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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.	)	Case No. 80, 2025 Court Below: Court of Chancery; C.A. No. 2023-0150-JTL

APPELLANT'S REPLY BRIEF

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May 23, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Rules and Statutes

INTRODUCTION[1]

Plaintiff does not dispute that Delaware public policy has "long recognized the value of flexibility and private ordering," *Maffei v. Palkon*, 2025 WL 384054, at *30 (Del. Feb. 4, 2025), and "strives to enhance flexibility in order to engage in private ordering, and to defer to case-by-case law development." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 137 (Del. 2020). The court below did the opposite—it "discerned" a broad, merits-based test for claims that should have been dismissed on equitable defenses, and placed the Challenged Provisions, as described by Plaintiff, "beyond the bounds of permissible private ordering." A1753. Plaintiff's positions would:

- Result in any person being able to buy stock at any time to challenge as facially invalid any agreement, whether years, decades or generations old, even when that person (and the market as whole) was on notice of the agreement at all relevant times, and in the absence of any facts to support any as-applied challenge;

- Leave whether an agreement is "beyond private ordering" to indeterminate considerations, like whether a source of capital is debt or equity, whether the capital provider has other relationships with the company, and the sufficiency of the underlying commercial exchange—notwithstanding the Opinion's acknowledgment that similar consent rights could be included in a golden share of preferred stock; and

[1] Plaintiff's Appendix is cited as "B__", Plaintiff's Answering Brief as "Answering Brief" or "AB __", and capitalized terms used but not defined herein have the meanings given them in Defendant's Opening Brief ("Opening Brief" or "OB __") or, if not defined therein, in the Opinion.

- Create inappropriate litigation incentives by awarding Plaintiff's counsel $2.4 million, notwithstanding that the result of her litigation was to trigger a pre-existing, disclosed, and then-satisfiable right to a suitable and equitable replacement, leaving stockholders in virtually the same place they were before.

These positions are neither supported legally nor reflective of sound public policy. Accordingly, the Opinion should be reversed.

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE BARRED AT EQUITY.

A. *Equitable Defenses Apply.*

As explained in the Opening Brief (at 11-13), in *Grimes v. Donald*, 1995 WL 54441, at *9-10 (Del. Ch. Jan. 11, 1995), *aff'd*, 673 A.2d 1207 (Del. 1996), the Court of Chancery held claims a contract has the practical effect of precluding a "board from exercising its statutory powers and fulfilling its fiduciary duty" render it "voidable in equity." The Court distinguished cases involving directors being formally foreclosed from exercising their authority because they either agreed in advance how to vote or completely delegated their authority to someone else. *Id.* at *9. This distinction makes sense, as §141(a) caselaw does not address express violations of the statute, but rather is doctrine "derived from" it. *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 238 (Del. 2008).

Plaintiff responds by stating that under "Delaware common law, contracts that offend public policy or harm the public are deemed *void* as opposed to voidable" and that the General Assembly sets public policy through enacting statutes. AB 12 (citations and internal quotations omitted). True, but irrelevant. *Grimes* and *CA* are clear: Plaintiff's §141(a) challenges, even if sustained, would not result in a direct statutory violation. Indeed, in *CA*, this Court held a bylaw that could violate the "common law rule or precept" derived from cases such as

Quickturn Design Systems, Inc. v. Shapiro, 721 A.2d 1281, 1283 (Del. 1998), which Plaintiff states is "most on point" (A1860), did not "facially violate any provision of the DGCL." 953 A.2d at 238. Plaintiff attempts to minimize these distinctions by arguing the Challenged Provisions "formally preclude[] the Board from freely exercising its authority under the DGCL." AB 15. But even if accurate (it isn't), it would be substantially similar to how this Court described the facially *valid* bylaw in *CA*: removing from directors "their full power to exercise their fiduciary duty to decide whether or not it would be appropriate, in a specific case, to award reimbursement at all." 953 A.2d at 240. Plaintiff similarly cites cases holding that equitable defenses cannot validate void acts. AB 16. Again, true but irrelevant where the Challenged Provisions are at most voidable, not void.

