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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRP GROUP, INC., Defendant-Below/Appellant, v. RUBY WAGNER, on Behalf of Herself and All Other Similarly Situated Stockholders of BRP GROUP, INC., Plaintiff-Below/Appellee.	No. 80, 2025 Court Below: Court of Chancery C.A. No. 2023-0150-JTL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

NATURE OF PROCEEDING

Defendant-Below/Appellant BRP Group, Inc. ("BRP") asks this Court to reverse the Court of Chancery's well-reasoned decision invalidating three separate provisions in BRP's governance agreement ("Stockholders Agreement" or "SA") with its founder, Lowry Baldwin ("Lowry"). In violation of the DGCL and BRP's certificate of incorporation ("Charter") and bylaws ("Bylaws"), these provisions unlawfully subverted the authority of BRP's directors ("Board") by requiring them to obtain Lowry's pre-approval for significant corporate actions.[1]

Unlike *Moelis*, where the court invalidated a suite of provisions collectively, the challenge here targeted three specific provisions individually. As the court properly held, each provision separately violated Delaware law as it existed before the enactment of Section 122(18).[2] That is the lens through which this appeal must be decided because that is precisely what the legislature expressly directed: Section 122(18) "shall not apply to or affect" this case. For purposes of this appeal, the new statute is the proverbial elephant *not* in the room.

Specifically, Plaintiff-Below/Appellee ("Plaintiff") challenged three provisions in the Stockholders Agreement ("Challenged Provisions") that required

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[1] Undefined capitalized terms are defined below.

[2] References to "Section(s)__" are to the Delaware General Corporation Law ("DGCL") unless otherwise stated.

BRP to obtain Lowry's prior written approval before permitting the occurrence of, entering into any agreement regarding, or making any commitment with respect to:

i. material transactions resulting in the merger or sale of all assets of BRP's sole operating business ("Transaction Pre-Approval Requirement");

ii. any "significant decisions" (e.g., hiring, firing, and compensation) regarding key employees, including Lowry's son, CEO Trevor Baldwin ("Officer Pre-Approval Requirement"); and

iii. charter amendments ("Charter Pre-Approval Requirement").

These provisions are not simply "consent rights," and they remain effective as long as Lowry's group maintains just 10% voting power.

Each Challenged Provision usurped the Board's authority to manage BRP's business and affairs by unlawfully transferring that authority to Lowry in violation of Section 141(a). The Officer Pre-Approval Requirement also violated Section 142 and BRP's Charter and Bylaws. Section 142 requires a corporation's bylaws (or charter) to prescribe the method for appointing officers and determining their terms of service; BRP's Charter and Bylaws assigned that role to the Board, not Lowry. Additionally, the Charter Pre-Approval Requirement violated Section 242, which mandates the precise board-initiated sequence for amending a corporate charter. Accordingly, in its Opinion Addressing the Validity of Provisions in a Governance

Agreement ("Opinion" or "Op."),[3] the court correctly found the Challenged Provisions facially invalid and therefore void, meaning that BRP's equitable defenses fail.

During the litigation, BRP attempted to moot Plaintiff's claims by entering into a Consent Agreement in an attempt to preserve Lowry's pre-approval rights. The trial court held the Consent Agreement cured the Section 141(a) violations but did not cure the violations of Sections 142, 242, the Charter, and Bylaws.

The court awarded Plaintiff's counsel $2.4 million for the substantial benefits achieved through a final judgment. In determining the fee—a 31% reduction from Plaintiff's request—the court considered each of BRP's arguments and properly exercised its discretion. The court correctly rejected what it called BRP's "fix it after the fact" argument that the court should discount the benefits because Lowry supposedly has the right to demand that BRP undo them through statutorily permissible means. The court also rejected BRP's request to jettison the *Sugarland* factors in favor of a quantum meruit/lodestar-based approach.

In all respects, the court correctly interpreted and applied settled Delaware law. Its judgment should be affirmed. If this Court disagrees, it should remand for consideration of Plaintiff's unresolved applied challenges.

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[3] Exhibit A to Appellant's Opening Brief (cited herein as "OB").

SUMMARY OF ARGUMENT

1. **Denied.** The court correctly held that equitable defenses do not bar Plaintiff's facial challenges.

2. **Denied.** The court correctly held that each of the Challenged Provisions violate Section 141(a).

3. **Denied.** The court correctly held that the Officer Pre-Approval Requirement violates Section 142, the Charter, and the Bylaws, and that the Charter Pre-Approval Requirement violates Section 242.

4. **Denied.** The court properly exercised its discretion in awarding $2.4 million in fees and expenses to Plaintiff's counsel.

STATEMENT OF FACTS[4]

A. BRP Completes An Up-C IPO And Enters Into The Stockholders Agreement

In 2011, Lowry co-founded Baldwin Risk Partners, LLC ("LLC"), with his son Trevor Baldwin ("Trevor") and two other partners. Op. 4. Lowry held a majority of the equity through Baldwin Insurance Group Holdings, LLC ("Holdings"), which Lowry controls through majority ownership, and served as LLC's Chairman/CEO. Op. 4-5. Trevor, the two partners, several executives, and former owners of acquired companies held the remaining equity (collectively with Holdings and Lowry, "Holders"). Op. 5.

In October 2019, the business went public through an Up-C IPO. *Id.* Holders formed BRP as the publicly-listed vehicle. *Id.* To the public, BRP sold Class A common stock carrying one vote per share and representing a proportionate economic interest. *Id.* To Holders, BRP issued shares of Class B common stock carrying one vote per share but no economic interest. *Id.* The number of Class B shares issued to Holders matched the number of LLC units each Holder owned post-IPO, through which Holders retain an economic interest in the business. Op. 6. Lowry remained chairman; Trevor became CEO. Op. 4, 32.

[4] The pertinent facts are undisputed. Op. 4.

In connection with the IPO, BRP and Holders entered into a governance agreement styled as a Stockholders Agreement. Op. 7. The Stockholders Agreement gave Holders control over BRP, potentially forever. *Id.* For as long as Holders beneficially owned at least 10% of BRP's issued and outstanding common stock ("Substantial Ownership Requirement") or until they voluntarily relinquished their rights, the Stockholders Agreement prohibited BRP from taking certain fundamental actions without Holders' pre-approval ("Pre-Approval Requirements"). Op. 9. Through his control over Holdings and a separate voting agreement, Lowry can dictate the outcome of a Class B vote, meaning Lowry controls the Pre-Approval Requirements, and BRP cannot terminate the Stockholders Agreement without Lowry's prior written consent. Op. 5, 9, 32.

Upon completing the IPO, Holders controlled approximately 70% of BRP's outstanding voting power through the Class B shares and held units representing approximately 70% of LLC's economics. Op. 6. But Holders steadily converted their LLC units and Class B shares into Class A shares, which they sold into the market. *Id.* When Plaintiff sued, Holders owned approximately 23% of BRP's voting power and economics. Op. 6-7. That has fallen below 20%. A1941.

B. Plaintiff Challenges Three Pre-Approval Requirements

Plaintiff acquired BRP stock in December 2020. A0012. On February 8, 2023, Plaintiff filed her Complaint. A0007. Plaintiff brought facial and applied challenges

to the Challenged Provisions, which are contained in Section 1.01 of the Stockholders Agreement:

> Until the Substantial Ownership Requirement is no longer met, [BRP] shall not permit the occurrence of the following matters relating to [BRP] or [LLC] without first receiving the approval of the Holders holding a majority of the shares of Class B Common Stock held by the Holders as evidenced by a written resolution or consent in lieu thereof:
>
> (a) any transaction or series of related transactions resulting in the merger, consolidation or sale of all, or substantially all, of the assets of [LLC] and its subsidiaries; any dissolution, liquidation or reorganization (including filing for bankruptcy) of [LLC] and its subsidiaries or any acquisition or disposition of any asset for consideration in excess of 5% of the Total Assets (as defined below) of [BRP] and its subsidiaries;…
>
> (c) any amendments to the certificate of incorporation or bylaws of [BRP], or to the certificate of formation or operating agreement of [LLC];…
>
> (k) any hiring, termination, or replacement of, or establishing the compensation or benefits payable to, or making any other significant decisions relating to the Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Chief Partnership Officer or any other senior management or key employee of [the Company] or [the LLC], including entering into new employment agreements or modifying existing employment agreements, adopting or modifying any plans relating to any incentive securities or employee benefit plans or granting incentive securities or benefits to any such individuals under any existing plans; or
>
> (*l*) any agreement or commitment with respect to any of the foregoing.

