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IN THE

Supreme Court of the State of Delaware

IN RE AMC ENTERTAINMENT HOLDINGS, INC. STOCKHOLDER LITIGATION

No. 385, 2023

COURT BELOW:
COURT OF CHANCERY
OF THE STATE OF DELAWARE,
CONSOL. C.A. NO. 2023-0215-MTZ

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Some plaintiffs sell "deal insurance." Here, the plaintiffs sold disaster insurance. Once consummated, the challenged transaction vaporized over half of the market capitalization of AMC Entertainment Holdings, Inc. ("AMC"). A941. Reversal and remand present the only hope for thousands of AMC stockholders who objected to—or tried to opt out of—an inequitable bargain set by inadequate representatives.

Plaintiffs Anthony Franchi ("Franchi"), Usbaldo Munoz ("Munoz"), and Allegheny County Employees' Retirement System ("Allegheny") sued to enjoin the conversion of AMC's preferred shares ("APE units" or "APEs") into common stock. Their complaint celebrated "unlikely hero[es]"—retail investors in AMC stock—who put AMC's "bankruptcy concerns in the rearview mirror." A145-46. The only plaintiff fitting that description—Munoz—not only refused to support the settlement, he ***called Objector's counsel for help.*** A552-53. Plaintiffs concealed his opposition, then defenestrated him.

Instead of moving for an injunction, Plaintiffs Franchi and Allegheny ("Plaintiffs") pivoted, settling for a trivial issuance of additional common stock to class members while joining AMC and its board ("Defendants") in predicting imminent financial doom. (Of course, Defendants never opposed Plaintiff's $20 million fee request, even while supposedly staring into bankruptcy's maw.)

In a truly unprecedented response, thousands of retail stockholders objected, sought to intervene, and/or asked to opt out from what they saw as a bad settlement which would harm AMC and its stockholders. Plaintiffs assured the trial court that warnings of oncoming harm resulting from settlement were "wild speculation." A936. Plaintiffs were wrong.

The trial court's approval of the settlement rests on three legal errors. *First*, the settlement releases claims arising out of (a) tangential facts, as opposed to core facts in Plaintiff's complaints, and (b) operative facts that occur in the future. *Second*, the settlement violates due process by refusing an opt-out right to stockholders who, unlike Plaintiffs, correctly divined the oncoming catastrophe. *Third*, Plaintiffs, who stood to gain more from this lawsuit than they would lose as investors, could not adequately represent stockholder interests.

More fundamentally, this case involves two issues at the heart of Delaware corporate law: stockholder voting rights and representation. The challenged transaction drew dividing lines between more than the Board and stockholders, or common stockholders and APE unitholders. It also divided one group of stockholders—call them "Optimists"—who believed AMC could survive without repeated dilution of common stockholders and that dilution would harm AMC, and others—call them "Pessimists"—who agreed with the Board that bankruptcy was imminent and dilution was necessary for AMC's survival. Defendants created the

APEs after they could not overcome the Optimist's voting power. Plaintiffs came to court championing the Optimists' cause, then converted to Pessimists when a quick settlement (and an unopposed $20 million fee request) came into view. The Optimists deserved a fair vote and fair representation. They received neither.

Today, AMC's stockholders would be better off had Plaintiffs never filed suit. Once Plaintiffs abandoned efforts to enjoin the conversion, a post-closing (post-disaster) damages action would have yielded better results. Instead, Plaintiffs sold Defendants insurance against damages arising out of the plainly foreseeable collapse of AMC's market capitalization. Delaware law does not countenance such bargains. Nor should it permit Plaintiffs to bind the hands of thousands of retail stockholders who, correctly apprehending danger, sought to protect their rights and their investments.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by approving a settlement releasing claims arising out of tangential facts and future events. First, the trial court did not address Izzo's challenges to the settlement based on this Court's authority that a release cannot extend to claims based on tangential facts. Second, the trial court erred in concluding that the settlement does not release claims arising out of future events.

2. The Court of Chancery erred by approving a settlement without an opt-out. First, the trial court erred by approving a settlement without an opt-out that was required to protect the due process rights of dissenting stockholders. Second, the trial court erred, in its exercise of discretion, in approving a settlement without a feasible opt-out that would have preserved valuable stockholder rights.

3. The Court of Chancery erred by finding Plaintiffs to be adequate class representatives. First, the trial court erred by narrowly reading this Court's authority concerning the scope of the due process analysis as it relates to the determination of adequacy. Here, Plaintiffs were inadequate as class representatives. Second, the trial court erred by placing the burden on the objectors to prove that a class representative was not adequate. Third, the limited discovery that was made available showed that neither of the Plaintiffs were adequate to serve as class representatives with respect to the claims in this litigation. Finally, policy concerns

further dictate that parties such as Plaintiffs should not be deemed acceptable to serve as class representatives, making reversal and remand appropriate.

STATEMENT OF FACTS[1]

This case generated an unprecedented number of objections, over 675 docket entries, and numerous motions before both the trial court and a special master. A1-141. The narrative below contains facts "which should be known in order to determine the points in controversy. . . ." Del. Supr. Ct. R. 14(b)(v).

A. Stockholders Twice Reject AMC's Attempts to Dilute Their Shares; AMC Creates the APEs.

To stay afloat during the COVID-19 pandemic, AMC sold almost all its available common shares to enthusiastic retail investors, who made up approximately 85% of AMC's stockholders by April 2021. Op. at 7. With AMC nearly out of common stock to sell, AMC's board made two attempts between January and July 2021 to solicit stockholder approval to expand the number of common shares, but "the electorate was not on board." *Id*. at 8-10.

Some may excuse these failures as "rational apathy" among retail investors. A399. Of course, the Board's decision to purchase a $27.9 million stake in Hycroft, a struggling gold and silver mining company, when flush with retail investor cash might have negatively affected investors' willingness to be diluted. A165-67; A456.

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1 "SMR" refers to the Special Master's report (Ex. A); "Op." refers to the July 21, 2023 Opinion (Ex. B); "MO" refers to the August 11, 2023 Memorandum Opinion (Ex. C).

Despite their supposed rational apathy, stockholders also rejected a (non-binding) proposal to approve CEO Adam Aron's 2022 compensation package. A165-66.

Although tapped out of authorized common shares, AMC had not issued any of its authorized 50 million shares of preferred stock. Op. at 11. In July 2022, AMC's board created the "AMC Preferred Equity Units," or "APEs,"[2] depository receipts representing a 1/100th interest in a share of preferred stock. Op. at 11-12. Each APE would automatically convert into a share of common stock once AMC had enough authorized common shares to effectuate the conversion. *Id*. at 12.

