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Case Number 33,2021 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT LENOIS, on behalf of himself and all other similarly situated stockholders of ERIN ENERGY CORPORATION, and derivatively on behalf of ERIN ENERGY CORPORATION,

Plaintiff-Below, Appellant,

and

RONALD J. SOMMERS, as Chapter 7 Trustee for Nominal Defendant-Below ERIN ENERGY CORPORATION,

Movant-Below, Appellant,

v.

KASE LUKMAN LAWAL, LEE P. BROWN, WILLIAM J. CAMPBELL, J. KENT FRIEDMAN, JOHN HOFMEISTER, IRA WAYNE McCONNELL, HAZEL R. O'LEARY, and CAMAC ENERGY HOLDINGS, LIMITED,

Defendants-Below, Appellees,

and

ERIN ENERGY CORPORATION,

Nominal Defendant-Below, Appellee.

No. 33, 2021

Appeal from the Court of Chancery of the State of Delaware,
C.A. No. 11963-VCF

APPELLANTS' REPLY BRIEF

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DATED: May 7, 2021

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PRELIMINARY STATEMENT

Defendants[1] do not dispute that: (i) Trustee was vested with Erin's inherent authority to prosecute the undisputedly well-pled claims of bad-faith controller misconduct while those claims remained live and subject to appeal before this Court; and (ii) the lone basis for those claims' dismissal (*i.e.*, demand futility) is now a legal nullity because, as Defendants concede, the "demand futility arguments are moot."[2] Because Trustee was vested with the right to prosecute the underlying claims while the claims were still being actively pursued before this Court, it was error for the trial court to deny the Rule 60(b) request based largely on finality concerns, and then deny Trustee's motion to substitute on the basis that there was no active case in which Trustee could appear.

Defendants insist that Erin's undisputedly well-pled claims tumbled into an inescapable procedural black hole. Defendants even challenge this Court's ability to review the trial court's decisions on the Motions themselves. Defendants' suggestion that these decisions slipped through a tear in the procedural space-time continuum that renders them unreviewable contravenes not only this Court's

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[1] Capitalized terms not defined herein have the same meaning ascribed in Appellants' Opening Brief ("OB").

[2] Appellees' Answering Brief ("Defendants' Brief" or "DB") 15 n.2.

inherent authority, but also its express direction that the trial court opine on those Motions "in the first instance."[3]

Defendants claim the MTD Decision was a "Final Judgment"[4] that precludes any further litigation in this Action. But the MTD Decision undisputedly (i) was a routine pleadings-stage demand futility-based dismissal (as to Lenois only), and subject to appellate review; (ii) was timely appealed; and (iii) was live and pending when Trustee's election to take control over the claims rendered the "demand futility arguments [] moot."[5] It simply cannot be that this Court lost jurisdiction to adjudicate the timely filed First Appeal because Trustee's exercise of his authority to prosecute the claims nullified the sole basis for the MTD Decision, yet Trustee may not prosecute the claims because the MTD Decision is no longer subject to appeal.

Defendants' additional arguments fail. *First*, Defendants mischaracterize the Motion for Relief as Trustee's attempt to "unwind prior litigation decisions[.]"[6] Nonsense. Trustee was not vested with control over Erin until ***after*** Erin sought

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[3] A1537-A1538 (emphasis added).

[4] *See, e.g.*, DB 10-11 (defining the trial court's initial November 7, 2017 motion to dismiss decision as the "Final Judgment").

[5] DB 15 n.2.

[6] DB 5 (quoting *Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 386 (Del. 2013) ("*Carlyle II*").

bankruptcy protection, and because any issues regarding demand futility are moot, there is nothing for Trustee to "unwind" at all.

Second, Defendants note that Trustee has not cited a case granting Rule 60(b) relief in these precise circumstances.[7] That is meaningless because ***no case has ever addressed these unprecedented circumstances***. Moreover, Defendants cannot cite any case ***denying*** Rule 60(b) relief in circumstances remotely akin to these. And Defendants ignore myriad cases granting such relief based on substantially ***less*** extraordinary circumstances.

Third, Defendants rely heavily on their argument—and the trial court's holding—that Rule 60(b) relief is unavailable because "the judgment presents no legal bar to the Trustee filing a new action."[8] Yet, paradoxically, Defendants repeatedly avow that any "new action filed by [Trustee] would be barred by laches and the statute of limitations."[9] This undermines Defendants' argument and demonstrates the trial court's error in foreclosing Rule 60(b) relief on the basis that Trustee simply could file a new action.