A0019.

C. BRP Enters Into The Consent Agreement

In response to this litigation, BRP and Holdings entered into the Consent and Defense Agreement ("Consent Agreement" or "CA") in May 2023. Op. 12. Under that agreement, Holdings "irrevocably consent[ed]" to approve any action unanimously approved by BRP's "independent directors" ("Committee"), provided they determine "in good faith" that the action is "in the best interest of [BRP] and its stockholders." *Id.* (citing A0241 (CA §1)). The Consent Agreement automatically terminates if the Holders no longer meet the Substantial Ownership Requirement or this Court issues a final order upholding the Stockholders Agreement independent of the Consent Agreement or invalidating the Stockholders Agreement notwithstanding the Consent Agreement. A0242-A0243 (CA §7).

BRP's Board concurrently amended BRP's Bylaws to establish the Committee ("Bylaw Amendment"). A0244-A0245 (CA §4.02). "[S]olely for purposes of the [Consent Agreement]," the Board granted the Committee full authority to determine whether to approve proposed transactions requiring Lowry's pre-approval. *Id*. The Bylaw Amendment requires the Committee to "act unanimously" and only "at a meeting at which all of its members are present." Op. 3, 13-14. Therefore, a single Committee member can block approval by voting no, abstaining, or failing to appear. Op. 14. According to BRP's 2023 proxy, eight of

the eleven directors qualified as independent; only Lowry, Trevor, and Kris Wiebeck lacked independence. Op. 14.

D. The Parties Seek Judgment On The Pleadings

The parties cross-moved for judgment on the pleadings. A0086; A0123. The court heard argument on February 8, 2024. A1842-A1920.

Plaintiff argued that: (i) all three Challenged Provisions were facially invalid under Section 141(a); (ii) the Officer Pre-Approval Requirement violated Section 142(b) and the Bylaws; (iii) the Charter Pre-Approval Requirement violated Section 242(b)(2); (iv) the Transaction Pre-Approval Requirement violated Section 251; (v) the Consent Agreement did not moot her claims, and (vi) BRP's equitable defenses failed. A0103-A0121. Plaintiff did not move on her applied challenges. A0104.

BRP responded that: (i) Plaintiff's facial challenges to the Challenged Provisions were unripe; (ii) the Challenged Provisions complied with the DGCL, Charter, and Bylaws; (iii) Plaintiff's claims were barred by equitable defenses; and (iv) any defects of the Challenged Provisions were mooted by the Consent Agreement and Bylaw Amendment. A0141-A0168.

E. The Court Rules And Enters Judgment

On May 28, 2024, the court issued its merits Opinion. The court rejected BRP's equitable defenses, holding that: (i) all three Challenged Provisions violated

Section 141(a) without the Consent Agreement; (ii) the Officer Pre-Approval Requirement violated Section 142, the Charter, and the Bylaws; and (iii) the Charter Pre-Approval Requirement violated Section 242. Op. 93. The court further held the Consent Agreement cured the Section 141(a) violations but not the other violations. Op. 86-87, 93. The court never reached Plaintiff's Section 212 argument, Op. 75 n.213, or her as applied challenges. On June 20, 2024, the court entered an implementing order, resolving the cross-motions. OB, Ex. C.

F. BRP Rejects Lowry's Request For A "Golden Share"

After the court ruled, Lowry invoked Section 4.09 of the Stockholders Agreement ("Severability Provision"), which allowed Holders to request a "suitable and equitable" and "valid and enforceable" substitute for any rights deemed invalid. A2026. Specifically, Lowry requested a so-called "golden share" of preferred stock to restore the rights invalidated by the litigation. *Id.* BRP rejected that request for unidentified "commercial reasons." A2006.

In July 2024, Delaware enacted Section 122(18), effective August 1. The implementing statute expressly states that Section 122(18) "shall not apply to or affect" litigation, including this action, pending on the effective date. 84 *Del. Laws*, c.309, §6 (2024).

On September 19, 2024, Plaintiff moved for attorneys' fees and expenses ("Fee Petition"). A1923-A1986.

On October 30, 2024, BRP and Holders entered into an agreement pursuant to Section 122(18) ("New Agreement" or "NSA"). A2026. The New Agreement (with a further Bylaw amendment) purports to restore the Pre-Approval Requirements. OB 9 (citing A2036 (NSA §1.01(h))). However, the New Agreement does not become operative if this Court upholds the Stockholders Agreement independent of the Consent Agreement. A2043 (NSA §4.15(e)). Under any other outcome, the New Agreement supersedes the Stockholders Agreement and Consent Agreement. A2039-A2040; A2043 (NSA §§4.02, 4.15(c)).

G. The Court Awards Plaintiff A $2.4 Million Fee

BRP opposed the Fee Petition one day after entering into the New Agreement. A1987-A2052. BRP argued the potential availability of substitute rights under the Severability Provision and the New Agreement demonstrated that Plaintiff conferred little or no benefit and any fee should therefore be pegged to counsel's lodestar. A2004-A2007.

On January 22, 2025, the court heard argument and awarded Plaintiff $2.4 million in fees and expenses. OB, Ex. D ("Fee Tr.") at 66-67.

On February 21, 2025, BRP appealed the court's merits ruling and fee award.

ARGUMENT

I. EQUITABLE DEFENSES DO NOT APPLY TO PLAINTIFF'S FACIAL CHALLENGES.

A. Question Presented

Did the court correctly reject BRP's equitable defenses? A0155-A0162, A1718-A1724.

B. Scope of Review

A judgment on the pleadings is reviewed *de novo*. *ACE Am. Ins. Co. v. Guaranteed Rate, Inc.*, 305 A.3d 339, 344 (Del. 2023).

C. Merits of the Argument

1. The Court Correctly Rejected BRP's "Practical Effects" Argument.

The court correctly held that the Challenged Provisions are void if they facially violate any provision of the DGCL, including Sections 141(a), 142, or 242. Op. 24. *See Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010) ("[A] bylaw provision that conflicts with the DGCL is void."). As the court explained, "[u]nder Delaware common law, contracts that offend public policy or harm the public are deemed *void* as opposed to voidable." *Id.* (quoting in *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1067 (Del. 2011)). Observing that "[t]hrough the enactment of statutes, the General Assembly declares the public policy of the State," the court properly concluded the

Challenged Provisions are void (rather than voidable) because they violate the DGCL. *Id.* (quoting *Edwards v. William H. Porter, Inc.*, 1991 WL 165877, at *8 (Del. Super. July 26, 1991), *aff'd*, 616 A.2d 838 (Del. 1992)). This was correct when BRP entered into the Stockholders Agreement *and* it was correct when the court issued the Opinion. *See, e.g.*, *Nat'l Acceptance Co. of Cal. v. Hurm*, 1989 WL 70953, at *4 (Del. Super. June 16, 1989) (holding repeal of Secondary Mortgage Act "has no bearing on the validity or public policy of the Act when the contract was made" and "contract must be enforced under the statutes *operating at the time it was made*" (emphasis added)).[5]

Ignoring this authority, BRP incorrectly analogizes to *Grimes v. Donald*, 1995 WL 54441 (Del. Ch. Jan. 11, 1995), and *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008). OB 13. BRP argues that, under *Grimes*, the Challenged Provisions are "voidable in equity" because they "have the *practical effect* of abdication of director responsibility violating §141(a) and the *practical effect* of a vote on officer selection and charter amendments violating §§142 and 242, respectively." *Id.* BRP also argues that, under *AFSCME*, Plaintiff's

[5] The Court issued its Opinion two-and-a-half months before Section 122(18) became effective. Accordingly, neither party had an opportunity to address that statute below. Because Section 122(18) "shall not apply to or affect" this litigation, BRP does not rely on it in this appeal. However, if this Court is inclined to consider Section 122(18), Plaintiff respectfully submits that it should permit supplemental briefing.

claims are "derived from" the DGCL, not a direct violation. *Id.* BRP misconstrues *Grimes*, *AFSCME*, and the Challenged Provisions.

