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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MOELIS & COMPANY Defendant-Below/ Appellant, v. WEST PALM BEACH FIREFIGHTERS' PENSION FUND, on behalf of itself and all other similarly-situated Class A stockholders of MOELIS & COMPANY, Plaintiff-Below/ Appellee.	Case No. 340, 2024 Court Below: Court of Chancery; C.A. No. 2023-0309-JTL

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Moelis appeals from: (i) the Court of Chancery's decision that this action is not time-barred by the equitable doctrine of laches; (ii) the Court of Chancery's decision that the Invalidated Provisions of Moelis's Stockholders Agreement are facially invalid under Section 141(a) of the DGCL; and (iii) the Court of Chancery's exercise of its discretion in awarding fees to plaintiff's counsel.

The appeal turns on a simple question: does Section 141(a) impose any limits on the extent to which board power may be constrained by contract? If so, the Invalidated Provisions—which dictate or constrain effectively *every imaginable board-level action*—cannot stand. In the words of two leading corporate law scholars: "**If DGCL § 141(a) imposes any restrictions at all, the stockholder governance agreement at issue … must violate those limits.**"[1]

Moelis appears to recognize this. It relies entirely on an all-or-nothing argument that Section 141(a) imposes no relevant limits whatsoever. That argument fails. Section 141(a) does impose limits on the extent to which board power may be constrained, by contract or otherwise. That is the consensus of generations of Delaware case law dating back to Chancellor Seitz's seminal 1956 decision in *Abercrombie v. Davies*, 123 A.2d 893 (Del. Ch. 1956).

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[1] Marcel Kahan & Edward Rock, *Section 122(18): A proposed compromise*, HARVARD FORUM ON CORPORATE GOVERNANCE (June 10, 2024) (Compendium 1).

The Court of Chancery expertly applied this robust body of law to strike down the Invalidated Provisions. This Court should affirm that decision in its entirety. But even a narrower reading of Section 141(a) would not change the result. Unless this Court declares the statute an effective nullity, and thereby overturns Delaware's entire multigenerational canon of Section 141(a) case law and its related public policy of director-centric governance, the Invalidated Provisions cannot stand.

This Court should also affirm the Court of Chancery's decision finding plaintiff's claims timely. Where a corporation is being managed pursuant to an *ongoing* facially invalid governance arrangement, no timeliness principle prevents a court from declaring that arrangement unlawful and putting it to an end. Accordingly, both Moelis's laches argument (the time for a facial challenge has come and gone) and its *amici*'s directly contradictory ripeness argument (the time for a facial challenge has not yet arrived) should be rejected.

Finally, there is no basis for finding the Court of Chancery abused its broad discretion in awarding fees. The court faithfully applied the *Sugarland* factors in a manner consistent with precedent, and its exercise of discretion should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The court below correctly rejected Moelis's laches defense on three independent grounds: (i) the Invalidated Provisions are void and therefore cannot be validated by laches; (ii) plaintiff's claims are, in any event, timely under either the "continuing wrong" or "separate accrual" methods; and (iii) Moelis has failed to demonstrate prejudice, a prerequisite to laches.

2. Denied. The court below correctly held the Invalidated Provisions are facially invalid under Section 141(a). Moelis's defense of the Invalidated Provisions rests on the extreme position that Section 141(a) imposes no limits whatsoever on the extent to which board power may be constrained in its Stockholders Agreement. That argument collides with generations of Delaware case law to the contrary. The court below correctly applied this law, and its decision should be affirmed in its entirety. But even if the Court were to adopt a narrower interpretation of Section 141(a), the Invalidated Provisions would still be facially invalid. Moelis's backup argument, that the Invalidated Provisions can operate validly in some circumstances, boils down to the irrelevant truism that the provisions do not operate invalidly when they do not operate at all. That does not defeat a facial challenge.

3. Denied. The court below did not abuse its discretion in approving plaintiff's requested award of fees and expenses. Moelis's argument rests on a mischaracterization of the decision below. The court did not adopt an improper

"either-or" approach, but rather faithfully exercised its broad discretion in applying the *Sugarland* factors and awarded a fee consistent with substantial precedent that Moelis provides no basis for this Court to disturb.

STATEMENT OF FACTS

I. The Stockholders Agreement

On the day before its shares began trading publicly, Moelis entered a Stockholders Agreement (A0125–50) with Ken Moelis—its founder, CEO, and then-majority stockholder—and other entities under his control. *West Palm Beach Firefighters' Pension Fund v. Moelis & Company (Moelis II)*, 311 A.3d 809, 824–25 (Del. Ch. 2024). The Stockholders Agreement included provisions devised to ensure Ken Moelis's continued control over the business and affairs of the corporation even in scenarios where his voting power fell below a majority or where he lost the support of his fellow directors. *Id.* at 865–66.

Five aspects of the Stockholders Agreement, described herein as the "Invalidated Provisions," were held facially invalid by the court below and are relevant to this appeal: (i) the Pre-Approval Requirements; (ii) the Recommendation Requirement; (iii) the Vacancy Requirement; (iv) the Size Requirement; and (v) the Committees Composition Provision. The relevant facts are largely limited to the substance of these five provisions.[2]

The Pre-Approval Requirements, found in Section 2.1 of the Stockholders Agreement, compel Moelis's directors to secure Ken Moelis's prior approval before

[2] Plaintiff necessarily provides only a concise summary. The full factual context, including the text of each Invalidated Provision, is accurately presented by the court below in *Moelis II*. *See* 311 A.3d at 823–28.

taking any of eighteen categories of action. *Moelis II*, 311 A.3d at 825–26; A0133–34. The eighteen enumerated categories read like the result of a brainstorming session undertaken to identify any conceivable board action. They cover the hiring and firing of senior executives (including Ken Moelis as CEO), the most important species of one-off board decisions (including whether to amend governing documents, enter fundamental transactions, issue stock or dividends, enter material contracts, incur significant debt, or adopt a rights plan), and the most important aspects of the continuing management of the business (including the adoption of the corporation's annual budget and business plans, the entry into new lines of business, and changes to the corporation's taxable or fiscal year). *Id.*[3]

The Recommendation Requirement, found in Section 4.1(c) of the Stockholders Agreement, compels Moelis's directors to recommend stockholders vote in favor of Ken Moelis's designees for election to the Board, regardless of whether the incumbent directors actually believe those designees should be elected in independent exercise of their fiduciary judgment, by requiring the inclusion of Ken Moelis's designees "in the slate of nominees recommended by the Board." *Moelis II*, 311 A.3d at 826–27; A0135.

[3] The Invalidated Provisions provide control rights to an entity controlled by Ken Moelis, and thus to him indirectly. For clarity, plaintiff describes these rights as belonging to Ken Moelis. Moelis has not argued this distinction makes a difference.

The Vacancy Requirement, found in Section 4.1(d) of the Stockholders Agreement, compels Moelis's directors to fill any Board vacancy created by the departure or removal of a Ken Moelis designee with another Ken Moelis designee, regardless of whether the incumbent directors actually believe that person should fill the relevant vacancy in independent exercise of their fiduciary judgment. *Moelis II*, 311 A.3d at 826–27; A135.