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[7] DB 5.

[8] DB 5; *see also id.* at 4-5, 17, 22, 34-35 n.9.

[9] DB 7.

Fourth, Defendants assert that the trial court "did not ignore any 'highly-unique facts' presented by this case or misinterpret arguments of counsel."[10] But Defendants then immediately underscore (and reprise) one of the trial court's clear, reversible errors by mis-framing Trustee's argument as a contention that relief is warranted "***based merely on [a] change in corporate control***."[11] Thus, Defendants perpetuate the trial court's exclusive focus on the bankruptcy to the exclusion of the other extraordinary circumstances, including (i) that the timely filed First Appeal remained pending until this Court determined that it lacked jurisdiction to consider that appeal's merits, and (ii) the trial court's prior holding that the underlying claims articulated serious fiduciary breaches by a corporate controller, which breaches precipitated Erin's bankruptcy. Thus, Defendants' suggestion—and the trial court's holding—that granting Rule 60(b) relief here would deal a "significant blow … to the finality of judgments in Delaware based merely on a change in corporate control"[12] is completely unfounded.

Further—and critically—Defendants do not even attempt to disprove that the trial court's holding that Trustee's claims are "inchoate" rested on a fundamental distortion of the record. Instead, Defendants label that error "much ado about

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[10] DB 5.

[11] DB 6 (emphasis added); *see also id*. at 5-6, 24.

[12] DB 6.

nothing," which is irreconcilable with the fact that the trial court's incorrect assertion that Trustee had not actually determined to prosecute the claims led directly to its decision to deny relief.[13]

Unable to rebut the substantive merits of the Motion for Relief, Defendants resort to suggesting that the Rule 60(b)(6) argument was an afterthought, and Trustee "abandoned" his "primary arguments" under Rule 60(b).[14] False. The record unequivocally demonstrates that Rule 60(b)(6) was ***always*** Trustee's primary basis.

Finally, Defendants acknowledge that (i) substitution and realignment is the appropriate procedural vehicle for Trustee to prosecute the claims; and (ii) if this Court reverses the denial of Rule 60(b) relief, substitution and realignment are appropriate.

Under any standard, the trial court committed reversible error. The manifest injustice that will arise from condemning these well-pled claims—which challenge bad-faith fiduciary breaches that bankrupted a Delaware company, and which were live when Trustee attempted to assert them—to perish in a procedural abyss warrants Rule 60(b) relief here.

[13] Op. 32 (emphasis added).

[14] DB 7, 15-16.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING RULE 60(b) RELIEF

A. Defendants Misstate the Applicable Standard of Review

Defendants assert that Movants failed to "identify a … legal standard that the Court of Chancery … misapplied.[15] Wrong. Movants' brief specified that the trial court misapplied the "extraordinary circumstances" standard for Rule 60(b)(6) relief, including wrongfully reaching the legal conclusions that (i) the judgment of the trial court was "final," such that reopening would undermine the finality of judgments generally; (ii) the dismissal of the First Appeal as moot divested Trustee of the inherent authority to control derivative litigation initiated on Erin's behalf; and (iii) Trustee could simply pursue the claims through a new proceeding.[16] These misapplications of the law require *de novo* review.[17] Further, the trial court's legal

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[15] DB 4.

[16] OB 21-22 & n.80-81, 26-29; *see also* Op. 29-30.

[17] This Court routinely reviews certain questions *de novo* and others for abuse-of-discretion. *See, e.g.*, *KT4 Partners LLC v. Palantir Techs Inc.*, 203 A.3d 738, 749 (Del. 2019); *LG Elecs., Inc v. InterDigital Comms, Inc.*, 114 A.3d 1246 (Del. 2015). Defendants' citation to *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2021 WL 419146 (Del. Feb. 8, 2021), is unavailing. DB 19. *Meso Scale* does not address a misapplication of the law; rather, the Court focused on the trial court's assessment of whether the appellant's delay had been "unreasonable" and whether the trial court had correctly concluded it was reasonable to infer that no "reasonably conceivable harm" was caused by non-disclosure of a potential conflict. *Meso*, 2021 WL 419146, at *5.

error with respect to its denial of Rule 60(b)(6) relief led directly to its error in denying the request for substitution.[18]

However, the Chancery Court's errors warrant reversal even under an "abuse of discretion" standard.

