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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 of the State of Delaware, C.A. No. 2023-0309-JTL

BRIEF OF PROFESSORS JOSEPH A. GRUNDFEST, LAWRENCE A. HAMERMESH, JONATHAN R. MACEY, AND CHARLES R.T. O'KELLEY AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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Professors Joseph A. Grundfest, Lawrence A. Hamermesh, Jonathan R. Macey, and Charles R.T. O'Kelley ("*Amici*") are law professors who study and teach corporate law. They have commented on cases in Delaware courts, and their work on the topic is cited as authority by commentators, litigants, and courts. They have no financial interest in this case.

This appeal raises the question of when challenges to the validity of corporate acts are justiciable. This question falls within the expertise and scholarly interests of *Amici*, who offer their academic perspective and experience to aid in the Court's evaluation of the issues on appeal.

SUMMARY OF ARGUMENT

This is an appeal from a case that should not have been decided. The stockholder agreement invalidated below (the "Stockholder Agreement") was not alleged to have been the product of a breach of fiduciary duty. The Stockholder Agreement was not alleged to have ever blocked board-desired action or have caused the stockholders any harm. There was no justiciable case for the trial court to decide.

The trial court decided it anyway, *see* Notice of Appeal, Ex. A ("*Moelis I*"), issuing a sweeping decision that invalidated contractual provisions present in countless agreements involving Delaware corporations. *See* Notice of Appeal, Ex. B. ("*Moelis II*"). The trial court did so by inventing an unworkable test distinguishing between "commercial agreements" and "governance agreements," a test with no basis in the text of the Delaware General Corporation Law ("DGCL") and which offers no predictability to corporate planners. The trial court discarded precedent recognizing that the DGCL's broadly enabling nature includes empowering corporations to make contracts granting consent and governance rights in a bargained-for exchange. Disregarding the potent tool of equity to address abuse in a particular case, the trial court resorted to broad, proscriptive rules that strip the DGCL of its cherished qualities of flexibility, predictability, and commercial sensitivity.

Recognizing *Moelis II*'s disruptive effects on the corporate franchise, and consistent with its historic role as an attentive caretaker of the DGCL, the General Assembly took swift corrective action by enacting new DGCL Section 122(18). That statute effectively overruled the trial court's decision and confirmed the correctness of precedent reading Section 141(a) as not limiting third-party contracts. *Moelis II* remains relevant only for a handful of cases, like this one, filed before August 1, 2024 and exempted from Section 122(18). Nonetheless, that decision should not be allowed to stand undisturbed on appeal. In addition to validating the trial court's erroneous construction of Section 141(a), affirmance would result in a profound inequity: a handful of Delaware corporations subjected to a different legal regime that the legislature has repudiated.

A principled basis exists, however, for this Court to vacate *Moelis II* without addressing that decision's controversial holdings. This Court should reverse *Moelis I*'s finding that Plaintiff's facial challenge was ripe. Under longstanding precedent, a trial court should only adjudicate a claim for declaratory judgment where "litigation sooner or later appears unavoidable." *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 481 (Del. 1989). There was "no factual basis for the existence of any controversy between these parties" in this case. *Ackerman v. Stemerman*, 201 A.2d 173, 176 (Del 1964). The Stockholder Agreement had been in place for nearly a

decade. Plaintiff alleged nothing suggesting there was any present dispute over that agreement. Plaintiff's claim was entirely academic, and therefore not justiciable.

A ripeness ruling can provide useful guidance to the lower courts. *Amici* are concerned by a recent trend of Court of Chancery cases that, like this one, addressed significant legal issues either unripe or unnecessary to resolve the matter presented for decision. This trend has encouraged a wave of value-destructive lawsuits seeking to invalidate long-since-completed corporate acts not alleged to cause stockholders any injury. Re-affirming Delaware law's traditional ripeness principles will discourage lawsuits and rulings requesting and providing advisory opinions that may have broad, unintended consequences for Delaware corporations. This holding will allow the Court of Chancery to focus its invaluable, but limited, resources deciding actual cases and controversies.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING A RIPE DISPUTE.

