EFiled: Jan 26 2024 01:24PM EST
Filing ID 71885338
Case Number 385,2023

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 REPLY BRIEF

Anthony A. Rickey (Bar No. 5056)
MARGRAVE LAW LLC
3411 Silverside Road, Suite 104
Baynard Building
Wilmington, Delaware 19810
Tel: (302) 604-5190

Theodore A. Kittila (Bar No. 3963)
James G. McMillan, III (Bar No. 3979)
HALLORAN FARKAS + KITTILA LLP
5801 Kennett Pike, Suite C/D
Wilmington, Delaware 19807
Tel: (302) 257-2025

Attorney for Rose Izzo,
Objector Below-Appellant

January 26, 2024

TABLE OF CONTENTS

Page

Exhibits

* *Ms. Izzo requested that the Court take judicial notice of these exhibits. See D.I. 24.*

TABLE OF CITATIONS

Page(s)

Cases

Statutes & Regulations

Rules

Other Citations

PRELIMINARY STATEMENT[1]

Reversal and remand remain AMC stockholders' only hope for recovery following the economic disaster that Plaintiffs dismissed as "speculation." A936. While Plaintiffs boast of increasing common stockholders "*pro forma* ownership of post-Conversion AMC by nearly 3%," they ignore AMC's post-Conversion collapse. PAB at 1. The Class lost millions. Plaintiffs lost nothing: their incentive awards exceed their investments. And the hemorrhaging continues: AMC now trades below $5/share, far less than the approximately $28/share post-Conversion price Plaintiffs predicted. A453.

Defendants "rig[ged] the Special Meeting vote to overcome common stockholder opposition and the defeating presence of nonvotes." MO at 76. Plaintiffs then sold Defendants insurance against predictable devastation. True, Defendants could have resubmitted their proposal following the amendments to DGCL Section 242. PAB at 35. But had they won the vote, Class claims would not have been, as Plaintiffs maintain, "statutorily mooted." *Id*. at 1. Defendants gained far greater protection through an overbroad release. *See* Section I, *infra*.

---

[1] The Plaintiff's Answering Brief and Defendants' Answering Brief (together, the "Answering Briefs") are abbreviated "PAB," and "DAB," respectively. Unless otherwise defined herein, capitalized words have the meaning set forth in Appellant's Opening Brief ("OB").

Appellees urged the trial court to the erroneous conclusion that "Plaintiffs suffered the same type of harm proportionate to their common stock holdings as every other class member." MO at 24. They did not. Plaintiffs consider that the Settlement's "equitable . . . relief" included lifting the Status Quo Order. PAB at 31. That "relief" vindicated stockholders who voted "yes"—the beneficiaries of Defendants' scheme, not the victims. As a matter of due process, Plaintiffs' admission that they would not have enforced an injunction rendered a non-opt-out settlement uncertifiable and made Plaintiffs inadequate representatives. *See* Sections II & III, *infra*.

Plaintiffs' deal required no contribution from the individual Defendants, but instead diluted APE-holders not accused of wrongdoing. Defendants took no position on Plaintiffs' $20 million fee application. MO at 90 n.319. Yet Defendants' actions inflicted, and continue to inflict, enormous economic harm on stockholders who opposed dilution.[2] Delaware law should not leave dissenting stockholders without a remedy.

[2] *See, e.g.*, AR48 (stockholder requesting opt-out following losses of "75%" of investment of "life savings of $554,707.35"); AR51 (stockholder holding 1,000 shares and requesting opt-out).

STATEMENT OF FACTS ON REPLY

Plaintiffs' reliance upon uncited facts reinforces the gulf between them and the stockholders they purported to represent. In February 2023, Plaintiffs maintained that AMC's non-public internal documents did not "indicate that the Company faced bankruptcy or any other existential threat." A184. AMC's 2022 forecast showed positive cash positions without ***any*** capital raise or additional borrowing. PAB at 34. Discovery showed AMC was set to exceed these expectations, even without $80.3 million in APE sales. *Compare id*. *with* AR54 (February 2023 email anticipating Q1 cash balance of $428.6m). Actual results were even better. PAB at 15 n.38. Plaintiffs' opinion changed once settlement (and a potential $20 million fee) loomed. But when the trial court asked Plaintiffs to identify which discovery document convinced them that AMC "was facing imminent bankruptcy," they did not. Op. at 61 n.194; MO at 81.

