13, 14, 21

Mesirov v. Enbridge Energy Co., Inc.,
2018 WL 4182204 (Del. Ch. Aug. 29, 2018).....25

Morris v. Spectra Energy P'rs (DE) GP, LP,
2021 WL 221987 (Del. Jan. 22, 2021) 15

Oliver v. Bos. Univ.,
2006 WL 1064169 (Del. Ch. Apr. 14, 2006).....6, 30

Paramount Commc'ns Inc. v. QVC Network Inc.,
637 A.2d 34 (Del. 1994) 21

Parfi Hldg. AB v. Mirror Image Internet, Inc.,
954 A.2d 911 (Del. Ch. 2008) 22

Reith v. Lichtenstein,
2019 WL 2714065 (Del. Ch. June 28, 2019).....12, 13, 14

Ret. Sys. v. Carlson,
2010 WL 2376890 (Del. Ch. June 7, 2010).....32

Roca v. E.I. du Pont de Nemours & Co.,
842 A.2d 1238 (Del. 2004) 29

Rothenberg v. Santa Fe Pac. Corp.,
1992 WL 111206 (Del. Ch. May 18, 1992).....6

Sciabacucchi v. Liberty Broadband Corp.,
2018 WL 3599997 (Del. Ch. July 26, 2018) 12, 13, 21, 25

Schoon v. Smith,
953 A.2d 196 (Del. 2008) 23

Shawe v. Elting,
157 A.3d 152 (Del. 2017) 7

State v. Barnes,
116 A.3d 883 (Del. 2015) 26

Tooley v. Donaldson, Lufkin & Jenrette, Inc.,
845 A.2d 1031 (Del. 2004) .....*passim*

Travelers Indemnity Co. v. Lake,
594 A.2d 38 (Del. 1991) 27

Truxton v. Fait & Slagle Co.,
42 A. 431 (Del. 1899) 24

Urdan v. WR Capital P'rs, LLC,
2020 WL 7223313 (Del. Dec. 8, 2020) 11

W&M Helenthal Hldg. LLC v. Schmitt,
C.A. No. 2018-0505-AGB (Del. Ch. June 3, 2019) 12, 14

Winshall v. Viacom Int'l, Inc.,
76 A.3d 808 (Del. 2013) 28

Zimmerman v. Crothall,
2013 WL 5630992 (Del. Ch. Oct. 14, 2013), *rev'd in part on other grounds*, 94 A.3d 733 (Del. 2014) 22

Statutes & Rules

8 *Del. C.* § 259(a) 24

Ct. Ch. R. 12(b)(6) 29, 31

Supr. Ct. R. 8 7

Supr. Ct. R. 14 29

Supr. Ct. R. 14(d)(iv) 15

Other Authorities

Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Delaware Court of Chancery* § 11.02 (2020) 8

Jonathan Rotenberg, *The Rapid Demise of* Gentile *Picks Up (Even More) Speed* Bloomberg Law (Oct. 2, 2019) 27

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PRELIMINARY STATEMENT

Under the "simple analysis" that this Court articulated in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), Plaintiffs' claim is entirely derivative. The Company[1] allegedly was harmed by issuing shares of common stock to Brookfield for inadequate consideration, and any remedy that would flow from that alleged harm would inure to the benefit of the Company. Plaintiffs focus their appeal almost entirely on *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), which allowed for so-called "dual" (direct and derivative) standing where a controller allegedly "expropriated" economic value and voting power from minority stockholders. Notably, Plaintiffs' focus on *Gentile* is a departure from their primary argument below—namely, that irrespective of *Gentile*, they have standing to sue directly for a loss of "voting power."

Plaintiffs' belated defense of *Gentile*, however, falls short. Plaintiffs fail to address the doctrinal inconsistencies that have arisen as a result of *Gentile*. For example, Plaintiffs have no explanation for why one rule should apply to dilution cases where directors issue stock to themselves and another rule to dilution cases where stock is issued to a controller. Nor do Plaintiffs address why alleged "expropriation" by controllers should permit direct standing in the stock dilution

[1] Capitalized terms have the same meanings as set forth in Defendants' Opening Brief ("Op. Br.") (Dkt. 9).

context but not in other contexts. Furthermore, Plaintiffs completely disregard the longstanding case law holding that derivative damage awards may not be recovered by stockholders directly.

Each of these separate points, which Plaintiffs ignore, counsels in favor of overruling *Gentile* and doing away with its "awkward carve-out to the otherwise straightforward [*Tooley*] doctrine."[2] While Plaintiffs argue that this Court should follow *Gentile* without regard to its defects, *Gentile* "muddies the clarity of [Delaware] law in an important context" and "cannot be reconciled with the strong weight of [Delaware] precedent."[3] Practitioners and jurists alike have advocated that *Gentile* should not remain good law, and this Court's decision to clarify and harmonize the law will have no surprising or destabilizing effect. To the contrary, eliminating the *Gentile* standing doctrine will promote a more consistent, common-sense application of Delaware law in the critical direct-derivative context.

Accordingly, for the reasons set forth below, the Court should apply *Tooley*'s "simple analysis," reaffirm that alleged "expropriation" is not a basis for direct standing, and harmonize the law on direct-derivative distinctions in the controlling

[2] *See* Exhibit A to Op. Br. (Mem. Op., dated October 30, 2020 (the "Opinion" or "Op.")) at 41.
[3] *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1265-66 (Del. 2016) (Stine, C.J., concurring).

stockholder context by overruling *Gentile* and ordering dismissal of Plaintiffs' claims.

SUMMARY OF CROSS-APPEAL ARGUMENT

1. Denied. The Complaint does not state a direct claim for voting power dilution irrespective of *Gentile*. As the Court of Chancery held below, Plaintiffs rely on speculation, rather than supporting facts, and mischaracterizations of the law to invent a purported dilution claim that is not reasonably conceivable. On appeal, Plaintiffs offer no authority and no principled reason why the Court should reverse the trial court's holding that the Complaint does not state a direct claim for voting power dilution.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE EXCLUSIVELY DERIVATIVE UNDER *TOOLEY*

In the Opening Brief, Defendants established that Plaintiffs' claims are exclusively derivative under the *Tooley* test, which "turn[s] *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"[4] In their Complaint, Plaintiffs allege that *the Company* was damaged because the $10.66 per share price that Brookfield paid in the Private Placement was too low and thus unfair to the Company.[5] Likewise, Plaintiffs seek rescissory damages on behalf of *the Company—i.e.*, for the Company to be paid the "fair value" of the stock sold in the Private Placement.[6] Plaintiffs, however, fail to state how TerraForm's minority stockholders suffered direct harm in connection with the Private Placement.

As this Court acknowledged in *Gentile*, "[n]ormally, claims of corporate overpayment are treated as causing harm solely to the corporation and, thus, are regarded as derivative" because "the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the

[4] *Tooley*, 845 A.2d at 1033.
[5] A129 (Compl. ¶ 102).
[6] A082, A141 (*Id.* at ¶¶ 1, 140).

remedy (a restoration of the improperly reduced value) would flow."[7] This reasoning is a logical application of *Tooley*, and provides an orderly and consistent rule—*i.e.*, equity dilution claims are derivative.[8] Indeed, numerous decisions, both before and after *Gentile*, have recognized that equity dilution claims are exclusively derivative and, thus, belong to the company.[9]

While Plaintiffs generally agree that *Tooley* governs the issue of whether claims are direct or derivative,[10] they disagree as to how *Tooley* should be applied. In attempting to establish direct standing for their equity dilution claim, Plaintiffs

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[7] *Gentile*, 906 A.2d at 99.