Plaintiff seeks to minimize precedent dismissing a §141(a) claim on laches grounds, *In re Sirius XM Shareholder Litigation*, 2013 WL 5411268 (Del. Ch. Sept. 27, 2013), by quoting the *Moelis Preliminary Issues* opinion's observation that *Sirius* "did not . . . consider whether . . . the ongoing nature of a statutory violation made laches unavailable." AB 18 (as quoted in AB). But that does not mean this twelve-year-old precedent dismissing a §141 claim on laches grounds can just be ignored. *See Account v. Hilton Hotels Corp.*, 780 A.2d 245, 249 (Del. 2001) (rejecting, based on *stare decisis*, argument that each stockholder must consent to rights plan because "[w]hile it is technically correct to argue that *Moran* did not

explicitly pass upon the question of whether a rights plan required express consent of all parties affected by it, there is little doubt that *Moran*, *inter alia*, denied objecting shareholders the right to oppose implementation of a rights plan"). So too with *Sirius*.

Finally, Plaintiff creates a strawman—whether adoption of §122(18) should factor into the laches analysis. AB 13 n.5. Defendant's argument regarding the void/voidable distinction, however, does not depend on the existence of §122(18) (although the fact that the General Assembly did adopt §122(18) need not be ignored, as explained below).

B. *Laches Bars Plaintiff's Claims.*

Plaintiff's attempt to argue that laches, even if available, does not apply, incorrectly conflates claims accrual with the void/voidable distinction. AB 18. As Defendant observed, assuming a laches defense were available, applying the "continuing wrong" claim accrual theory would effectively preclude that defense. OB 15. Plaintiff does not dispute this conclusion but seeks to deflect by arguing a contrary rule would "permit corporations to break the law in perpetuity if they can avoid scrutiny for three years." AB 18. But this Court has held §141(a) claims are based on a "common law rule or precept," not a direct violation of a statute, and the Stockholders Agreement was publicly disclosed even before the IPO

and repeatedly thereafter. Stockholders also remain free to bring as-applied challenges if they arise.

Plaintiff also attempts to distinguish *Kraft v. Wisdom Tree Investments, Inc.*, 145 A.3d 969 (Del. Ch. 2016), *In re Coca-Cola Enterprises, Inc. Shareholders Litigation*, 2007 WL 3122370 (Del. Ch. Oct. 17, 2007), and *Sirius* as "inapposite discrete-act decisions." AB 17-18. But *Sirius* is directly-on-point precedent. *Kraft* held a cause of action arising from a stock issuance in violation of statute accrues upon issuance; the continued existence of the stock is not a continuing wrong. 145 A.3d at 989. And in *Coca-Cola*, the Court dismissed as time-barred claims based on a twenty-year old agreement that "hinge[d] upon the allegations that the terms and conditions established by a contract are unfair to the plaintiff[s]." 2007 WL 3122370, at *6. Although Plaintiff argues the Stockholders Agreement is a violation of §141(a) common law precepts, rather than fiduciary duty, the laches analysis remains the same. As contemplated by *Lebanon County Employees' Retirement Fund v. Collis*, 287 A.3d 1160, 1202 (Del. Ch. 2022), a "discrete act," rather than continuing wrong, approach is correct when the initial act provided potential plaintiffs knowledge of conduct and incentive to sue, and a "finite quantum of conduct"—here, entering into the Stockholders Agreement—caused all the harm that may result.

Plaintiff argues authorities cited in *Moelis Preliminary Issues*—*Abercrombie v. Davies,* 123 A.2d 893 (Del. Ch. 1956), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957), and *In re Ebix, Inc. Stockholder Litigation*, 2014 WL 3696655 (Del. Ch. July 24, 2014)—support her position. AB 18-19. But laches was not raised in *Abercrombie*, and the one equitable defense raised there *was addressed on its merits*, and *Ebix* involved allegations that an agreement's adoption violated a stock plan (to which the Court suggested laches would have applied absent tolling) *and* that the board breached its fiduciary duties in *maintaining* that plan (which allegation was not time barred). OB 15.

Finally, Plaintiff argues Defendant cannot show prejudice to itself. AB 19. Of course, the Court may "presume prejudice if the claim is brought after the analogous limitations period has expired." *Kraft*, 145 A.3d at 979. And Plaintiff ignores the potential claims against Defendant from Holders who sold stock given Defendant's representation that the Stockholders Agreement is a binding obligation, as well as both potential claims and market-based risks from current and former stockholders who traded based on the disclosed terms of the Stockholders Agreement and Lowry's continued role in Defendant's future success.