Plaintiffs now offer recent data, without attribution or context, to contend that AMC "bled money" during 2023 "while selling almost a billion dollars' worth of equity." PAB at 20 n.63. AMC's SEC filings tell a different story. AMC held $729.7 million in cash and cash equivalents after its "most successful third quarter results" in its history and the "second consecutive quarter" of "positive net income." Ex. 1 at 1. Yes, AMC raised $865 million in equity by December 11, 2023. Ex. 2 at 1. But $440 million was used to pay down debts, most not due until 2026. *Id.*

Paying down debt with new equity is restructuring, not "bleeding" cash or a sign of insolvency.

At settlement, Plaintiffs believed that the Conversion would save AMC from bankruptcy and set it on an "upward trajectory." A721. Dissenting stockholders believed the exact opposite. Plaintiffs had a remedy: dismiss their lawsuit and vote for Defendants' transaction. Allowing them to speak for dissenters and strip them of their rights is the core legal error at issue.

ARGUMENT

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

The Opening Brief demonstrated that the release exceeds the limits set by *In re Philadelphia Stock Ex., Inc.*, 945 A.2d 1123 (Del. 2008) ("*PHLX*") and *Griffith v. Stein*, 283 A.3d 1124, 1137 (Del. 2022). OB at 21-26. Defendants sought protection they could not win at trial to insure against predictable economic disaster. Appellees ignore the settlement's text and argue that an appropriate release would be "unworkable" (PAB at 27) or beyond "any court's power to grant." DAB at 27. A compliant release was not only possible, it was constitutionally required.

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

PHLX forbids releases that "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.2d at 1146 (quotation omitted). Appellees' arguments that the settlement conforms with *PHLX* have no merit.[3]

[3] All parties agree that review is *de novo*. OB at 20; PAB at 21; DAB at 24. Defendants incorrectly contend that the trial court "flatly rejected" the *PHLX* argument, latching onto the bare statement that the settlement "does not release tangential claims." DAB at 24-25 (citing MO at 49). The Memorandum Opinion, however, never discusses Appellants' arguments concerning *PHLX*. *See* MO at 50-88. The trial court only addressed future claims, not tangential claims. *See* Op. at 58 n.186.

1. Appellees Cannot Rewrite the Release on Appeal.

Appellees cannot rewrite the settlement on appeal. It broadly extinguishes claims that "concern," "relate to," or are "in any way connected to" facts in two lengthy, unconsolidated complaints, if those claims merely "relate to" ownership during the Class Period. The trial court's "conjunctive limitations" omitted part of this broad language. Op. at 58 n.186. Defendants would further limit the release to claims that "arise out of the same operative facts as the Complaints." DAB at 30.

In interpreting Appellees' agreement, "each word should be given meaning and effect by the court." *NAMA Holdings, LLC v. World Market Center Venture LLC*, 948 A.2d 411, 419 (Del. Ch. 2007). The release extends beyond claims that "arise out" of the Complaints' facts. Appellees cannot ignore their own text.

2. Plaintiffs' New Rebuttals Fail.

Below, and in her opening brief, Ms. Izzo raised specific challenges under *PHLX*. OB at 22-23; A477-79. Defendants offer no specific counterarguments; indeed, they admitted at the settlement hearing that the release encompassed "*tangential* or other claims of little value." A877 (emphasis added). Plaintiffs, for the first time on appeal, make self-contradictory and meritless rebuttals.[4]

[4] Plaintiffs contend that the Special Master surveyed claims "that were not pleaded by Plaintiffs." PAB at 30. The Special Master reviewed claims advanced by several objectors, but not Ms. Izzo. SMR at 62-64.

a. Derivative Claims.

Ms. Izzo argued that the release inappropriately extends to derivative claims involving, for example, AMC's Hycroft Mine investment and the Compensation Committee's decision to amend AMC's long-term incentive plan. OB at 22-23. The trial court concluded that these facts were "mentioned in the complaint [but] not advanced as claims or investigated." MO at 48 n.159. Plaintiff contends that the release does not extend to the Hycroft investment because it occurred prior to the class period, but would encompass a compensation claim. PAB at 24-25. Yet the Board's decision to amend the compensation plan ***also*** occurred before the August 2, 2022 Class period. *See* A170 (alleging decision made July 25, 2022). If the release "relate[s] to" one, it covers both.