The Size Requirement, found in Section 4.1(a) of the Stockholders Agreement, compels the corporation to use its best efforts to maintain a Board with not more than 11 seats unless Ken Moelis consents otherwise in writing, regardless of whether the incumbent directors actually believe that the size of the Board should be maintained at 11 or fewer seats in independent exercise of their fiduciary judgment. *Moelis II,* 311 A.3d at 826–27; A0135.

The Committees Composition Provision, found in Section 4.2 of the Stockholders Agreement, compels Moelis's directors to, at Ken Moelis's direction, populate Board committees with a number of Ken Moelis designees proportionate to the number of his designees on the Board as a whole, regardless of whether the incumbent directors actually believe any committee should be populated in that manner in independent exercise of their fiduciary judgment. *Moelis II,* 311 A.3d at 827–28; A0136.

II. The Litigation and Judgment

On March 13, 2023, plaintiff brought suit in the Court of Chancery seeking a declaration that provisions of the Stockholders Agreement are facially invalid under Section 141(a) of the DGCL and related principles of Delaware common law. A0018–43. Plaintiff also sought a declaration that the Committees Composition Provision is invalid under Section 141(c) and that certain aspects of the Pre-Approval Requirements are invalid under Sections 109, 242, and 251 of the DGCL (in addition to Section 141(a) of the DGCL). *Id.*

On April 21, 2023, Moelis answered the complaint and raised affirmative defenses, including that plaintiff's claims are time-barred by the equitable doctrine of laches. A0048–80. Cross-motions for summary judgment, briefing, and oral argument followed. A0081–1657 (briefing); A1673–1757 (argument transcript).

On February 12, 2024, the court issued its first opinion, both rejecting Moelis's laches defense and holding that plaintiff's claims are ripe. *West Palm Beach Firefighters' Pension Fund v. Moelis & Company (Moelis I)*, 310 A.3d 985 (Del. Ch. 2024).

On February 24, 2024, the court issued its second opinion, holding that each of the five Invalidated Provisions are facially invalid under Section 141(a). *Moelis II*, 311 A.3d at 866–70 (Pre-Approval Requirements); 870–72 (Recommendation Requirement); 872–73 (Vacancy Requirement); 873–74 (Size Requirement); 876–

77 (Committees Composition Provision). The court also held the Committees Composition Provision was invalid under Section 141(c). *Id.* at 876–77. Because it held the Pre-Approval Requirements collectively violated Section 141(a), the court did not reach plaintiff's alternative argument that certain individual approval rights violated other sections of the DGCL. The court held certain other provisions of the Stockholders Agreement were not facially invalid (*id.* at 874–75), but plaintiff does not challenge those holdings on appeal.

On March 4, 2024, the court entered a stipulated form of judgment implementing its holdings in *Moelis I* and *Moelis II*. Ex. C to Appellant's Opening Brief ("AOB").

On July 18, 2024, the court held a hearing on plaintiff's motion for an award of fees and expenses in the total amount of $6 million. At the conclusion of the hearing, the court issued a bench ruling applying the *Sugarland* factors and granting plaintiff's requested award. *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, C.A. No. 2023-0309, Tr. 36–61 (Del. Ch. Jul. 18, 2024) (Transcript) ("*Moelis III*").

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY REJECTED MOELIS'S LACHES DEFENSE

A. Question Presented

Whether plaintiff's claims—which challenge the facial statutory validity of an *ongoing* governance arrangement—are barred by the equitable doctrine of laches. (A0392–94, A1131–45; *Moelis I*, 310 A.3d at 993–1003).

B. Scope of Review

The decision below was based on undisputed facts and decided as a question of law subject to *de novo* review. *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 768 (Del. 2013).

C. Merits of Argument

1. Laches cannot bar a statutory challenge to an ongoing governance arrangement

Moelis argues plaintiff's claims are barred by laches. AOB13–23. At bottom, the argument is: *even if our governance arrangement facially violates fundamental principles of Delaware law, we may nevertheless maintain that arrangement in perpetuity, simply because we got lucky and no one challenged it for three years*.

This radical notion is inconsistent with Delaware law. Indeed—as the court identified below, but Moelis does not address on appeal—Chancellor Seitz's decision in *Abercrombie* applied Section 141(a) to invalidate a contract entered nearly five years before anyone challenged it. *See Moelis I*, 301 A.3d at 999 (citing

Abercrombie, 123 A.2d 893). Laches was not an issue. That is unsurprising, because three independent grounds foreclose a laches defense. The court below correctly rejected Moelis's laches defense on each of these three independent grounds: (i) the Invalidated Provisions are void; (ii) plaintiff's claims are timely under either the "continuing wrong" or "separate accrual" methods of determining claim accrual; and (iii) Moelis failed to show prejudice, which is prerequisite to laches.

The Invalidated Provisions are void. The court correctly held laches could not bar plaintiff's claims because equitable defenses cannot validate void agreements, and the Invalidated Provisions are void. *Id.* at 994. This holding is consistent with established Delaware law. *See, e.g.*, *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059 (Del. 2011) ("contracts that offend public policy . . . are deemed *void* as opposed to voidable"); *see also Paramount Comms. v. QVC Network*, 637 A.2d 34, 51 (Del. 1994) (counterparty "never had any vested contract rights" in provision unlawfully constraining board's exercise of fiduciary duties).

Indeed, another Vice Chancellor reached precisely the same conclusion in another recent Section 141(a) case. There, the plaintiff investor—represented by the Delaware law firm now representing Moelis—argued a CEO's employment contract was "facially illegal"[4] and "void as against public policy because it impermissibly

[4] *Politan Capital Mgmt. v. Masimo Corp.*, C.A. No. 2022-0948-NAC (Del. Ch.), (*continued on next*)

limit[ed] the [directors'] ability to exercise their fiduciary duties." *Id.* at 23 (capitalization adjusted). The plaintiff responded to a laches defense arguing "because the [agreement] is void, laches is inapplicable." *Id.* at 37. The court agreed, holding an agreement violating Section 141(a) is "void *ab initio* and that laches, therefore, does not apply." *Politan Capital Mgmt. v. Masimo Corp.*, C.A. No. 2022-0948-NAC, Tr. at 185 (Del. Ch. Feb. 3, 2023) ("*Politan*") (A2801).

Moelis now argues a contractual governance arrangement in violation of Section 141(a) is "voidable" and not "void." AOB15–16. It says this is because everything accomplished by the Invalidated Provisions could have been accomplished in its charter. *Id.* That argument fails on its premise. Moelis *could not* have accomplished what it accomplished through the Invalidated Provisions in its charter. The Invalidated Provisions are, by design, a dead-hand. Implemented contractually, they secure control rights for Ken Moelis that can never be removed or altered even in situations where Moelis's Board and stockholders wish to remove or alter them. That dead-hand effect could not be accomplished in a corporate charter, which remains subject to amendment under Section 242(b).