C. *Other Applicable Equitable Defenses.*

Plaintiff argues (AB 20) that the court below incorporated its entire analysis on other equitable defenses from *Moelis Preliminary Issues*, although the

court's discussion of them in *this* case focused solely on the void/voidable distinction. Op. at 25-26. Regardless, these defenses, particularly acquiescence, apply here. Plaintiff, like the court below, argues for a broad, one-size-fits-all rule for all facial challenges. But when focusing on the specific allegations in this case—as a traditional common law inquiry would—it is clear acquiescence applies based on the *combination* of four undisputed facts:

1. the Prospectus acknowledged Lowry's critical role in the business before shares publicly traded;

2. the terms of the Stockholders Agreement were disclosed in the Prospectus and at least eleven subsequent filings before litigation commenced so that the choice to acquire stock, whether in the IPO or secondary market, was made with full disclosure;

3. the Company represented to the Holders in the Stockholders Agreement that the rights granted therein were binding obligations, thereby causing the Holders to sell stock assuming the Stockholders Agreement is valid; and

4. the Complaint was filed over three years after the IPO.

OB 19-20. Plaintiff argues these facts should be ignored because "a fiduciary challenge may be impossible." AB 20. But rank speculation regarding future events ignores, as did the court below, the need for a factual context in judicial decision-making. *Maffei*, 2025 WL 384054, at *26-27 (discussing ripeness jurisprudence; reversing application of entire fairness without factual record). Applying equitable defenses, whether laches or acquiescence, does not foreclose the possibility of as-applied statutory claims or fiduciary claims within a factual context.

Plaintiff's new argument that applying acquiescence would conflict with Delaware's standing requirement (AB 20) both suffers from the same infirmity of making broad legal pronouncements untethered to specific factual allegations and is contrary to this Court's precedent. *Schultz v. Ginsburg*, 965 A.2d 661, 668 (Del. 2009) ("Delaware law recognizes a policy against buying a lawsuit."), *overruled on other grounds by Urdan v. WR Cap. Partners, LLC*, 244 A.3d 668 (Del. 2020).

II. THE CHALLENGED PROVISIONS ARE FACIALLY VALID UNDER § 141.

A. *The Challenged Provisions Are Valid Consent Rights.*

Plaintiff argues that *Moelis Merits*, upon which the Opinion is based, was a simple application of the *Abercrombie* test. AB 22. But the court below itself acknowledged that it "discerned" a new two-part test in its analysis. Op. at 28.

The first part of this new two-part test—whether "the challenged provision constitutes part of the corporation's internal governance agreement" (itself based on at least seven subparts)—finds no support in law and yields arbitrary distinctions. OB 21-22. Realizing this, Plaintiff suggests that "[e]ven if this Court were inclined to take issue with those factors," AB 27, it should not reverse because the Stockholders Agreement resembles the one in *Moelis*. But Delaware courts have routinely upheld commercial contracts limiting a board's freedom of action over substantial corporate matters. OB 29-30. Plaintiff attempts to discount this precedent by arguing it does not involve §141(a) issues and quoting *Moelis Merits* that "it would be an extreme step to declare a provision invalid when no one has challenged it." AB 28 (citing *Moelis Merits* at 878). But *Sirius did* involve a §141(a) challenge. *See* A0159. And in *ThoughtWorks*, the Court itself suggested obtaining a contract right requiring a forced sale of the company as a viable alternative to redemption rights. *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 992

(Del. Ch. 2010) (citing *Hokanson v. Petty*, 2008 WL 5169633 (Del. Ch. Dec. 10, 2008)).

Plaintiff also cites a letter ("14a-8 Letter") drafted by Defendant's counsel distinguishing unilaterally-adopted governance guidelines, rules or bylaws from commercial agreements to support the lower court's new, seven-part test. B001-004 (AB 27). But distinguishing such documents from commercial agreements in which consideration is received is sensible, workable and consistent with existing caselaw. *Cf.* Del. S.B. 313 syn., 152d Gen. Assem. (2024) ("SB313") (observing that, in accord with precedent, §122(18) only authorizes contracts "supported by consideration received by the corporation" and thus does "not change the outcome in cases that invalidated bylaws, and other arrangements" unsupported by consideration). Plaintiff seeks to minimize the market-destabilizing impact of her inability to propose any workable test distinguishing among various commercial arrangements, saying such failure is "irrelevant." AB 27. Yet it was Plaintiff who argued the court should consider her claims because they "implicate[] other corporations considering similar provisions." A0116.