In any event, Plaintiffs' argument that derivative claims do not "relate to" share ownership during the class period is pure *ipse dixit*. They cannot deny that a stockholder must have owned shares during the class period to challenge either issue. *Compare* PAB at 24 *with Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984).

Defendants, meanwhile, appear to have taken the opposite tack. Shortly after the Answering Briefs were filed, Defendants moved to dismiss a lawsuit in Massachusetts federal court concerning, *inter alia*, challenges to the Hycroft investment. *See* Ex. 3 at 8, 9. Without discussing "conjunctive limitations,"

Defendants argued that "[a]ny claims against AMC would also be barred and enjoined" by this settlement. *See id.* at 11.

b. Securities Claims.

The Answering Briefs also disagree concerning securities claims. Defendants argue that the release cannot be read to extend "in any conceivable way to any word or concept in the Complaints." DAB at 26. Plaintiffs maintain that merely mentioning "liquidity hurdles" extinguishes associated securities claims. PAB at 25.

Neither brief confronts the obvious due process problem. The trial court closed the record on June 30, 2023, and it did not consider submissions thereafter. MO at 6. Because the settlement may release securities claims related to subsequent statements (PAB at 25), "absent class members . . . could have their claims released without an opportunity to be heard." *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 433-34 (Del. 2012) (quoting Edward P. Welch, *et al.*, *Mergers and Acquisitions Deal Litigation Under Delaware Corporation Law* § 11.01 (2012)).

Plaintiffs sold Defendants immunity from violations of Delaware law and federal securities claims for over a month after the settlement hearing for any material misrepresentation connected "in any way" to an allegation in the Complaints. This violates due process and disregards *PHLX*'s limitations.

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

Similarly, the release violates *Griffith*'s holding. Because "a release that directly or indirectly binds absent interested parties is limited by the Due Process Clause," it may not "release claims based on a set of operative facts that will occur in the future." 283 A.3d at 1134, 1137.

Appellees cannot cabin *Griffith* to releases that explicitly mention future stockholder votes. *See* PAB at 26-27; DAB at 28-29. The *Griffith* Court also analyzed future events unrelated to any vote—such as a future corporate scandal—that might implicate an overbroad release. *Id*. at 1136. Ms. Izzo offered a similar example: a federal securities claim. OB at 26. Appellees did not respond because the example is fatal to their argument.

Damages are an element of a federal securities claim under Rule 10b-5, and losses often may not be measured until the market responds to the correction of a misleading statement. *See, e.g.*, *Stanley Black & Decker, Inc. v. Gulan*, 70 F. Supp. 3d 719, 727-28 (D. Del. 2014) (discussing economic loss and loss causation). Assume an AMC stockholder purchased shares in reliance upon Aron's statements related to this action during the class period. If those statements are revealed to be materially misleading a year later, a securities claim would "relate to" ownership during the class period since that is when the purchase occurred. But it would also arise out of unknowable future events.

Defendants' need for this overbroad protection is obvious given the post-settlement catastrophe. In class settlements, "[d]efendants are motivated to reach an agreement that provides the broadest possible protection from future disputes." *Griffith*, 283 A.3d at 1133-34. Contrary to Plaintiffs' Brief, Defendants could not have protected themselves through a new, fair vote. PAB at 1, 35. Stockholder ratification does not extinguish claims: it applies a deferential standard of review. *Griffith*, 283 A.3d at 1136. That protection only extends to the specific transaction that Defendants seek to approve; thus, a vote on the Conversion would not affect claims arising from the creation of the APEs (let alone tangential claims like Hycroft). *See Gantler v. Stephens*, 965 A.2d 695, 713 (Del. 2009).

Defendants, while pursuing an unconstitutionally overbroad release, never echoed Plaintiffs' assurance that after the settlement "[AMC's] market cap would be in an upward trajectory." A721. They anticipated the value of protection greater than they could achieve through a fair vote, a *PHLX*- and *Griffith*-complaint release, or even victory at trial.[5]

[5] Defendants' discussion of *res judicata* misses the mark. DAB at 29. A trial court's holdings concerning the scope of a release do not bind later courts. OB at 26. But a trial court can still refuse to approve a settlement that, on its face, applies to unknown future events. Due process obligates it to do so. *Griffith*, 283 A.3d at 1137.