A. Delaware's Disciplined Ripeness Doctrine

In 1952, five years after Delaware adopted its first declaratory judgment act, the Delaware Supreme Court stressed in *Stabler v. Ramsay* that "[e]ven in the declaratory judgment procedure, . . . courts will not ordinarily grapple with problems which there is any real likelihood that they may never have to settle." 88 A.2d 546, 550 (Del. 1952). Accordingly, *Stabler* held that Delaware courts must "be convinced that litigation sooner or later *appears to be unavoidable* before they will intervene" with a declaratory judgment. *Id.* at 555 (emphasis added). This holding has been reaffirmed in Supreme Court decisions ever since. *See, e.g.*, *Kellner v. AIM ImmunoTech Inc.*, 320 A.3d. 239, 259 n.139 (Del. 2024); *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1217 (Del. 2014); *Stroud*, 552 A.2d at 481; *Ackerman*, 201 A.2d at 175.

Today, as when *Stabler* was decided, a dispute is generally ripe if "litigation sooner or later appears to be unavoidable and where the material facts are static." *XL Specialty Ins. Co.*, 93 A.3d at 1217.[1] "Conversely, a dispute will be deemed not ripe where the claim is based on uncertain and contingent events that may not occur or where future events may obviate the need for judicial intervention." *Id.* "A

[1] Case citations omit internal quotations, citations, and footnotes unless noted.

ripeness determination requires a common sense assessment of whether the interests of the party seeking immediate relief outweigh the concerns of the court in postponing review until the question arises in some more concrete and final form." *Id.* As ripeness "goes to the very heart of whether a court has subject matter jurisdiction . . ., the court has a positive duty" to consider that question, *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006), including on appeal. *See Stroud*, 552 A.2d at 479.

Stockholder suits challenging facial validity and statutory compliance are not exempt from this doctrine. On the contrary, two of this Court's seminal ripeness decisions addressed such suits. In *Ackerman*, this Court dismissed a challenge to a stock option plan alleged to grant directors indemnification rights exceeding those then authorized under the DGCL. 201 A.2d at 174-75. Because no director had "ever received a payment in the form of indemnity" or "ever made a claim for indemnity," and "there [was] no imminent or contemplated application" of the challenged provisions, the Court found "no factual basis for the existence of any controversy between these parties in this cause." *Id.* at 175-76.

In *Stroud*, this Court again dismissed a challenge to legal validity on ripeness grounds. 552 A.2d at 480. That case involved a challenge to a proposed stockholder meeting notice alleged to be insufficient to satisfy DGCL Sections 222 and 242. The Court dismissed the appeal *sua sponte* and directed the Court of Chancery to vacate

its decision, finding that the trial court had "inappropriately" granted "an advisory opinion upon a significant question of corporation law which . . . was clearly not ripe for judicial intervention." *Id.* at 481.

The Court of Chancery has, historically, also exercised restraint in ruling on facial challenges. In a series of cases, the Court of Chancery found challenges to proposed bylaws unripe in advance of stockholder votes on their adoption. *See, e.g.*, *Bebchuk*, 902 A.2d at 740; *Gen. DataComm Indus., Inc. v. State of Wis. Inv. Bd.*, 731 A.2d 818 (Del. Ch. 1999); *Diceon Elecs., Inc. v. Calvary P'rs, L.P.*, 1990 WL 237089 (Del. Ch. Dec. 27, 1990). Likewise, in *Wayne County Employees' Retirement System v. Corti*, the Court of Chancery declined to rule on the facial validity of a corporate opportunity waiver and an exculpation provision because "the possibility that some future action may be taken under [the provisions] that will harm plaintiff" was "too remote and speculative to justify rendering a declaratory judgment." 2009 WL 2219260, at *19 (Del. Ch. July 24, 2009), *aff'd* 996 A.2d 795 (Del. May 28, 2010) (TABLE).[2]

[2] *See also, e.g.*, *Nask4Innovation Sp. Z.o.o. v. Sellers*, 2022 WL 4127621, at *5-6 (Del. Ch. Sept. 12, 2022) (declining to rule on validity of waiver in letter of transmittal because any dispute was "hypothetical" and litigation "is not inevitable."); *Energy P'rs, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *11-12 (Del. Ch. Oct. 11, 2006) (finding facial challenge to merger agreement provision unripe because "there is no present harm to [plaintiff] as a result of the speculative future consequences" of a potential breach).

B. Adhering to Ripeness Doctrine Serves Important Policy Interests.

Delaware's disciplined approach to ripeness, especially when considering facial and statutory challenges, advances important policy interests. They include: (1) promoting predictability and stability in Delaware law; (2) minimizing value-destructive litigation; and (3) conserving judicial resources.