The APEs were a trap. AMC did not prominently disclose that uninstructed APEs—which had one vote per unit—would be voted proportionately with instructed APEs (the "mirrored-voting feature"). *Id*. at 13. In other words, non-voting stockholders who held common shares and APEs would, in any election, see 100% of their common shares count as "no" votes, while their APEs would be counted proportionally with voted APEs. Only careful stockholders would realize that they needed to actively vote to oppose the dilution of their common shares.

In August 2022, AMC announced that it would issue one APE as a special dividend for each share of AMC common stock. *Id*. at 12-13. An AMC FAQ stated

[2] The name "APE" was a nod to AMC's retail stockholders, who referred to themselves as "Apes." A158.

that while APEs could convert to common stock, the Company "did not currently expect AMC to make such a proposal anytime soon." *Id*. at 14-15.

Defendants, who sold millions of APEs into the market, claimed that the APEs were "'designed to have the same economic value'" as common stock, and that "'in theory, the common stock and AMC Preferred Equity unit should have similar market values . . . .'" A175, A177 (quoting AMC APE FAQs) (emphasis removed). They did not: by December 2022, APEs were trading below $1 per unit, while common stock was trading above $5 per share, forcing AMC to stop open market sales. Op. at 15; A177.

B. The Board Pursues Conversion.

Stockholders who purchased common shares based on the assurance that AMC did not expect a conversion of the APEs to common "any time soon" were bound for disappointment. AMC almost immediately launched a plan to convert the APEs. A452. In December 2022, the Board approved two certificate amendments for submission to stockholders: one to increase the number of common shares to an amount sufficient to trigger the conversion, and another that would subsequently effect a 10-for-1 reverse stock split. Op. at 15-16. These proposals would not only benefit APE holders (whose shares would convert to more-valuable common), they would give AMC's Board what it longed for: the ability to massively dilute recalcitrant common stockholders again, and again, and again.

At the same meeting, the Board approved the sale of millions of APEs to Antara Capital LP ("Antara"). *Id*. at 16-17. Ultimately, Antara owned and was entitled to vote 258,439,472 APEs, or 27.8% of all outstanding APEs and approximately 17.8% of the Company's voting power. *Id*. at 16-17. The vote on the proposals would have failed without Antara's purchased votes and the APE's mirrored-voting feature. *Id*. at 23. Defendants, unable to win earlier elections, had bought themselves a new electorate.

C. Plaintiffs File Suit and Quickly Settle.

Three plaintiffs filed two complaints: Allegheny, Franchi, and Munoz. Op. at 19-20. The Franchi/Munoz complaint, later designated operative, alleged a single breach of fiduciary duty claim "paint[ing] the creation, issuance, sale, and voting capabilities of APE units as the instrumentalities used to thwart the stockholder franchise. . . ." *Id*. The Allegheny complaint also alleged a statutory claim for violation of 8 *Del. C.* § 242. *Id*.

While the operative complaint extolled the virtue of retail stockholders as "unlikely hero[es] . . . banding together and buying massive amounts of AMC stock, beginning in January 2021" (A145), only Munoz fit that description.

Table 1: Plaintiff Shareholding

	Common Shares	APE Units
Munoz	53,787	3,065
Allegheny	879	879
Franchi	32	0

A460-64; A513-551; A565-569.

The three plaintiffs faced very different risks:

- Munoz would suffer enormous losses if the APEs converted: according to discovery documents, he appears to have exchanged most of his APE dividend into common shares and purchased more common stock on margin. A463-64.
- Franchi purchased his handful of common shares in November 2022, after AMC created the APEs, despite having sworn that he owned shares "at the time of the wrongs complained of" in his complaint.[3] A460.
- Allegheny never purchased shares alongside the "unlikely hero[es]": It sold most of its stake to retail holders during the short squeeze. A569.

[3] Franchi would later walk back this sworn statement by arguing that "[a]ny claim concerning APEs did not arise until Defendants weaponized them alongside the [December 2022] Antara transaction." MO at 46. The trial court rejected this argument (*id*. at 46-47), but placed no importance on how it rendered Franchi's sworn affidavit false.

Most of this data exists in the record only because (a) a *pro se* stockholder sought (and won) access to discovery and (b) Izzo alone agreed to onerous terms, including trading restrictions that burden her to this day, to review the relevant documents. A937.

The parties agreed to, and the Court entered, a status quo order ("SQO") that permitted AMC to hold a meeting to approve the proposals but prohibited the vote from taking effect "pending a ruling . . . on Plaintiffs' to-be-filed preliminary injunction motion." Op. at 21. At the Special Meeting, the proposals only passed due to Antara's pre-promised votes and the APE's mirrored-voting feature. *Id*. at 23.

Plaintiffs never briefed an injunction motion. Instead, they reached an agreement to settle the case conditioned upon the lifting of the SQO. *Id*. at 24. After the trial court refused to lift the SQO, the parties revised the settlement to remove the condition. *Id*. at 24-25.

Under the settlement, AMC agreed to distribute 6,922,565 shares of common stock to existing common stockholders, at a ratio of one share per every 7.5 shares held after a 10-to-1 reverse split but before the conversion. *Id*. at 26. Plaintiffs argued that this "benefit" was worth over $129 million (A315), but its practical effect was marginal. Without the settlement, the class—existing common stockholders—would own 34.28% of AMC's equity after the conversion; with the settlement, that percentage increased to 37.15%. Op. at 27. For that bargain price, AMC's Board took the power stockholders had twice refused to give: the ability to repeatedly dilute common stockholders.

Plaintiffs' brief stated that Franchi, Allegheny, and Munoz had all filed affidavits in support of the settlement. A336. This was not true. MO at 98. No non-hearsay evidence suggests that Munoz ***ever*** supported the settlement. Notably, Plaintiffs settled on the eve of Munoz's deposition, when he might have expressed his disagreement. A346-47; A490.

D. Stockholders Object.

After Plaintiffs abandoned injunctive relief, AMC's stockholders offered an unprecedented response. Approximately 2,850 purported stockholders submitted over 3,500 communications, including objections and requests to opt out.[4] Op. at 29.

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[4] The stockholder response might have been even more dramatic if the parties' notice procedures had been robust. Notice was not mailed to approximately 1 million beneficial owners, and was significantly delayed to another 1.5 million. MO at 38-39. The postcard contained a "non-functioning URL that did not direct to the correct website." *Id.* Over half of postcard notices were not sent until May 26, 2023, the day before Memorial Day weekend, leaving stockholders with, at best, one or two business days to evaluate the settlement, potentially find counsel, and file a timely objection. A582.

The trial court initially stated that the settlement schedule "depends upon prompt initiation of postcard notice, and will only work if postcards will generally be delivered by May 24, 2023." MO at 39. This did not happen. The trial court found notice acceptable anyway.