In *Grimes*, the plaintiff challenged an employment agreement permitting the CEO to receive a termination payment if he unilaterally determined the board "unreasonably interfered" with his management. 1995 WL 54441, at *1. As Plaintiff explained below, "the Court [of Chancery] dismissed the claim because plaintiff pled 'insufficient facts'" for the court to "conclude that 'the amount of money that [the company] could owe to [the CEO]…[was] so great in relation to the wealth of [the company] as to preclude reasonable directors from freely exercising their business judgment.'" A1675 (quoting *Grimes*, 1995 WL 54441, at *10-11). Critically, the court in *Grimes* contrasted the termination payment's "practical effect," chilling the Board's exercise of its authority and fiduciary duties, with "formal[] foreclosure" warranting a finding of facial invalidity, such as a "covenant that [the] directors will not 'interfere' with [the CEO's] management." *Grimes*, 1995 WL 54441, at *9. This Court affirmed, applying *Abercrombie* and holding there was no Section 141(a) violation where the board was not "formally preclude[d]" from exercising its statutory powers and "retain[ed] the ultimate freedom to direct the strategy and affairs of the Company." *Grimes v. Donald*, 673 A.2d 1207, 1212, 1214-15 & n.2 (Del. 1996) (characterizing practical-effect theory as "*de facto* abdication of directorial authority").

Grimes supports Plaintiff. As explained below, the Pre-Approval Requirements *directly* interfere with the Board's authority, as the plain language of the Pre-Approval Requirements—"shall not permit"—formally precludes the Board from freely exercising its authority under the DGCL just like the hypothetical covenant not to interfere with a CEO's management discussed in *Grimes*. Accordingly, BRP's "voidable in equity" argument fails.

BRP's passing reference to *AFSCME* fares no better. BRP argues that, "[a]s in [*AFSCME*], [Plaintiff's] claims are 'derived from' the statute, *not* a direct violation of it." OB 13. The comparison is misplaced. In *AFSCME*, this Court held that a bylaw mandating reasonable reimbursement of stockholders' proxy expenses did not "facially violate" the DGCL or the corporation's charter because the bylaw did not "impermissibly intrude[] upon board authority" to manage the corporation's business and affairs. *AFSCME*, 953 A.2d at 236 n.19. The Court explained that, rather than regulating Board *authority*, the bylaw's "context and purpose" were "process-related." *Id.* at 236-37. However, this Court still found the bylaw would be invalid where it "mandate[d] reimbursement of election expenses in circumstances that a proper application of fiduciary principles could preclude." *Id.* at 238, 240.

In short, the Challenged Provisions (i) *formally* and directly preclude the Board from (ii) exercising its *authority* to manage BRP's business and affairs under the DGCL, Charter, and Bylaws. Unlike the employment agreement in *Grimes*, they

impose direct restrictions. Unlike the "process-related" bylaw in *AFSCME*, they intrude upon core areas of Board authority. Neither *Grimes* nor *AFSCME* supports BRP.

The court also properly relied on precedent from this Court and the Court of Chancery in holding that "[e]quitable defenses, including laches, cannot validate void acts." Op. 24 (citing *Holifield v. XRI Inv. Holdings*, 304 A.3d 896, 930, 931 (Del. 2023) (outside of Sections 204 and 205, "a void act could essentially be unfixable in the corporate context")); *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991) (rejecting "trial court's authorization of the two million shares of common stock on equitable grounds" because "[s]tock issued in violation of 8 *Del. C.* § 151 is void and not merely voidable"); *Waggoner v. Laster*, 581 A.2d 1127, 1137 (Del. 1990) ("Estoppel…has no application…where the corporate contract or action approved by the directors or stockholders is illegal or void."); *Absalom Absalom Tr. v. Saint Gervais LLC*, 2019 WL 2655787, at *3 (Del. Ch. June 27, 2019) ("Equitable defenses can validate voidable but not void acts."); *see also Politan Cap. Mgmt. LP v. Massimo Corp.*, C.A. No. 2022-0948-NAC, at 185 (Del. Ch. Feb. 3, 2023) (TRANSCRIPT) (holding plaintiff adequately alleged governance provision was "void *ab initio* and that laches, therefore, does not apply") (cited below at A1682-A1683). BRP addresses *none* of these decisions on appeal.

2. The Court Correctly Held that Laches Does Not Apply.

The court held that laches does not apply for three independent reasons—affirmance as to any would defeat laches here. *First*, as addressed above, "equitable defenses, including laches, cannot validate a void act." Op. 24 (internal quotation marks omitted). *Second*, even assuming laches could apply, Plaintiff "did not delay unreasonably." Op. 25. *Third*, there is no prejudice. *Id.* The court adopted (without repeating) its analysis from *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 310 A.3d 985, 994-1000 (Del. Ch. 2024) ("*Moelis I*") for the latter two points.

No Delay. The court held "the on-going existence of the Challenged Provisions violates Section 141(a)" and is a continuing wrong. *Moelis I*, 310 A.3d at 995-96. "Every moment that the Company's board operates under the constraints of the Challenged Provisions interferes with the directors' authority." *Id.* at 996. Plaintiff did not unreasonably delay because her claims accrued under the continuous-wrong or separate-accrual methods. Op. 25; *Moelis I*, 310 A.3d at 994-1000.

BRP does not dispute the Challenged Provisions represent an ever-present interference with Board authority. Instead, BRP (i) repeats its void/voidable arguments; (ii) pivots to inapposite discrete-act decisions; and (iii) attempts to distinguish the court's authorities. OB 11-20. Each strategy fails.

First, BRP falls back on voidability, arguing that "[t]he lower court's ruling effectively requires a perpetual carveout to the statutory limitation period applicable to *any action* based on *any claim* that an agreement or its effects violates a statute." OB 15. BRP ignores that the court's laches analysis was premised on finding that the Challenged Provisions continuously interfere with Board authority. BRP's position would permit corporations to break the law in perpetuity if they can avoid scrutiny for three years. That is not Delaware law.

Second, BRP's "settled law" is inapposite. OB 14-15. In *Kraft v. WisdomTree Investments, Inc.*, 145 A.3d 969, 970, 989 (Del. Ch. 2016), plaintiff challenged a stock issuance (not governance provisions), did not argue the issuance represented a continuing wrong, and did "not ma[k]e any tolling argument." In *In re Coca-Cola Enterprises, Inc.*, 2007 WL 3122370, at *4, *6 (Del. Ch. Oct. 17, 2007), plaintiffs based their claims "on discrete actions that occurred within the past three years" and never argued a continuing wrong, instead offering a (failing) equitable-tolling defense. In *In re Sirius XM Shareholder Litigation*, the court "did not…consider whether…the ongoing nature of a statutory violation made laches unavailable." *Moelis I*, 310 A.3d at 998 n.39 (citing 2013 WL 5411268, at *5 (Del. Ch. Sept. 27, 2013)).