[8] *See, e.g.*, *Oliver v. Bos. Univ.*, 2006 WL 1064169, at *17 (Del. Ch. Apr. 14, 2006) ("Under *Tooley*, the harm alleged by the Plaintiffs was suffered by the corporation because it was the corporation in the Plaintiffs' scenario that issued its stock too cheaply.").

[9] *See, e.g.*, *El Paso*, 152 A.3d at 1264 (claims for economic dilution are derivative); *Daugherty v. Dondero*, 2019 WL 4740089, at *4 (Del. Ch. Sept. 27, 2019) ("[D]ilution claims challenging the Stock Offerings are classic derivative overpayment claims."); *Agostino v. Hicks*, 845 A.2d 1110, 1124 (Del. Ch. 2004) (finding devaluation of stockholder's stock "a natural and expected consequence of the injury initially borne" by the corporation); *Behrens v. Aerial Commc'ns Inc.*, 2001 WL 599870, at *4 (Del. Ch. May 18, 2001) (all stockholders, including the controller, suffer economic dilution when a company is alleged to have issued shares to the controller at an unfairly low price), *overruled by Gentile v. Rossette*, 906 A.2d 91 (Del. 2006); *Rothenberg v. Santa Fe Pac. Corp.*, 1992 WL 111206, at *3 (Del. Ch. May 18, 1992) (issuance of shares for no consideration caused "dilution [that] would have diminished the value of the shares held by *all* Santa Fe stockholders" and "only the corporation could recover damages for the injury"); *Avacus P'rs, L.P. v. Brian*, 1990 WL 161909, at *6 (Del. Ch. Oct. 24, 1990) ("[I]f a board of directors authorizes the issuance of stock for no or grossly inadequate consideration, the corporation is directly injured and shareholders are injured derivatively.").

[10] *See* Ans. Br. at 21-22 (Dkt. 11).

advance a series of arguments (for the first time on appeal)[11] that mischaracterize the law, ignore multiple lines of authority that are doctrinally inconsistent with *Gentile*, and do not support direct standing in this scenario.

A. *Gentile* Cannot Be Reconciled With *Tooley* And Ought To Be Overruled

In *Tooley*, the Court was clear: "[i]n the *Tri–Star* case, . . . this Court lapsed back into the 'special injury' concept, *which we now discard*."[12] Although Plaintiffs deny that *Tooley* overruled—or even *addressed—Tri-Star*'s analysis,[13] Plaintiffs state that "*Gentile*'s rule is a continuation of long-standing Delaware law recognized in *Tri-Star*."[14] Indeed, the Court in *Gentile* recognized that the case was "functionally *indistinguishable* from *Tri–Star*" and held that "*Tri–Star*'s governing rule should control."[15]

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[11] These arguments are therefore waived. *Shawe v. Elting*, 157 A.3d 152, 162 (Del. 2017) (holding under Supreme Court Rule 8 that "our Court requires that arguments be considered in the first instance by the trial court before appellate review").

[12] *Tooley*, 845 A.2d at 1038 n. 21 (emphasis added); *see also id.* at 1035 ("We now disapprove the use of the concept of 'special injury' . . . .").

[13] Ans. Br. at 4 ("In any event, *Tooley* did not address or overrule *Tri-Star*'s analysis of why minority stockholders suffer harm independent of the corporation in circumstances like those present here.").

[14] A306 (Pls.' Ans. Br. in Opp. to Mot. to Dismiss at 27); *see also* Ans. Br. at 5 ("*Gentile*, applying *Tooley*, correctly relied on *Tri-Star*'s analysis finding individual harm to stockholders.").

[15] *Gentile*, 906 A.2d at 101 (emphasis added); *see also id.* at 101 (finding *Tri-Star* "created the analytical framework for this issue").

While Plaintiffs disagree about whether *Gentile* in fact applied the "special injury" test (which courts were unable to apply consistently before *Tooley* was decided),[16] it is clear that *Gentile* did not simply apply the *Tooley* test. In an attempt to square the inherent contradictions between *Tooley* and *Gentile*, Plaintiffs advance a series of new arguments on appeal that only underscore why the *Gentile* framework should be discarded.

1. ***Tooley*** **Did Not "Liberalize" The Test For Direct Standing**

Plaintiffs argue, without reference to any decision, that *Tooley*'s "elimination of the confusing special injury requirement liberalized direct standing."[17] This is incorrect. *Tooley* clarified—and *simplified*—the direct-derivative analysis,[18] but it did not make it any easier for stockholders to assert claims directly. To the contrary, *Tooley* replaced the "special injury" requirement with the requirement that "[t]he

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[16] Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Delaware Court of Chancery* § 11.02 (2020) ("The term 'special injury' was variously characterized to include a lengthy list of imprecise and often opaque descriptions . . . ."). By focusing on whether one group of stockholders (*i.e.*, a controller and its affiliates) was impacted differently than another group of stockholders (*i.e.*, public holders), *Gentile* applied one iteration of the special injury concept. *Tri-Star*, 634 A.2d at 330 ("A special injury is established where there is a wrong suffered by plaintiff *that was not suffered by all stockholders generally* or where the wrong involves a contractual right of the stockholders, such as the right to vote." (emphasis added)).

[17] Ans. Br. at 22; *see also id.* at 5, 27.

[18] *Tooley*, 845 A.2d at 1035 (finding that some cases "complicated" Delaware jurisprudence "by injection of the amorphous and confusing concept of 'special injury'").

stockholder must demonstrate that . . . he or she can prevail without showing an injury to the corporation."[19]

Under Plaintiffs' view of *Tooley*, any alleged breach of fiduciary duty by a controller should result in direct standing because controlling stockholders owe fiduciary duties to minority stockholders.[20] This argument ignores the bedrock principle of Delaware law that corporate fiduciaries owe duties not only to stockholders, but also to the corporation *itself*.[21] In *Agostino*, 845 A.2d at 1122, the Court of Chancery, recognizing this fundamental principle, laid the groundwork for the first prong of the *Tooley* test:

> [T]he inquiry should focus on whether an injury is suffered by the shareholder that is *not dependent on a prior injury to the corporation*. In the context of a complaint asserting breaches of fiduciary duty—duty that under Delaware law runs to the corporation *and* the shareholder—the test may be stated as follows: *Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation*?[22]

In *Tooley*, this Court embraced *Agostino*'s "scholarly analysis," holding that "[w]e believe that this approach is helpful in analyzing the first prong of the analysis: what

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[19] *Id.* at 1039.
[20] Ans. Br. at 26.
[21] *See, e.g.*, *Firefighters' Pension Sys. of City of Kan. City, Mo. Tr. v. Presidio, Inc.*, 2021 WL 298141, at *38 (Del. Ch. Jan. 29, 2021) (collecting cases).
[22] *Agostino,* 845 A.2d at 1122 (footnotes and citations omitted).

person or entity has suffered the alleged harm? The second prong of the analysis should logically follow."[23]

Indeed, *Tooley* is necessary precisely because the existence of fiduciary duties running to both stockholders and the corporation requires a simple, common sense framework for differentiating between direct and derivative claims.[24] Here, Brookfield's fiduciary duties extended to both the Company and its stockholders, but the Private Placement allegedly harmed the Company in the first instance, and stockholders only indirectly. The Company should receive the benefit of any recovery, and Plaintiffs' claims are therefore derivative because Plaintiffs cannot prevail without showing an injury to the Company.