The trial court appointed a special master to review multiple motions to intervene and objections, and to advise on whether to approve the settlement. *Id*. at 25-26.

Izzo, like most objectors, wanted injunctive relief preventing the conversion of APEs to common and, more importantly, restraining the Board's power to repeatedly dilute common stockholders. Plaintiffs had a change of heart: bankruptcy was no longer "in the rearview mirror," but rather a looming, immediate probability. *Compare* A415 *with* A325; A383-87. Plaintiffs admitted that, even had they won an injunction, they would have used it only to leverage for a larger monetary settlement. A485, A611. Yet Plaintiffs could not point to the document that changed their mind. Op. at 61 n.194.

Izzo, the only objector whose counsel reviewed the discovery information, could not figure it out either. For instance, the Special Master's report put great emphasis on risks expressed in AMC's "2023 Plan," which projected that AMC would end its first quarter with $215 million in cash, even without any capital raise. A597. Discovery showed that by February 2023, AMC already anticipated a quarter-end cash balance of $428.6 million—almost ***double*** the December prediction. *Id*. Somehow, every bit of good news made bankruptcy ***more*** likely—for Plaintiffs.

AMC's in-court pessimism likewise contrasted both with its out-of-court statements and the discovery record. On May 4, 2023, Defendants warned the trial court that "unless revenue and attendance levels rise, the failure to obtain additional liquidity through equity capital would likely result in bankruptcy." A247-48. The very next day, AMC's released earnings showing year-on-year revenue and attendance gains of 21.5% and 21.9%, respectively. A457. AMC's CEO could hardly contain his excitement, proclaiming: "We could not be more optimistic about the prospect for the 2023 box office, except to say that 2024 looks even better." *Id*. Meanwhile, Antara concluded, in an internal email, that AMC's "Debt Capacity" could exceed $500 million without any "votes/amendments" to current debts and that, with certain amendments, "all bets are off to the tune of 2.25bn+ of investment capacity." A458-59, A512.

Meanwhile, Plaintiffs concealed Munoz's position on the settlement. First, they misrepresented in their opening brief that Munoz had signed a Rule 23 affidavit in support of the settlement. MO at 98. They did not respond when Izzo's counsel inquired about the nonexistent affidavit. *Id*. When they first moved to withdraw Munoz, they failed to serve objectors (*id*.), prompting an expedited motion over a holiday weekend. A73-74. They speculated—with no evidence—that Munoz withdrew from litigation due to online harassment. A355-56. This entirely baseless supposition evaporated when, on the eve of Plaintiffs' reply brief, Munoz called Izzo's counsel seeking assistance. A552-53.

E. The Special Master's Report, the Opinion, and the Memorandum Opinion.

Izzo and other stockholders submitted objections. The Special Master's Report recommended that all objections be denied. Plaintiffs and at least 13 objectors filed exceptions to the Report. Op. at 30. The trial court held a two-day settlement hearing on June 29 and 30, 2023. *Id*. By the settlement hearing, Plaintiffs had gone from referring to retail stockholders as "unlikely hero[es]" to describing objectors as villains—who "overpaid for AMC stock"—constituting a "frenzy seeking to block" the settlement. A379, A578.

On July 21, 2023, the trial court initially rejected the settlement, finding that the release was overbroad because it gave away class claims relating to the ownership of APEs.[5] Op. at 36-56. The Opinion also held, in a footnote, that the release "does not apply to future events." *Id*. at 58 n.186.

One day later, Plaintiffs and Defendants amended the release. MO at 4.

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[5] The trial court stated that Izzo "did not raise the release of APE claims as a fault in the Proposed Settlement." Op. at 58. But the Opinion cites only to Izzo's Objection, while the problem of the APE release was discussed in Izzo's Exceptions. *See* A590.

Moreover, even Izzo's Objection argued that the inclusion of APE claims was fatal to the settlement, albeit in the context of Plaintiffs' inability to represent the class rather than the release. *Compare* A486-87 ("the conflict involves antagonistic interests between AMC Common stockholders and Preferred unitholders as much as between the Class and directors") *with* Op. at 52 (noting that neither Franchi nor Allegheny could "represent or release APE direct claims"). This makes sense: as the Opinion notes, the typical settlement ruling considers class certification *first*, and the settlement's fairness afterwards. Op. at 33-34.

On August 11, 2023, the trial court issued its Memorandum Opinion approving the settlement. The Memorandum Opinion held that Plaintiffs were adequate representatives of the class. MO at 17-25. In reaching that decision, the trial court affirmed the Special Master's conclusion that "objectors did not carry their burden to disqualify Plaintiffs as adequate class representatives." It concluded that the holding of *Prezant v. DeAngelis*, 636 A.2d 915 (Del. 1994), was limited to a requirement of a judicial determination of adequacy in class actions. MO at 20. It also determined that there was no economic antagonism between Plaintiffs and other class members. *Id*. at 21-25.

As for an opt-out, the Memorandum Opinion concluded that no opt-out is warranted because (a) the class can be certified under Rule 23(b)(1) and (b)(2), (b) the lack of an opt-out would not violate the due process rights of other stockholders, and (c) an opt-out was not feasible. *Id*. at 29-33. Regarding the fairness of the settlement itself, the Memorandum Opinion held that Plaintiffs' Section 242 claim possessed little value (*id*. at 52) but that "a preliminary injunction has a discounted valued in Plaintiffs' 'give.'" *Id*. at 83.

Finally, the Memorandum Opinion denied Izzo's request for a stay pending appeal. *Id*. at 109.

F. Aftermath.

In a final effort to avert disaster, Izzo asked this Court to reimpose the SQO; that request was denied on August 21. Thereafter, the calamity Plaintiffs derided as "wild speculation" came to pass: AMC's market capitalization cratered, falling from $4.50 billion to $1.97 billion.

Closing Price on:	AMC	APE	Market Cap.
July 21 (Court Issues First Opinion)	$ 4.40	$ 1.80	$ 4,076,178,059
Aug. 11 (Court Issues Second Opinion)	$ 5.26	$ 1.78	$ 4,502,775,387
Aug. 18 (Last Trading Day Before Supreme Court Denies Stay)	$ 4.09	$ 2.27	$ 4,383,069,433
Aug. 21 (Supreme Court Denies Stay)	$ 3.12	$ 2.12	$ 3,730,141,852
Aug. 25 (Last Trading Day Before Settlement Shares Issued)	$ 12.43*	-	$ 1,968,638,180
Reflects price following 10-to-1 reverse split.			

A941 (footnotes omitted). Izzo's prediction of a 50% collapse in market capitalization was only off because it underestimated the catastrophe.[6]

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6 Why was the prediction so accurate? The trial court considered a "mass exodus of aggrieved retail investors" unpersuasive and unsupported by evidence. A955. Yet the evidence was there.