Third, the court's authorities support its conclusion that the Challenged Provisions represent ongoing harms. In *Abercrombie v. Davies*, 123

A.2d 599, 602-04 (Del. Ch. 1956), plaintiffs successfully challenged a governance arrangement four-and-a-half years after its execution, with an equitable defense rejected as irrelevant. In *In re Ebix, Inc. Stockholder Litigation*, 2014 WL 3696655, at *11 (Del. Ch. July 24, 2014), defendants' laches defense failed because the court found "the alleged injury is ongoing" due to its "continued existence or subsequent implementation."

Prejudice. BRP cannot show prejudice to itself, as it must. *See Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 769-70 (Del. 2013) (unreasonable-delay element of laches separate from "prejudice *to the defendant*") (emphasis added). It identifies no risk of lost evidence or memories. BRP's only purported "prejudice" depends upon BRP's speculation that stockholders traded in reliance on the illegal governance arrangement. OB 16-17. That makes no sense. *See Moelis I*, 310 A.3d at 1001. Correcting statutory violations that harm stockholders does not "prejudice" *them*, nor does past trading prejudice *BRP*.

BRP has not proven its equitable defenses. If this Court finds BRP's equitable defenses are available, Plaintiff requests remand for the trial court to evaluate those defenses on the merits. *See* Op. 16.

3. The Court Correctly Held Waiver, Acquiescence, and Estoppel Do Not Apply.

The court held that Plaintiff's facial challenges are not subject to waiver, acquiescence, or estoppel. Op. 25-26.

BRP wrongly claims the court "rejected these defenses…only on the ground of the void/voidable distinction." OB 18. *Moelis I* (which the Opinion adopted for this issue) explained that acquiescence "depends on a defense-friendly inference that the act of purchasing shares connotes agreement with a disclosed arrangement." 310 A.3d at 1001. But "[p]urchasers could just as easily believe that the law rendered the disclosed arrangement invalid such that they did not have to worry about it." *Id.* BRP offers no response except to deride this reasoning as "speculation." OB 18.

BRP's acquiescence-through-purchase argument also conflicts with Delaware's standing requirements. "By purchasing shares, a buyer does not acquiesce in the prior conduct giving rise to a direct claim. Instead, a buyer can challenge that conduct." *Moelis I*, 310 A.3d at 1003. Under BRP's proposed regime, "timeliness principles would become irrelevant because the act of purchasing shares would insulate the conduct from challenge." *Id.* at 1001. BRP offers no response.

Moelis I further explained that a regime "in which purchasing shares constituted acquiescence would enable a corporation to create its own body of law through its IPO prospectus." *Id.* BRP half-responds that ripe fiduciary challenges present an alternative to facial challenges. OB 19. The court rejected that argument in *Moelis I*, 310 A.3d at 998, 1008-10.

For starters, a fiduciary challenge may be impossible if laches eliminated the facial challenge. *Id.* at 998. Moreover, statutory and fiduciary challenges "invoke

different principles and do different things." *Id.* at 1009. Those differences matter. Here, for example, "[a] situation in which the directors opt not to pursue a course of action because of the likelihood that [Lowry] would not approve thus will be virtually impossible to detect and more difficult to investigate. That undercuts the effectiveness of the Company's [fiduciary duty] solution." *Id.* BRP ignores this distinction. *See* OB 19.

Finally, BRP argues the court's "broad rule for all facial challenges" undercuts common-law incrementalism. OB 19-20. That merely repackages BRP's acquiescence-through-purchase argument. Arguing the Challenged Provisions were *super-disclosed* does not change the court's careful analysis of the problems with BRP's argument.

II. THE CHALLENGED PROVISIONS ARE FACIALLY INVALID UNDER SECTION 141(a).

A. Question Presented

Did the court correctly find the Challenged Provisions facially invalid under Section 141(a)? A0144-A0153, A1706-A1715.

B. Scope of Review

Issues of law based on uncontroverted facts are reviewed *de novo*. *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

C. Merits of Argument

In a well-reasoned opinion, based on a well-established line of precedent, the court correctly found the Challenged Provisions facially invalid under Section 141(a). Op. 28-72, 75-79, 81-85.

1. The Court Properly Applied *Abercrombie*.

The court properly applied the test established by then-Chancellor Seitz in *Abercrombie* and adopted by this Court on multiple occasions: "The provision is invalid [under Section 141(a)] if it has 'the effect of removing from [the] directors in a very substantial way their duty to use their own best judgment on management matters' or 'tends to limit in a substantial way the freedom of directors' decisions on matters of management policy….'" Op. 35-36 (quoting *Abercrombie*, 123 A.2d at 899); *see W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 311 A.3d 809, 819 n.13 (Del. Ch. 2024) ("*Moelis II*") (collecting cases). Applying that test,

the court found that the Challenged Provisions—each implicating a core Board function—were invalid under Section 141(a). Op. 36-39, 75-83.

BRP does not argue the court misapplied the *Abercrombie* test. Although the court analyzed each provision individually, BRP makes no provision-specific arguments and therefore waived any. *Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017). Instead, BRP offers only general, formalistic arguments. Each fails.

Quoting stray phrases from Plaintiff's brief below without confronting the court's text-based analysis, BRP argues the Challenged Provisions are merely contractual consent rights. OB 22-25. The court found this argument "plainly untrue" because "[t]he Stockholders Agreement frames all the Pre-Approval Requirements as flat prohibitions." Op. 39-40. In *Moelis II*, the court addressed the same argument, explaining that it would not matter even if accurate: "A flat prohibition that a counterparty can waive is the mirror image of a requirement to obtain counterparty consent." 311 A.3d at 867.

BRP claims the Challenged Provisions are "very different from other cases finding a potential issue under §141(a)" because Lowry cannot compel Board action. OB 22. But the *Abercrombie* test, which addresses "removing" or "limit[ing]" director freedom, draws no such distinction, as BRP's counsel has recognized.[6] In

[6] BRP claims the court "minimized these [case] distinctions." OB 24. To the contrary, the court methodically analyzed each of BRP's cases. Op. 30-40.

advising that a stockholder proposal barring a board from nominating certain individuals as directors violated Section 141(a), BRP's counsel relied on *Abercrombie*, *Quickturn*, and *Chapin*—the same cases it now calls "very different" from the functionally analogous Pre-Approval Requirements. B001-B004.

BRP also attempts to distinguish *Moelis* (where the contract bound the board) from the Stockholders Agreement (which binds BRP). OB 25. "But if Section 141(a) only applied to [director-level] restrictions, then corporate planners could circumvent the statute by specifying that a provision imposed an obligation on the corporation. The Section 141(a) decisions show that a provision can be invalid if [it] requires or forbids action on an issue that falls exclusively within the board's authority." *Moelis II*, 311 A.3d at 830; *see also id.* at 866 n.290. BRP never argues the Challenged Provisions fall outside the Board's exclusive authority. As the court rightly observed, "[i]n every sense, that outcome is functionally indistinguishable from preventing the Board from acting." Op. 41.

2. The Court Properly Conducted the Facial Analysis.

The court applied the appropriate test for facial challenges: "that a challenged provision cannot operate lawfully '*under any circumstances*.'" Op. 83 (quoting *Salzberg v. Sciabacucchi*, 227 A.3d 102, 113 (Del. 2020)). It correctly found the Challenged Provisions facially invalid by focusing on their obvious purpose and only possible consequence: to vitiate Board authority when the Board disagrees with

Lowry. Op. 85. Whether the Board agrees with Lowry or not, the Pre-Approval Requirements force the Board to obtain his pre-approval *before* taking action. That plainly violates Section 141(a).