C. This Court's Limitations on Settlements are Workable.

Finally, Appellees argue that a compliant release was "unworkable" (PAB at 27) or beyond "any court's power to grant." DAB at 27. They cite supposed similarities with settlements "commonly found" in Delaware. DAB at 27 n.98; PAB at 22 & n.68. Former Chancellor Chandler memorably decried such reliance as the "tyranny of the form." *UniSuper Ltd. v. News Corp.*, 898 A.2d 344, 348 (Del. Ch. 2006). As this Court emphasized, past settlements offer little precedential value without evidence that the scope of the release was considered. *Griffith*, 283 A.3d at 1136.

Appellees' arguments are weaker where the "form" references external documents. A past settlement's compliance with *PHLX* or *Griffith* must be evaluated against the complaint it references. The Answering Briefs make no attempt to do so. Meanwhile, the unconsolidated complaints here clearly included tangential allegations. *See* MO at 48 n.159 ("certain facts mentioned in the complaint were not advanced as claims or investigated").

Appropriate limitations were not only workable but have worked. Past litigants have "avoid[ed] releasing future claims" by restricting a release to "claims that were or could have been asserted through the date of the settlement hearing." *Griffith*, 283 A.3d at 1136 (quoting *In re Medley Cap. Corp. S'holders Litig.*, C.A.

No. 2019-0100, at 33 (Del. Ch. Nov. 19, 2019) (Trans.)). Appellees could have done the same.

PHLX and *Griffith* protect the constitutional due process rights of absent stockholders. If an appropriate settlement were truly "unworkable," then the settlement must yield, not constitutional rights. An appropriate release was available. But it would not have protected Defendants from the looming post-settlement disaster.

II. THE TRIAL COURT ERRED BY APPROVING A NON-OPT-OUT SETTLEMENT.

Approving a non-opt-out settlement violated due process (which is reviewed *de novo*) and was an abuse of discretion. Appellees' counterarguments (a) ignore differences between Delaware and federal practice; (b) baselessly contend that an opt-out was not mandated by due process; (c) wrongly maintain that no valuable claims remain; and (d) continue to assert that an opt-out was not feasible.

A. Due Process Protections Require an Opt-Out Rather than Rule 23(b)(3) Certification.

Due process required an opt-out because, at the time of certification, Plaintiffs did not represent stockholders who opposed the transaction. OB at 29-37. Appellees ignore the elephant in the room: by the time Plaintiffs sought to certify a class, they had abandoned the intent to enforce an injunction, and instead intended to "leverage" any injunction for monetary relief. A325. In federal court, this would likely require a Rule 23(b)(3) certification to preserve class members' due process rights. Delaware protects absent stockholders differently.

In *Wal-Mart Stores, Inc. v. Dukes*, the U.S. Supreme Court considered the "serious possibility" that due process requires an opt-out in Rule 23(b)(2) class actions. 564 U.S. 338, 363 (2011). After *Wal-Mart*, federal courts have shown reluctance to certify Rule 23(b)(2) classes, even when they include injunctive relief, if they release monetary claims. For instance, the Third Circuit not only vacated

certification of a Rule 23(b)(2) class despite a settlement including injunctive relief, it considered the attempt to certify an injunction class a "red flag" because the parties received the benefits of a Rule 23(b)(3) settlement—"a broad class-wide release of claims for money damages from defendants, and a percentage-of-fund calculation of attorneys' fees for class counsel"—while "sidestep[ping]" notice and opt-out protections.[6] *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 329 (3rd Cir. 2019). That is what Plaintiffs did here.

Delaware law addresses *Wal-Mart*'s due process concerns differently. In general, "actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2)." *Celera*, 59 A.3d at 432-33 (quotation omitted). While opt-outs are not mandatory in every 23(b)(2) settlement, "circumstances may arise where discretionary opt-out rights should be granted, such as where the class representative does not adequately represent the interests of particular class members, triggering due process concerns." *Id.* at 435.

Had Plaintiffs settled for monetary relief in federal court, a challenge to 23(b)(2) certification would have been appropriate. Delaware gives plaintiffs

---

[6] On remand, the district court refused certification under 23(b)(2) where the settlement would "release of millions of damages claims. . . ." *In re Google, Inc. Cookie Placement Consumer Privacy Litig.*, 2023 WL 4420431, at **5-6 (D. Del. July 10, 2023).

greater latitude to seek 23(b)(2) approval—but contemplates an opt-out if the plaintiffs are not adequate representatives. The conflict between Plaintiffs (the Pessimists who considered dilution necessary to avoid bankruptcy) and the objecting stockholders (the Optimists who opposed giving Defendants nearly-unlimited power to dilute stockholders) mandated an opt-out.