B. Defendants Fail to Rebut the Extraordinary Circumstances Warranting Rule 60(b)(6) Relief

This Action presents well-pleaded claims of bad-faith controller misconduct which were dismissed solely for reasons relating to Lenois's derivative standing. While that dismissal was subject to an active appeal before this Court—*i.e.*, before any final determination in the case—the bankruptcy precipitated by that same misconduct vested Trustee with the authority to prosecute those claims directly, rendering moot any issue about Lenois's derivative standing. Defendants do not dispute this.[19] Logically and equitably, with the dismissal a legally nullity, the case should have progressed Rule 60(b)'s "extraordinary circumstances" prong. Defendants tellingly identify no case in which circumstances nearly as compelling as these failed to secure such relief. Although Defendants maintain that Movants cite no factually identical cases,[20] this is precisely because the circumstances are

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[18] OB 36-37.

[19] Defendants concede the "demand futility arguments are moot, as this Court has already held and is now law of the case." DB 15 n.2.

[20] DB 4.

unprecedented. Moreover, Rule 60(b)(6) relief is granted even where doing so lifts final, non-appealable judgments months or years after they were entered.[21]

Instead, Defendants assert that (i) Trustee's Motion for Relief should be denied as an afterthought; (ii) that by denying vacatur, this Court implicitly denied Rule 60(b) already; and (iii) Movants overstate the viability and importance of the indisputably well-pled claims. Each argument fails.

1. Defendants' Assertion that the Rule 60(b)(6) Argument Is Not Trustee's "Primary" Argument Is Wrong

Defendants label Movants' 60(b)(2) and 60(b)(3) arguments the "primary arguments,"[22] and then claim that Movants' decision to not challenge the trial court's treatment of these arguments is somehow "telling."[23] But the Rule 60(b)(6) argument was the primary argument in the Motion for Relief.[24] Indeed the first sentence of the reply brief in support thereof stated: "Relief is warranted ***under Rule 60(b)(6)*** because Erin's bankruptcy vested control over Erin and its legal claims with

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[21] *See, e.g.*, *Klapprott v. United States*, 335 U.S. 601 (1949) (granting Rule 60(b)(6) relief more than four years after the judgment); *O'Conner v. O'Conner*, 98 A.2d 130 (Del. 2014) (reversing denial of request to reopen filed months after final dismissal); *Scureman v. Judge*, 1998 WL 409153 (Del. Ch. June 26, 1998) (granting Rule 60(b)(6) relief five years after judgment).

[22] DB 15.

[23] DB 16.

[24] *See* A596-97 (presenting the Rule 60(b)(6) argument as the primary basis for Rule 60(b) relief); A606-09 (same).

Trustee..."[25] That clear and unequivocal focus continued at the March 3 and August 27 hearings.[26] Indeed, Trustee's counsel expressly stated at the August 27 hearing that the Rule 60(b)(6) argument "will be my focus with respect to Rule 60(b)."[27]

2. Defendants Wrongly Assert this Court Already Denied Rule 60(b) Relief

Unable to dispute that the MTD Decision's sole basis became moot while the timely-filed appeal of the MTD Decision remained pending,[28] Defendants instead argue this Court ***already*** denied Rule 60(b) relief by previously denying vacatur.[29]

Defendants' argument improperly conflates vacatur with Rule 60(b) relief. This Court "decline[d] to order vacatur" because it determined that "[n]either the Trustee nor the plaintiff-stockholder contend that the parties are involved ***in other litigation*** in which the Court of Chancery's decision concerning demand futility will have preclusive effect."[30] By contrast, this Court directed that "Trustee's right to

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[25] A1196 (emphasis added); *see also* A1214-A1221.

[26] *See, e.g.*, A1230-A1232 9:14-11:12; A1248 27:8-16; A1594 7:7-16; A1607 20:6-9 ("I will turn to the Rule 60(b) motion and, specifically, the Rule 60(b)(6) argument.)"; A1621 34:14-16 ("Just very briefly, with respect to Rule 60(b)(2) and 60(b)(3), I have just 30 seconds on each to have it on the record.").

[27] A1594 7:7-16 (emphasis added).

[28] DB 15 n.2.

[29] DB 26-27.

[30] *Id*. (emphasis added).

proceed will more appropriately be determined by the Court of Chancery ***in the first instance, in the context of the motions that are pending before that court, including the motion for relief from judgment.***"[31] Thus, this Court clearly has not addressed either "Trustee's right to proceed" or "the motion for relief from judgment."[32]

Moreover, because Defendants now affirmatively represent that any newly filed action by Trustee would be barred as untimely, treating the trial court's dismissal of Lenois's derivative claim as "final" would, in fact, effectively have a *res judicata* impact on Trustee's ability to prosecute the claims. These changed circumstances provide a basis for this Court to now order vacatur.[33] At minimum, the Court should remand with instructions that the Action should continue directly notwithstanding the mooted demand ruling.