BRP analogizes to *AFSCME*, arguing that the Challenged Provisions do not facially violate Section 141(a) solely because they *could* violate it under "a given set of facts"—i.e., as applied. OB 26-27. But, as explained above, the bylaw in *AFSCME* did not limit board *authority* to manage the company (unlike the Challenged Provisions). Rather, this Court found the bylaw would be invalid when the directors believed that reimbursing a stockholder would require them to breach their fiduciary duties. *AFSCME*, 953 A.2d at 238.

BRP misconstrues the Opinion in claiming the court "got it backwards, and reached its facial validity determination notwithstanding its own acknowledgement of scenarios where the Challenged Provisions could operate lawfully." OB 27. Rather, the court examined numerous scenarios to refute BRP's argument that "the Board remains free to exercise its decision-making authority," Op. 40-72, concluding BRP "would have no meaningful way to defeat the exercise of the Pre-Approval Requirements." Op. 72.

The "scenarios" BRP claims show the Challenged Provisions can operate lawfully show just the opposite: (i) if a court finds the implied covenant overrides them; (ii) if Lowry fails to obtain an injunction enforcing them; or (iii) if Lowry's

replacement rights are triggered by a court invalidating the Challenged Provisions. OB 27-28. BRP takes phrases in the court's analysis out of context but fails to show a single example of lawful operation. OB 27-29. In fact, the court painstakingly analyzed—and rejected—the "circumstances" where BRP claims the Challenged Provisions could operate lawfully. *See* Op. 40-72.[7] To the extent the court considered matters of degree, it was to assess the quantum of directorial abdication—a component of the *Abercrombie* test, i.e., whether abdication exists "in a substantial way."

3. The Court Properly Found Section 141(a) Applies.

Before conducting a facial inquiry, the court examined whether Section 141(a) applied to the Stockholders Agreement under the internal-governance inquiry articulated in *Moelis II*. Op. 30-35.

Contrary to BRP's assertion, *Moelis II* did not "legislate[] a new test." OB 21. Rather, it reasoned from two well-settled propositions: (1) "Delaware decisions regularly recognize that ordinary commercial contracts do not raise Section 141(a) concerns," and (2) "[a]ll of the successful Section 141(a) challenges have involved contracts or provisions tied to a corporation's internal affairs." 311 A.3d at 27-28.

[7] Perhaps for this reason, the court traced the standard's Delaware origins (imported from the criminal constitutional context of *United States v. Salerno*, 481 U.S. 739 (1987)), chronicled the "[c]onsiderable judicial and scholarly debate…over the *Salerno* standard," and observed, "it may be worth giving further consideration to whether Delaware should use the *Salerno* test." Op. 83-85 n.241.

Even *before Moelis I*, BRP's counsel acknowledged this distinction. *See* B002-B004 (advising "intra-governance restrictions" on future director conduct, as opposed to restrictions "imposed in a commercial agreement or arrangement," can violate Section 141(a)).

The court in *Moelis II* analyzed seven non-dispositive factors to distinguish commercial agreements from internal-governance agreements. 311 A.3d at 831; *id.* at 859 ("All are matters of degree. None are essential."). Even if this Court were inclined to take issue with those factors, that would be no reason to reverse because the court's holding was not a close call. It found "the Stockholders Agreement is a paradigmatic governance agreement" that "closely resembles the stockholder agreement at issue in the *Moelis Merits* decision, and it provides another prototype of an agreement that falls into that category." Op. 35.[8] Indeed, the court found all *seven* factors pointed to a governance agreement. Op. 30-35. BRP does not challenge those findings on appeal.

Instead, BRP complains that the *Moelis II* internal-governance factors are "unworkable" and "yield[] arbitrary distinctions." OB 22, 30. But BRP's musings (about debt, preferred stock, etc.) do not concern the Stockholders Agreement and are thus irrelevant.

[8] Buttressing that finding, *Moelis II* separately considered the role of stockholders agreements in a corporation's internal governance, finding them "fertile ground for Section 141(a) violations." 311 A.3d at 91-95.

In arguing the court's Section 141(a) holding "was not in keeping with longstanding Delaware public policy," BRP suggests that Section 141(a) could not apply to the Stockholders Agreement *at all*. OB 29. Unable to refute that the Stockholders Agreement creates an internal governance arrangement, BRP topples a strawman: "adopting a 'per se rule' that directors cannot enter into 'contracts with third-parties for legitimate reasons simply because those contracts necessarily impinge on the directors' future freedom to act' would render them unable to manage the corporation." *Id.* (quoting *Sample v. Morgan*, 914 A.2d 647, 672 n.79 (Del. Ch. 2007)). Citing cases that did *not* address Section 141(a) (*Sirius*, *ThoughtWorks*, *Hokanson*, *ReliaStar*), BRP claims that "Delaware courts have routinely upheld contracts limiting a board's freedom of action over substantial corporate matters." OB 29-30; *see Moelis II*, 311 A.3d at 878 ("The Company observes that those decisions have not held the provisions invalid. That is because no one challenged them. It would be an extreme step for a court to declare a provision invalid when no one has challenged it. Those decisions do not speak to the validity of the provisions.").[9]

[9] After examining Section 141(a) authority, *Moelis II* concluded that *Sample* "stands alone and on dubious ground in arguing for eliminating Section 141(a) challenges to corporate contracts. The weight of the Section 141(a) precedents…supports the viability of those challenges." 311 A.3d at 855; *see also id.* at 838 n.102 ("*InfoUSA*…relied exclusively on *Sample*…and rested on the purported impossibility of distinguishing between governance arrangements and commercial contracts.").

The court's ruling was far from anomalous—even excluding *Moelis*. *See Moelis II*, 311 A.3d at 878 ("The contemporary canon of Section 141(a) cases contains more than a dozen decisions that have invalidated contractual constraints in governance agreements under Section 141(a).").

BRP's policy entreaty is further belied by recent academic literature, which confirms that the Stockholders Agreement was an outlier from a market perspective. *See* B029 (Gladriel Shobe et al., *Moelis and Private Equity in the Public Market*, YALE J. REG. (forthcoming)) ("[T]he pre-approval rights in *Moelis* and *Wagner* were significantly more aggressive than the majority of the other 91 companies in our sample."). Moreover, before passing Section 122(18), the General Assembly knew similar agreements were of dubious legality. B058 (quoting Representative Madinah Wilson-Anton, Delaware S.B. 313 Senate Debate and Final Vote (June 13, 2024): "I've seen several memos from years back with the precise warning that these agreements are unenforceable.").

III. THE OFFICER AND CHARTER PRE-APPROVAL REQUIREMENTS VIOLATE SECTIONS 142 AND 242.

A. Question Presented

Did the court correctly hold that (a) the Officer Pre-Approval Requirement violates Section 142, the Charter, and the Bylaws; and (b) the Charter Pre-Approval Requirement violates Section 242? A0025-A0026, A0030-A0031, A0034-A0035, A0094, A0109, A0113-A0114, A1656-A1657, A1676-A1677.

B. Scope of Review

Questions of statutory interpretation are reviewed *de novo*, *Croda Inc. v. New Castle Cnty.*, 282 A.3d 543, 547 (Del. 2022), as are interpretations of charters and bylaws, *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990).

C. Merits of the Argument

"When evaluating corporate action for legal compliance, a court examines whether the action contravenes the hierarchical components of the entity-specific corporate contract, comprising (i) the [DGCL], (ii) the corporation's charter, (iii) its bylaws, and (iv) other entity-specific contractual agreements…." *Quadrant Structured Prods. Co. v. Vertin*, 2014 WL 5465535, at *3 (Del. Ch. Oct. 28, 2014). "Each of the lower components of the contractual hierarchy must conform to the higher components." *Sinchareonkul v. Fahnemann*, 2015 WL 292314, at *6 (Del. Ch. Jan. 22, 2015). "[A] corporate action is void where it violates

a statute or a governing instrument such as the certificate of incorporation or the bylaws." *Southpaw Credit Opportunity Master Fund, L.P. v. Roma Rest. Holdings, Inc.*, 2018 WL 658734, at *5 (Del. Ch. Feb. 1, 2018); *see also XRI Inv. Holdings LLC v. Holifield,* 283 A.3d 581, 653 (Del. Ch. 2022) ("An act that an entity lacks authority to take is *ultra vires* and void, in the sense that the act exceeds the authority that the state has granted.").