Wal-Mart and *Celera* highlight another distinction between federal and Delaware practice. *Celera* permits a 23(b)(2) class to seek monetary damages in addition to declaratory or injunctive relief "so long as the claim for equitable relief" is predominant. 59 A.3d at 433. *Wal-Mart* rejected that predominance test, holding that damages may be available if "incidental to requested injunctive and declaratory relief." 564 U.S. at 363-64. *Wal-Mart* further distinguishes between "'equitable' remedies generally" (including equitable damages) and "injunctions and declaratory judgments"—only the latter can sustain "incidental monetary damages." *Id*. at 365. The U.S. Supreme Court has not spoken to whether Delaware's predominance test satisfies due process at settlement when plaintiffs abandon their intent to enforce a class-wide injunction.

B. A Non-Opt-Out Settlement is a Denial of Due Process and an Abuse of Discretion.

Here, Plaintiffs failed to represent "the interests of particular class members, triggering due process concerns." *Celera*, 59 A.3d at 418. Plaintiffs' chosen relief did not simply differ from that "thought to be what would be desired by other

members of the class." *Prezant v. DeAngelis*, 636 A.2d 915, 924 (Del. 1994) (quotation omitted)). Plaintiffs viewed the lifting of the Status Quo Order as part of the settlement's "relief." PAB at 31. They lauded the Conversion as ***benefitting*** AMC, asserting there was "no basis to assume that the market cap would be cut by half" and that it would put "market cap . . . in an upward trajectory." A721. Not only were Plaintiffs wrong, they sat in diametric opposition to the stockholders whose will Defendants subverted—those who wished to vote "no." MO at 76. It was "a violation of due process to permit them to obtain a judgment binding absent plaintiffs." *Prezant*, 636 A.2d at 924 (quotation omitted).

Plaintiffs—who could have voted "yes" if they believed that the transaction was the only alternative to bankruptcy—haggled with Defendants over the percentage of APE-holder's equity that would be transferred to dissenting common stockholders to sterilize their votes. In that context, it makes little sense to say that Plaintiffs' rights were injured. Their rights were ***enhanced***.[7] Permitting them to bargain for dissenters was a denial of due process.[8]

---

[7] Other doctrines of law draw similar distinctions. Had Plaintiffs proved liability arising out of the Conversion, fully-informed stockholders who voted in favor of the transaction could be barred from recovery by the doctrine of acquiescence. *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *21 (Del. Ch. Aug. 18, 2006).

[8] Defendants' (and the trial court's) reliance on *CME Group, Inc. v. Chicago Board Options Exchange, Inc.* overlooks a key fact in that case. DAB at 32-34; MO

It was also an abuse of discretion. Appellees limit *Celera* to cases where a large stockholder appears.[9] PAB at 35-36; DAB at 34. But "a court's ruling is rarely limited to the specific facts before it." *In re Fox Corp./Snap Inc.*, -- A.3d --, 2024 WL 176575, at *11 (Del. Jan. 17, 2024). Nothing in Delaware law values large stockholders' due process rights over smaller investors' rights. This case attracted an unprecedented number of objectors, some of whom traveled great distances to make their voices heard. A783-84, A796. The number of opt-outs would undoubtedly have been greater if (a) stockholders were given notice of an opt-out right, and (b) notice were distributed in a manner designed to let them exercise that right.[10] OB at 12 n.4. Given the hurdles set before dissenting stockholders, the fact

---

at 21 n.76. While the *CME* court certified a class including two groups of stockholders with opposing interests, separate counsel represented each group. 2009 WL 1547510, at *5 (Del. Ch. June 3, 2009). That did not happen here.

[9] Defendants resort to mind-reading, asserting that Ms. Izzo "would have sought an injunction, not monetary damages." DAB at 35. To the contrary, her objection and exceptions sought an opt-out to preserve ***both*** a possible injunction and monetary damages. *Compare id*. (citing A468) *with* A469 ("[T]he unique circumstances of this case allow the Court to provide complete post-trial relief even if a preliminary injunction motion were unsuccessful."); A598-99 (discussing damages claims).