Further, Moelis fails to support its premise that the Invalidated Provisions could validly have been repurposed as charter provisions even in an amendable, and

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Plaintiff's Answering Brief in Opposition to Director Defendants' Partial Motion to Dismiss (Feb. 6, 2023) (Trans. ID 69082304) at 1.

therefore fundamentally different, form. It relies upon a mischaracterization of the decision below, saying the court held "Moelis had the power to bind itself to the challenged provisions … if they were implemented in its charter." AOB16. Not so. In fact, the court expressly recognized some might contravene public policy even if included in Moelis's charter. *Moelis II*, 311 A.3d 822, n.19. Questions concerning exactly which provisions could have been repurposed as charter provisions were "issues [] for another day," *id.*, because Moelis did not argue below that the Invalidated Provisions could have been included in its charter and were therefore merely voidable. *See* A0370–420, A1615–A1657 (argument not present in Moelis's briefing below). Accordingly, Moelis waived the argument.[5]

[5] These are, moreover, consequential issues with implications beyond this appeal. In *Jones Apparel Group v. Maxwell Shoe Co.*, the court recognized neither Section 102(b)(1) nor Section 141(a) authorize limitations on board authority "contrary to the laws of this State." 883 A.2d 837, 845–46 (Del. Ch. 2004) (Strine, V.C.). The *Jones* court suggested, without deciding, that some "serious intrusions on core director duties" could be invalid even in a charter—specifically identifying boards' statutory powers to approve mergers and certificate amendments (both notably implicated by the Pre-Approval Requirements). *Id.* at 851–52. These issues have taken on heightened importance following the enactment of Section 122(18), which was narrowed between its initial proposal and enactment to specify that it does not permit provisions "contrary to the laws of this State." 8 *Del. C.* § 122(18). The Court should decline Moelis's invitation to unnecessarily wade into this fraught area, without appropriate briefing, to reach arguments not preserved below.

Claim accrual principles preclude laches. The court also correctly held that, even if laches could theoretically apply, plaintiff's claims were timely under established claim accrual principles. *Moelis I*, 310 A.3d at 994–1000. Moelis's argument for rote application of 10 *Del. C.* § 8106's statute of limitations by analogy, running from initial adoption of the Invalidated Provisions, begs the question of when plaintiff's claims accrued. As the court explained: "[t]he plaintiff asserts a claim based on an ongoing statutory violation. The plaintiff does not argue that the invalid act happened when the Stockholders Agreement was executed and became complete at that point. The plaintiff contends that the on-going existence of the Challenged Provisions violates Section 141(a)." *Id.* at 995–96. The court further explained, at significant length, that Delaware law supports analyzing claims of this nature under either the "continuing wrong" or "separate accrual" methods. *Id.* at 996–1000. Under either, plaintiff's claims are timely because the Invalidated Provisions remain in effect, restrain and compel the Board today, and will continue to restrain and compel the Board into the future. *Id.* at 999–1000. The *Politan* court notably applied the same analysis and reached the same conclusion in rejecting the laches defense in that Section 141(a) case. *Politan* (A2801), Tr. at 187–88.

Moelis responds by insisting the laches analysis should track the analysis in cases challenging the adoption of a contract as a fiduciary breach. AOB19–20. As the court explained, however, these cases are fundamentally inapposite because

"[n]one involved statutory challenges and assertions of ongoing illegality." *Moelis I*, 310 A.3d at 998. Where entry into a contract constitutes a breach, but the contract does not require future unlawful conduct, the entry into the contract is the sole unlawful act. That is different from the situation here, where the Invalidated Provisions require Moelis to be operated unlawfully on an ongoing basis.

Moelis's secondary authority, *Kraft*, is unpersuasive for the reasons articulated by the court below. Specifically, *Kraft* erroneously relied on cases involving *voidable* acts. *Id.* at 998–99 (discussing *Kraft v. WisdomTree*, 145 A.3d 969 (Del. Ch. 2016)). *Kraft*, moreover, involved a challenge to a single fifteen-year-old share issuance, not an ongoing arrangement. *Id.* Nothing about the company's continuing operation was rendered unlawful. That is not the case here, where the Invalidated Provisions cause Moelis to be operated unlawfully on an ongoing basis.

The court also correctly explained that applying Moelis's rote laches analysis would have enormously pernicious policy implications. A corporation could "implement[] a governance arrangement that directly violated the most fundamental principles of the DGCL" and "as long as the arrangement managed to evade stockholder challenge for three years, the corporation could operate illegally in perpetuity." *Moelis I*, 310 A.3d at 996. Moelis responds by insisting the court below—a court of equity, applying an equitable doctrine—had no discretion to consider "policy interests." AOB20. That is incorrect. Policy considerations

necessarily inform a court's choice of an accrual method. *See Moelis I*, 310 A.3d at 995. Here, the relevant interests overwhelmingly favor plaintiff. A ruling for Moelis would result in the absurd regime cautioned against by the court below—one in which the mere passage of time would reward Delaware corporations with unique licenses to maintain statutorily-invalid governance arrangements.

The absence of prejudice precludes laches. The court also correctly held Moelis's failure to identify any prejudice precluded application of laches. *Id.* at 1000. Black letter law holds that a showing of prejudice is a prerequisite for application of laches. *Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000) ("there must be prejudice to the defendant," as an "essential element[] of laches"). Below, Moelis failed to even attempt to identify any cognizable prejudice supporting its laches defense. That continues to be the case on appeal. AOB21.

2. Future as-applied fiduciary suits are no substitute for a facial challenge

Moelis attempts to ameliorate the untenable policy implications of its defense by arguing plaintiffs could still bring fiduciary suits challenging application of the Invalidated Provisions. AOB22. The court below correctly rejected this argument, explaining the fundamentally different purposes served by a statutory claim and a fiduciary claim. *Moelis I*, 310 A.3d at 1008–09.

As the court observed, an as-applied fiduciary challenge "cannot substitute for a facial challenge because they invoke different principles and do different things.

One enforces statutory requirements. The other enforces fiduciary obligations." *Id.* at 1009. The court illustrated this distinction with the example of an obviously invalid provision purporting to bar stockholders from inspecting books and records:

> Assume the Company disclosed the arrangement, and it went unchallenged for three years. If directors rely on the provision to refuse a books and records request, then the proper challenge is not to argue that the directors acted disloyally, carelessly, or in bad faith. The directors might well have been disinterested and independent, believed that they could invoke the provision, and relied on the advice of counsel under Section 141(e). The proper challenge is that the provision was never valid in the first place.

Id. at 1008–09.

The court further explained that a fiduciary challenge "also cannot provide a substitute for a facial challenge in this case because the effects of the Challenged Provisions can be subtle, and a stockholder plaintiff might never know about the breach." *Id.* at 1009. In particular, for reasons the court detailed at length, "[a] situation in which the directors opt not to pursue a course of action because of the likelihood that Moelis would not approve … will be virtually impossible to detect and more difficult to investigate." *Id.* That is exactly right. The potential future availability of as-applied fiduciary suits provides no substitute for a facial challenge and does not ameliorate the pernicious policy implications of Moelis's position.[6]

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[6] Moelis's citations to *Politan* and *Ebix* do not support its position on this point. The *Politan* court specifically held a laches defense could not bar a claim sounding in a violation of Section 141(a), on grounds mirroring those of the court below. *Politan*

(*continued on next*)

3. *Amici*'s ripeness arguments contradict Moelis's laches defense and are misplaced

Amici disagree that it is too late for a facial challenge. Dkt. 15 ("AB"). They say it is too early. That Moelis and *amici* cannot get on the same page is a signal that neither argument rests in established law. Rather, each reflects a creative, but ultimately failed, attempt to resist an undeniable conclusion: where a corporation is being managed pursuant to an *ongoing* invalid governance arrangement, no timeliness principle can shield that arrangement from judicial review.