First, consider retail investors like Munoz. Munoz held much of his stake in a margin account and, as Izzo's Objection noted, "[t]he downside to using margin is that if the stock price decreases, substantial losses can amount quickly." A464. Even under Plaintiff's optimistic assumption, retail investors (like Munoz) holding on margin would need to either provide more capital—meet a "margin call"—or sell

In the end, Plaintiffs' counsel's fee fell—from the $20 million they had initially sought to $5,759,087.46. Even that may be too much: the "benefit" to the class may be ephemeral. The business day after the August 11, 2023 Memorandum Opinion, a purported APE holder brought a pending action for breach of contract, contending that AMC must pay APE holders the monetary value of the settlement's benefit to common stockholders. A929-31. If successful, the lawsuit would undo the settlement (although not the payment to Plaintiffs' counsel).

The class would have been better off had Plaintiffs never filed suit. AMC's stockholders deserved better representatives. A more aggressive plaintiff might have sought to enjoin a transaction that devastated AMC's market capitalization. A more cautious plaintiff might have withdrawn their lawsuit, waiting to seek a post-closing damages action based on the catastrophe that Franchi and Allegheny both refused to accept was barreling towards the class.

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shares to cover. If the stock price fell further, additional margin calls would lead to a downward spiral.

Second, consider the main institutional investor—Antara. If Plaintiffs' predictions held water, APEs were a license to print money: each would convert to more valuable common after the conversion. Yet in January 2023, Antara proposed to *loan* AMC money if it would stop selling APEs. A436-37, A597-98. This offer makes sense if Antara anticipates the value of APEs declining after a post-transaction collapse, as they did.

Third, while the trial court may have found Izzo's explanation unpersuasive, Defendants did not. They included it as a risk factor for buyers to consider in their first dilutive offering. A936.

Instead, Plaintiffs sold disaster insurance, potentially allowing Defendants to escape liability for a predictable outcome. Reversal and remand is necessary to avoid that outcome, which is inimical to Delaware law and good policy.

ARGUMENT

I. THE TRIAL COURT ERRED BY APPROVING AN OVERBROAD RELEASE.

A. Question Presented.

Whether the trial court erred by approving a stockholder settlement that releases claims that are not based on the same identical factual predicate or the same set of operative facts as the underlying action. (Preserved: A476-80, A586-93.)

B. Scope of Review.

A trial court's application of law to fact concerning a settlement release is reviewed *de novo*. *In re Philadelphia Stock Ex., Inc.*, 945 A.2d 1123, 1145 (Del. 2008) (hereafter, "*PHLX*"). Questions of contractual interpretation are reviewed *de novo*. *Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP*, 288 A.3d 1083, 1111 (Del. 2022). While approval of a settlement may be evaluated for abuse of discretion, such an abuse can occur "when a relevant factor that should have been given significant weight is not considered. . . ." *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005) (internal quotation omitted).

C. Merits of Argument.

The scope of the release involves no factual dispute. As the trial court held, the scope of the release is an "ordinary question of contract interpretation. . . ." MO at 106. Thus, this Court's review is *de novo*.

The trial court's decision concerning the scope of the release rests on two separate errors. First, neither the Special Master's Report, the Opinion, nor the Memorandum Opinion addressed Izzo's challenges to the settlement based on this Court's ruling in *PHLX*: that a release cannot extend to claims based on tangential facts. Second, the Opinion (and later the Memorandum Opinion) erred in concluding that the release, based on its text, does not extend to future events.

1. The Scope of the Release.

The breadth of the release is apparent from its text:

> "Released Plaintiffs' Claims" means any and all actions, causes of action, suits, liabilities, claims, rights of action, debts, sums of money, covenants, contracts, controversies, agreements, promises, damages, contributions, indemnities, and demands of every nature and description, whether or not currently asserted, whether known claims or Unknown Claims, suspected, existing, or discoverable, whether arising under federal, state, common, or foreign law, and whether based on contract, tort, statute, law, equity, or otherwise (including, but not limited to, federal and state securities laws), that Plaintiffs or any other Settlement Class Member: (i) asserted in the *Allegheny* Complaint or the *Munoz* Complaint; or (ii) ever had, now have, or hereafter can, shall, or may have, directly, representatively, derivatively, or in any other capacity that, in full or part, concern, relate to, arise out of, or are in any way ***connected to or based upon the allegations, transactions, facts, matters, occurrences, representations, or omissions involved, set forth, or referred to in the Complaints*** and that ***relate to the ownership of Common Stock during the Class Period***, except claims with regard to enforcement of the Settlement and this Stipulation.

MO at 44 (emphasis added). The Opinion found this release to be compliant with Delaware law because it is subject to "two conjunctive limitations" based on the text bolded above. Op. at 58 n.186. These conjunctive limitations, however, are porous, do little to limit the scope of the release, and do not comply with this Court's precedent.

2. The Release Exceeds the Bounds Set by *PHLX*.

To begin with, none of the multiple opinions in this case ever addressed Izzo's objection based on *PHLX*: that "a release may be overbroad if it could be interpreted to encompass any claim that has some relationship—however remote or tangential—to any 'fact,' 'act,' or conduct 'referred to' in the Action." *PHLX*, 945 A.3d at 1146 (quoting *UniSuper, Ltd. v. News Corp.*, 898 A.2d 344, 347 (Del. Ch. 2006) (internal quotation omitted)).

The plain language of the release clearly extends to claims arising out of any "facts, matters, occurrences, representations, or omissions involved, set forth, or referred to in the Complaints. . . ." MO at 44. Izzo highlighted *tangential* facts included in the complaints that could form the basis for released claims, including:

- Derivative claims related to the Hycroft mine or similar investments. The Hycroft investment involves "facts . . . set forth in the Complaints." A165-66, A478, A591. Even if the investments themselves were made outside the class period, they would "relate" to class ownership due to the continuous ownership requirement. *See Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984).

- Any derivative challenge to AMC's decision to grant awards under or amend the Company's long-term incentive plan, for the same reasons. A478.
- Any securities lawsuit related to any SEC filing, or even tweet by Adam Aron, between August 3, 2022 and August 24, 2023, so long as it was in any way "connected to" a fact in the complaints. For example, AMC issued an earnings release on August 8, 2023 wherein Adam Aron assured investors that despite "liquidity hurdles" that AMC was "accustomed to and skilled in rising to meet any and all challenges and are very much committed to our relentless efforts to ensure that AMC is best positioned for sustained long term success." A897-9. Seventeen days later, AMC's stock plummeted, wiping out over 50% of its market capitalization.

None of these claims are "core" to the fiduciary duty and statutory claims Plaintiffs brought. But they all potentially fall within the scope of the release. Such claims are at best tangential and cannot be released under *PHLX*.