1. Promoting Predictability and Stability in Delaware Law

One of the virtues of Delaware corporate law is that it is primarily developed through the case-by-case system of the common law. In contrast to a civil code system, a common-law system allows decisions to be made in a "bottom up" fashion, where individual cases provide a "steady accretion of and emendation of decision rules." Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21, 25 (2007). The common law is "evolutionary in nature, that is—there [are] no sudden lurches in legal doctrine (as almost always exist in legislation) creating uncertainties for people relying on the existing law." Henry G. Manne, *The Judiciary and Free Markets*, 21 HARV. J.L. & PUB. POL'Y 11, 21 (1997).

Delaware corporate law embraces the incrementalism of the common-law system because, as this Court has emphasized, "[p]romoting stability in our DGCL is and remains of paramount importance." *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323, 353-54 (Del. 2022); *see also Salzberg v. Sciabacucchi*, 227 A.3d 102, 137 (Del. 2020) ("The policies underlying the DGCL include certainty and

predictability."); *In re Fox Corp./Snap Inc. Section 242 Litig.*, 312 A.3d 636, 649 n.72 (Del. 2024) (rejecting rule that would "undermine[] the predictability of our corporate law"). Delaware law therefore "defer[s] to case-by-case law development." *Salzberg*, 227 A.3d at 137. Distinguished Delaware jurists and academics have noted the value in doing so.[3]

Justiciability doctrines like ripeness ensure that the common law of Delaware corporations develops gradually and predictably. By only deciding actual cases and controversies, Delaware courts minimize the risk of "an inappropriate or unnecessary step in the incremental law building process." *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987); *see also Stone*, 2006 WL 2947483, at *11 (noting "the risk of

[3] *See, e.g.*, Wiliam T. Allen, Jack B. Jacobs, and Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1070 (2002) (Delaware courts have "have generally avoided sweeping policy pronouncements" and "[t]his tentative, case-specific approach lends itself to low-cost innovations and mid-course corrections."); William B. Chandler, *The Delaware Court of Chancery: An Insider's View of Change and Continuity*, 2012 COLUM. BUS. L. REV. 411, 423-24 (2012) ("[B]y ruling only on the facts in front of them," Delaware judges avoid "rulings too broad or too harsh."); Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 742 (2013) (Delaware courts' "highly incremental approach … allows the courts both to withhold broad policy judgments pending sufficient ripening of the issues and to distinguish holdings on a fact-specific basis."); Marcel Kahan & Edward B. Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VANDERBILT L. REV. 1573, 1577-78 (2005) (exploring how Delaware courts' "adherence to the classical common law model" of addressing disputes "only in an incremental fashion" minimizes conflict with federal and state law).

creating bad law" when issuing declaratory relief). The risks associated with an improvident ruling are heightened when considering facial challenges to measures widely adopted in the marketplace. While "market practice is not law," *Moelis II*, slip op. at 127, it does provide good reason for Delaware courts to be cautious about announcing new, broadly applicable rules that contradict precedent relied upon by stakeholders.

For this reason, Delaware's ripeness jurisprudence emphasizes that "[e]special caution is appropriate" when considering facial challenges that "raise novel and important issues to Delaware corporate law." *Bebchuk*, 902 A.2d at 740 (cleaned up). Such caution manifested in *Ackerman*, where this Court cited the "important questions regarding the Delaware Corporation Law and its public policy" as a reason why plaintiff's facial challenge was unripe. 201 A.2d at 176. Similarly, in *Stroud*, this Court found that "[t]he significance of these issues requires this Court to demand that the dispute between the parties be close to a concrete and final form." 552 A.2d at 481.

2. Controlling Excessive Litigation

Ripeness, like all justiciability doctrines, curbs excessive litigation. That role is important for stockholder litigation, which, while it can serve important monitoring functions, has agency costs. The Court of Chancery's crackdown on ubiquitous disclosure-only-settlements demonstrates how the common law plays a

vital role in "ensur[ing] that the laws do not impose unnecessary costs on Delaware entities." *SeeCubic*, 279 A.3d at 353–54; *see In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016).