[10] Plaintiffs refer to "only" 2,850 timely objectors (PAB at 36)—but omit that the parties gave the majority of recipients no more than two business days to respond. OB at 12 n.4. Appellees' failure put the trial court in the awkward position of walking back its earlier order that notice "will only work if postcards will generally be delivered by May 24, 2023." MO at 39.

that thousands responded—when normally few appear—speaks to the need for an opt-out.

C. An Opt-Out Preserves Valuable Rights.

Appellees ignore viable claims preserved by an opt-out: the claims Plaintiffs advanced in the trial court. PAB at 30-31. Allegheny's complaint sought "damages in an amount which may be proven at trial." AR41. At settlement approval, Plaintiffs maintained that "[t]he claims against the AMC Board for its conduct involve both equitable relief ***and monetary damages***." A333 (emphasis added); SMR at 71 (same). At the settlement hearing, Plaintiffs' counsel discussed the possibility of post-Conversion monetary damages if AMC avoided bankruptcy, estimating that "the maximum post-trial damages is [$]692 million." A729-30, A733. An opt-out would have preserved dissenters' share of the $692 million in damages claims that Plaintiff identified.

That analysis only includes claims Plaintiffs prosecuted, not the numerous claims Plaintiffs didn't. For instance, the trial court described the truthfulness of Defendants' statements "accompanying the APE issuance that no conversion was intended" as a "thin reed" to uphold an injunction. MO at 72. Perhaps. But the trial court put no value on federal securities claims arising from those statements. *Id*.; *cf.* A729 (Plaintiffs' counsel arguing that a higher post-transaction share price implies lower potential post-trial damages).

Plaintiffs' contention that "no viable claim" for money damages exists contradicts their $692 million trial court damages estimate. That estimate adopted Plaintiffs' Panglossian theory that Defendants' transaction would not harm AMC. We now know actual damages were far worse.

D. An Opt-Out was Feasible.

Finally, Appellees repeat that an opt-out was not feasible because "the claims and relief sought are class-wide." PAB at 36-37 (citing MO at 32). This is a tautology: "class-wide" claims and relief will exist in almost every class action, with or without an opt-out.

Plaintiffs correctly described the settlement as "essentially a common fund." A631. The consideration was liquid, publicly-traded stock, freely convertible to cash. Delaware litigants, like their federal counterparts, are capable of organizing opt-out common funds. Appellees chose not to do so.

Plaintiffs misunderstand the settlements in *PHLX* and *Nottingham Partners v. Dana*.[11] PAB at 36-37. In *PHLX*, approximately 83% of the relief involved rescission or cancellation of stock returned to the company—not to stockholders.[12] 945 A.2d at 1137. In *Nottingham Partners*, "the *primary* relief sought and *obtained*

---

[11] 564 A.2d 1089 (Del. 1989).

[12] The rump common fund in *PHLX* was "primarily for payment of attorneys' fees." 945 A.2d at 1137.

. . . was declaratory, injunctive, and rescissory," such as amendments to bylaws that applied to all stockholders. 564 A.2d at 1093, 1096-97 (emphasis in original). It would be impossible for a *PHLX* or *Nottingham Partner* stockholder to opt-out and decline their settlement's benefits. AMC's stockholders could have declined to accept shares—just like money—had Appellees permitted it.

Defendants' challenges hold no water. DAB at 36-37. In Delaware, the sufficiency of notice (which need be provided only to record holders, MO at 35-36) says nothing about the feasibility of providing an opt-out to beneficial holders. Again, if federal securities litigants can oversee common-fund settlements with opt-outs, Delaware litigants can. Meanwhile, it is obvious that a post-conversion opt-out settlement was feasible, and is today. On remand, a plaintiff pursuing the preserved claims will have time to move for class certification and provide effective notice to the class, including instructions for an opt-out.

Appellees cannot overcome the fundamental, constitutional issues requiring an opt-out. Defendants negotiated a common fund settlement that released the claims for monetary damages of "no" voters—who believed their intervention had already saved AMC, rendering dilution unnecessary—with Plaintiffs who believed that their lawsuit, if successful, would lead to AMC's bankruptcy. "No" voters were not at the table. Due process, Delaware law, *Celera*, and *Prezant* require an opt-out.

III. PLAINTIFFS ARE NOT ADEQUATE REPRESENTATIVES.

Only Plaintiffs addressed this issue. Their responses fall short and, even if reviewed for abuse of discretion, are troubling.