In considering the scope of the release, the Court addressed only the value of the claims Plaintiffs actually pled. *See* MO at 45-83. Had the release been limited to such claims, this might have been sufficient. But the plain text of the release exceeds those bounds.

As set forth above, this issue should be reviewed *de novo*. Had the trial court addressed this question, the decision to approve the settlement notwithstanding its noncompliance with *PHLX* would fail as error. But it did not. And even under an abuse of discretion standard, there is nothing to review. *See Homestore, Inc.*, 886 A.2d at 506 (Del. 2005) (abuse of discretion may occur "when a relevant factor that should have been given significant weight is not considered").

3. The Release Exceeds the Bounds Set by *Griffith*.

Similarly, "a release that directly or indirectly binds absent interested parties is limited by the Due Process Clause" and may not "release claims based on a set of operative facts that will occur in the future." *Griffith v. Stein*, 283 A.3d 1124, 1134, 1137 (Del. 2022) (quotations omitted). The release here exceeds those limits—as the post-settlement catastrophe has shown.

The most obvious problem is that the class period, by definition, extends to events that the trial court could not consider at the time of the settlement hearing. By its plain text, the settlement releases all claims "relating to" ownership within the class period, which extends from August 3, 2022 to August 24, 2023—the day the Defendants effected the reverse stock split. A205, A211, A918. Yet the trial court was clear that the "record closed on June 30" and that apart from briefing that it specifically requested, it did "not consider[] . . . other submissions after that date." MO at 6. Thus, in approving the settlement, the Court could not have considered claims arising out of facts that would occur in the future, including the massive collapse of AMC's market capitalization that occurred in the lead-up to the conversion. A941. The release would even apply to stockholders who purchased shares between August 11 (the date the class was certified) and August 24—even if they were not class members at the time the trial court ruled.

Time did not freeze between the June 30 settlement hearing and August 24. CEO Adam Aron made numerous statements, on Twitter and in public filings. While Defendants were bewailing AMC's imminent doom in court, AMC was publicly celebrating the success of movies like *Oppenheimer* and *Barbie*, and AMC was privately arranging to be the exclusive distributor for Taylor Swift's "Eras Tour" film.[7] But any federal securities claim related to ***any*** such statement (or omission) would be released, so long as it was in any way "connected to" any allegation in the complaints.[8]

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[7] *See* A897 (Adam Aron stating in Aug. 8, 2023 Earnings Release, "Our ongoing progress is obvious and ever so encouraging. Combining AMC's commitment to innovation with a notable increase in both the number and quality of movie titles from our studio partners, movie theatres are once again captivating audiences and driving attendance back to AMC theatres."). *See also* Adam Aron (@CEOAdam), Twitter (Sept. 1, 2023, 08:59), https://twitter.com/CEOAdam/status/1697595088644235387 (announcing that *Taylor Swift/The Eras Tour* concert film, for which AMC is "acting as the theatrical distributor," had "shatter[ed] advance ticket sales records").

[8] Further confounding this issue was the trial court's willingness to allow the parties to proceed to a settlement which was keyed off of the "Complaints" when there was no consolidated complaint filed. Op. at 6-7 n.1.

Finally, it is easy to conceive of claims that would fall within the release based on events that have yet to occur. For instance, on July 23, 2023, in response to the Opinion rejecting the settlement, Adam Aron issued an "open letter" to AMC stockholders concerning this action.[9] It clearly "relates to" facts in the complaints—it discusses this litigation. Assume that a stockholder purchased on July 24, based on statements made in the "open letter," that are found to be untrue one year from today. That stockholder's federal securities law claim would "relate to" ownership during the class period—and thus fall within the release. But damages would be based upon the future drop in AMC's stock price when the false statement came to light: an "operative event" that has yet to occur.

4. The Trial Court's Rulings and Defendants' Statements Cannot Save the Release.

Despite the text of the release, the trial court held that an appeal would be "strange" based upon its holding that the release did not encompass future claims, "as well as defendants' statements that it did not apply." (MO at 105 n.381.) But this is not so strange, again because these protections are porous.

A "court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can only be tested only in a subsequent action . . . ." *PHLX*, 945 A.2d at 1147 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S.

9 *See* AMC Entertainment Holdings, Inc., Form 8-K (July 24, 2023).

367, 396 (1996) (Ginsburg, J., concurring)). The trial court agreed on this point in denying a motion by another objector. A950-51. The question of *res judicata* is particularly significant for released federal securities claims, which would likely be tried in federal court.

Similarly, Defendants' in-court statements might support an argument for judicial estoppel. *See Motors Liquid. Co. DIP Lenders Trust v. Allstate Ins. Co.*, 191 A.3d 1109 (Table), 2018 WL 3360976, at *4 (Del. July 10, 2018) ("Judicial estoppel applies when a litigant's position contradicts another position that the litigant previously took and that the Court was successfully induced to adopt in a judicial ruling" (quotation omitted)). But, as with *res judicata*, that conclusion rests on the premise that any court in the world will apply Delaware's equitable doctrine, even concerning non-Delaware claims, despite the plain text of the settlement agreement.

The parties could have, and should have, crafted a release that avoided this problem. But that would have prevented Plaintiffs from selling Defendants "deal insurance" that became disaster insurance. If Plaintiffs believed that a massive drop in AMC's market capitalization was "wild speculation," they should have limited the release to claims arising as of the date of the settlement hearing. *See Griffith*, 283 A.3d at 1136 (discussing *In re Medley Cap. Corp. S'holders Litig.*, C.A. No. 2019-0100 (Del. Ch. Nov. 19, 2019) (Trans.), where settlement was amended to release only "claims that were or could have been asserted through the date of the settlement hearing"). They should not have offered Defendants a release that would give up significant claims for monetary damages arising after their settlement was approved. Reversal and remand preserves those valuable rights.

II. THE TRIAL COURT ERRED BY APPROVING A SETTLEMENT WITHOUT OPT-OUT RIGHTS.

A. Question Presented.

Whether the trial court erred by approving the settlement without an opt out. (Preserved: A484-88, A610-13.)

B. Scope of Review.

To the extent that class certification implicates due process claims, those claims are reviewed *de novo*. *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 428 (Del. 2012). Similarly, if a trial court formulates incorrect legal precepts or applies those precepts incorrectly, review is *de novo*. *Id*. Even if it is assumed that a non-opt-out-class was legally permissible, a "separate, rigorous analysis is required to determine" whether the trial court abused its discretion. *Id*. at 433.

C. Merits of Argument.

1. Due Process Requires an Opt-Out.

a. Legal Standards.