Amici fail to acknowledge the direct, fundamentally-important interest stockholders have in their corporation's observance of Section 141(a). Where a governance provision "circumscribes the board's statutory power under Section 141(a)" it also "circumscribes … the directors' ability to fulfill their concomitant fiduciary duties" to stockholders. *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1293 (Del. 1998) (invalidating contractual provision as violative of Section 141(a)). Perhaps the single most important right of any stockholder in a Delaware corporation is the right to have the corporation managed by fiduciaries. Where a

(A2801), Tr. at 173–91. Ebix did not involve statutory claims, but its reasoning that a challenge to the "continued existence" of the agreement "was timely because the alleged injury is ongoing" supports plaintiff's accrual analysis. *See In re Ebix S'holder Litig.*, 2014 WL 3696655, *11 (Del. Ch. July 24, 2014); *Moelis I*, 310 A.3d at 999 (discussing *Politan* and *Ebix*).

fiduciary's ability to exercise her statutory powers is unlawfully constrained, that necessarily affects the interests of her beneficiaries.

Perhaps the next most important right of stockholders is the right to vote for their fiduciaries. Where a governance arrangement bars directors from exercising their statutory powers, every stockholder election becomes a sham—stockholders can elect directors, but those directors are not actually empowered to manage.

Then-Vice Chancellor Jacobs recognized these principles in *Carmody v. Toll Brothers*, where he rejected a ripeness defense to a Section 141(a) challenge against a dead-hand rights plan. 723 A.2d 1180, 1187–88 (Del. Ch. 1998). The defendants argued the challenge would not ripen until a live dispute. They stressed that, so long as it remained a "clear day" and the company's directors did not wish to redeem the pill, the dead-hand did not come into play. Vice Chancellor Jacobs, relying on the earlier decision rejecting a ripeness defense in *Moran*,[7] held that the ripeness defense was "easily disposed of," *id.* at 1187, including because the challenged provision had a "*present* depressing and deterrent effect upon the shareholders' interests" including "shareholders' *present* entitlement … to vote for a board of directors capable of exercising the full array of powers provided by statute." *Id.* at 1188.

[7] *Moran v. Household International*, 500 A.2d 1346 (Del. Ch. 1985) (also rejecting ripeness defense to claim of statutory invalidity), *aff'd*, 500 A.2d 1346 (Del. 1985).

The court below relied on this line of cases to find plaintiff's claims ripe. *Moelis I*, 310 A.3d at 1004–05. That decision was correct. Indeed, *amici*'s ripeness argument is even more "easily disposed of," *Toll Bros.*, 723 A.2d at 1187, than was the argument in *Toll Brothers.* There, the board was prevented from exercising its power as to just one matter. Here, Moelis's directors are effectively barred from exercising *any* of their powers. It is like *Toll Brothers* on steroids. This case is, therefore, ripe under well-established law. Indeed, leading practitioners from *amici*'s own law firm have recognized this, acknowledging in a recent article (cited by *amici*) that the court's ripeness analysis in *Moelis I* "[did] not represent a departure from the tempered principles of ripeness traditionally applied under Delaware law" and that *Moelis I* "should not be construed as a fundamental shift in Delaware's view of ripeness in facial validity challenges."[8]

Amici's contrary arguments rely on easily distinguishable cases. *Bebchuck*, *Diceon*, and *General DataComm* involved challenges to proposed bylaws that had not even been adopted. *See* AB7 (acknowledging these cases involved "challenges to proposed bylaws … in advance of stockholder votes on their adoption"). *Stroud* involved a naked request for a mid-litigation advisory opinion. *Stroud v. Milliken*

[8] Zeberkiewicz & Greco, *Not All Facial Challenges Are Ripe* (Oct. 18, 2024) (unpublished manuscript) at 27, 34. The authors "[do] not necessarily concede" the correctness of *Moelis I*. *Id.* But their analysis demonstrates the court's reasoning was consistent with *Toll Brothers* and other long-standing authority.

Enterprises, 552 A.2d 476, 481 (Del. 1989) ("the facts upon which the decision under review is based are taken from a letter to the court from a party litigant seeking the reaction of opposing counsel and the court to an alternative course of action"). *Corti* and *Ackerman* involved discrete provisions that did not interfere in any way with directors' ability to manage their corporation on an ongoing basis.[9] Indeed, none of *amici*'s cases involved any arrangement that, at the time of the challenge, unlawfully restricted directorial power in any way.

Really, *amici* ask this Court to overturn the principles relied upon in *Toll Brothers* and change Delaware ripeness law. Indeed, they appear to acknowledge that their approach would require a plaintiff to demonstrate "actual, present harm" (AB20)—as opposed to the threat of harm— notwithstanding that "[a] principal purpose of the Declaratory Judgment Act is to prevent harm before it actually occurs." *Siegman v. Tri-Star Pictures*, 1989 WL 48746, at *5 (Del. Ch. May 5, 1989). Further, they clearly envision a drastically restricted notion of "harm," rejecting the correct principle of *Toll Brothers* that stockholders suffer harm where they are denied the right to have their corporation managed by fully empowered fiduciaries. This Court should decline *amici*'s invitation to change Delaware

[9] *See Wayne County v. Corti*, 2009 WL 2219260, at *19 (Del. Ch. July 24, 2009), *aff'd* 996 A.2d 795 (Del. May 28, 2010) (TABLE) (discrete corporate opportunity waiver never implicated); *Ackerman v. Stemerman*, 201 A.2d 173, 174–76 (Del. 1964) at 174–76 (discrete indemnification provision never implicated).

ripeness law, particularly because no party to this appeal has asked the Court to do so. *See NVIDIA v. City of Westland*, 282 A.3d 1, 22 (Del. 2022) (declining to reconsider precedent "when neither party has asked").

Finally, it is worth noting *amici* appear to be animated by unrelated pending cases challenging bylaws. AB12, 20. Ironically, it seems *amici* want this court to issue an advisory opinion concerning those cases—which have not yet been decided below, let alone presented to this Court. Whether those cases are ripe will need to be decided *in those cases*. For present purposes, such cases are easily distinguished from plaintiffs' challenge to the Invalidated Provisions, which operate—*right now*—to constrain stockholders' fiduciaries in every conceivable sphere of directorial action. Indeed, in those bylaw cases, the defendants (represented by both law firms representing Moelis and the law firm representing *amici*) have had no difficulty distinguishing *Moelis I*. In their words:

> A substantial and ongoing effect on stockholders' interests also supported the recent finding of ripeness in [*Moelis I*]. As the Court explained in its merits opinion, the consent rights contained in the stockholder agreement at issue "always and necessarily inhibit[ed] the exercise of board power." 311 A.3d 809, 869.[10]

Well said. Whatever their merits generally, *amici*'s concerns are misplaced here.

[10] *In re Irrevocable Resignation Bylaw Litig.*, C.A. No. 2024-0538-JTL, Opening Brief in Support of Defendant's Omnibus Motion to Dismiss (Oct. 11, 2024) (Trans. ID 74738666) at 23–24.