2. *Gentile*'s "Expropriation" Analysis Upset The Settled Expectations Created By *Tooley*

Plaintiffs urge the Court to enshrine an exception to *Tooley* that would flip the *Tooley* test on its head. Where a stockholder alleges "expropriation" by a controller in connection with a stock issuance by the corporation to the controller (*i.e.*, economic and voting power dilution),[25] Plaintiffs argue that the Court should analyze

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[23] *Id.* at 1036.

[24] *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1139 (Del. 2016) ("[T]here must be some way of determining whether stockholders can bring a claim for breach of fiduciary duty directly, or whether a particular fiduciary duty claim must be brought derivatively on the corporation's behalf. We established *Tooley*'s two-pronged test as a means of determining whether such claims are direct or derivative.").

[25] *Gentile*, 906 A.2d at 102 & 102 n. 26.

standing not as a matter of who was harmed (and to whom a remedy belongs) under *Tooley* but, instead, should make a standing determination *based on the identity of the alleged wrongdoer*.[26] Plaintiffs, however, offer no principled reason why the Court should perpetuate this anomaly, which is clearly inconsistent with *Tooley*.[27]

It is well-settled that not every transaction involving controlling stockholders in a dilutive context can be challenged directly. For example, in *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1250-52 (Del. 2016), this Court rejected the argument that a class of equity holders could sue directly where a controlling stockholder had overcharged the company for assets the controller sold to the company, uniquely benefiting the controller by $171 million. The Court

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[26] Ans. Br. at 23-24. *Gentile* also attempted to distinguish between harms to "shares" as opposed to harms to "minority stockholders." *Id.* However, there is no separate harm to "holders" apart from "shares" in the dilution context. Indeed, this Court recently reaffirmed that a "breach of fiduciary duty claim for dilution" is not "personal" to the holder because it "arises from the relationship among stockholder, stock and the company"—"[w]hether described as direct, derivative, or both, the dilution claims were not personal to the plaintiffs and traveled with the sale of their . . . stock." *Urdan v. WR Capital P'rs, LLC*, 2020 WL 7223313, at *7 (Del. Dec. 8, 2020) (internal quotation marks omitted).

[27] *See Caspian Select Credit Master Fund Ltd. v. Gohl*, 2015 WL 5718592, at *5 (Del. Ch. Sept. 28, 2015) ("*Gentile* cannot stand for the proposition that . . . a direct claim arises whenever a controlling stockholder extracts and expropriates economic value from a company to its benefit and the minority stockholders' detriment. Such an exception would largely swallow the rule that claims of corporate overpayment are derivative—stockholders could maintain a suit directly whenever the corporation transacts with a controller on allegedly unfair terms."); *Agostino*, 845 A.2d at 1126 n.84 ("The identity of the culpable parties does not speak to whether the conduct of those parties injured the corporation, rather than its shareholders.").

expressly rejected an argument that the "expropriation" of value by a controller "constituted a *direct* injury to the unaffiliated limited partners."[28] While the Court described its reasoning as "declin[ing] the invitation to further expand the universe of claims that can be asserted 'dually,'"[29] the Court also rejected the rationale underlying *Gentile*—that alleged "expropriation" by a controller (as opposed to overpayment to a third-party or corporate directors) could on its own support direct standing. Subsequent decisions from the Court of Chancery have likewise refused to allow direct standing under the guise of "expropriation."[30]

While several trial court opinions had previously purported to extend *Gentile*'s "expropriation" concept—including *In re Nine Systems Corp. Shareholders Litigation*, 2014 WL 4383127 (Del. Ch. Sept. 4, 2014),[31] *Carsanaro*

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[28] *El Paso*, 152 A.3d at 1264.

[29] *Id.*

[30] *See, e.g.*, *Reith v. Lichtenstein*, 2019 WL 2714065, at *12 (Del. Ch. June 28, 2019); *Klein v. H.I.G. Cap., L.L.C.*, 2018 WL 6719717, at *6-9 (Del. Ch. Dec. 19, 2018); *Markusic v. Blum*, 2020 WL 4760348, at *3-4 (Del. Ch. Aug. 18, 2020); *see also W&M Helenthal Hldg. LLC v. Schmitt*, C.A. No. 2018-0505-AGB, at 51:11-15 (Del. Ch. June 3, 2019) (TRANSCRIPT) ("In its 2016 *El Paso* decision, our Supreme Court made clear that the *Gentile* doctrine is to be construed narrowly and that the sort of dual claims described in that case only apply in the unique circumstances of that case."). The Court of Chancery, in an effort to make conceptual sense of *Gentile*, has further cabined the holding to situations where a controller "extract[s] a benefit" from the challenged transaction. *Daugherty*, 2019 WL 4740089, at *3 (finding that "*Gentile* and its progeny require that the expropriated benefit inure *exclusively* to the controllers").

[31] 2014 WL 4383127, at *28-29 (Del. Ch. Sept. 4, 2014) (granting plaintiffs direct standing to challenge dilutive transaction involving directors and affiliated funds),

v. Bloodhound Technologies, Inc.,[32] and the trial court's decision in *In re El Paso Pipeline Partners, L.P. Derivative Litigation*, 132 A.3d 67 (Del. Ch. 2015)[33]—the Court of Chancery has subsequently recognized that those decisions have been abrogated by this Court's decision in *El Paso*.[34] Plaintiffs fail to recognize this change in the law, citing *Carsanaro* repeatedly throughout their Answering Brief[35] and parroting several arguments from the Court of Chancery's decision in *El Paso*, which this Court reversed.[36] As the law currently stands, "expropriation" can be a basis for direct standing *only* in the specific factual scenario of *Gentile*.[37]

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abrogation recognized by Sciabacucchi v. Liberty Broadband Corp., 2018 WL 3599997, at *10 (Del. Ch. July 26, 2018).

[32] 65 A.3d 618, 658 (Del. Ch. 2013) (extending *Gentile* to "non-controller issuances in which insiders participate"), *abrogation recognized by Sciabacucchi*, 2018 WL 3599997, at *10.

[33] 132 A.3d 67, 116 (Del. Ch. 2015) ("[T]he claim for expropriation has a dual nature, so it properly remains with the injured sell-side stockholders, who can continue to maintain their suit against the sell-side controller."), *judgment entered by*, 2016 WL 451320 (Del. Ch. Feb. 4, 2016), *and rev'd sub nom. by El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1251 (Del. 2016) ("the claims of the derivative plaintiff here were not dual in nature").

[34] *See, e.g.*, *Sciabacucchi*, 2018 WL 3599997, at *10 (holding that *El Paso* "implicitly rejected the reasoning of decisions such as *Carsanaro* and *Nine Systems*").

[35] Ans. Br. at 22, 29, 30, 36, 41.

[36] *See id.* at 32-36.