3. Defendants' Attempt to Downplay the Claims' Viability and Importance Fails

Defendants do not dispute that the Transactions—and thus the misconduct that engendered them—ultimately bankrupted Erin. Nevertheless, seeking to

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[31] A1537-38 (emphasis added).

[32] *Id.*

[33] *In re Appeal of Sun Life Assurance Co. of Canada*, 2021 WL 964896 (Del. Mar. 15, 2021) (TABLE) (once moot, judgment below should be vacated "'where the interests of justice so require'") (quoting *Tyson Foods, Inc. v. Aetos Corp.*, 818 A.2d 145, 147-48 (Del. 2003)).

downplay the inequity of forever precluding Trustee from exercising his undisputed authority to prosecute the claims challenging these egregious Transactions, Defendants try to discount the claims' strength and value. This effort fails.

First, Defendants argue the trial court never ruled on the claims' merits.[34] This argument, at best, distorts the record. The trial court issued a 63-page decision finding Plaintiff alleged well-pleaded claims that controller Lawal "acted in bad-faith,"[35] and either "very serious claims of bad-faith" or "a duty of care claim"[36] against the full Board. Although the MTD Decision was not a final adjudication, the trial court substantively analyzed the claims' merits and recognized their strength, holding, *e.g.*, that:

- "[T]he complaint is replete with allegations of bad-faith conduct against [the controller], including that he attempted to dominate the process, withheld material information from the board, and rushed the board into the unfair Transactions.";[37]

[34] DB 27.

[35] A562; *see also* A520-A521 ("[T]he complaint is replete with allegations of bad-faith conduct against [the controller], including that he attempted to dominate the process, withheld material information from the board, and rushed the board into the unfair Transactions"); A563 (the controller "really was negotiating with himself in shifting around assets for his own benefit.").

[36] A575; *see also* A520 (committee "relied on [the controller]"); A563 (directors lacked vital information).

[37] A520-21.

- The controller "really was negotiating with himself in shifting around assets for his own benefit.";[38]
- The controller "knowingly and purposefully created an information vacuum";[39]
- The Committee "relied on [the controller] as the sole voice for—and, more importantly, information source from—the two [transactional counterparties], despite a potential misalignment of incentives for the controller";[40] and
- "[B]y the end of the process, Director Defendants lacked [a litany of vital information related to the Transactions.]"[41]

Defendants' suggestion that the Transactions were approved by an esteemed Special Committee that met several times also fails.[42] Defendants omit many facts, including that the Special Committee acted in an "information vacuum."[43] The Special Committee's financial advisor, Canaccord, initially refused to bless the Transactions,[44] ultimately caving and issuing a "fairness" opinion based only on an

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[38] A563.

[39] A563.

[40] A520.

[41] A563. In a footnote, Defendants seek to downplay the alarming concession that Lawal terminated his Chief Financial Officer and General Counsel for failing to sufficiently manipulate the Transactions' process in his favor. (DB 28 n.5). Yet Defendants' own counsel represented to the trial court that "when this deal closed, [those] officers lost their jobs. ***They lost their jobs because, frankly, they displeased the controller by acting in a way that was fully at arm's length***." A143 (emphasis added).

[42] DB 28.

[43] A563-A564.

[44] A90 ¶77.

accretion analysis which, "says nothing about whether the buyer is paying a fair price."[45] Defendants also note the stockholders' approval of the deal, but omit the trial court's finding of well-pleaded claims of disclosure violations in connection with that vote, including Defendants' representation that Lawal and Allied had acquired the subject assets for "$250 million in cash," when it is now undisputable that ***each Defendant knew that statement was demonstrably false when made***.[46]

Finally, Defendants proffer a red herring, suggesting that Trustee's action against NAE diminishes Trustee's claims here. The fact that, years after the Transactions, NAE improperly seized the Assets because ***Lawal never even paid for the Assets before flipping them to Erin for a massive profit***, does not detract from the egregiousness of the Transactions and the misconduct that engendered them.[47] Rather, it underscores the massive inequity of allowing Lawal and his cohorts to evade any accountability for their fiduciary breaches that ultimately destroyed Erin.

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[45] *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2015 WL 1815846, at *19 (Del. Ch. Apr. 20, 2015) (quoting Vincent J. Calabrese, Economic Value Added: Finance 101 on Steroids, J. Bank Cost & Mgmt. Actg., Jan. 1999, at 6).