1. The Court Correctly Held that the Officer Pre-Approval Requirement Violates Section 142, the Charter, and the Bylaws.

The Officer Pre-Approval Requirement "requires that [BRP] obtain Lowry's prior written approval before permitting the occurrence of, entering into any agreement regarding, or making any commitment with respect to…'senior management or key employee[s].'" Op. 10 (quoting (A0175-A0176 (SA §1.01(k))). Because it violates Section 142, the Charter, and the Bylaws, the court rightly invalidated it.

Section 142(b) provides that "[o]fficers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors or other governing body." *See also Cooper v. Anderson-Stokes, Inc.*, 571 A.2d 786 (Del. 1990) (TABLE) ("Directors are empowered to remove officers with or without cause under the [DGCL]. [Section 142(b)] provides that corporate officers shall hold office subject to the

terms prescribed by the bylaws."). Section 142(b) does not dictate *how* officers must be selected and removed or on what terms; it "allows bylaws to establish a method." *Gorman v. Salamone*, 2015 WL 4719681, at *4 (Del. Ch. July 31, 2015). Section 142(e) similarly addresses vacancies: "Any vacancy occurring in any office of the corporation by death, resignation, removal or otherwise, shall be filled as the bylaws provide. In the absence of such provision, the vacancy shall be filled by the board of directors or other governing body."

Given Section 142's plain language, the court correctly held that it "does not authorize a stockholders agreement to determine how officers are chosen or removed, nor how vacancies are filled." Op. 73. The court also correctly noted that it "need not address whether the Charter or the Bylaws could empower a contractual counterparty to control those matters, because nothing in the Charter or Bylaws purports to allow it." Op. 74-75.

Sections 142(b) and 142(e) operate as "bylaw includers," meaning both bylaws *and* the charter can address how officers are chosen and removed and vacancies are filled. Op. 73 (citing Section 102(b)(1)). Accordingly, the procedures for hiring, firing, and making significant decisions regarding senior officers must be set forth in the Charter or Bylaws, or otherwise determined by the Board. These procedures cannot be stifled by the Stockholders Agreement.

Nothing in Section 142, the Charter, or the Bylaws permits Lowry to pre-approve significant officer-related decisions. Rather, the Charter "reinforces the Company's board-centric governance structure" by providing that "[t]he business and affairs of the Corporation shall be managed by, or under the direction of, the Board." Op. 74; A0197 (Charter §7.1(i)). The Bylaws are more specific, fully empowering the *Board* as ultimate decision-maker in hiring and removing officers. *See* A0234 (Bylaws §§5.01 & 5.02); A0109. "[J]ust as in *Schroeder* [*v. Buhannic*], '[u]nder the By-Laws, the power to hire and fire officers rests solely with the Board.'" A0109 (quoting *Schroeder*, 2018 WL 11264517, at *2 (Del. Ch. Jan. 10, 2018)).

The Officer Pre-Approval Requirement "purports to transfer that power to [Lowry]," A0109, by preventing the Board from making "any…significant decisions" concerning senior officers "without first receiving [Lowry's] approval." A0175-A0176 (SA §1.01(k)). This contradicts the Charter and Bylaws; the Officer Pre-Approval Requirement is therefore void under Section 142. A0109 (citing *Schroeder*, 2018 WL 11264517, at *2 ("Without reaching or considering any other arguments relating to the Consent, the By-Laws render the changes ineffective.")).

BRP argues the court "ignore[d]" supposedly "controlling precedent" in *Matulich v. Aegis Communications Essar Investments, Ltd.*, 942 A.2d 596 (Del.

2008). OB 3, 32-34. But BRP did not make this argument below. *See* A0154-A0155 (citing *Matulich* for argument that Transaction Pre-Approval Requirement and Charter Pre-Approval Requirement do not facially violate Sections 212(a), 242, and 251); A1716-A1718 (same). It is therefore waived. *Shawe*, 157 A.3d at 168.

Regardless, *Matulich* is unavailing. There, the plaintiff contested a short-form merger, arguing the acquiror lacked the requisite 90% ownership of the corporation's Series B preferred stock as mandated by Section 253. *Matulich*, 942 A.2d at 600-01. The question was whether the acquiror "had the statutory voting power necessary to execute a short-form merger." *Id.* at 602. This Court affirmed, holding that the acquiror possessed the requisite voting power under Section 253 because the certificate of designations expressly stated that holders of Series B preferred stock had "no voting rights," and "[t]he only right granted to the holders of the Series B Preferred Stock with respect to a merger was the right of approval and consent." *Id.* at 601. Critically, there was no dispute concerning the *validity* of the consent right in *Matulich* because it was properly established in accordance with the DGCL. *Id.* at 598, 600; *accord In re Fox Corp./Snap Section 242 Litig.*, 312 A.3d 636, 649 (Del. 2024) (certificate of designations amends and becomes part of charter). Here, the court *did* address the validity of the Officer Pre-Approval Requirement, correctly finding it invalid because it conflicted with BRP's organizational documents.

2. The Court Correctly Held the Charter Pre-Approval Requirement Violates Section 242.

"The Charter Pre-Approval Requirement requires the Company to obtain Lowry's prior written approval before permitting the occurrence of, entering into any agreement regarding, or making any commitment with respect to 'any amendments to the certificate of incorporation' of the Company." Op. 11 (quoting A0176 (SA §1.01(c))). This violates Section 242 by placing Lowry "at the head of the line" in any decision concerning Charter amendments. Op. 80, 85.

Section 242(b) sets forth the specific procedure BRP must follow in order to amend its Charter. "First, the board of directors must adopt a resolution declaring the advisability of the amendment and calling for a stockholder vote. Second, a majority of the outstanding stock entitled to vote [on the amendment] must vote in favor." *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996) (citing Section 242(b)(1)). These "two discrete corporate events must occur, in precise sequence" for a charter amendment to be effective. *Id.* As the court put it, "Section 242 establishes a straightforward process in which the board acts as the gatekeeper for charter amendments." Op. 87; *see also* Op. 79-80.

Directly contravening Section 242, the Charter Pre-Approval Requirement "designate[s] Lowry as the gatekeeper for whether the Company can amend its charter." Op. 11, 79; *see also* A0114. In so doing, it violates the "precise sequence" mandated by Section 242 and is therefore invalid and void. *Geier*, 671 A.2d at 1381.

On appeal, BRP raises a new argument: the court supposedly ignored the "[a]ctual text" of the Charter Pre-Approval Requirement. OB 34-35.[10] According to BRP, this provision does not put Lowry "at the head of the line" because it contains no "prohibition on the Board pursuing or considering any of the matters subject to" the Pre-Approval Requirements. OB 34. BRP attempts to support its new argument with an unrelated company's stockholders agreement that is *not* part of the record below. A2122-A2143. Because BRP did not present this argument and document below, this Court should decline to consider them. *Page v. Oath Inc.*, 270 A.3d 833, 842 n.59 (Del. 2022) ("We are, however, hesitant to consider documents not referenced in pleadings or included in a complaint."); *see also Shawe*, 157 A.3d at 168.