II. THE COURT OF CHANCERY CORRECTLY DECLARED THE INVALIDATED PROVISIONS INVALID

A. Question Presented

Whether the Invalidated Provisions of Moelis's Stockholders Agreement—which dictate or constrain effectively every imaginable board-level action—are facially invalid because they violate Section 141(a). (A0102–20, A0395–419, A1147–1165; *Moelis II*, 311 A.3d at 816–81).

B. Scope of Review

The decision below was based on undisputed facts and decided as a question of law subject to *de novo* review by the Supreme Court. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020).

C. Merits of Argument

1. Section 141(a) imposes limits, and the Invalidated Provisions violate those limits

Section 141(a) provides that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." 8 *Del. C.* § 141(a). This iconic statutory language expresses "[t]he central idea of Delaware's approach to corporate law."[11] Indeed, this Court has long recognized "the bedrock of the General Corporation Law of the State of

[11] Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 675 (2005).

Delaware is the rule that the business and affairs of a corporation are managed by and under the direction of its board." *Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984) (citing Section 141(a)) (emphasis added). Enforcing that rule, this Court has "invalidated contracts that would require a board to act or not act in such a fashion that would limit the exercise of their fiduciary duties." *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 238 (Del. 2008) (discussing *Paramount*, 637 A.2d 34, and *Quickturn*, 721 A.2d 1281). With that rule as its foundation, "the director-centered Delaware way" has achieved "a long record of superlative performance"; indeed, it has "nurtured the most successful economy in the world."[12]

Now, however, Moelis says there never was any such rule: corporations have always been free to opt-out of the "director-centered Delaware way" with the stroke of a pen. Moelis argues Section 141(a) imposes no limits on the extent to which board power may be constrained through a corporate contract with a favored insider. Consider the implications. It is not an exaggeration to say that, on Moelis's view, Section 141(a) permits corporations to enter agreements providing, for example: "*our board shall be purely advisory, while actual authority to manage our business and affairs shall remain with our founder; our board shall take all actions our founder directs and none that he does not approve*." That is not far from what Moelis

[12] Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 757–58 (2007).

implemented, and it would surely be permissible on Moelis's extreme no-limits interpretation of Section 141(a). *See Moelis II*, 311 A.3d at 869 ("The Pre-Approval Requirements are so all-encompassing as to render the Board an advisory body").

Moelis's position is not Delaware law. The Supreme Court has stated unambiguously that "to the extent that a contract, or a provision thereof, purports to require a board to act *or not act* in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable" under Section 141(a). *Quickturn*, 721 A.2d at 1292 (emphasis in original) (cleaned up). That is consistent with longstanding law, dating back to at least *Abercrombie*, recognizing that Section 141(a) prohibits agreements that "have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters" or "tend[] to limit in a substantial way the freedom of director decisions on matters of management policy[.]" 123 A.2d at 899, 610.

That is the test the court correctly applied below. There was nothing novel about it. Indeed, as the court explained, "the Delaware Supreme Court has repeatedly endorsed the *Abercrombie* test" and the Court of Chancery "has repeatedly applied it." *Moelis II*, 311 A.3d at 818–19 (collecting cases); *see also id.* at 830–52 (surveying the cases). The distinction between "internal governance agreements" and "external commercial contracts" is also consistent with the existing authorities, which show "successful [Section 141(a)] challenges focus on provisions

that are part of the corporation's internal governance." *Id.* at 855. Moelis continues to insist "a distinction between internal governance arrangements and external commercial agreements is impossible," *id.* at 858 (AOB30), but the court eviscerated that argument below, explaining it rests in a "soritical paradox." *Moelis II*, 311 A.3d at 857. Delaware courts are more than capable of "[u]sing protypes and categories" to "identify provisions that allocate authority among internal corporate actors and seek to constrain the board." *Id.* at 858.

The analysis is easy here. The guiding factors identified by the court below (*id.* at 859–60) are helpful and faithful to precedent, but ultimately unnecessary on these extreme facts. The Invalidated Provisions "are prototypical governance provisions in a prototypical governance agreement." *Id.* at 866. It is telling Moelis does not discuss the specifics of the provisions anywhere in its brief. They prevent the directors from freely taking effectively *any* action; they compel directors to make recommendations; they control the composition of the Board and its committees. Any suggestion they are not directed to controlling Moelis's internal governance can be easily dismissed. They control essentially all of Moelis's internal governance. In doing so, they both "have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters" and "tend[] to limit in a substantial way the freedom of director decisions on matters of management policy[.]" *Abercrombie*, 123 A.2d at 899, 610. Indeed, they "look like

something a law professor dreamed up for students to use as a prototypical Section 141(a) violation." *Moelis II*, 311 A.3d at 820.

That the Invalidated Provisions were arguably supported by consideration makes no difference. A mountain of decisions have applied Section 141(a) to third-party contracts supported by consideration. *See, e.g.*, *In re Bally's Grand Deriv. Litig.*, 1997 WL 305803, at *5–6 (Del. Ch. June 4, 1997) (management agreement); *Grimes v. Donald*, 673 A.2d 1207, 1214–15 (Del. 1996) (employment agreement); *Politan*, Tr. at 173–91 (A2801) (employment agreement); *Schroeder v. Buhannic*, 2018 WL 11264517, at *2, 4 (Del. Ch. Jan. 10, 2018) (ORDER) (stockholder agreement); *Nagy v. Bistricer*, 770 A.2d 43, 46, 60–62 (Del. Ch. 2000) (merger agreement); *ACE Ltd. v. Cap. Re. Corp.*, 747 A.2d 95, 106 (Del. Ch. 1999) (merger agreement); *Jackson v. Turnbull*, 1994 WL 174668, *1, *4–5 (Del. Ch. Feb. 8, 1994), *aff'd*, 653 A.2d 306 (Del. 1994) (merger agreement).

That the cases have not drawn the distinction implicitly proposed by Moelis makes sense. If some identifiable consideration was the only thing necessary to bring a governance arrangement outside the scope of Section 141(a), that statute—the bedrock of Delaware corporate law—could be trivially circumvented. [13]

[13] Notably, while Moelis now relies on the purported consideration Moelis received in connection with the Stockholders Agreement (AOB31–33), it did not do so below. *See Moelis III*, Tr. at 57 (recognizing argument not made at merits-stage below). The argument can be rejected on this basis, though it is meritless in any event.

Further, this body of case law discredits the suggestion that Section 141(a) addresses only "the allocation of power between directors and managers." AB16; *see also* AOB16 (same, except "stockholders, officers, and directors"). Even if this were correct, however, the Invalidated Provisions here provide control rights to Moelis's chief executive officer. They function to preclude Moelis's directors from firing him or exercising their fiduciary duties to take any board-level action with which he disagrees. The direct function of that arrangement is to render the corporation's chief manager *utterly and completely unaccountable to the corporation's directors*. It is difficult to understand how one could think that does not upset the statutory "allocation of power between directors and managers." AB16.

Meanwhile, there is no contrary authority to support Moelis's radical no-limits reading of Section 141(a). Moelis relies principally on *Grimes* and *Sample*,[14] but neither support its position.