[37] Trial court decisions after *El Paso* have avoided applying *Gentile*. *See, e.g.*, *Markusic*, 2020 WL 4760348, at *4 ("The facts of this case do not fit the mold of *Gentile* as set by *El Paso*."); *Reith*, 2019 WL 2714065, at *12 (challenges to issuances of preferred stock do not state a cause of action under *Gentile*); *Klein*, 2018 WL 6719717, at *6-9 ("In this case, unlike in *Gentile*, the economic harm that allegedly occurred came not from the issuance of shares of stock to a controller that resulted in an expropriation of economic value from the minority stockholders *by*

Plaintiffs have not articulated a reason why the law should afford stockholders direct standing to pursue dilution claims where a controller's conduct is at issue, as opposed to that of directors.[38] Plaintiffs also have no explanation as to why the law should afford direct standing in the dilutive stock issuance context, but not in the non-stock issuance context, where stockholders are limited to derivative standing.[39] Nor does it make sense to afford direct standing for dilutive issuances of common stock, but not preferred stock.[40]

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diluting their aggregate ownership percentage, but from the issuance of a different type of security (the Preferred Stock) whose terms allegedly should have commanded a higher price than was paid. . . . In sum, the *Gentile* framework does not fit the facts pled in this case."); *see also Daugherty*, 2019 WL 4740089, at *3 ("[T]he Complaint fails to state a claim under *Gentile* as to the 2016 Stock Offering. For a dilution claim to meet the narrow criteria of *Gentile*, a controller must extract a benefit from the challenged transaction. 'As such, a transaction does not fit within the *Gentile* paradigm if the controller itself is diluted by the transaction.'" (quoting *Almond for Almond Fam. 2001 Tr. v. Glenhill Advisors LLC*, 2018 WL 3954733, at *28 (Del. Ch. Aug. 17, 2018)); *id.* ("The Complaint also fails to state a claim under *Gentile* as to the 2017 Stock Offering, even though it resulted in a marginal increase to the Controlling Stockholders' net equity and voting positions. This is so because *Gentile* and its progeny require that the expropriated benefit inure *exclusively* to the controllers."); *W&M Helenthal*, C.A. No. 2018-0505-AGB, at 51:11-15 (Del. Ch. June 3, 2019) (TRANSCRIPT) ("In its 2016 *El Paso* decision, our Supreme Court made clear that the *Gentile* doctrine is to be construed narrowly and that the sort of dual claims described in that case only apply in the unique circumstances of that case.").

[38] *See Nine Sys.*, 2014 WL 438127, at *28-29; *Carsanaro*, 65 A.3d at 658.

[39] *See Markusic*, 2020 WL 4760348, at *2, 4 (expropriation allegations did not "fit the mold of *Gentile* as set by *El Paso*" where effective controller had allegedly engineered foreclosure of the company's senior debt and controller's new employer subsequently acquired all of the company's assets in bankruptcy).

[40] *See Reith*, 2019 WL 2714065, at *11-12; *Klein*, 2018 WL 6719717, at *6-9.

3. Plaintiffs' Claims Are Not "Dual-Natured"

Unable to reconcile *Tooley* and *Gentile*, Plaintiffs attempt to argue that their claims should survive based on the so-called "dual claim" framework.[41] Plaintiffs contend (for the first time) that "dual-natured claims" are a "longstanding" and "well-established" "allowance" in Delaware,[42] but they cite inapposite opinions and ignore the fact that dual-natured standing is a creation of *Gentile*.[43] Although some recent post-*Gentile* decisions have mentioned (in passing) the possibility of a dual-natured claim, those statements were *dicta* and not critical to the decisions.[44] Indeed, in *El Paso*, this Court recognized that "the decisions in which the Delaware Supreme Court has recognized dual-natured claims *have been controversial* and *stand in tension* with other decisions that have characterized similar claims as purely derivative."[45]

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[41] Ans. Br. at 5, 20, 29, 30, 33.
[42] *Id.* at 29, 33.
[43] *Id*. at 29-33. Plaintiffs also attempt to argue (in a footnote) that Defendants have waived the issue of whether Plaintiffs' claims are "dual." Ans. Br. at 29 n. 105. Defendants, however, have consistently argued that Plaintiffs' claims are "exclusively derivative" and, therefore, do not qualify for dual or direct standing. *See* Op. Br. at 15-17. Furthermore, Plaintiffs' waiver argument is waived, as it was included only in a footnote in their brief. *See* Supr. Ct. R. 14(d)(iv) (footnotes shall not be used for argument).
[44] *See e.g., El Paso,* 152 A.3d at 1251 ("the claims of the derivative plaintiff here were not dual in nature"); *Morris v. Spectra Energy P'rs (DE) GP, LP*, 2021 WL 221987, at *6 n. 38, 39 (Del. Jan. 22, 2021).
[45] *El Paso*, 152 A.3d at 1262 (emphasis added).

As explained below, Delaware law requires that any damages recovery to a class of stockholders be accompanied by a showing of direct harm to such stockholders independent of an alleged harm to the corporation. Stockholders may not receive a *pro rata* recovery of damages owed to the corporation.

a. *Gentile* Created The Concept Of "Dual-Natured" Standing

The concept of a hybrid "dual claim" is a creation of *Gentile*.[46] In doing so, *Gentile* relied primarily on *Grimes v. Donald*, 673 A.2d 1207 (Del. 1996)[47] and *In re Tri-Star Pictures, Inc. Litigation*, 1992 WL 37304 (Del. Ch. Feb. 21, 1992).[48] But neither of those decisions actually held that stockholders can recover directly for harms that are derivative in nature.

In *Grimes*, this Court recognized that "the same set of facts can give rise both to a direct claim and a derivative claim."[49] Specifically, the Court held that a claim for abdication of a statutory duty could be brought directly where the plaintiff sought "only a declaration of the invalidity" of certain agreements and no monetary recovery would accrue to the corporation as a result.[50] The Court, however,

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[46] *Gentile*, 906 A.2d at 100.
[47] 673 A.2d 1207 (Del. 1996), *overruled sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)
[48] 1992 WL 37304 (Del. Ch. Feb. 21, 1992), *aff'd in part, rev'd in part by* 634 A.2d 319 (Del. 1993), *as corrected* (Dec. 8, 1993).
[49] *Grimes*, 673 A.2d at 1212-13.
[50] *Id.* at 1213.

explicitly held that damages claims brought for "due care, waste and excessive compensation" were solely derivative.[51] *Grimes* did *not* create a "hybrid" claim that allowed plaintiffs to recover damages for harm to the corporation.

Likewise, in *Tri-Star*, stockholders were *not* allowed to recover damages for harm suffered by the company.[52] There, the Court of Chancery dismissed plaintiffs' derivative claims where a subsequent merger terminated plaintiffs' standing to assert them, leaving only a disclosure claim for money damages against Tri-Star's directors.[53] With respect to the disclosure claim, the plaintiffs offered "no specific evidence of damage" to the class but, rather, presented a number of "factors" to justify the damages sought, including the "Court's equitable discretion," the defendants' "wrongful intent," and "benefit" to the acquiror.[54] The court granted defendants' motion for summary judgment because plaintiffs had "not adduced evidence of individual damage to the members of the class flowing from" the alleged wrongful conduct.[55] Critically, the court rejected the notion that a plaintiff could "sidestep" its obligation to prove damages "by enumerating elements of a *derivative*

[51] *Id.*
[52] *Tri-Star*, 1992 WL 37304, at *8-9.
[53] *Id.* at *1.
[54] *Id.* at *2-3.
[55] *Id.* at *4.

recovery and then labeling them as 'factors' to be considered as evidence of the former shareholders' *individual* damage claim."[56]

Thus, neither *Grimes* nor *Tri-Star* support *Gentile*'s ruling that stockholders can assert a single claim that is "*both* derivative and direct."[57] The core insight in each of these decisions is that stockholders may recover damages only to the extent they actually prove that the class suffered damages *independently* of the company.[58]

b. *Gentile* Violates Delaware's Longstanding Bar On Stockholder Recoveries For Corporate Harms

Contrary to Plaintiffs' theories of the "transitive property of entity litigation,"[59] a trial court cannot convert an entity-level harm into a damages award to stockholders through a *pro rata* recovery.[60] This Court's decision in *In re J.P. Morgan Chase & Co. Shareholder Litigation*, 906 A.2d 766 (Del. 2006), which follows a long line of opinions barring *pro rata* recoveries of damages for corporate

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[56] *Id.* at *3.