Regardless, BRP's new argument is wrong. As the court described it, the Charter Pre-Approval Requirement "requires the Company to obtain Lowry's prior written approval before permitting the occurrence of, entering into any *agreement regarding*, *or making any commitment with respect to* any amendments to the certificate of incorporation of the Company." Op. 11 (emphasis added) (internal quotation marks omitted). That precisely tracks the Stockholders Agreement's text,

[10] *See also* A1676-A1677 (explaining "*BRP makes only one argument in response* [to Plaintiff's argument concerning Sections 242 and 251]: the Approval Rights…do not take the form of a statutory vote") (emphasis added) (citing BRP's argument regarding *Matulich* at A0154-A0155)).

which provides that BRP "shall not permit the occurrence of" a Charter amendment or "*any agreement or commitment with respect to*" a Charter amendment "without *first* receiving [Lowry's] approval." A0175-A0176 (SA §§1.01(e), (*l*) (emphasis added)). A Board resolution declaring the advisability of a Charter amendment *and* calling for a stockholder vote, as contemplated by Section 242(b)(1), clearly constitutes an "agreement or *commitment with respect to*" a Charter amendment requiring Lowry's prior approval. A0175-A0176 (emphasis added). The court correctly held that this requirement violates Section 242 by placing Lowry "at the head of the line." Op. 80.

BRP also incorrectly claims the court "ignored" its argument regarding the difference between voting and consent rights addressed by *Matulich*. OB 3, 32-34. Not only did the court directly address this argument, it *agreed* that the Charter Pre-Approval Requirement "is not an additional vote":

> Importantly, the Charter Pre-Approval Requirement is not an additional vote that the corporation must obtain before a transaction can close. Transaction agreements often provide for additional votes, such as by requiring that a transaction can only close if, in addition to the statutorily required vote, it also receives approval from a majority of the unaffiliated shares. *The Charter Pre-Approval Requirement does not call for a specific additional vote as an additional requirement at the end of the line*. The Charter Pre-Approval Requirement purports to introduce *a threshold requirement before the statutory mechanism can proceed*. That mechanism violates Section 242.

Op. 80-81 (emphasis added). This explains exactly why *Matulich* is inapposite.

Elsewhere, BRP implicitly concedes the court's interpretation is correct. With respect to Section 251, BRP argues:

> [F]or mergers—which the Vice Chancellor suggested would be subject to the *same analysis*…—[the Court's reasoning] would substantially undermine the policy of §122(18) in that §251 requires an extra step before stockholders vote: entry into an actual merger agreement.... Thus, the lower court's analysis would suggest that, to avoid violating the sequencing requirements of §251, a [stockholders] agreement must allow entry into a merger agreement—one that may very well contain penalties if the contractual consent is not approved—before a consent right must be triggered.

OB 36 (emphasis added). In other words, BRP argues it would make bad policy to require a consent right to operate only *after* the Board causes BRP to enter into a merger agreement, potentially triggering a break-up fee. This argument reinforces the court's analysis. The Board must seek Lowry's approval at the *beginning* of the process, *before* it acts. That violates Section 242.

3. BRP's Policy Argument Fails.

The court correctly held the Consent Agreement does not cure the facial invalidity of the Officer and Charter Pre-Approval Requirements under Sections 142 and 242, respectively. Op. 86-87. BRP challenges that determination only with a policy argument: the Opinion "conflicts with the will of the Delaware Legislature

by suggesting that §122(18) cannot authorize contracts containing such consent rights." OB 35-36.

This argument fails for two reasons. *First*, BRP waived it by failing to raise it below. *Shawe*, 157 A.3d at 168. *Second*, Section 122(18)'s implementing statute expressly states that it "shall not apply to or affect any civil action or proceeding," including this one, that is "completed or pending on or before" August 1, 2024. 84 *Del. Laws*, c.309, §6; *see also Seavitt v. N-Able, Inc.*, 321 A.3d 516, 556 (Del. Ch. 2024) ("The Market Practice Amendments thus apply both prospectively and retrospectively, but with a donut hole for 'any civil action or proceeding completed or pending on or before August 1, 2024.' This case falls into the donut hole, as do *Moelis*, [and] *Wagner*…." (alteration and citation omitted)).

Put simply, Delaware's public policy for purposes of this case is that Section 122(18) is irrelevant and that the Court should instead apply the law as it existed before Section 122(18) became effective. *See, e.g.*, B006 (S.B. 313 sponsor Senator Bryan Townsend stating *Moelis* and "any lawsuit brought by August 1, 2024," such as this lawsuit, "needs to play out based on the facts and law of that case, *including the DGCL as it existed prior to the effectuation of SB313*.") (emphasis added).

IV. THE COURT PROPERLY EXERCISED ITS DISCRETION IN AWARDING REASONABLE ATTORNEYS' FEES.

A. Question Presented

Did the court properly exercise its discretion in awarding $2.4 million in attorneys' fees and expenses to Plaintiff's counsel for obtaining a judgment that invalidated unlawful pre-approval requirements in BRP's Stockholders Agreement? A1987-A2023.

B. Scope of Review

This Court reviews an award of attorneys' fees for abuse of discretion. *Sugarland Indus. v. Thomas*, 420 A.2d 142, 149 (Del. 1980). An award "will not be disturbed on appeal in the absence of capriciousness or factual findings that are clearly wrong." *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1262 (Del. 2012).

C. Merits of the Argument

In determining fee awards in representative litigation, Delaware courts apply the familiar *Sugarland* factors, "the yardstick to measure whether a fee award is 'reasonable': (1) the results achieved; (2) the time and effort of counsel; (3) the relative complexities of the litigation; (4) any contingency factor; and (5) the standing and ability of counsel." *In re Dell Techs. Inc. Class V S'holders Litig.*, 326 A.3d 686, 698 (Del. 2024) (citing *Sugarland*, 420 A.2d at 149). "The first factor—the results achieved—is paramount." *Id.*

Here, the court properly applied *Sugarland*, correctly treated the "significant" benefits achieved as "most important," and recognized that Plaintiff's counsel achieved those benefits in a complex litigation on a fully contingent basis. Fee Tr. 50-53, 64-65.

1. The Court of Chancery Properly Rejected BRP's Attempt to Trivialize the Benefits Achieved.

Plaintiff invalidated and modified governance provisions that ceded control over BRP's business and affairs to a minority stockholder. The court correctly found the results "were meaningful [and] [P]laintiff prevailed on the merits by winning a judgment." Fee Tr. 52-53.

Below, BRP argued that these benefits were negated by BRP's later decision to enter into the contingent New Agreement under Section 122(18) and, therefore, any fee award should not exceed counsel's lodestar. A1996; A2005-A2006. That argument is barred by Section 122(18) itself, which "shall not apply to or affect" this litigation. BRP also ignores that the New Agreement must be "suitable and equitable" and "valid and enforceable." A0181 (SA §4.09). No determination exists that the not-yet-effective New Agreement meets those criteria.

Recognizing Section 122(18)'s irrelevance, BRP argues the court committed "*legal error*" by disregarding what BRP says it could have done instead (but did not do): issue a "golden share." OB 38-40 (emphasis added). According to BRP, because the Severability Provision "was satisfiable through the issuance of a golden share,"

the benefit achieved "was of extraordinarily limited duration." OB 39. But BRP admits it "*rejected*" Lowry's request for a golden share, A2005-A2006; *see also* A1998; OB 38, and cites no authority suggesting fees should be based on its counterfactual scenario. Moreover, while the issue was not litigated below, the court questioned whether a validly-issued golden share—which could not bind the Board without a stockholder vote with support from over 30% of BRP's unaffiliated stockholders—could fully restore Lowry's pre-approval rights. Op. 49-50 n.135; A2063.