Theoretical facial challenges run a significant risk of value destruction to corporations and their stockholders. Plaintiffs usually seek only declaratory relief, and so no common fund is created by a successful plaintiff. Because there is no common fund, "the Court lacks any yardstick against which to measure the reasonableness of a fee request." *Off v. Ross*, 2009 WL 4725978, at *7 (Del. Ch. Dec. 10, 2009). Despite *quantum meruit*, the Court of Chancery often eschews that approach in favor of imprecise efforts to quantify the benefit that are unrooted in reliable valuation principles. This can result in substantial fee awards many times counsel's lodestar.[4]

For example, in this case, the trial court awarded a $6 million fee based on its calculation of a more than $100 million benefit. *See* Notice of Appeal, Ex. D

[4] *See, e.g.*, *Garfield v. Boxed, Inc.*, 2022 WL 17959766, at *11 (Del. Ch. Dec. 27, 2022) ($850,000 for invalidated stockholder vote); *Sciabaucchi v. Salzberg*, 2019 WL 2913272 (Del. Ch. July 8, 2019) ($3 million for invalidated forum-selection bylaw), *rev'd*, 227 A.3d 102 (Del. 2020); *In re Vaalco Energy, Inc. Consol. Stockholder Litigation*, C.A. No. 11775-VCL (Del. Ch. Apr. 20, 2016) (TRANSCRIPT) ($775,000 for invalidated bylaw); *In re Cheniere Energy, Inc.*, C.A. No. 9710-VCL (Del. Ch. Mar. 16, 2015) (TRANSCRIPT) ($1 million for invalidated equity grants); *In re Xencor, Inc.*, C.A. No. 10742-CB (Del. Ch. Dec. 10, 2015) (TRANSCRIPT) ($950,000 for invalidated charter amendments).

("*Moelis III*"). The trial court's benefit calculation rested on unsettled academic literature on the value of control rights, rather than case-specific evidence. *Id.* at 53. The resulting fee award was over 15 times counsel's lodestar. *See id.* at 33.

The Court of Chancery is currently facing an excessive number of facial challenges. Shortly following that court's decision in *Kellner* declaring certain advance-notice bylaws "facially invalid," over twenty facial challenges were filed against companies with similar bylaws. *See, e.g., Golla v. Short*, C.A. No. 2024-0100-JTL; *Garfield v. Allen*, C.A. No. 2024-0270-KSJM. Also this year, stockholder-plaintiffs filed approximately two dozen cases challenging bylaws requiring board nominees to provide an irrevocable letter of resignation. *See, e.g.*, *In re Irrevocable Resignation Bylaw Litig.*, Consol. C.A. No. 2024-0538-JTL (consolidating 13 such cases). The plaintiffs in these cases do not allege that there is a proxy fight or other live dispute implicating the challenged bylaw. Rather, the plaintiffs' attorneys appear to have brought these claims expecting the defendants would amend their bylaws and pay a mootness fee, which, while costing stockholders value, is less than expected litigation costs. Ripeness doctrine should deter this sort of value-destructive litigation.

3. Conserving Judicial Resources

Lastly, justiciability doctrines like ripeness "conserve limited judicial resources." *XL Specialty Ins. Co.*, 93 A.3d at 1217. That purpose is salient given

the increased workload of the Court of Chancery in recent years, an issue which members of that court and this Court have stressed.

C. *Moelis I* Departed from Delaware Ripeness Doctrine.

This case was not ripe because Plaintiff alleged nothing suggesting that litigation between the parties "sooner or later appears to be unavoidable." *Stroud*, 552 A.2d at 481. Plaintiff did not allege that the Stockholder Agreement had caused it or other stockholders injury. Plaintiff did not allege that agreement had ever impeded board-desired action, let alone that Ken Moelis had ever invoked it to block board-desired action. There was no dispute over the Stockholder Agreement—either between Ken Moelis and the board, or between the board and stockholders. Plaintiff's suit simply sought a declaration on the theoretical question of whether common consent and governance rights are valid under Delaware law. That question may be (and, indeed, has been) one for academics like *Amici* to explore in law review articles. It is not a case or controversy that a court should decide.