[57] *Gentile*, 906 A.2d at 99 (emphasis added). This Court recently reaffirmed this concept in *Dohmen v. Goodman*, 234 A.3d 1161 (Del. 2020), emphasizing that *Tri-Star* does *not* allow stockholders to recover damages that are not proven. 234 A.3d, at 1173 ("*Tri–Star* stands only for the narrow proposition that, where directors have breached their disclosure duties in a corporate transaction that has in turn caused impairment to the economic or voting rights of stockholders, there must at least be an award of nominal damages. *Tri–Star* should not be read to stand for any broader proposition."

[58] *Dohmen*, 234 A.3d at 1174-75; *see also J.P. Morgan*, 906 A.2d at 772.

[59] Ans. Br. at 33-34 n. 119.

[60] *See El Paso*, 152 A.3d at 1264. *Baker v. Sadiq*, 2016 WL 4375250, at *1-4 (Del. Ch. Aug. 16, 2016), the only case cited by Plaintiffs, was decided prior to this Court's opinion in *El Paso*.

harms, makes clear that stockholders may only obtain class-level damages by demonstrating evidence of harm to the class.[61] Where the alleged harm to the stockholders is "exactly the same as" the harm suffered by the entity, the injury "is properly regarded as injury to the [company] and not to the [stockholders]."[62] Accordingly, Plaintiffs cannot "bootstrap the harm and damages causatively linked to a derivative claim onto . . . [a] direct cause of action."[63] Where the only injury alleged is to the entity, the recovery "must go to the" corporation and "only to the" corporation.[64] Plaintiff has not cited a single decision, other than *Gentile*, which allowed stockholders to recover for damages to the company in a similar situation.

In *In re Loral Space & Communications Inc.*, 2008 WL 4293781 (Del. Ch. Sept. 19, 2008), the sole case following *Gentile* that imposed a remedy for a so-

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[61] *J.P. Morgan*, 906 A.2d at 773 (rejecting plaintiffs' theory that the direct and derivative damages are the same, in part, because "if the plaintiffs' damages theory is valid, the directors of an acquiring corporation would be liable to pay both the corporation and its shareholders the same compensatory damages for the same injury"); *Agostino*, 845 A.2d at 1122 (in order to pursue a direct claim, plaintiff must allege "an injury [that was] suffered by the shareholder that is not dependent on a prior injury to the corporation"); *see also Tooley*, 845 A.2d at 1036 (direct injury suffered by a stockholder is "distinct from an injury caused to the corporation alone").

[62] *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008); *see also El Paso*, 152 A.3d at 1264 ("Were [plaintiff] to recover directly for the alleged decrease in the value of the Partnership's assets, the damages would be proportionate to his ownership interest. *The necessity of a* pro rata *recovery to remedy the alleged harm indicates that his claim is derivative*." (emphasis added)).

[63] *Id*. (citing *J.P. Morgan*, 906 A.2d at 771-74).

[64] *Tooley*, 845 A.2d at 1036.

called "expropriation" claim in the dilution context, the Court of Chancery was careful to sidestep this issue by imposing an equitable remedy.[65] In *Loral*, a 36% stockholder was issued a new class of preferred stock that gave the stockholder "the potential to acquire a total of 63% of Loral's equity" and changed the stockholder "from a large blockholder who could not unilaterally prevent a control transaction to a preferred stockholder whose class voting rights gave it affirmative negative control over almost any major transaction."[66] In other words, *Loral* was a change-of-control case in which the defendants "maneuvered to avoid a technical invocation of *Revlon* duties."[67] In granting class certification, former Vice Chancellor Strine focused on the defendants' interference with voting rights—not dilution—and criticized the *Gentile* framework as creating "considerable uncertainty."[68]

While former Vice Chancellor Strine was not free to depart from the *Gentile* framework in *Loral*, he crafted an equitable remedy to reform stock certificates and the attendant voting rights of the defendants in order to sidestep the issue of a potential double recovery.[69] Thus, in *Loral*, the stockholder plaintiffs did not receive

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[65] 2008 WL 42937801, at *32 (Del. Ch. Sept. 19, 2008).
[66] *Id.* at *1, *31.
[67] *Id.* at *11.
[68] *In re Loral Space & Commc'ns, Inc. Consol. Litig.*, C.A. No. 2808-VCS, at 108:24-109:2 (Del. Ch. Feb. 15, 2008) (TRANSCRIPT) (finding that "after *Gatz* or *Gentile* -- I have to say, I think there is considerable uncertainty injected into our law").
[69] *Loral*, 2008 WL 4293781, at *32.

a damages award belonging to the corporation. On appeal, this Court affirmed the concept of dual standing under *Gentile* as a threshold matter, but focused primarily on the separate issue of whether attorneys acting on behalf of the putative class could receive attorneys' fees for obtaining an equitable remedy.[70]

Although Plaintiffs exhort the Court to adopt a "pragmatic rather than doctrinal" approach to *Tooley*[71] and to elevate substance over form,[72] *El Paso* precludes the approaches adopted in *Gatz v. Ponsoldt*, 925 A.2d 1265 (Del. 2007) and *Carsanaro*.[73] Plaintiffs also take issue with Defendants' argument that *Gentile* is unnecessary because stockholders have standing to assert direct claims challenging a dilutive issuance that effects a change of control.[74] But the loss of control implicates certain individual rights that are not at issue where, like here, a controller already exists—*e.g.*, the public holders' rights to elect directors, approve a merger, or receive a control premium.[75]

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[70] *See Loral Space & Commc'ns, Inc. v. Highland Crusader Offshore P'rs, L.P.*, 977 A.2d 867, 870 (Del. 2009).
[71] Ans. Br. at 30.
[72] *Id.* at 31.
[73] *See e.g.*, *Markusic*, 2020 WL 4760348, at *4 n. 28 (declining to follow *Gatz* because it pre-dates *El Paso*); *Sciabacucchi*, 2018 WL 3599997, at *10 ("*El Paso* thus implicitly rejected the reasoning of decisions such as *Carsanaro* and *Nine Systems*, which had extended *Gentile* to any dilutive issuance approved by a conflicted board.").
[74] Ans. Br. at 31-32.
[75] *See, e.g.*, *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42-43 (Del. 1994) (acquisition of controlling stake by a single person, entity, or a control group (i) implicates "elections of directors, amendments to the certificate of

4. That Plaintiffs Have Otherwise Lost Standing To Pursue Their Claims Is Not A Basis To Uphold *Gentile*

The continuous ownership requirement "has been a staple of Delaware law for over [three] decades,"[76] and has been described as "sacrosanct"[77] and a "bedrock tenet of Delaware law" that "is adhered to closely."[78] Nevertheless, Plaintiffs argue—without explanation—that their direct claims should survive because the "additional burdens" imposed by forcing them to bring a (direct) *Primedia* claim challenging the Merger render *Primedia* an "ineffective substitute for stockholders' direct *Gentile* claim."[79] Plaintiffs, however, fail to identify any principled reason why their claim should enjoy priority status over any other claim for corporate injury simply because they allege that the harm was committed by a controlling stockholder. Moreover, it is well-settled that when a corporation suffers harm, it

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incorporation, mergers, consolidations, sales of all or substantially all of the assets of the corporation, and dissolution" because "minority stockholders have lost the power to influence corporate direction through the ballot" and (ii) typically entitles the minority to a control premium that "compensates the minority stockholders for their resulting loss of voting power").