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[14] Moelis and its *amici* also prominently tout *In re InfoUSA, Inc. S'holders Litig.*, 953 A.2d 963 (Del. Ch. 2007), but *InfoUSA* merely cites *Sample* without meaningful analysis. Their citations to other cases where rights were discussed, but not challenged, provide even less support. *See Moelis II*, 311 A.3d at 878. Moreover, none involved an agreement as extreme as Moelis's. In particular, the only Supreme Court case—*OptimisCorp v. Waite*, 137 A.3d 970 (Del. 2016) (TABLE)—involved an agreement in which stockholders agreed to use *their stockholder-level powers* to maintain a desired board composition. The only potentially relevant commitment binding the board into the future was a set of *observer rights*, which the board could deny if it were "reasonably determined by the Board to be necessary." *See generally OptimisCorp v. Waite*, Case No. 523, 2015, Appendix to Appellant's Opening Brief Vol. 3 (Dkt. 14) at A1408 (stockholders agreement; observer rights at § 3.9).

In *Grimes*, the plaintiff challenged an employment agreement that permitted a CEO to declare a constructive termination and receive a large payment in the event of "unreasonable interference" by the board in the CEO's management. *Grimes*, 673 A.2d at 1210–11. The Supreme Court quoted the *Abercrombie* test with approval and applied it, ultimately holding there was no Section 141(a) violation where the board "retain[ed] the ultimate freedom to direct the strategy and affairs of the Company" and was not "formally preclude[d]" from exercising its statutory powers. *Id.* at 1214–15. *Grimes* supports plaintiff, not Moelis. It is not the case that Moelis's directors, like the board in *Grimes*, retain their freedom of action but have to weigh some financial consequence in deciding whether to fire their corporation's CEO; rather, Moelis's directors are formally precluded from firing their CEO or taking any action he disagrees with. Moelis's directors *do not* retain the ultimate freedom to direct the strategy and affairs of their corporation. *Grimes*, therefore, supports the holding below.[15] Indeed, *Grimes*'s application of Section 141(a) and *Abercrombie* to the agreement at issue demonstrates there are, contrary to Moelis's suggestion, limits on the extent to which directors may constrain themselves in exchange for a CEO's "human capital." *See* AOB32.

[15] As discussed by the court below, *Moelis II*, 311 A.3d at 839, the analysis in *Grimes* does not support that formal preclusion is necessary to support a Section 141(a) violation—only that its absence was one relevant factor. Here, however, the distinction is irrelevant because Moelis's directors are formally bound.

In *Sample*, the plaintiff challenged an agreement providing a third-party purchaser of equity with a *single* narrowly-tailored right, for a limited duration, to approve stock issuances. *Sample*, 914 A.2d at 670–71. The court declined to invalidate that narrow right and criticized earlier decisions holding discrete contractual provisions statutorily-invalid under Section 141(a), *id.* at 672, n.79, including this Court's holding in *Quickturn* that a delayed-redemption provision in a pill was "invalid under Section 141(a), which confers upon any newly elected board of directors *full* power to manage and direct the affairs of the corporation." *Quickturn*, 721 A.2d at 1292. That analysis renders *Sample* an outlier—particularly considering that, just one year later, the Supreme Court approvingly block-quoted and applied the *Quickturn* holding that *Sample* had criticized. *See CA, Inc.*, 953 A.2d at 239. The court below demonstrated *Sample* is fundamentally at odds with the weight of Delaware law applying Section 141(a). *Moelis II*, 311 A.3d at 854–55.

That said, even *Sample* did not adopt Moelis's proposed no-limits reading of Section 141(a). Indeed, the *Sample* court expressly distinguished, and recognized Delaware law would not permit, "a more extreme situation [where] the directors can be thought to have given away to a third-party powers that are so crucial to management that the directors are essentially no longer in control of the corporation." *Sample*, 914 A.2d at 671, n.77. The *Sample* court noted the "more particular limitation" at issue was "far-removed from that unusual context." *Id.*

The Invalidated Provisions are not far-removed from, but rather are a textbook example of, the "extreme situation" referenced in *Sample*. In the words of the court below, the jump from the single right challenged in *Sample* to Moelis's all-encompassing agreement "*is like Evel Knievel trying to jump the Grand Canyon*." *Moelis III*, at 52. Moelis's directors cannot fire their CEO or take any action without his prior approval. In that situation, how can it be said the directors are still in control of the corporation? They are not. Under the Invalidated Provisions, "the Board is not really a board. The directors only manage the Company to the extent [Ken Moelis] gives them permission to do so." *Moelis II*, 311 A.3d at 820.

The court below expertly surveyed Delaware's robust canon of Section 141(a) case law, then applied the clear teachings of that case law to strike down the Invalidated Provisions. This Court should affirm that decision in its entirety. But even if this Court chose to adopt some more cabined reading of Section 141(a), that would not change the outcome of this case. It might change the outcome of other cases, but not this one. The Invalidated Provisions would still be invalid.

In the words of two leading scholars: "If DGCL § 141(a) imposes any restrictions at all, the stockholder governance agreement at issue in [this] case—an agreement that gave founder Ken Moelis almost complete control over corporate decisions and governance—must violate those limits." Kahan & Rock, n.1 *supra*.

Unless this Court chooses to go beyond even *Sample* and declare the statute an effective nullity, thereby overturning Delaware's entire multigenerational canon of Section 141(a) case law and its public policy of director-centric governance, the Invalidated Provisions cannot stand, and the decision below must be affirmed.

2. Nothing about the enactment of Section 122(18) supports Moelis's position

Case law aside, Moelis and its *amici* argue the General Assembly's recent enactment of Section 122(18) merely "confirmed" what the General Assembly already understood to be the law, demonstrating that the decision below was incorrect. AOB28; AB3. This is bad revisionist history.

In reality, Senate Majority Leader Bryan Townsend—who introduced and shepherded the bill to enact Section 122(18)—has gone on record explaining that the legislation was influenced by the General Assembly's understanding that this case was *correctly* decided under existing law. Specifically, Senator Townsend has explained "it is important to be clear that few people, if any, criticized the *Moelis* decision as flawed from the perspective of statutory interpretation. In other words, people are saying that Vice Chancellor Laster got it right[.]"[16]

Senator Townsend has further explained that "waiting for the Supreme Court to hear an appeal did not seem to be the optimal approach" because "we should not

[16] Andrew Galvin, "*Townsend responds to corporate law uproar*," DELAWARE CALL (July 20, 2024) (Compendium 2).

want the Supreme Court to be expected to set aside clear statutory language to make a policy call." *Id.* Moreover, reflecting the General Assembly's understanding that Section 122(18) changed the law, Senator Townsend has emphasized the legislature's considered choice to make Section 122(18) inapplicable to this appeal, not retroactive, and not immediately effective.[17] Accordingly, *amici*'s suggestion that it would somehow be "unjust" to apply pre-Section 122(18) law on this appeal (AB21) effectively asks the Court to override clear legislative intent.

Further, consistent with Senator Townsend's observation that "people are saying Vice Chancellor Laster got it right," prominent scholars from across the ideological spectrum commented favorably on the decision.[18] And at least one prominent Delaware law firm quickly cited *Moelis II* in an opinion letter proffered to the SEC, for the proposition that "Delaware courts have consistently applied [Section 141(a) case law] to prevent attempts to dictate future conduct or decisions by directors, *whether by contract, bylaw, stockholder resolution or otherwise*."[19]

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[17] *See id.* (describing considered choice to make the legislation inapplicable to pending cases and to delay effectiveness).