Turning to the second part of the lower court's test, the Opening Brief discussed the *specific* reasons why each of *CA*, *Chapin v. Benwood Foundation, Inc.*, 402 A.2d 1205 (Del. Ch. 1979, *aff'd*, *Harrison v. Chapin*, 415 A.2d 1068 (Del. 1980)), *Abercrombie*, *Gorman v. Salamone*, 2015 WL 4719681 (Del. Ch. July 31,

2015), *Schroeder v. Buhannic*, 2018 WL 11264517 (Del. Ch. Jan. 10, 2018), *Jackson v. Turnbull*, 1994 WL 174668 (Del. Ch. Feb. 8, 1994), *Field v. Carlisle Corp.*, 68 A.2d 817 (Del. Ch. 1949), *Clarke Memorial College v. Monaghan Land Co.*, 257 A.2d 234 (Del. Ch. 1969), and *Quickturn* are inapposite. OB 21-25. Plaintiff does not explain why those distinctions are unpersuasive; indeed, she does not even cite *Chapin*, *Gorman*, *Schroeder*, *Jackson*, *Field*, *Clarke, or Quickturn* in her §141(a) analysis. Nor does she address the observation that if, as suggested in *Gorman*, a bylaw may grant stockholders the power to fill officer vacancies, a contractual consent right must be permissible. OB 23 (citing *Gorman*, 2015 WL 4719681, at *6). Instead, in circular fashion, she argues for affirming the Opinion mostly by citing the Opinion itself and the *Moelis Merits* opinion on which it is based. AB 22-23.

A key distinction from the cases referenced above is that the Challenged Provisions reflect only contractual consent rights, and do not *mandate* the Board affirmatively act a certain way, allow stockholders *directly* to take action reserved for directors, or completely *delegate* authority to a nonfiduciary to take action reserved for directors. OB 22-23; *cf.* §122(5) (providing that delegation of authority remains subject to §141(a)). In response, Plaintiff argues the court below correctly engaged in a "text-based" analysis to hold this distinction "plainly untrue" because the Challenged Provisions are "flat prohibitions" rather than consent rights and cites

Moelis Merits for the proposition that "[a] flat prohibition that a counterparty can waive is the mirror image of a requirement to obtain counterparty consent." AB 23 (citing Op. at 39 and *Moelis Merits* at 867). But that is clearly wrong, both textually and practically. Textually, the Stockholders Agreement prevents certain actions "without first receiving the approval of the Holders holding a majority of the shares of Class B Common Stock held by the Holders." A0175. If that's not a consent right, what is? Practically, asking a counterparty to provide a contractually-contemplated consent—subject to the implied covenant of good faith and fair dealing and the potential substitution of new provisions under the Severability Provision, and after the board has resolved to take the action—is clearly different from asking a counterparty to provide a waiver to a contractually-contemplated flat prohibition (particularly one that does not even allow the board to resolve to act). OB 25. Plaintiff's only response is that a provision *can* raise §141(a) issues if it nominally binds a corporation. AB 24. But that does not answer whether *these consent rights* are distinguishable from prior provisions courts have found infirm under §141(a).

Finding no legal support outside *Moelis Merits* to address these distinctions, Plaintiff resorts to citing the 14a-8 Letter (B001-004), which addressed a proposal for a board to adopt a governance guideline, rule or bylaw that would prohibit it from nominating a director for reelection in certain instances. AB 23-24.

But the difference between such a proposal and a contractual consent right is manifest. Indeed, the 14a-8 Letter expressly noted that such a restriction "may be permissible if it is imposed in a commercial agreement or arrangement, such as a restriction on nominations granted in exchange for bargained-for consideration given to the Company or to induce actions that benefit the Company or its stockholders"—exactly what the Stockholders Agreement is. B004.

In an effort to avoid the merits, Plaintiff claims Defendant waived any provision-specific defense of each of the Challenged Provisions individually, AB 23, notwithstanding that she defended her failure to allege any §141(a) challenge to the Charter Consent Right or §142 challenge to the Officer Consent Right by stating that Defendant "cannot seriously claim prejudice or that it was not on notice, particularly given that [those rights] are simply clausal subparts to the contractual sentence containing the other Approval Rights." A1750. Regardless, because each individual right is simply a contractual consent, they each individually are valid and, in any case, Defendant did address cases specific to the Officer Consent Right. *See* OB 23-24 (discussing *Gorman* and *Schroeder*).