[76] *In re New Valley Corp. Deriv. Litig.*, 2004 WL 1700530, at *3 (Del. Ch. June 28, 2004).

[77] *Zimmerman v. Crothall*, 2013 WL 5630992, at *5 (Del. Ch. Oct. 14, 2013), *rev'd in part on other grounds*, 94 A.3d 733 (Del. 2014).

[78] *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 940 (Del. Ch. 2008).

[79] Ans. Br. at 34-35.

alone owns the claim, which stockholders merely have standing to assert on the corporation's behalf.[80]

Plaintiffs do not seriously dispute that under *Primedia* they could challenge the Merger directly; they instead argue that a direct challenge to the Merger under *Primedia* "provides, at best, a mere possibility that an extinguished derivative claim will give rise to a direct claim" because they would be required to demonstrate that the pre-Merger derivative claim was material in the context of the Merger and that the acquirer did not provide value for, and would not assert, the derivative claim.[81] This Court rejected virtually identical arguments in *El Paso*.[82] The question of

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[80] *Schoon v. Smith*, 953 A.2d 196, 201-02 (Del. 2008) ("The stockholder does not bring [a derivative] suit because *his* rights have been *directly* violated, or because the cause of action is *his*, or because *he* is entitled to the relief sought; he is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court* . . . . In fact, the plaintiff has no such *direct* interest; the defendant corporation alone has a direct interest . . . .") (quoting 4 Pomeroy's Equity Jurisprudence § 1095, at 278 (5th ed. 1941)). Because the company retains ownership of its claim at all times, even while a stockholder is controlling the litigation, "[a] plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit." *Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del. 1984); *see also Ark. Tchr. Ret. Sys. v. Countrywide Fin. Corp.*, 75 A.3d 888, 890, 894-95, 897 (Del. 2013) (discussing, "ratify[ing]," and "reaffirm[ing]" the continuous ownership rule recognized in *Lewis v. Anderson*).

[81] Ans. Br. at 34-35; s*ee In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455 (Del. Ch. 2013).

[82] In the *El Paso* trial court decision, Vice Chancellor Laster noted that *Primedia*'s "materiality-based exclusion can encompass quite a bit," and that there was "ample reason to think that an acquirer would never assert, and therefore would not pay for" pre-merger derivative claims. *In re El Paso*, 132 A.3d at 114-17. This Court rejected that reasoning on appeal, ruling that exclusively derivative claims passed to the

whether an acquirer actually bargained for derivative claims as part of merger negotiations is irrelevant to the derivative nature of the claims.[83] Accordingly, *El Paso* applied the continuous ownership rule to deny the plaintiff standing despite the fact that it "might be difficult" for the plaintiff to allege "that the value they are receiving in the merger is unfair simply as a result of the failure to consider their derivative suit."[84] The Court further determined in *El Paso* that a "general rule where derivative plaintiffs can continue to sue after a merger would . . . raise overall transaction costs and barriers to mergers, with obvious costs to public investors, with no gain substantial enough to compensate them."[85] The same logic applies to this case, and the Court should not create an exception to *Primedia* for *Gentile*-type direct claims.

B. ***Stare Decisis* Does Not Bar The Court From Overruling *Gentile***

This Court has long recognized that it is better to reconsider certain decisions "than to have the character of [Delaware] law impaired, and the beauty and harmony of the system destroyed, by the perpetuity of error."[86] Plaintiffs, however, argue that

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buyer in a merger, and the plaintiff was free to challenge the merger even if it were more difficult than proceeding directly. *El Paso*, 152 A.3d at 1251-52.

[83] 8 *Del. C.* § 259(a).

[84] *El Paso*, 152 A.3d at 1251-52.

[85] *Id*.

[86] *Truxton v. Fait & Slagle Co.*, 42 A. 431, 437 (Del. 1899).

stare decisis bars this Court from reconsidering decisions in all but the most extreme scenarios.

As explained in Defendants' Opening Brief, *Gentile* is not well-settled law, and the doctrine of *stare decisis* does not bar the Court from revisiting a prior opinion.[87] Yet Plaintiffs do nothing more than repeat their *ipse dixit* refrain that *Gentile* is consistent with *Tooley*—it is not for the reasons set forth both herein and in Defendants' Opening Brief[88]—and attempt to discount widespread criticism of *Gentile*.[89] Contrary to Plaintiffs' assertions, the opinions cited by Defendants have not merely "acknowledge[d]"[90] then-Chief Justice Strine's concurrence in *El Paso*.[91] Instead, those opinions have limited *Gentile*'s application and questioned *Gentile*'s continuing viability.[92] Plaintiffs' criticism that these (trial court) opinions "do not

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[87] Op. Br. at 27-40.

[88] In light of the doctrinal inconsistencies identified by Defendants and ignored by Plaintiffs, it is disingenuous for Plaintiffs to suggest that Defendants have not identified any "urgent reasons" or "unanticipated consequences" that warrant the revisiting of *Gentile*. Ans. Br. at 38.

[89] *Id.* at 37-41.

[90] Ans. Br. at 38-39.

[91] *See, e.g.*, Op. Br. at 37 ("*Gentile* has been much discussed, and often distinguished, in the case law, particularly in light of the simple test posed in *Tooley* for determining whether a claim is direct or derivative: who has suffered the injury and to whom will the recovery flow? Post-*Gentile*, Delaware courts have *struggled* to define the boundaries of dual-natured claims." (emphasis added)).

[92] *See, e.g.*, *Mesirov v. Enbridge Energy Co., Inc.*, 2018 WL 4182204, at *8 n. 77 (Del. Ch. Aug. 29, 2018) ("I note that there is a reason to question whether *Gentile* will remain the law of Delaware. At the very least, *El Paso* makes clear that *Gentile* and its progeny should be construed narrowly."); *Sciabacucchi*, 2018 WL 3599997,

call for overruling *Gentile*" is not credible.[93] Plaintiffs also argue that any confusion surrounding *Gentile* does not undermine its precedential value.[94] *Stare decisis*, however, is based on concerns for stability; it poses no bar to the reconsideration of a case that has no stable application.[95]

The consternation caused by *Gentile* has been recognized by both the bench and the bar. For example, Justice Valihura has noted that "[s]eparate opinions might indicate possible shifts in the law" and that "[*Gentile*], as the Court of Chancery observed, ha[s] been somewhat controversial and ha[s] been the source of some confusion in the Bar."[96] Although of no precedential weight, such commentary underscores the fact that litigants are unlikely to be surprised by any change in the law with respect to *Gentile*. Indeed, legal practitioners and commentators have also speculated that there may be a change in the law.[97]

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at *10 n. 147 ("limiting *Gentile* to controller situations, rather than expanding it to conflicted board non-controller dilution cases, or overruling it entirely, is, as a matter of doctrine, unsatisfying"); *see also* Op. Br. at 25-26, 29.

[93] Ans. Br. at 39.

[94] *Id.* at 40-41.