The trial court's role in approving settlements is "intended to balance policies favoring settlement with concerns for due process." *Id*. at 434 (quoting *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1283 (Del. 1989)). The United States Supreme Court has held that "absence of notice and opt-out violates due process" in a class action predominantly for money damages, and that even where monetary claims do not predominate, there is a "serious possibility" that due process may also require an opt-out. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). This Court has recognized that opt-out rights should be granted "where the class representative does not adequately represent the interests of ***particular class members***, triggering due process concerns." *Celera*, 59 A.3d at 435 (emphasis added) (citing *Prezant v. DeAngelis*, 636 A.3d 915, 924 (Del. 1994)).

In particular, "[u]nless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, ***and a denial of due process to permit them to obtain a judgment binding absent plaintiffs.***" *Prezant*, 636 A.3d at 924 (emphasis added) (quotation omitted)). As explained below, Plaintiffs here were inadequate representatives of the class (*see* Section III, *infra*), and they were certainly inadequate to represent the thousands of stockholders who believed, unlike Plaintiffs, that the conversion would be ruinous for their investment.

b. Plaintiffs Did Not Represent Dissenting Stockholders.

Dissenting stockholders—the Optimists—twice rebuffed Defendants' attempts to increase the number of authorized common shares. Defendants then "sought to overcome the stockholders' right to vote 'no,' and their right not to vote—their 'rational apathy'" with the intent and effect of "rig[ging] the Special Meeting vote to overcome common stockholder opposition and the defeating presence of nonvotes." MO at 76. They sold votes by selling APEs, first in the market and, when the price fell below the threshold limit, to Antara. Op. at 15-16. In so doing, Defendants violated a sacrosanct right the General Assembly placed squarely in stockholder hands: control over whether their investment should be diluted. *See* 8 *Del. C.* § 242. Section 242 has no "zone of insolvency" exception. Delaware directors who believe bankruptcy is imminent may propose, advise, cajole, or plead with stockholders to authorize more shares. ***But stockholders decide.*** They choose whether to risk bankruptcy by sending directors back to the drawing board to consider other funding options.[10]

Izzo, and thousands of other stockholders, correctly presaged the risk of expanding the number of authorized shares. Izzo's Objection and Exceptions argued that an opt-out right would preserve dissenting stockholders' rights not only to an injunction, but to post-transaction "equitable damages based on their dilution harm in an amount that exceeds what they might otherwise receive in the Settlement." A612; *see also* A485 (noting that dissenting stockholders desire *either* an injunction

[10] Defendants had, and rejected, options other than the conversion. In January 2023, AMC's CFO shut down a $100 million debt proposal ***from Antara***—because it was conditioned on ceasing to sell APEs. A436-37, A597-98. As the CFO stated, "[m]any debt holders have approached us with offers to transact in a convertible" but he "hate[d] to give up the option to raise up to $100m pre March 14 [the date of the AMC vote]" by selling APEs (and their votes). A436.

or a "post-Transaction damages ruling restoring their ownership stake"). The value of that right became apparent immediately after the conversion and the subsequent collapse in AMC's stock value.

Plaintiffs supposedly sued to vindicate the rights of those "dissenters." Instead, they reached a monetary settlement that, in effect, allowed Defendants to override the class's voting rights. In support of their settlement (and their counsels' $20 million fee request), Plaintiffs joined Defendants in emphasizing AMC's supposedly perilous financial condition.[11] A387. They argued that giving Defendants the right to dilute common stockholders would be good for the company and increase AMC's market capitalization:

> [Plaintiff's Counsel:] There's no basis to assume that the market cap would be cut by half, just because a settlement is approved.
>
> As I'm saying, I actually think it's the opposite. I think that if the market perceives that the company has more time to deal with its debt, more ability to deal with its debt, I would think that the market cap would be in an upward trajectory, not a downward trajectory.

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[11] Ironically, Plaintiffs argued that the pre-conversion "*status quo* [was] not in the Class's best interests, as cheap APE sales are insufficient to stem the bleeding . . . without massive additional dilution to Common Stock." A387. The class should have been so lucky. Before the conversion, APEs sold at over $1/unit—equivalent to $10 post-conversion. A941. The "massive additional dilution" that has taken place after the conversion has not been as lucrative.

A721, A939. They were disastrously wrong. But worse, they adopted the position of the Pessimists—who would presumably have voted to authorize more shares even before the creation of the APEs. The Pessimists did not need representation.

Plaintiffs did not represent the interests of the "particular class members" that correctly anticipated disaster. Many stockholders lost sums significant to their personal net worth. Approving the settlement without giving them a right to opt-out and protect their investment was a denial of due process.

2. Dissenting Stockholders Should Have Been Permitted an Opt-Out as a Matter of Fundamental Fairness.

In exercising discretion concerning an opt-out, a trial court must engage in a "rigorous analysis." *Celera*, 59 A.3d at 432 (citing *Wal-Mart*, 564 U.S. at 350-51). Even where not required by due process, circumstances may arise where discretionary opt-outs should be granted. *Id*. at 435. *Celera* is illustrative: this Court held that settlement approval was an abuse of discretion under "somewhat unique circumstances," where the class representative was barely adequate, the objector was a significant stockholder prepared to prosecute claims for money damages, and those claims were the only ones realistically being settled at the fairness hearing. *Id*. at 436.

The circumstances here are also unique and equally required an opt-out. Where *Celera* involved a single large objector, this case involved an unprecedented number of objectors who disagreed with Plaintiffs concerning the financial harm posed by the proposed transaction. As in *Celera*, by the time of the settlement, injunctive relief was no longer a dispute between the parties, and the only issue remaining between them was monetary. A325. In this circumstance, as in *Celera*, a discretionary opt-out right was required.

a. An Opt-Out Preserves Valuable Rights.

Instead, the trial court reasoned that an opt-out was inadvisable because it would be "impossible to split [the settlement] by permitting the Reverse Split and Conversion to go forward, while excluding certain class members from the consideration and permitting them to maintain their claims against, and request to enjoin, the Reverse Split and Conversion." (MO at 32-33.) This is incorrect.

"Class certification must be assessed based on the facts and circumstances at the time of the settlement/certification hearing." *Celera*, 59 A.3d at 436. By that time, Plaintiffs had disclaimed the intent to enforce an injunction, even if victorious. A325. The relief sought was no longer primarily equitable: consideration amounted to a distribution of publicly-tradable common stock, one step away from cash.

Preserving the value of post-transaction damages action was not "impossible." MO at 33. If the trial court agreed with Defendants (and, at the time of the settlement hearing, Plaintiffs) that the conversion was necessary for AMC's survival, it could have nonetheless rejected the Settlement and either (a) permitted the parties to submit a new settlement with an opt-out for post-transaction damages actions or

(b) heard expedited argument on a preliminary injunction, and (if the motion failed), lifted the SQO. That process would have immediately revealed the due process issue at the heart of this case: were the settlement rejected, the class "representatives" would be left to argue in favor of a preliminary injunction that they had admitted they did not intend to enforce. A323, A325. Either option would have been preferable to the outcome below.

b. An Opt-Out Was Feasible.