[46] A596 at ¶¶1-2 (final arbitration judgment indicated that $250 million purchase price was never paid).

[47] DB 28-29.

C. Defendants Fail to Rebut the Trial Court's Several Reversible Errors in Denying the Motion for Relief

The Opening Brief presented several reversible errors.[48] Defendants fail to refute any of—and in fact underscore certain of—them.

1. The Trial Court Erroneously Denied Relief Based On Its Determination That *Bankruptcy Alone* Is Not "Extraordinary"

The trial court improperly reduced Trustee's argument to an assertion that relief is warranted "merely because of a commonplace change in control," then denied relief because "Erin's bankruptcy is not an extraordinary event requiring relief under Rule 60(b)(6)."[49] Defendants assert that the trial court "did not ignore any 'highly unique facts' … or misinterpret arguments of counsel …"[50] But their very next sentence repeats the trial court's error by mis-framing Trustee's argument as a contention that relief is warranted "***based merely on [a] change in corporate***

[48] OB 26-34.

[49] OB 26-29 (quoting Op. 29-30).

[50] DB 5.

control."[51] Defendants then attack that strawman, insisting that bankruptcy is an "everyday occurrence."[52]

In perpetuating the trial court's myopic focus on the bankruptcy to the exclusion of the other extraordinary circumstances, Defendants underscore the trial court's error.

2. The Trial Court Erroneously Held That Granting Relief Would Undermine The Finality Of Judgments

The trial court held that granting relief "would enable companies to disturb the finality of judgments merely because of a commonplace change in control."[53] That is wrong. The Motion for Relief is predicated on unique and unprecedented facts exceedingly unlikely to recur, and was filed while the dismissal of the underlying claims was subject to appeal and thus subject to reversal. Any supposed concern with protecting "finality of judgments" is misplaced.

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[51] DB 6 (emphasis added); *id*. at 5-6 (asserting that the trial court "properly rejected the Trustee's claims ***that the change of corporate control created by the appointment of a bankruptcy trustee*** warrants vacatur of a final judgment." (emphasis added)).

[52] DB 22; *id.* at 24 (reiterating the trial court's holding that Trustee and Lenois "'cited no authority for the proposition that ***the mere transfer [of] the right to assert previously dismissed derivative claims through a bankruptcy trustee*** warrants relief under Rule 60(b)(6)." (emphasis added)).

[53] OB 29 (quoting Op. 30).

Defendants repeat the trial court's error by insisting that "[t]here is simply not a case for the Trustee to pursue[,]"[54] and allowing Trustee to proceed "would significantly undermine the finality of judgments in Delaware corporate law."[55] But Defendants do not dispute that the MTD Decision was timely appealed, which appeal was live and pending upon the occurrence of the bankruptcy precipitated by the very Transactions challenged in this lawsuit, vesting Trustee with the authority to prosecute the claims and undisputedly mooting the "demand futility arguments"[56] that were the sole basis for the dismissal.

Defendants ignore that the MTD Decision was the subject of an active appeal, until this Court dismissed the appeal as moot and remanded the case to the trial court for further proceedings. Indeed, Defendants' fundamental argument is that Trustee's right to prosecute the claims ***disappeared*** when this Court confirmed the legal irrelevance of the sole basis for the claims' dismissal. As a matter of equity, justice and logic, that simply cannot be.

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[54] DB 25.

[55] DB 4.

[56] DB 15 n.2.

This situation is nothing like Defendants' lone case citation on this issue.[57] In *Bachtle*, ***19 months*** after a post-evidentiary hearing judgment regarding the value and disposition of the marital residence in a divorce proceeding—which judgment "[t]he wife did not appeal"[58]—the wife "petitioned the Family Court to reopen the [J]udgment" based on a sale of the residence that occurred nine months after the judgment, purportedly causing her "surprise *and* dismay."[59] The Family Court found no basis for such relief, given, *e.g.*, (i) the 19-month delay since the never-appealed-from post-hearing "judgment on ancillary matters," and (ii) that "the circumstances … [we]re not extraordinary and [] the apparent disparity in valuations … d[id] not constitute a *real* disparity."[60] In affirming, this Court distinguished, on procedural and substantive grounds, *Bachtle* from *Wife F. v. Husband F.*, where Rule 60(b) relief ***was*** granted because of a substantial change in asset value while that the court was "still attempting to finally settle the property issues."[61]

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[57] *See* DB 23-24 (citing *Bachtle v. Bachtle*, 468 A.2d 302, 305 (Del. Fam. Ct. 1983) ("*Bachtle I*"); *Bachtle v. Bachtle*, 494 A.2d 1253 (Del. 1985) ("*Bachtle II*").