[95] *State v. Barnes*, 116 A.3d 883, 891 (Del. 2015) ("[t]he doctrine of *stare decisis* exists to protect the settled expectations of citizens").

[96] A515-516 (Hon. Karen L. Valihura, *The Role of Appellate Decision-Making in the Development of Delaware Corporate Law—A View from Both Sides of the Bench*, Lecture at Seventeenth Annual Albert A. De Stefano Lecture on Corporate Securities and Financial Law at the Fordham Corporate Law Center (Apr. 3, 2017), in 23 Fordham J. Corp. & Fin. L. 5, 28 (2017)).

[97] *See, e.g.*, S. Michael Sirkin, *Direct, Derivative, or Both? Delaware Supreme Court Answers Questions of Claim Ownership and Standing*, The M&A Lawyer (Mar. 2017) (suggesting that former Chief Justice Strine's *El Paso* concurrence "may have

Moreover, the suggestion that the Court in *Gentile* already considered and rejected the arguments made by Defendants on this appeal is wrong.[98] The defendants in *Gentile* never disputed that plaintiffs could assert their stock dilution claim directly.[99] Rather, they merely argued that direct standing should be limited to situations "where the loss of voting power is 'material.'"[100] The Court in *Gentile* did not consider and reject the issues before the Court today, some of which involve inconsistencies between the reasoning of *Gentile* and decisions which post-date *Gentile*.[101]

Finally, Plaintiffs' attempt to distinguish *Travelers Indemnity Co. v. Lake*, 594 A.2d 38 (Del. 1991) is unavailing.[102] Defendants have explained at length why *Gentile* has led to "difficulties in adjudicating cases" and identified the many doctrinal inconsistencies caused by *Gentile*. This Court has, in similar instances, expressed a willingness to revisit and, if necessary, overrule its prior decisions,

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marked the beginning of the end of *Gentile*'s doctrinal life"); *see also* Rose Krebs, *Delaware Cases To Watch In 2021*, Law360 (Jan. 3, 2021) (naming the instant case as one of five key "cases to watch" and characterizing the Opinion as "wad[ing] into a *years-long judicial debate* over the *viability* of 'dual-natured,' both direct and derivative claims" under *Gentile*) (emphasis added)); Jonathan Rotenberg, *The Rapid Demise of* Gentile *Picks Up (Even More) Speed*, Bloomberg Law (Oct. 2, 2019).

[98] Ans. Br. at 38.

[99] *Gentile*, 906 A.2d at 98.

[100] *Id.*

[101] *See supra* Part I.A.2 (describing inconsistencies between *Gentile* and case law following *El Paso*).

[102] Ans. Br. at 37.

including where those decisions "conflict[] with . . . prior case law"[103] or have resulted in conflicting and "confusing precedent"[104] that has been difficult for lower courts to apply. Indeed, that was the very basis of this Court's decision in *Tooley* to clarify the law in the important direct-derivative standing context.[105] The Court's approach to *Gentile* should be no different.

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This Court should take the opportunity to clarify the law in a way that promotes consistency and simplicity. Not overturning *Gentile* would only perpetuate doctrinal tension and, potentially, undermine the precedential value of other decisions like *El Paso* that the Court of Chancery has relied upon with great frequency. In light of the doctrinal inconsistencies and undesirable consequences created by *Gentile*,[106] the Court should overrule *Gentile* to the extent that it conflicts with *Tooley* and permits stockholders to proceed directly for corporate overpayment claims.

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[103] *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 815 n. 13 (Del. 2013) (overruling *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400 (Del. 2013)).

[104] *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 252 (Del. 2017), *as revised* (Mar. 28, 2017) ("In this appeal, we change course from the earlier pleading standard announced in *Brinckerhoff III* to which the Court of Chancery was bound, and apply the definition of bad faith that is commonly used in our entity law and incorporated into the Enbridge LPA.").

[105] *Tooley*, *passim*.

[106] *See* Op. Br. at 34-40 (describing undesirable policy consequences created by *Gentile*).

II. PLAINTIFFS' CROSS-APPEAL SHOULD BE DISMISSED

A. Question Presented

Whether Plaintiffs have direct standing regardless of *Gentile* to assert a claim for voting power dilution in connection with the Private Placement and, if so, whether they have adequately pleaded such a claim.

B. Scope Of Review

This Court reviews *de novo* an order deciding a motion to dismiss under Court of Chancery Rule 12(b)(6).[107]

C. Merits Of The Argument

Plaintiffs' cross-appeal of the trial court's holding that the Complaint failed to state a direct claim for voting power dilution independent of *Gentile* lacks merit.[108] Plaintiffs make two arguments that the Complaint states a direct voting dilution claim irrespective of *Gentile*.[109] First, Plaintiffs allege under an entrenchment theory that, without the June 2018 Private Placement, Brookfield's majority stake in

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[107] *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

[108] Although the Supreme Court Rules do not permit Defendants to move to dismiss Plaintiffs' cross-appeal, Plaintiffs lack standing to cross appeal because they were not aggrieved by the trial court's decision. *See Hercules Inc. v. AIU Ins. Co.*, 783 A.2d 1275, 1277 (Del. 2000).

[109] Plaintiffs also alleged below, without pleading any supporting factual allegations, that the Private Placement permitted Brookfield to avoid paying a control premium to TerraForm's minority stockholders in a future corporate sale. A302 (Ans. Br. In Opp. To Mot. To Dismiss at 23). Plaintiffs waived this argument on appeal under Supreme Court Rule 14 by failing to raise it in their cross-appeal opening brief. *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242-43 (Del. 2004).

TerraForm (then 51%) would have been lost in October 2019 when TerraForm conducted a $250 million public offering.[110] Second, Plaintiffs allege that Brookfield, following the Private Placement, supposedly had the intent to use its "near-supermajority voting power"[111] to remove the $66^{2/3}$% supermajority voting requirement in TerraForm's Charter.[112] As the Court below correctly found, neither of these conclusory and unsupported allegations offers a reasonably conceivable basis for Plaintiffs to prevail on a voting dilution claim.

On appeal, Plaintiffs mischaracterize several decisions—as they did below—to argue that the minority stockholders' loss of voting power following the Private Placement constitutes a direct harm.[113] The decisions on which Plaintiffs rely involved allegations of unique entrenchment motives in connection with voting dilution.[114] However, none of these opinions absolve Plaintiffs of their burden to

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[110] A293, A298 (Pls.' Ans. Br. in Opp. To Mot. To Dismiss 14, 19) (citing Compl. ¶¶ 10, 106).
[111] Ans. Br. at 47.
[112] A301-A302 (Pls.' Ans. Br. in Opp. To Mot. To Dismiss at 22-23) (citing Compl. ¶¶ 108-14).
[113] Ans. Br. at 44, 47; *see also* A298-A303 (Pls.' Ans. Br. in Opp. To Mot. To Dismiss at 19-23); *see also* A361-A367 (Def. Reply Br. to Mot. To Dismiss 16-22) (distinguishing Plaintiffs' authority below).
[114] *See, e.g.*, *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *8 (Del. Ch. Dec. 11, 2017) (finding that plaintiffs pleaded "non-conclusory facts" supporting "a reasonable inference" that controller was "on the cusp of losing its control position" when it engaged in a transaction that "admittedly was done to perpetuate that control"); *Oliver*, 2006 WL 1064169, at *16-17 (post-trial decision distinguishing between equity dilution, which gives rise to *derivative* claims, and voting power dilution, which "*may* constitute a direct claim" where insiders "solidify

plead facts supporting a reasonable inference that entrenchment was the "primary or sole purpose" of the Private Placement.[115] Indeed, dilution "is not *per se* wrongful."[116] Therefore, "[t]o survive dismissal on a wrongful dilution claim, . . . a plaintiff must plead not only that he was diluted, but also that the defendants did something wrongful that caused him to be improperly diluted."[117]