The trial court also determined that an opt-out right was not feasible. MO at 32. This sets dangerous precedent, because it encourages Delaware litigants to place hurdles in front of dissenting stockholders, fail to provide effective notice, and then benefit from their own procedural failures.

First, the trial court found that an opt-out would require a second notice with "a higher distribution rate" to allow opt-outs. MO at 32. True. But the parties' difficulties in distributing postcard notices to over ***half the class*** was not the fault of AMC stockholders. MO at 38-39. Delaware law should not be seen to countenance settling parties' failure and then let them use it as an excuse to limit the rights of stockholder dissenters.

Second, the trial court concluded that "stockholder procedural compliance" with an opt-out would be too difficult, citing *pro se* stockholders' difficulty in complying with the unusual objection procedures in this case. MO at 32. Again, this is a problem of the parties' making. Rather than appoint a claims administrator (who can follow up with stockholders if they, for instance, fail to provide adequate proof of ownership), the parties chose to distribute the settlement consideration through record holders. As a practical matter, this largely absolves the parties of difficulties with settlement administration. While this may be appropriate and more efficient in other cases, the parties' wish to avoid administrative burdens should not outweigh the due process rights of stockholders.

Third, the trial court concluded that "permitting an opt-out right would further delay the effective date. . . ." MO at 32. But its powers were not so limited. As described above, the trial court had multiple means to preserve at least some stockholder rights while moving the case forward, including simply lifting the SQO. Dissenting stockholders would have lost their option for preliminary injunctive relief. But they would, as in *Celera*, remain free to pursue substantial damages rather than a suboptimal settlement.

Respected commentators have described opt-out rights as a "market check on the propensity of counsel to serve their own interests over those of the class." Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1536 (2004). The unprecedented number of AMC stockholders demanding such rights below shows that the settlement failed that market check. Due process requires, and good policy supports, allowing stockholders the option to decline representation by stockholders who (wrongly) believed that the conversion of APEs to common stock would put AMC's market capitalization "in an upward trajectory." A721, A939. Reversal and remand will preserve for AMC stockholders "multiple avenues towards a better result. . . ." A611.

III. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS WERE ADEQUATE REPRESENTATIVES.

A. Question Presented.

Whether the trial court erred by finding that Plaintiffs adequately represented all AMC stockholders. (Preserved: A488-91, A607-610.)

B. Scope of Review.

Determinations on class certification claims are reviewed for abuse of discretion, but to the extent that certification of the class implicates due process claims, those claims are reviewed *de novo*. *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 428 (Del. 2012); *In re Philadelphia Stock Exchange, Inc.*, 945 A.3d 1123, 1135 (Del. 2008). Similarly, if a trial court formulates incorrect legal precepts or applies those precepts incorrectly, those claims are reviewed *de novo*. *Celera*, 59 A.3d at 428.

C. Merits of Argument.

1. Legal Standards.

"The adequacy of the class representative has a constitutional dimension." *Prezant v. DeAngelis*, 636 A.3d 915, 923 (Del. 1994). As this Court explained, the rationale underlying the need for adequate representation is that "[u]nless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a denial of due process to permit them to obtain a judgment binding absent plaintiffs." *Id*. at 924 (quoting *National Ass'n of Regional Med. Programs, Inc. v. Mathews*, 551 F.2d 340, 346 (D.C. Cir. 1976)). *See also Dierks v. Thompson*, 414 F.2d 453, 456 (1st Cir. 1969).

2. The Memorandum Opinion Does Not Follow *Prezant*.

The Memorandum Opinion errs in limiting this Court's teachings to the narrow requirement that a trial court must rule on adequacy of representation before approving a settlement. (MO at 20 & n.75.) Even if *Prezant*'s holding can be read so narrowly, the rest of this Court's opinion was not dicta. On remand, the trial court in *Prezant* could not have found the plaintiff adequate unless it sought relief "thought to be what would be desired by the other members of the class." 636 A.3d at 924; *id*. at 926 (remanding "for further proceedings consistent with this opinion.").

This Court used longstanding federal authority to mark the constitutional boundaries set by the Due Process Clause. *Dierks*, which *Prezant* cites, is instructive. In that case, plaintiffs sought to represent a class of former employees of a pension plan subject to two competing interpretations. *Dierks*, 414 F.2d at 455. Plaintiffs advocated for one interpretation that would result in a continuing interest in a potentially growing fund. Other former employees—including many who "filed papers disassociating themselves from the suit" and asking to opt-out—believed that a vested obligation in a fixed amount of the pension fund assets would be preferable. *Id*. at 456 & n.5. "Under the Rule, ***and as a matter of due process***, plaintiffs could not represent both groups." *Id*. at 456 (emphasis added). The United States Court of Appeals for the First Circuit only determined the class to be compliant with due process because plaintiffs represented the interests of the first group of stockholders, and defendants advocated for the latter. *Id*. at 457.

Here, the opposite is true. While the operative complaint contended that AMC's bankruptcy concerns were "in the rearview mirror" (A145), by the time of the settlement hearing, the two remaining Plaintiffs had joined Defendants in emphasizing the risk of bankruptcy and the benefit that additional dilution would provide to the Company. A721, A939. The "Optimist" faction—stockholders who disagreed—were left without a party advocate.

There is no question that "the relief sought by the particular plaintiffs" cannot "be thought to be what would be desired by other members of the class." *Prezant*, 636 A.3d at 924 (quotation omitted). *Prezant* requires more than a ruling on Rule 23(a)(4). The purpose of that ruling is to ensure that representative plaintiffs have respected the constitutional due process rights of absent stockholders through actual representation. The Plaintiffs here failed *Prezant*'s test.

3. The Trial Court Misapplied the Burden of Proof.

The Memorandum Opinion's next error presents a question of first impression. In general, a settlement's proponents bear the burden of establishing adequacy, along with all class certification elements. *Deiter v. Prime Computer,* *Inc.*, 681 A.2d 1068, 1071 (Del. 1996). Nonetheless, the trial court held that objectors "did not carry their burden to disqualify Plaintiffs as adequate class representatives." MO at 18. It approved the Special Master's conclusion that "[o]nce *prima facie* adequacy is established, the burden shifts to the nonmovant (in this case, the Objectors) to disqualify plaintiff." SMR at 66. To Izzo's knowledge, this Court has never affirmed this burden-shift to non-party objectors, which the Special Master derived from a case discussing *defendants'* challenges to class certification. *See id*. (citing *Van De Walle v. Unimation, Inc.*, 1983 WL 8949, at *5 (Del. Ch. Dec. 6, 1983)).