[58] *Bachtle II*, 494 A.2d at 1255.

[59] *Bachtle I*, 468 A.2d at 305.

[60] *Id*. at 306.

[61] *Bachtle II*, 494 A.2d at 1255.

Thus, *Bachtle* presented circumstances completely inapposite to and indisputably weaker[62] than those here.

3. The Trial Court Materially Misinterpreted Commentary, And Assumed Trustee Could File New Claims

In the Opening Brief, Movants demonstrated that (i) the trial court misinterpreted commentary elicited from Movants' counsel at the August 27 hearing to suggest Trustee was equivocal in his intent to prosecute this case; and (ii) relied on that misinterpretation in denying Rule 60(b) relief.[63]

Defendants do not grapple with—much less disprove—that misinterpretation.[64] Nor do they dispute that the trial court relied on that misinterpretation in denying the Motion for Relief by holding that granting Rule 60(b) relief would "exercise an extraordinary power in the service of an inchoate claim."[65] Instead, Defendants dismiss the trial court's clear error as "much ado about

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[62] Nevertheless, Justice Stiftel dissented on the basis that "Rule 60(b) was born to prevent injustice," and that he would allow Rule 60(b) relief "in order to attempt to correct a possible inequity." *Id.* at 1257.

[63] *See* OB 30-33.

[64] Defendants half-heartedly contend that "any claims" here are "inchoate" because the existing claims were dismissed, and no direct claims were asserted. DB 31. That is clearly divorced from ***the trial court's*** use of "inchoate" (*i.e.*, that it was uncertain whether Trustee even intended to pursue the claims).

[65] Op. 32. This holding undermines Defendants' footnoted assertion that Trustee has not demonstrated ***reversible*** error. DB 32 n.7. By contrast, both cases Defendants cite on this point involved mistaken recitations of a standard with no impact on the underlying decision.

nothing"[66] because Defendants speculate that the trial court would have reached the same decision based on two other "salient legal observations."[67] Defendants cannot possibly know this error's impact on the trial court's ultimate conclusion. Moreover, both "observations" that Defendants argue might have superseded that error are flawed.

First, Defendants note that "Erin did decline to assume the role of plaintiff in this case."[68] But Trustee, which controls Erin, seeks to do precisely that. The fact that the same fiduciaries who committed well-pleaded fiduciary breaches "decline[d] to assume the role of plaintiff" is irrelevant to whether Trustee may now exercise Erin's undisputed authority to prosecute those claims.

Second, Defendants assert that "the [MTD Decision] itself presents no legal bar to the Trustee[.]"[69] This disingenuous assertion is irreconcilable with Defendants' repeated affirmations that there is a "time-bar to any separate suit that Trustee may file"[70] and any "new action filed by [Trustee] would be barred by laches

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[66] DB 30.

[67] DB 31.

[68] *Id*..

[69] *Id*. (quoting Op. 33).

[70] DB 1.

and the statute of limitations."[71] Defendants never engage with, let alone reconcile, this blatant inconsistency. Indeed, when a corporation seeks to take over the prosecution of a derivative case, it does so through realignment, not by commencing a new action.[72]

Reversible error exists here because: (i) the trial court held that Trustee failed to demonstrate hardship sufficient to satisfy Rule 60(b) because Trustee could potentially file a new action, and yet (ii) Defendants have repeatedly avowed that any such action is time-barred. Unless this Court holds that a new action by Trustee would be timely, eliminating the procedural bar behind which Defendants seek to hide, then relief is necessary to avoid the precise hardship and injustice against which Rule 60(b) exists to protect. *Solomon v. Buckley* supports this proposition. There, the court allowed realignment specifically to avoid extinguishment of claims based on timeliness.[73]

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[71] DB 7; *id.* at 5 (asserting that Rule 60(b)(6) relief is unavailable "even when the litigant's choices result in a limitations bar"), *id.* at 7 ("[A] suit by the Trustee would be too late").

[72] *Infra*, n.77-79.

[73] 86 F.R.D. 464, 467 (E.D. La. 1980); *see also DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 832 (9th Cir. 1963) (finding on appeal that plaintiff lost derivative standing as a result of merger but allowing reconstitution/realignment of parties to preserve otherwise time-barred claims).