Moelis I nonetheless found a ripe dispute by exempting Plaintiff's claim from ripeness doctrine. Instead, the trial court's analysis proceeds as if all facial challenges are ripe. *See* slip op., at 25-30. That approach contradicts Delaware law and is unsupported by the authorities *Moelis I* cited. In *Abercrombie v. Davies*, there was "clearly an actual controversy" over the agents' agreement's validity because some directors had "raised the question of a violation of the agreement," and

litigation had been filed in another forum enjoining violations of the agreement. 123 A.2d 893, 896 (Del. Ch. 1956), *rev'd*, 130 A.2d 338 (Del. 1957). The remaining cases *Moelis I* cited involved stockholder rights plans, which raise unique considerations because they are "incredibly powerful and novel device[s]." *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1083 (Del. Ch.), *aff'd*, 872 A.2d 559 (Del. 2005). Those cases were ripe because the plans had a "*present* depressing and deterrent effect upon the shareholders' interests, in particular, the shareholders' *present* entitlement to receive and consider takeover proposals" and (with dead-hand rights plans) "to vote for a board of directors capable of exercising the full array of powers provided by statute, including the power to redeem the poison pill." *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1188 (Del. Ch. 1998); *accord Moran v. Household Int'l Inc.*, 490 A.2d 1059, 1072 (Del. Ch.), *aff'd* 500 A.2d 1346 (Del. 1985).

Moelis I did not find that the Stockholder Agreement impeded stockholders' rights as a rights plan does. Unlike rights plans and certain other measures found ripe for facial challenge because of their "deterrent effect," the Stockholder Agreement lacks a built-in feature that dissuades an as-applied challenge. *Compare Solak v. Sarowitz*, 153 A.3d 729, 737 (Del. Ch. 2016) (finding facial challenge to fee-shifting bylaw ripe). Absent any present harm to stockholders, the fact that Plaintiff alleged the Stockholder Agreement violated the DGCL is insufficient to

create a ripe dispute. *See generally* John Mark Zeberkiewicz & Robert B. Greco, *Not All Facial Challenges Are Ripe* (October 18, 2024) (unpublished manuscript, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4992321) (reviewing recent cases and concluding that they have not altered traditional ripeness doctrine).

D. *Moelis II* Illustrates the Importance of Adhering to Ripeness Doctrine.

When a declaratory judgment claim raises "novel and important [issues] of Delaware corporate law," Delaware courts have substantial institutional interests "in postponing review until the question arises in some more concrete and final form." *Stroud*, 552 A.2d at 480-81. *Moelis I* nowhere considered these interests when assessing ripeness. The fallout from *Moelis II* illustrates why it should have.

The trial court's ruling greatly upset market expectations. The Stockholder Agreement was not a "new wave" stockholder agreement unfamiliar to the court or practitioners. As *Moelis II* acknowledged, the Court of Chancery in *Sample v. Morgan* rejected a Section 141(a) challenge to a stockholder agreement giving consent rights over equity issuances, finding that boards can "for proper business reasons, enter into contracts limiting [their] ability to exercise that power." 914 A.2d 647, 671 (Del. Ch. 2007); *see also In re INFOUSA, Inc. S'holder Litig.*, 953 A.2d 963, 999 (Del. Ch. 2007) (following *Sample* and rejecting Section 141 challenge to stockholder agreement because "a board is empowered to make agreements with

other actors in commerce, including its own shareholders"). Other decisions treated consent and governance rights in stockholder agreements as valid for various purposes.[5] They did so because Section 141(a) was understood to address the allocation of power between directors and managers. *See, e.g.*, *Grimes v. Donald*, 673 A.2d 1207, 1214-15 (Del. 1996) (subsequent history omitted); *Unisuper Ltd. v. News Corp.*, 2005 WL 3529317, at *6 (Del. Ch. Dec. 20, 2005). It was not understood to prohibit corporations from entering into agreements with capital providers, whether debt, equity, or human.

Compounding the problem was the test the trial court invented for determining compliance with Section 141(a). *Moelis II* makes facial validity turn on an atextual and amorphous distinction between "governance agreements" and "commercial agreements." Under the trial court's test, the same restriction can be valid or invalid depending on the counterparty—valid when given to a debt provider, for example, but invalid when given a provider of human or equity capital or other counterparty

[5] *See, e.g.*, *Chordia v. Lee*, 2024 WL 49850, at *22-23 (Del. Ch. Jan. 4, 2024) (enforcing stockholder agreement and holding that board was not entitled to hire or fire non-executive officers); *Voigt v. Metcalf*, 2020 WL 614999, at *19-21 (Del. Ch. Apr. 4, 2020) (considering consent rights in stockholder agreement when determining whether plaintiff has pled existence of controlling stockholder); *Wu v. White*, C.A. No. 2018-0427-JRS (Del. Ch. Aug. 14, 2018) (TRANSCRIPT) (acknowledging validity of provision allowing stockholder to designate board members); *Southpaw Credit Opp. Master Fund, L.P. v. Roma Restaurant Hldgs., Inc.*, 2018 WL 658734, at *6-7 (Del. Ch. Feb. 1, 2018) (invalidating equity issuance that violated stockholder agreement).