A. Plaintiffs are Constitutionally Inadequate.

The Opening Brief highlighted the due process error: once Plaintiffs decided not to enforce an injunction, they no longer sought relief that could "be thought to be what would be desired by other members of the class"; as such it would be "a violation of due process to permit them to obtain a judgment binding absent plaintiffs." OB at 39-40 (quoting *Prezant*, 636 A.2d at 924 (quotations omitted)). The problem is not, as Plaintiff contends, that "a small faction of Class members objected to the Settlement."[13] PAB at 43. It is that Plaintiffs sued purporting to defend stockholders from Defendants' scheme to frustrate stockholders' ability to vote "no." They settled championing the cause of stockholders who voted "yes." The spirited opposition to Plaintiffs' settlement merely highlights a problem that would exist no matter how many stockholders objected.

Plaintiffs' attempt to distinguish *Dierks v. Thompson*, 414 F.2d 453 (1st Cir. 1969), disregards the opinions of this Court and the United States Court of Appeals for the D.C. Circuit, both of which recognized *Dierks*' relevance to adequacy.

---

[13] Plaintiffs' arguments concerning the number of objectors suffers from the same problems with notice identified in note 10, *supra*.

Compare PAB at 45-46 *with Prezant*, 636 A.2d at 923-24 (quoting *Dierks* in context of Rule 23(a)(4)); *Nat'l Assoc. of Regional Med. Programs, Inc. v. Mathews*, 551 F.2d 340, 346 (D.C. Cir. 1976) (same). Plaintiffs' argument rests on *Dierks*' use of the word "typical" to describe ***litigants*** and not, as in Rule 23(a)(3), ***claims***. *Dierks*, 414 F.2d at 456. This Court correctly recognized that *Dierks* discussed both typicality and adequacy of representation (*id.* at 456 n.4), and its conclusions about whether to "recognize plaintiffs as a representative" squarely addressed Rule 23(a)(4). As in *Dierks*, Plaintiffs "were typical of only one of two conflicting groups." *Id*. at 456.

Plaintiffs would limit *Prezant* to its specific facts, where a trial court omits an adequacy ruling. But "[i]nterpreting precedent solely on the facts, rather than the reasoning stated by this Court, undermines the predictability of our corporate law." *Fox*, 2024 WL 176575, at *11 n.72. *Prezant*'s teachings go further and apply directly to this case. OB at 39-40, 46.

B. An Adequacy Finding Was an Abuse of Discretion.

While due process issues are reviewed *de novo*,[14] Plaintiffs' adequacy is contestable even as an exercise of discretion.[15] PAB at 39-43. Delaware's "loose,

---

[14] *Celera*, 59 A.3d at 428.

[15] In a footnote, Plaintiffs maintain that the burden to establish adequacy must shift to objectors after a *prima facie* showing because "a burden shift of some type

multifaceted analysis" of antagonism between representatives and class members includes "the magnitude of the representative's financial interest in the suit compared with other class members." Wolfe & Pittenger, 2 CORP. & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 12.02 (2023). For instance, then-Chancellor Strine declined to appoint a plaintiff with shares worth $400, commenting that this was "not worth the phone call to a lawyer," and that "I don't understand how such a party would have an adequate economic incentive." *Id*. (quoting *In re NYSE Euronext S'holders Litig.*, Consol. C.A. No. 8136-CS, at 7–8 (Del. Ch. Mar. 8, 2013) (Trans.)). Franchi's 32 shares were less valuable. Even Allegheny's holdings were small enough that the $5,000 incentive award covered its post-Conversion losses.

The trial court's decision contrasts with the protections that Congress provided to stockholders in federal court. Stockholder claims are not removable

---

must occur." PAB at 40 n.140. This case demonstrates that a "burden shift," in practice, amounts to a presumption favoring plaintiffs.