In any event, the court considered—and correctly rejected—BRP's "fix-it-after-the-fact" argument. Whether BRP theoretically could restore the invalidated rights through valid means is not a measure of the damage it suffered. *See* Fee Tr. 54 ("The fact that you get your car fixed doesn't mean you didn't have a wreck and suffer harm."). Relatedly, the court explained that "once you go the distance to a judgment…you may do something in response to that judgment. But that doesn't change the judgment. And it doesn't change, in my view, when the benefit should be valued." *Id.* As the court recognized, BRP's argument (1) "is inconsistent with principles of finality and respect for court judgments to have a system where defendants can negate relief post judgment"; and (2) would have perverse systemic effects on litigation incentives that would undermine how the "system works" to provide "accountability and integrity" for Delaware corporations. Fee Tr. 55-56;

see also Shepherd v. Simon, C.A. No. 7902-VCL, ¶4 (Del. Ch. Sept. 10, 2014) (ORDER) (finding "[i]f the plaintiffs had obtained a decision from the court on the merits that invalidated the [o]riginal [a]ward," they "would be entitled to have the benefits measured by the value of the full amount of the [o]riginal [a]ward").

As the court observed, this case involves an adjudicated judgment, not a mooted or settled claim. Fee Tr. 50-51. The benefit is measured from the judgment Plaintiff obtained, not BRP's potential "response to that judgment." Fee Tr. 54; *see also Ams. Mining*, 51 A.3d at 1263-64 (rejecting attempt to recast corporate benefit where defendants argued plaintiff's derivative recovery should be reduced by 81% (the percentage held by controller) before valuing benefit for purposes of awarding attorneys' fee).

None of BRP's cases involved a merits decision or a defendant's post-judgment effort to negate a court-awarded benefit. Instead, they concerned settled or mooted claims whose benefits were fixed from the outset—two of which BRP failed to cite below. *See In re Golden State Bancorp Inc. S'holders Litig.*, 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000) (disclosure-only settlement where benefit described as "quite modest"); *Friedman v. Baxter Travenol Labs., Inc.*, 1986 WL 2254, at *4-5 (Del. Ch. Feb. 18, 1986) (settlement involved "marginal decrease in liquidated damages clause in" merger agreement, which was "intangible" and "speculative"); *Dann v. Crysler Corp.*, 215 A.2d 709, 714 (Del. Ch.

1965) (court struggled to value rescinded stock options because defendant likely received replacements); *Berger v. Adkins*, C.A. No. 2022-0487-KSJM, ¶¶4-6, 8, 28 (Del. Ch. Aug. 8, 2023) (ORDER) (plaintiff largely abandoned claims and alleged speculative harm); *In re Cheniere Energy Inc. S'holders Litig.*, Consol. C.A. No. 9710-VCL, at 94-95 (Del. Ch. Mar. 16, 2015) (TRANSCRIPT) (benefit involved restriction on equity compensation, but settlement did not restrict non-equity compensation).[11]

At bottom, BRP's "legal error" argument fails because a judgment requiring a corporation to follow the law when devising its governance structure is not a "minimal" benefit of "extraordinarily limited duration." OB 39-40. As the court recognized, that is a "significant" benefit irrespective of the Severability Provision. Fee Tr. 53, 57.

2. BRP's Quantum Meruit Argument is Wrong.

In awarding attorneys' fees, Delaware courts assign "the greatest weight" to the benefit achieved. *Ams. Mining*, 51 A.3d at 1259; *see also Dell*, 326 A.3d at 698 (results achieved "paramount"). This Court has expressly rejected a quantum meruit-based approach to fee awards. *Id*. Hours spent creating the benefit are of

[11] Below, BRP omitted *Cheniere* in its Severability Provision argument and never cited *Dann*.

"secondary importance," serving only as a cross-check. *Ams. Mining*, 51 A.3d at 1258.

BRP seeks to turn Delaware law on its head, arguing the court committed legal error by not making "hours" paramount and "beginning the *Sugarland* analysis with a review of counsel's time and effort devoted to litigation creating an unquantifiable benefit." OB 44. The court correctly rejected this methodology, Fee. Tr. 59-60, which is contrary to Delaware's longstanding rejection of the lodestar method, *Ams. Mining*, 51 A.3d at 1254.

BRP calls the benefits "unquantifiable," OB 43-44, yet Plaintiff quantified them, *see* A1936; A1962-A1966; A2078-A2079. BRP largely ignored Plaintiff's quantification below, A2079, and entirely ignores it now. "[M]athematical exactitude" and "scientific precision is not required when awarding fees." *In re Compellent Techs., Inc. S'holder Litig.,* 2011 WL 6382523, at *20, *21 (Del. Ch. Dec. 9, 2011).

The court properly treated counsel's hours as a secondary factor, focusing instead on precedents involving similar benefits as the "primary benchmarks," namely *Moelis* and *N-Able*, the latter representing the "right starting point." Fee Tr. 60, 64. BRP does not mention these precedents, much less distinguish them. *See id.* at 57; A1964-A1969.

Instead, relying on three sets of cases, BRP incorrectly argues that a precedent-based approach results in "inconsistent fee awards." OB 43.

First, BRP cites five cases supposedly supporting its preferred quantum meruit approach. OB 41-42. Each is distinguishable: in *Dunkin' Donuts* and *Bass*, counsel's role in creating the benefit was uncertain; in *Forgo* and *Stanzione*, the court *did* rely on precedent in setting the fee, A2081-A2082; and *Xencor* involved a settlement where the court awarded counsel's requested fee. *In re Xencor, Inc.*, C.A. No. 10742-CB, at 54-55 (Del. Ch. Dec. 10, 2015) (TRANSCRIPT).

Second, BRP cites *Beaulieu*, *Pezzoli*, *Colfax*, and *Vaalco* as having purportedly involved "Section 141(a) facial statutory invalidity" challenges. OB 43; A2083. BRP simply ignores what Plaintiff explained below: "*None* were Section 141(a) cases, and the benefits achieved varied widely." A2083-A2084.

Third, BRP cites disclosure-only and regulatory compliance *settlements* without explaining their relevance. OB 43-44. BRP offers no basis for concluding its approach would be "more predictable and precise" rather than creating the bad incentives and administrative problems the court analyzed. OB 44; Fee Tr. 58-59.

In sum, BRP's proposal to recast Delaware law to "reward[] counsel based on the effort invested" instead of the benefits achieved, OB 45, is inconsistent with *Sugarland*, *Dell*, and decades of caselaw.

3. BRP Identifies no Abuse of Discretion.

According to BRP, the court should have determined the fee award by trying to assess what a reasonable plaintiff would have agreed to pay "in advance" for "the results achieved." OB 46. That is not part of the *Sugarland* test. Nor would such an open-ended subjective approach lead to "more predictable and precise" results. OB 44. The court correctly explained that this "classic *ex post* thinking" fails because it is "vulnerable to hindsight bias" and ignores contingency risk. Fee Tr. 65-66. There was no abuse of discretion.

BRP also quibbles with how the court assessed counsel's lodestar, the multiplier, and the implications of this case having proceeded in parallel with *Moelis* and *N-Able*. OB 45.[12] But the court carefully addressed those issues, Fee Tr. 63-64; BRP identifies only an exercise—not abuse—of discretion. That falls well-short of showing the court relied on "an irrelevant or improper factor," or that any part of its analysis was arbitrary or capricious. *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005). A 4x multiplier (which does not include time devoted to this appeal) was well within the range of precedent and "eminently reasonable." Fee Tr. 67.

[12] The court recognized this was not a tag-along action because it "addressed individual constraints, unlike *Moelis*," and the Consent Agreement required litigation of unique issues "that were not previously decided." Fee Tr. 53.

CONCLUSION

The Court of Chancery correctly applied existing law, ruling that three separate provisions in BRP's governance contract facially violate Sections 141(a), 142, and 242, and BRP's Charter and Bylaws, and are therefore void. Consequently, BRP's equitable defenses have no application and, in any event were never proven. The court awarded a reasonable fee for the judgment achieved. This Court should affirm.

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