This Court should reject the burden shift. Objectors and defendants are not similarly situated, as this case demonstrates. Unlike defendants, objectors "have limited discovery rights into the good faith of the parties to the settlement negotiation process" and even then "only where they make a showing of good cause." A363. Defendants were entitled to depose Munoz; the objectors in this case were not.

Representative plaintiffs cannot have it both ways. If they wish to bind non-parties who lack access to discovery, they should bear the burden to prove their adequacy. Requiring non-parties, often on very expedited schedules, to meet the same burden as representative plaintiffs is inequitable.

4. Franchi and Allegheny are not Adequate Representatives.

Finally, the Memorandum Opinion errs in disregarding the economic antagonism between Franchi and Allegheny, on the one hand, and other class members—like Izzo and Munoz—who made their investments during the COVID pandemic. This is critical because even if a proposed settlement may be considered fair, "an adequate representative, vigorously prosecuting an action without conflict and bargaining at arms-length, may present different facts and a different settlement proposal to the court than would an inadequate representative." *Prezant*, 636 A.2d at 925 (citing *Dierks*, 414 F.2d at 456).

a. Franchi

Franchi is a frequent-filing plaintiff. A461. He purchased his 32 shares of AMC common stock in November 2022, and received no APE dividend. A520. Franchi did not own shares "at the time of the wrongs complained of" in his complaint—including the creation of the APEs. A609-10.

The Memorandum Opinion's attempts to square this circle suffer two flaws. First, it observes that "since Franchi purchased within the Class Period, he is a class member with standing to bring claims on behalf of the class." MO at 21-22. But standing and adequacy are separate analyses. *See Celera*, 52 A.3d at 431 ("The adequacy of such a class representative is a separate issue" from standing).

Franchi's standing to bring direct claims does not imply that he suffered the same harms as, or desired the same relief as, stockholders who purchased earlier.

Second, in finding that Franchi "possess[es] sufficient familiarity with this litigation" in the absence of "evidence to the contrary" (MO at 16 n.54), the trial court put no weight on Franchi's failure to accurately disclose his ownership. In his initial verification he swore he owned AMC common stock "at the time of the wrongs complained of" in his complaint. A194. Even the trial court found this untrue. MO at 46-47. He did not disclose this fact until his second affidavit, filed with the settlement. A350. As explained below, stockholders who did not know that Franchi was dissimilarly situated from them would not know that they needed to intervene before he could present an inadequate settlement. *See* Section III.C.5, *infra*.

b. Allegheny

Similarly, discovery revealed that Allegheny did not fit the mold of the Optimists—the "unlikely hero[es]"—that they purported to represent. Allegheny did not purchase shares during the COVID pandemic. A565-69. It sold most of its holdings during the short-squeeze triggered by the stockholders who Plaintiffs alleged "saved" the Company. *Id*. Its decision to settle is unsurprising: Allegheny ***made money*** by selling to stockholders who lost money after the Board created the

APEs. Allegheny's small remaining stockholding would, like Franchi, lead to a greater recovery through an incentive award than it stood to lose in the settlement.

c. Munoz

The economic antagonism between Plaintiffs and other class members, however, is probably best evidenced by Munoz's withdrawal from the case—and Plaintiffs' response to it. In formulating Izzo's objection, her counsel faced a mystery: why would Munoz support this bargain? Like Izzo, he stood to lose far more than he would gain through any incentive award. *See* Section C, Table 1, *supra*. Like Izzo, he purchased shares during the COVID pandemic, invested heavily in AMC, and would be devastated by the settlement. *Id*. Indeed, he likely faced greater losses than many others: he seems to have sold much of his APE dividend to buy more common stock. A530-51. And he purchased shares on margin. A463-64. This settlement, and the following catastrophe, would be disastrous for him.

As it turns out, there was no mystery. Plaintiffs' counsel "misrepresented in Plaintiffs' opening brief . . . that [Munoz] signed a Rule 23 affidavit in support of the Proposed Settlement: he had not." MO at 98. They "delayed responding to Izzo's counsel when they inquired about the nonexistent affidavit." *Id*. When Plaintiffs attempted to dismiss Munoz, they did not serve Izzo's counsel (despite the outstanding inquiry). *Id*. They "speculated" (without evidence) that Munoz withdrew due to online harassment. *Id*. at 102 n.367; A355-56. In short, they delayed disclosing the truth.

The plaintiff whose personal experiences most aligned with those described in the complaint would not agree to settle. This speaks to the antagonism between the Optimists and the Pessimists. Plaintiffs not only could not represent both; ultimately, they did not.

5. Reversal Will Conserve Future Judicial Resources.

Finally, while *Prezant*'s doctrinal reasoning controls the outcome here, reversal based on adequacy will also conserve future judicial resources, in this Court and the trial court. While a handful of *pro se* motions and letters appear on the docket before the parties announced the settlement, the flood of correspondence came afterwards.[12] This makes sense. Until Plaintiffs revealed their change of heart, stockholders seeking injunctive relief thought they were being represented. As they should have: to that point, every bit of docket evidence suggested that Franchi, Munoz, and Allegheny were opposing the conversion of APE units to common stock.

The tens of thousands of stockholders who observed the proceedings below have now learned a different lesson. If this settlement stands, the next set of

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12 See Op. at 25 n.76 (listing numerous docket entries). Apart from the first eight, all were filed after Plaintiffs announced the settlement.

engaged stockholders will know not to wait to be objectors to a settlement. They will know that they cannot trust Delaware plaintiffs to represent their goals and objectives, and must become plaintiffs themselves. If Plaintiffs here can pivot from "bankruptcy is in the rearview mirror" to "settlement is the only way to avoid bankruptcy," stockholders will know that they must intervene ***before*** representative plaintiffs announce an about-face via an inadequate settlement. If stockholder "adequacy" means nothing more than standing and share ownership, then any stockholder seeking real relief must seek control of the litigation ***at the start***, during expedited proceedings. Litigation can be expected to multiply.

If avoiding this outcome is not the "holding" of *Prezant*, it is the policy, the teaching, and the wisdom of that decision. It relied upon *Dierks*, which ruled that where there are two significant sets of class members with opposing goals, "as a matter of due process, plaintiffs [cannot] represent both groups." *Dierks*, 414 F.2d at 456. Stockholders who know that a settlement will only be approved if plaintiffs have provided actual, adequate representation will not feel the need to file prophylactic lawsuits. Stockholders lacking that confidence must, and likely will, seek their own relief.

Due process, this Court's precedent, and policy all favor reversal of this settlement and remand for further proceedings in the trial court.

CONCLUSION

For the foregoing reasons, reversal and remand of the trial court's orders approving the settlement and dismissing the action is appropriate to preserve valuable claims of dissenting stockholders.

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