4. The Trial Court Erroneously Held That Trustee Could Have Sought To Prosecute the Claims Sooner

Defendants do not dispute that since being vested with Erin's right to control and prosecute the previously derivative claims, Trustee assiduously sought to do so. Nevertheless, Defendants persist in mis-framing the Motion for Relief as an attempt to escape "'neglect' by the movant or its counsel"[74] and use Rule 60(b)(6) as "a vehicle" for "undoing 'intentional or willful' acts previously taken during litigation."[75] But Defendants cannot cite ***any*** "neglect" or "intentional or willful acts" by Movants (or their counsel) which they now seek to "undo." Indeed, Trustee had nothing to do with this litigation until ***after*** Erin sought bankruptcy protection while this case was on appeal.

Defendants' lone authority illustrates the absurdity of their argument. In *Carlyle*, the trial court denied a Rule 60(b) motion to vacate a default judgment where the movant made a "***voluntary decision to violate the forum selection clause and to duck this litigation for more than two years***," and "[i]nstead of participating in this suit in a timely way or otherwise acting to bring its claims in Delaware promptly, [the movant] ***chose to flout this case and take the chance that it would get away with violating the forum selection clause***[.]"[76] Those circumstances bear

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[74] DB 18 (quoting *Wimbledon Fund*, 2011 WL 378827, at *6).

[75] DB 20 (quoting *Carlyle II*, 67 A.3d at 386).

[76] *Carlyle II*, 67 A.3d at 386 (quoting *Carlyle I*, at *11 (emphasis added)).

no resemblance to this Action, where Trustee has timely, diligently and unwaveringly sought to prosecute claims against the very faithless fiduciaries that previously sought to evade liability by securing the claims' dismissal.

Further, Defendants' argument that their self-interested efforts to dismiss the well-pleaded ***derivative*** claims against them forever preclude Erin—and thus Trustee—from ***directly*** prosecuting those claims clearly defies (i) the basic Delaware law principle that Erin (and thus Trustee) possess inherent authority to assert control over and prosecute derivative claims[77] (***including after a pleadings stage dismissal on demand futility grounds***[78]); and (ii) precedent confirming that inheritors of that

[77] *See, e.g.*, OB 28; *Zapata Corp v. Maldonado*, 430 A.2d 779, 785 (Del. 1981) ("Even though demand was not made in this case and the initial decision of whether to litigate was not placed before the board, [the] board . . . retained all of its corporate power concerning litigation decisions"); *Telxon Corp. v. Bogomolny*, 792 A.2d 964, 973 (Del. Ch. 2001) (internal citations omitted)) ("the board of directors retains the inherent power to manage derivative claims when, for example, a new disinterested majority is selected or when a special litigation committee appointed by the board decides to dismiss or settle [the] litigation"); *see also Braddock v. Zimmerman*, 906 A.2d 776 (Del. 2006) (describing "legal options" available to a new board taking control of litigation).

[78] *See Stotland v. GAF Corp.*, 469 A.2d 421, 423 (Del. 1983) (finding that a board could acquire and exercise control over derivative claims dismissed on demand excusal grounds); *In re Brocade Comm'cns Sys. Inc. Deriv. Litig.*, 615 F. Supp. 2d 1018, 1033 (N.D. Cal. 2009) (same).

authority may—and routinely do—adopt different positions from their predecessors, particularly in connection with litigation against those very predecessors.[79]

Finally, Defendants' assertion that "Trustee is judicially estopped from 'waiving the Rule 23.1 arguments' successfully advanced by Erin"[80] is both wrong and irrelevant. As Defendants concede, this Court held that demand futility-related issues are moot.[81] Trustee need not take ***any*** position on Rule 23.1 in order to assume control over this Action or prevail in this appeal. Thus, there are no "Rule 23.1 arguments" left to waive, Trustee need not "disavow" any such arguments, and Defendants' judicial estoppel argument fails.

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[79] *Telxon*, 792 A.2d at 971-72 (acquiror sought to prosecute directly previously derivative claims the prior board opposed); *Bluth v. Bellow*, 1987 WL 9369, at *1 (Del. Ch. Apr. 9, 1987) (reconstructed board sought to prosecute previously derivative claims directly in corporation's name); *Weaver v. United Mine Workers of Am.*, 492 F.2d 580, 582-83 (D.C. Cir. 1973) (reconstituted leadership sought to prosecute derivative claims the prior leadership opposed).

[80] DB 29 (emphasis removed).

[81] DB 15, n.12.