(like a licensor of intellectual property or an activist investor settling a proxy fight). That is not a coherent construction of Section 141(a), and, like other tests this Court has rejected, it would "foster uncertainty and potential inconsistency in a context where predictability is crucial." *SeeCubic, Inc.*, 279 A.3d at 353-54; *see also Williams v. Geier*, 671 A.2d 1368, 1385 & n.36 (Del. 1996) (rejecting statutory interpretation that would be "impermissible judicial legislation" and "introduce an undesirable degree of uncertainty into the corporation law").

Moelis II was at odds with market practice because the marketplace recognizes the value of corporations having flexibility to enter into stockholder agreements. Although Delaware law carefully monitors controlling stockholders, it recognizes their presence may benefit all stockholders by promoting long-term interest alignment. *See, e.g.*, *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1035 & n.66 (Del. Ch. 2012). Many stockholders will only hold large and non-diversified positions if they can negotiate for contractual protections. "There is a reason that the DGCL authorizes stockholder agreements, and the rights of control that come with them are important to the willingness of people to commit capital to corporations and therefore to the ability of society to create wealth through the corporate form." *OptimisCorp. v. Waite*, 137 A.3d 970 (Del. 2016) (TABLE).

In addition to attracting capital, stockholder agreements can be beneficial by ensuring that influential CEOs or founders continue focusing their attention on the

company. The Court of Chancery recognized this value in *Tornetta v. Musk*, which faulted Tesla's board for failing to insist on a provision requiring Elon Musk to "devote substantially all of his professional time and attention" to the company. 310 A.3d 430, 516 (Del. Ch. 2024).[6] Stockholder agreements can be a win-win situation where a stockholder makes important, ongoing promises to keep wealth and human capital concentrated in a company the stockholder is incentivized to help succeed.

Finally, the trial court's decision occurred amid an unusual number of Court of Chancery decisions addressing issues of first impression, including cases where those issues were unnecessary to decide the matter presented for decision. For example, in *In re McDonald's Corp. Stockholder Derivative Litigation*, the Court of Chancery departed from its proper tradition of considering a Rule 23.1 motion before a 12(b)(6) motion. 289 A.3d 343 (Del. Ch. 2023). Doing so allowed the trial court to hold, as a matter of first impression, that corporate officers with direct responsibility for managing a function should have their duties assessed on the same basis as an independent director exercising oversight duties. *Id.* at 349. That ruling was superfluous (and unappealed), since the court later found that demand was not

[6] Additional cases highlight the potential for distraction public corporations can face when founder-CEOs involve themselves in other public companies. *E.g.*, *In re Oracle Corp. Deriv. Litig.*, 2023 WL 3408772 (Del. Ch. May 12, 2023); *City of Coral Springs Police Officers' Pension Plan* v. *Dorsey*, 2023 WL 3316246 (Del. Ch. May 9, 2023), *aff'd*, 308 A.3d 1189 (Del. 2023) (TABLE).

futile. *See In re McDonald's Corp. S'holder Deriv. Litig.*, 291 A.3d 652 (Del. Ch. 2023); *In re McDonald's Corp. S'holder Deriv. Litig.*, 2023 WL 2329711, at *1 (Del. Ch. Mar. 1, 2023) (ORDER).

Similarly, in *Crispo v. Musk*, the Court of Chancery issued a broad decision on the enforceability of so-called "*ConEd* provisions" when ruling on a petition for attorneys' fees, even while recognizing that a narrower ruling could have decided that petition. 304 A.3d 567, 586 n.106 (Del. Ch. 2023) (acknowledging "[t]he parties focused most of their arguments in briefing over the question of whether Plaintiff's claim was ripe" and finding that "[e]ven if Plaintiff's enforcement right had vested, Plaintiff's claim had not yet ripened.").[7] *Amici* are concerned that broad decisions like these and *Moelis II* undermine the gradual, common-law evolution of Delaware corporate law that has been critical to its success.