[18] *See, e.g.*, Kahan & Rock, n.1 *supra* ("a well-supported interpretation of current Delaware law"); Lucian Bebchuk, *The Perils of Governance by Stockholder Agreements*, HARVARD FORUM ON CORPORATE GOVERNANCE (May 21, 2024) (complimenting decision and expressing "expect[ation] . . . that the Supreme Court would likely affirm the *Moelis* decision and support its reasoning and conclusions.").

[19] March 8, 2024 Opinion Letter from Richards, Layton & Finger to Booz Allen Hamilton Holding Corporation at 5 (Compendium 3) (emphasis added).

That letter explicated—as the official opinion of Richards, Layton & Finger—an interpretation and application of Section 141(a) that is fully consistent with the interpretation of plaintiff and the court below, and that is utterly irreconcilable with the interpretation advanced by Moelis and its *amici*.[20] Moreover, as the Court is likely aware, Section 122(18) itself was the subject of controversy among members of the bench, bar, academy, investing community, and legislature. None of this is consistent with Moelis and *amici*'s assertion that Section 122(18) merely confirmed what everyone except plaintiff and the court below already agreed was the law.

There is, additionally, no merit to Moelis's related argument that its Stockholders Agreement typified a market practice that Section 122(18) was intended to legalize. Moelis's agreement is, to plaintiff's knowledge, the single most extreme board-constraining stockholder agreement ever attempted by a public corporation. The first law review article to address such agreements—which recognized their dubious legality under Delaware law as a general matter, further

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[20] *Id.* at 4–7. This is consistent with opinion letters Delaware law firms have, for years, routinely prepared to support the invalidity of stockholder proposals. Plaintiff introduced other examples below (A1505–11; A1512–18; A1603–14) which were cited by the court in *Moelis II*. 311 A.3d at 880. There is no reason Section 141(a) should be read broadly to preclude proposals by public investors, but as a nullity when applied to contractual rights provided to favored insiders. Indeed, in *CA*, the Supreme Court recognized the distinction between "binding contractual arrangements that the board of directors had voluntarily imposed upon themselves" and "a binding bylaw that the shareholders seek to impose involuntarily on the directors" is a "distinction . . . without a difference." 953 A.2d at 239.

undermining Moelis's suggestion there was some contrary consensus—singled out Moelis's agreement as particularly extreme.[21] Fifty-seven corporate law scholars agreed "[t]he contract in *Moelis* was far from typical, especially for public corporations."[22] Moelis introduced a list of purportedly-similar agreements below as evidence of a "market practice" supporting its position, but none mirrored the breadth of Moelis's own agreement and, reflecting validity concerns, many included fiduciary outs. *See* A1749.

The relevant legislative history, moreover, supports that Section 122(18) was motivated by a desire to legalize these more common types of agreements and their narrower restraints, and not devised for the purpose of validating Moelis's own uniquely extreme agreement. For example, Professor Charles Elson, called as a witness, explained to the House of Representatives that Moelis's agreement "was a rather extreme example of a shareholder agreement that went way beyond what

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[21] Gabriel V. Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. ON REG. 1124, 1163–64 (2021) (A1170–229) (recognizing board-constraining stockholder agreements "sit uneasily with Delaware law," including because they "effectively bind[] the hands of future boards and eviscerat[e] their fiduciary discretion," creating "a shadow of potential unenforceability" over such agreements); *id.* at 1172–73 (singling out Moelis's agreement as particularly extreme).

[22] *Letter in Opposition to the Proposed Amendment to the DGCL*, HARVARD FORUM ON CORPORATE GOVERNANCE (June 7, 2024) (Compendium 4).

typical agreements, in fact, entail."[23] In response, Representative Griffith—a supporter of the legislation—stressed her understanding that "the issue" with the decision below "is that while [Moelis's] was [an] unusual agreement, the decision has impacted non-extreme situations, the normal" and further stressed that the legislation would not impact "pending litigation"—*i.e.*, this case.[24] Moelis's agreement is extreme and abnormal, not typical of any market practice.

3. The Invalidated Provisions cannot operate lawfully under any circumstances

The court also correctly held the Invalidated Provisions cannot operate lawfully under any circumstances. *Moelis II*, 311 A.3d at 869–77. Moelis attacks that holding principally by arguing "the provisions do not formally constrain the Board *so long as [Ken Moelis] and the directors agree*." AOB34 (emphasis added). Straining to fit a citation to *Kellner*, Moelis argues the court relied on hypotheticals to reject that argument. *Id.* It did not. It relied on basic common sense. When Ken Moelis and the directors agree, the Invalidated Provisions are not operating validly—they are not operating at all. "There is no need to enforce contractual restraints when the counterparty is already doing what you want." *Moelis II*, 311 A.3d at 870.

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[23] Delaware House of Representatives Legislative Session, Session 2, 39th Legislative Day, 152nd General Assembly (June 20, 2024) at 7:02:20–48 (https://sg001-harmony.sliq.net/00329/Harmony/en/PowerBrowser/PowerBrowserV2/20240620/74/4347).

[24] *Id.* at 7:17:33–7:18:08.

Moelis cannot identify any situation in which the provisions are enforced to compel action the Board would not otherwise take, or prevent Board action, in which they would operate validly. That is what matters.

Moelis responds by arguing the provisions might not operate invalidly even where Ken Moelis seeks to enforce them, *because a court might decline to order specific performance*. AOB34. That is, the provisions will not operate invalidly if a court stops them from operating. Moelis, moreover, conjures a scenario in which directors are forced to litigate and still face some consequence merely to exercise their statutory powers. If directors need to go to court—let alone pay damages—in order to exercise their statutory powers, it is undeniable those powers have already been unlawfully constrained.

Moelis's reference to its severability clause (AOB35) also fails. It argues the Invalidated Provisions could operate validly if they were rewritten only to ensure Ken Moelis's "participation in and consultation on major decisions." *Id.* Moelis did not advance this argument below. Its only references to the severability clause below were to note that it provides "the invalidity or unenforceability of any provision shall not affect the validity or unenforceability of the other provisions." (A387, A407). The court below honored that provision by holding some challenged provisions facially valid. There is no basis for Moelis's new suggestion, not preserved below, that the court should have gone further and rewritten the Invalidated Provisions to

say something they do not. For it to have done so would, moreover, have been inconsistent with established principles recognizing a severability clause can only be applied consistent with the "clear and unambiguous" intent of the parties to the agreement. *See Suppi Construction v. EC Developments*, 2024 WL 939851, at *5 (Del. Super. Mar. 4, 2024). Here, the severability clause would not come close to supporting Moelis's position even had it preserved the argument.

The "deterrent effect" identified by the court below further undermines Moelis's argument by demonstrating the Invalidated Provisions have an *ongoing effect* on the Board's management of the corporation, regardless of whether they are being formally invoked or enforced. *Moelis II*, 311 A.3d at 865–69. Consider, for example, that the Invalidated Provisions prevent the Board from choosing the corporation's CEO. That is not a hypothetical about some potential future set of circumstances. That is the reality today. "How a board without the power to control who serves as CEO could effectively establish a longterm corporate strategy is difficult to conceive." *See Gorman v. Salamone*, 2015 WL 4719681, at *5 (Del Ch. July 31, 2015) (bylaw invalid under Section 141(a)). Indeed, it is impossible. And that is just one aspect of the Invalidated Provisions. Moelis's suggestion the provisions do not have an ongoing effect is not credible.

III. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS' FEES

A. Question Presented

Whether the Court of Chancery abused its discretion in awarding attorneys' fees and expenses to plaintiff's counsel. (A1763–777, A2134–48, A2611–20; *Moelis III*, Tr. 36–62).

B. Scope of Review

The Supreme Court "review[s] an attorneys' fee award for abuse of discretion" and will not "substitute [its] own notions of what is right for those of the trial judge if that judgment was based on conscience and reason as opposed to capriciousness or arbitrariness." *EMAK v. Kurz*, 50 A.3d 429, 432 (Del. 2012).

C. Merits of Argument

This Court has never before held the Court of Chancery abused its discretion in applying the *Sugarland* factors and fashioning a fee award. Moelis provides no basis for the Court to do so for the first time here. The court below did not "adopt[] a *post hoc* 'either-or' approach," nor did it "fail[] to independently determine fair and reasonable fees." AOB37. Moelis's argument is anchored to the court's reflection that its initial instinct concerning an appropriate fee, prior to briefing and argument, was in the range of $3 million. *See Moelis III*, at 60. Moelis ignores that, after considering plaintiff's persuasive briefing and argument (and Moelis's unpersuasive briefing and argument), the court concluded plaintiff's $6 million

request was "a reasonable, even conservative fee under the precedents that the plaintiffs have collected and which I view as apt." *Id.* at 55.

The relevant precedents constitute a substantial body of Court of Chancery authority supporting fees in the range of $5–10 million for counsel who achieve substantial corporate governance benefits implicating "control" of a corporation in a manner beneficial to public stockholders.[25] The court, consistent with its discretion to assess the benefit achieved, found these precedents apt. Moelis provides no basis for disturbing this robust body of reliable precedent (indeed, it does not engage with the cases), nor does it provide any basis for a finding that the court abused its discretion in assessing the magnitude of the benefit achieved. Moelis argues the benefit was insignificant because the Invalidated Provisions could have simply been

[25] *See, e.g.*, *Hollywood Firefighters' Pension Fund v. Malone*, 2021 WL 5179219, at *10–11 (Del. Ch. Nov. 8, 2021) (holding that reduction in control group's voting power from 61% to 47% warranted a $5.5 million fee, worth $6.14 million adjusted for inflation); *In re Activision Blizzard S'holder Litig.*, 124 A.3d 1025, 1071 (Del. Ch. 2015) (reduction in insiders' voting power from 24.9% to 19.9% and addition of two independent directors warranted a $5–10 million fee, worth $6.5–13 million adjusted for inflation); *In re Palantir Class F Stock Litig.*, C.A. No. 2021-0285-SG, Tr. at 43 (Del. Ch. Sept. 13, 2022) (Transcript) (A1938) (reforms to corporate voting procedures and imposition of independent approval requirements for certain types of transactions supported a $5.5 million fee, worth $5.75 million adjusted for inflation); *In re Expedia Group S'holders Litig.*, C.A. No. 2019-0494-JTL, Tr. at 40 (Del. Ch. Jan. 19, 2022) (Transcript) (A1895) (causing blockholder not to increase voting power from 28% to 49% and imposing reforms limiting blockholder's influence warranted $6.5 million fee, worth $7.17 million adjusted for inflation); *see also* A1768–70 (collecting additional cases).

implemented in Moelis's charter. AOB40. Wrong. The dead-hand effect could not be replicated in a charter, some aspects of the Invalidated Provisions could not be included in the charter at all, and the others would require stockholder approval. *See* pg. 13, *supra*. Moelis argues the benefit was insignificant because plaintiff did not identify or challenge any specific enforcement of the provisions. AOB40. Wrong. This is a facial challenge, and Moelis's argument ignores the provisions' substantial deterrent effect. *See Moelis II*, 311 A.3d at 869. Moelis argues the benefit was insignificant because Ken Moelis continues to wield 39% of the stockholder-level voting power. AOB40. Wrong. The court eviscerated that argument across twelve transcript pages. *Moelis III*, 40–52. Moelis argues there was no significant benefit because the recent enactment of Section 122(18) demonstrates Delaware has no public policy against board-constraining stockholder agreements. AOB 40. Wrong. Even if Moelis's agreement were permissible under public policy, its removal still created a valuable benefit for stockholders. Consider, for example, that Delaware has no public policy against dual-class stock, but successful challenges to dual-class stock plans—which address, as here, a separation between economic ownership and control—have supported substantial fees in Delaware courts.[26]

[26] *See In re Facebook, Inc. Class C Reclassification Litig.*, C.A. No. 12286-VCL (Oct. 24, 2018) (Order) (Trans. ID 62593582) (agreed award of $68.7 million where plaintiffs caused withdrawal of stock reclassification plan designed to preserve

(*continued on next*)

Finally, Moelis argues the court abused its discretion in applying the secondary *Sugarland* factors and not reducing its award based on counsel's hours. *See* AOB41–42. This argument also fails. The court carefully considered all of the *Sugarland* factors, finding they further supported an award of $6 million. *Moelis III*, 56–60. It acknowledged the resulting implied rate of $11,950.14—*not accounting for this appeal*—was a "big number," but exercised its broad discretion to weigh the relevant factors and conclude that "this is one of those cases where I don't think [counsel] should be penalized for that fact, particularly when all of the other factors point so strongly in favor of a $6 million award." *Id.* at 59–60. Indeed, the implied rate is within a range previously approved, particularly in novel or consequential cases.[27] The public policy of Delaware, moreover, is to award benefits achieved instead of hours expended. There were ways this litigation could have been handled that would have generated longer billing records, were that the goal. Instead, plaintiff pursued victory by the most efficient means and achieved it.

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controller's control); *In re IAC/InterActiveCorp Class C Reclassification Litig.*, C.A. No. 12975-VCL (Oct. 3, 2017) (Order) (Trans. ID 61194876) (agreed award of $9.25 million where plaintiffs caused withdrawal of similar plan).

[27] *See, e.g.*, *In re Versum Materials*, 248 A.3d 105 (Del. 2021) (Table) (affirming award reflecting nearly $11,000 hourly rate); *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1252 (Del. 2013) (affirming award reflecting hourly rate in excess of $35,000); *Garfield v. Boxed*, 2022 WL 17959766, at *15 (Del Ch. Dec. 27, 2022) (approving award reflecting nearly $20,000 hourly rate).

CONCLUSION

The judgment of the Court of Chancery should be affirmed. But, if the Court were to reverse as to the Court of Chancery's holding that the Invalidated Provisions are invalid under Section 141(a), it should still affirm the Court of Chancery's invalidation of the Committees Composition Provision under Section 141(c) because Moelis does not challenge that holding on appeal. In that event, the Court also should remand this action for further proceedings concerning plaintiff's alternative arguments, concerning Sections 109, 242, and 251, that were not yet addressed by the court below and are not addressed by Moelis in its opening brief on appeal.

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November 18, 2024

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2024, the foregoing *Appellee's Answering Brief* was caused to be served upon the following counsel of record via File and Serve *Xpress*:

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