Representatives must possess "a basic familiarity with the facts and issues involved in the lawsuit." PAB at 40 (citation omitted). Yet the trial court found Plaintiffs adequate "in the absence of substantiated argument or evidence to the contrary," citing only Plaintiffs' affidavits. MO at 15 n.54. This put no weight on Franchi's failure to accurately disclose his ownership. OB at 43 (citing A194; MO at 46-47). Shifting the burden to objectors, who must respond on accelerated schedules without a right of discovery, is inconsistent with the "rigorous analysis" required of class settlements. *Celera*, 59 A.3d at 432.

because Congress exempted claims based upon a state's "statutory or common law" from the Securities Litigation Uniform Standards Act.[16] 15 U.S.C. §77p(d)(1)(A). In federal court, AMC stockholders would have two protections under the Private Securities Litigation Reform Act ("PSLRA"). First, it limits "professional plaintiffs" to five securities class actions in a three-year period. *See* 15 U.S.C. §78u-4(a)(3)(B)(vi). Franchi's litigation history would call his leadership into question.

Second, the PSLRA creates a rebuttable presumption that, all else equal, the most adequate plaintiff "has the largest financial interest in the relief sought by the class." 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(bb). The policy is straightforward: the larger the potential loss, the greater the incentive to achieve effective relief and avoid unfair settlements. The PSLRA does not explicitly favor institutional stockholders—except inasmuch as they have larger holdings. *See* Gorsuch, *infra* n. 16, at 29-30 (noting decisions refusing to appoint an institutional stockholder). In contrast, Allegheny held a relatively small stake because it sold most of its shares at a profit in the short squeeze. OB at 10. Ms. Izzo alone had ***three times greater*** financial interest than ***both Plaintiffs combined***, and would have been presumptively

---

[16] *See also* Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, WASHINGTON LEGAL FOUNDATION WORKING PAPER at 10 & n.32 (Apr. 2005) (describing Congress's intent in SLUSA to "prevent plaintiffs from seeking to evade the protections that Federal law provides" (quotation omitted)), https://www.wlf.org/2005/04/08/publishing/settlements-in-securities-fraud-class-actions-improving-investor-protection/.

favored as representative in federal court. *Compare* OB at 10 (Plaintiffs holding 911 AMC shares and 879 APEs, collectively) *with* A464-65 (Ms. Izzo's holdings of 3,106 AMC shares and 4,244 APEs).

In this light, the trial court's failure to assign weight to Mr. Munoz's withdrawal raises concerns.[17] Mr. Munoz, alone among the plaintiffs, stood to lose out if Plaintiffs' counsel's assurances concerning AMC's post-Conversion performance proved overoptimistic. OB at 10. In federal court, Mr. Munoz's withdrawal would favor intervention by Ms. Izzo (or another large stockholder). In exercising discretion—particularly given Plaintiffs' counsels' assurances that the oncoming disaster was a "wild supposition"—the trial court should have considered that the only named plaintiff who would suffer if AMC's share price plummeted refused to support the settlement. *See Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005) (abuse of discretion occurs where a relevant factor that should have been given considerable weight is not considered). It did not.

---

[17] Plaintiffs falsely criticize Ms. Izzo for "shifting position" on Mr. Munoz. PAB at 41. Her objection "reason[ed] that [Mr. Munoz] may no longer support the settlement, as he is the only Plaintiff who will suffer a financial loss that will not be offset by the requested incentive fee." A463. Her evidence of Mr. Munoz's change of heart comes from the uncontroverted fact—admitted by Plaintiffs' counsel—that he ***called Objector's counsel***. A556-58. As for "[Plaintiffs'] counsel's clear explanation" of Mr. Munoz's position, it is inadmissible hearsay: the record lacks any testimony from Mr. Munoz, rather than his former counsel. A364; D.R.E. 802.

Due process and this Court's precedent in *Prezant* precluded certification of Franchi and Allegheny as representatives. But Plaintiffs' small stockholdings, coupled with the unusual last-minute refusal of the only significant stockholder plaintiff to support the settlement, call into question the discretionary decision to deem these stockholder plaintiffs adequate.

CONCLUSION

For the foregoing reasons, and those set forth in the opening brief, 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.

HALLORAN FARKAS + KITTILA LLP

By: */s/ Theodore A. Kittila*
Theodore A. Kittila (Bar No. 3963)
James G. McMillan, III (Bar No. 3979)
5801 Kennett Pike, Suite C/D
Wilmington, Delaware 19807
Tel: (302) 257-2025

Attorney for Rose Izzo
Objector Below-Appellant

MARGRAVE LAW LLC
Anthony A. Rickey (Bar No. 5056)
3411 Silverside Road
Baynard Building, Suite 104
Wilmington, Delaware 19810
Tel: (302) 604-5190
Fax: (302) 258-0995

DATED: January 26, 2024