II. THE TRIAL COURT ERRED IN SUMMARILY DENYING SUBSTITUTION AND REALIGNMENT

Defendants do not dispute that substitution and realignment is the ***precise*** procedural vehicle they confirmed was appropriate for Trustee to exercise his undisputed right to control and prosecute the previously derivative claims.[82] Instead, like the trial court,[83] Defendants merely deem substitution and realignment unnecessary because "such relief would serve no purpose ***without relief from the final judgment*** [*i.e.*, the Rule 60(b) relief]."[84] Thus, Defendants acknowledge that reversal as to the Motion for Relief necessitates reversal as to the Realignment Motion.[85]

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[82] A1318-A1319. This admission dooms Defendants' realignment arguments. DB 37. For avoidance of doubt, realignment has also been granted post-dismissal. *See Brocade*, 615 F. Supp. 2d at 1033.

[83] Op. 35-38.

[84] DB 6 (emphasis added); *see also id.* at 4 (same), 38 (same).

[85] Defendants' subsidiary, throwaway arguments also fail. Defendants suggest that substitution in a non-pending case is only permissible to enforce a judgment. DB 36. But if the Motion for Relief is granted, this case will be pending. Further, as described *infra*, substitution was unnecessary for Trustee to make the Rule 60(b) motion. Defendants also argue that substitution would allow a procedural mechanism to "substantively affect the underlying lawsuit." DB 36-37. False. The claims always belonged to Erin (or, post-bankruptcy, Erin's estate), and substituting Trustee for Erin in no way changes the claims' nature. Because the only change here—*i.e.*, the mootness of the prior dismissal—already has occurred, substitution changes nothing. Defendants' cited cases involved inapposite circumstances. *Brook v. Coreq, Inc.*, 53 F.3d 851, 852 (7th Cir. 1995), merely shows that a substituting party may not prejudice ***the adversary*** by abandoning litigation positions previously adopted by the substituted party. In *In re Countrywide Fin. Corp. Deriv. Litig.*, 581

In a footnote, Defendants suggest this appeal should be dismissed—and the Opinion should be exempt from appellate review—because Movants purportedly lack standing.[86] Defendants argue Trustee lacks standing because the trial court denied substitution.[87] This ignores (i) that the substitution denial is itself being appealed, and (ii) Trustee is the legal representative of a party (*i.e.*, Erin) and thus had standing to pursue—and appeal—a Rule 60(b) motion even without formal substitution.[88] Indeed, Defendants recognize that the Bankruptcy Court "concluded that Trustee was the legal successor to Erin and thus granted approval [for Trustee

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F. Supp. 2d 650, 653 n.1 (D. Del. 2008), stockholder plaintiffs lost derivative standing after a merger. In a footnote, the court rejected the plaintiffs' "brief[] argu[ment]" that it should convert their lost derivative claims into direct claims. *Id.* Here, the previously-derivative claims have always lied with Erin (which never lost standing to prosecute them), such that substitution has no impact on standing.

[86] DB 34 n.9.

[87] Lenois was nominally included as an appellant to protect against any standing or untimeliness argument.

[88] Ct. Ch. R. 60(b) (a Rule 60(b) motion may be brought by a party "or its legal representative"); *Heyman v. M.L. Marketing Co.*, 116 F.3d 91, 95 (4th Cir. 1997) (bankruptcy trustee "position gave [trustee] standing to bring a Rule 60(b) motion"); *Ex parte Overton v. Prince Family Housing*, 985 So.2d 423, 428 (Ala. 2007) ("A trustee in bankruptcy is a party's legal representative for the purposes of Rule 60(b)" and legal representatives need not intervene to bring a Rule 60(b) motion). No doubt, standing to make a Rule 60(b) motion confers standing to appeal it. *See Heyman*, 116 F.3d at 95. The non-party standing case law upon which Defendants rely—*Townsend v. Griffith*, 570 A.2d 1157, 1158 (Del. 1990) and *Coffey v. Whirlpool Corp.*, 591 F.2d 618 (10th Cir. 1979)—did not (i) arise in the Rule 60(b) context or (ii) involve a party's "legal representative" under that Rule, and is inapposite (DB 34 n.9).

to seek Rule 60(b) relief in the Court of Chancery]."[89] Defendants' argument that the Opinion is unreviewable also defies fairness norms, undermines this Court's authority, and flouts this Court's direction that it should consider the issues after the Chancery Court addressed them "in the first instance."[90]

[89] DB 13.

[90] A1537.

CONCLUSION

The decision of the Court of Chancery should be reversed.

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