E. Reaffirming Ripeness Doctrine Presents an Appropriate and Beneficial Way to Resolve this Appeal.

Amici respectfully submit that reversing *Moelis I*'s finding of ripeness and vacating *Moelis II* and *Moelis III* on that basis is a streamlined way to resolve this appeal that would advance salutary objectives.

First, reversing the lower court's ripeness holding will reinforce the Court of Chancery's traditional reluctance to address facial challenges that do not raise actual

[7] *Crispo* was also legislatively addressed this year.

cases and controversies. Some recent decisions from that court, like *Moelis I*, could be read to suggest that all facial challenges to the statutory validity of corporate actions are necessarily ripe. *See, e.g., Sciabacucchi v. Salzberg*, 2018 WL 6719718, at *24 (Del. Ch. Dec. 19, 2018), *rev'd on other grounds*, 227 A.3d 102 (Del. 2020); *Chester Cnty. Empls.' Ret. Fund v. New Residential Inv. Corp*., 2016 WL 5865004 (Del. Ch. Oct. 7, 2016), *aff'd*, 186 A.3d 798 (Del. 2018) (TABLE). Other decisions have found facial challenges ripe based on a "deterrent effect," *see, e.g.*, *Solak*, 153 A.3d at 737, a ground for ripeness that this Court has not had occasion to address. By clarifying how ripeness doctrine applies to facial challenges, this Court will give guidance to the lower courts and promote the stability of Delaware law.

Second, a finding that this case was unripe may help abate the excessive number of facial challenges being filed in the Court of Chancery. *Amici* believe that this category of lawsuits, as a whole, harms stockholders' interests. *See supra* pp. 10-12. Reversing *Moelis I*'s ripeness holding will discourage similar theoretical challenges that burden the courts and Delaware corporations, while still allowing challenges to the validity of corporate acts causing stockholders actual, present harm.

Third, reversing the trial court's decision on justiciability grounds fills the "donut hole" created by the recent DGCL amendments and their exemption for cases pending before August 1, 2024. *See Seavitt v. N-able, Inc.*, 321 A.3d 516, 556

(Del. Ch. 2024). While the legislature was understandably reluctant to affect pending litigation, the resulting situation of different legal regimes applying to similarly situated Delaware corporations is unjust. The General Assembly's prompt action acknowledged the reliance interests of the countless stakeholders who had contracted based on their understanding that Section 141(a) meant what cases like *Sample* and *INFOUSA* had interpreted it to mean. Companies should not be subject to an erroneous ruling simply because of when they were sued. Moreover, as the Court of Chancery observed in *N-able*, ruling what Delaware law was prior to the 2024 amendments is a "waste of judicial resources" that "risks creating confusion" on important issues. 321 A.3d at 558.

Finally, a holding that this case was unripe will not undercut the considerable protections Delaware law provides to stockholders against a misuse of corporate power—protections that the legislative amendments left fully intact. A stockholder aggrieved by an agreement can challenge its formation as a breach of fiduciary duty. *See Sample*, 914 A.2d at 672. A stockholder can also challenge any inequitable use of control rights or use the existence of such rights as evidence of a controlling stockholder who owes fiduciary duties. *See, e.g.*, *Hollinger*, 844 A.2d at 1081-82 (invalidating bylaw amendments); *Metcalf*, 2020 WL 614999, at *19-21 (citing contractual rights when finding controller). And, even if a stockholder agreement is valid, a court of equity may decline to specifically enforce it. *See 26 Capital Acq.*

Corp. v. Tiger Resort Asia Ltd., 309 A.3d 434, 473 (Del. Ch. 2023) ("For a decree of specific performance to issue, the equities must favor that outcome clearly and convincingly."); *Wu*, C.A. No. 2018-0427-JRS, Tr. at 45 (questioning availability of specific performance to enforce director designation right).

Equity provides important and substantial safeguards against abuse. These protections, and the alignment of interests that stockholder agreements foster, may explain why all the pending cases challenging stockholder agreements involve abstract requests for declaratory relief, rather than alleging an actual dispute over a stockholder's use of contractual rights.

CONCLUSION

Moelis II was a controversial decision. Given the recent DGCL amendments, there is little utility in this Court wading into that controversy. Reversing and vacating the Court of Chancery's rulings on ripeness grounds will efficiently resolve this appeal while clarifying an important issue of Delaware law for future cases.

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