Plaintiffs implicitly concede that this entrenchment authority is unavailing. In a transparent effort to escape their pleading burden, Plaintiffs criticize the trial court's opinion for creating an "impossible burden"[118] and argue, for the first time on appeal, that the trial court "misapplied the applicable pleading standard under Rule 12(b)(6)" by "erroneously appl[ying] entrenchment law rather than entire fairness law."[119] The law, however, does not support direct standing solely because "entire fairness" may be the governing standard of review, and it was Plaintiffs that

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control" over a company—*i.e.*, entrench themselves (emphasis added)); *Avacus P'rs*, 1990 WL 161909, at *6-7 (finding that if "a board issues stock for adequate consideration *but* with the wrongful intent of entrenching itself, . . . it may constitute a wrong to the shareholders" where plaintiff asserted straightforward entrenchment claim based on allegation that company insiders tried to prevent a hostile takeover by unfairly diluting the plaintiff's equity stake).

[115] *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 186, 190 (Del. Ch. 2005); *see also id.* at 190 ("An entrenchment effect alone, even assuming such an effect exists in this case, is not enough to demonstrate a primary or sole purpose to entrench").

[116] *Hindlin v. Gottwald*, 2020 WL 4206570, at *4 (Del. Ch. July 22, 2020).

[117] *Id.*

[118] Ans. Br. at 48.

[119] *Id.* at 43, 47.

chose to cite entrenchment precedents to the Court. Plaintiffs had little choice but to shift arguments on appeal because the trial court considered and correctly rejected *both* of Plaintiffs' voting dilution theories as not well-pleaded.[120] Equally important, "[e]ven in a self-interested transaction in order to state a claim a shareholder must allege some facts that tend to show that the transaction was not fair."[121]

As the trial court held, Plaintiffs have not satisfied their pleading burden. Plaintiffs' entrenchment counterfactual is unsupported and hypothetical. As an initial matter, "Plaintiffs do not allege that anyone knew in June, 2018 that TerraForm would conduct an offering in October, 2019."[122] Moreover, "for the Plaintiffs to state a claim under this theory, it would have to be reasonably conceivable that *even had the Private Placement not occurred*, Brookfield would not have participated on a *pro rata* basis in the 2019 offering, thereby choosing to

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[120] *See* Op. at 29-30 (calling Plaintiffs' entrenchment theory "somewhat convoluted" and finding that "it is not reasonably conceivable that the Private Placement constituted Brookfield's entrenchment in view of the 2019 offering"); *id.* at 30-31 (identifying "three defects" in Plaintiffs' usurpation argument that the Private Placement "put their rights under the [Supermajority Voting Requirement] at risk"). Plaintiffs' argument also is doctrinally incoherent. *See, e.g.*, *Glidepath Ltd. v. Beumer Corp.*, 2019 WL 855660, at *18 (Del. Ch. Feb. 21, 2019) ("When determining whether a fiduciary has breached its duties, Delaware law distinguishes between the standard of conduct and the standard of review.").

[121] *Calma ex rel. Citrix Sys., Inc. v. Templeton*, 114 A.3d 563, 589 (Del. Ch. 2015) (quoting *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *5 (Del. Ch. Apr. 21, 1995), *aff'd*, 672 A.2d 35 (Del. 1996)); *accord Monroe Cty. Emps.' Ret. Sys. v. Carlson*, 2010 WL 2376890, at *2 (Del. Ch. June 7, 2010).

[122] Op. at 29; *see also* A356 (Defs.' Reply Br. to Mot. To Dismiss at 11).

forgo its majority stake" without receiving a control premium.[123] Plaintiffs *conceded* below that this assertion is implausible and unsupported because (1) they "don't know what would have happened [in 2019 had the Private Placement not occurred]," (2) Plaintiffs' entrenchment counterfactual is "unprovable," and (3) "there's not a specific damage that's going to flow from it."[124] This Court should not "give any credence" to "conclusory allegations or wildly speculative and unreasonable conjecture."[125]

Plaintiffs seek an equally impermissible inference regarding their allegation that Brookfield used the Private Placement to "cement[] its control of TerraForm by increasing its stake from 51% to 65.3%"[126] with the intention of using the increased voting power—reduced to 61.5% after Brookfield permitted itself to be diluted in the 2019 offering—to remove the Charter's supermajority voting requirement.[127] The trial court correctly identified "three defects" with Plaintiffs' usurpation theory:

> (1) Brookfield never actually achieved the level of control necessary to unilaterally remove the [Supermajority Voting Requirement] rights; (2) Brookfield never attempted to abrogate the rights and through the 2019

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[123] Op. at 29-30 (emphasis in original); *see also* A356 (Defs.' Reply Br. to Mot. To Dismiss at 11).
[124] A441 (July 16, 2020 Hr'g Tr. at 39:14-15; 40:2-9).
[125] *In re Coca-Cola Enters., Inc. S'holders Litig.*, 2007 WL 3122370, at *3 (Del. Ch. Oct. 17, 2007), *aff'd sub nom. Int'l Bhd. Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Del. 2008 (TABLE).
[126] A282 (Pls.' Ans. Br. in Opp. To Mot. To Dismiss at 3); *see also* A133 (Compl. ¶ 109).
[127] A135 (Compl. ¶¶ 113-14).

> placement moved *further* from the ability to do so; and (3) the merger has mooted the issue and no damages could attach to any such claim.[128]

Plaintiffs also failed to plead any external threats to Brookfield's control or other concrete reasons why Brookfield might have sought to attain supermajority voting control.[129]

Even if there were plans to remove the supermajority provision, the Complaint contains no well-pleaded facts suggesting an improper motive.[130] Instead, Plaintiffs pleaded that the "plans" for the Charter amendment were announced one month after Institutional Shareholder Services, Inc. ("ISS") criticized the supermajority vote provision.[131] ISS had recommended that stockholders withhold votes for three of four directors in 2019 based on "the board's failure to remove, or subject to a sunset requirement, the supermajority vote requirement."[132] The facts that Plaintiffs actually *do* allege therefore support an inference that TerraForm announced a plan to "sunset" the supermajority voting provision in response to criticism from ISS.

In short, Plaintiffs ask the Court to draw the type of unreasonable pleading-stage inferences to which they are not entitled based solely on unsupported,

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[128] Op. at 31.
[129] A358 (Defs.' Reply Br. to Mot. To Dismiss 13).
[130] *See* A359 (*Id.* 14 n.45).
[131] A132 (Compl. at n. 21).
[132] A359 (Defs.' Reply Br. to Mot. To Dismiss 14) (internal quotation marks omitted).

conclusory allegations.[133] The trial court's reasoning and findings against Plaintiffs' voting dilution claim should be affirmed in all respects. The only supposed harm Plaintiffs have alleged is a claim for over-dilution that cannot be inflicted "without injuring the corporation"[134]—a "classically derivative" claim.[135]

[133] *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[134] *Tooley*, 845 A.2d at 1038.
[135] *El Paso*, 152 A.3d at 1261.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' Opening Brief, the Court should reverse the Order and direct the trial court to dismiss the claims against Defendants with prejudice.

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