B. *The Improper Facial Validity Analysis.*

Even assuming the Challenged Provisions may be unenforceable as applied in a given instance, the court below incorrectly held them facially invalid based on the following faulty syllogism:

1. If Lowry and the Board agree on a course of action, the Challenged Provisions do not operate at all.

2. Lowry will only invoke one of the Challenged Provisions if he disagrees with a course of action the Board wants to pursue.

3. Therefore "every setting in which Lowry relies on one of the Challenged Provisions will constitute a violation of Section 141(a)."

Op. at 85. That syllogism flies in the face of this Court's opinion in *CA*. There, the proposed bylaw would mandate expense reimbursement in successful short-slate proxy contests. This Court observed that a board could decide to reimburse proxy expenses "where the controversy is concerned with a question of policy." 953 A.2d at 240 (internal quotation marks omitted). According to the syllogism above, in those circumstances the bylaw would "not operate at all," since all persons would agree to reimbursement. Op. at 85. However, there could be situations, such as a proxy contest motivated by personal concerns, where the board's fiduciary duty "could compel that reimbursement be denied altogether." *CA*, 953 A.2d at 240. According to the syllogism above, this would mean that "every setting in which [a stockholder] relies on [the bylaw] will constitute a violation of Section 141(a)." Op. at 85. Yet, in *CA*, this Court held that the bylaw did *not* facially violate the DGCL. 953 A.2d at 238.

Tacitly recognizing the weakness of her argument, Plaintiff, like the court below, encourages this Court to abandon its test for facial validity. *See* AB 26

n.7. But that test, recently reapplied in *Kellner v. AIM ImmunoTech Inc.*, 320 A.3d 239 (Del. 2024), is high for a reason. As Plaintiff explains, a facial invalidity finding places a provision "beyond the bounds of permissible private ordering." A1753. Such a finding is contrary to longstanding Delaware public policy. *Maffei*, 2025 WL 384054, at *30. Rather than follow this public policy, the court reached to determine facial invalidity. Its analysis was the opposite of "enhanc[ing] flexibility in order to engage in private ordering, and to defer to case-by-case law development," *Salzberg*, 227 A.3d at 137, and is not supported by the law. To the contrary, for an act to be void it must be one that the corporation cannot lawfully accomplish because it is *ultra vires*; whereas voidable acts "are acts falling within the power of the corporation, though not properly authorized, and are subject to equitable defenses." *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 816-17 (Del. 2018), *superseded on other grounds by statute*. As the Opinion itself recognized that the Challenged Provisions could have been included in Defendant's charter (Op. at 7, 49), it cannot be said that they are void; they are at most voidable and subject to equitable defenses.

III. THE OFFICER CONSENT RIGHT AND CHARTER CONSENT RIGHT ARE FACIALLY VALID UNDER §§ 142 AND 242.

A. *Plaintiff Fails To Distinguish Matulich.*

The court below held that the Challenged Provisions were valid under §141(a) after the Consent Agreement because that Agreement "sufficiently frees the Board to make substantive decisions on matters otherwise governed by the Pre-Approval Requirements." Op. at 93. Yet the lower court nonetheless held the Officer Consent Right and Charter Consent Right invalid under §§142 and 242, respectively. It did so because the "mechanism" for changing officers and the "system" for addressing charter amendments are not contemplated by the statute. *Id.* at 86-87. In other words, these contractual consent rights were invalid because they interfered with a statutorily-contemplated *process*, *not* because of substantive over-delegation.

Matulich v. Aegis Communications Group, Inc., 942 A.2d 596 (Del. 2008), demonstrates the lower court was incorrect. *Matulich* addressed whether a corporation could utilize §253 (which requires ownership of 90% of each class of voting stock) if it did not own 90% of a series of preferred stock with "no voting rights," but the "right of approval and consent" before any merger. *Id.* at 599-601. This Court held that the "Series B shareholders' contractual right to consent and approve does not constitute a statutory right to vote on the merger" and was

"irrelevant" in determining whether the parent "had the statutory voting power necessary to execute a short-form merger." *Id*. at 602. That a contractual consent right is not a voting right implicating process issues is, as noted in the Opening Brief, similarly supported by §221, which allows charters to include provisions conferring on bondholders (generally protected by contractual consent rights) the power to vote, and says only in such case will the holders be "deemed to be stockholders" and their bonds "shares of stock". Plaintiff does not address §221. And her attempt to distinguish *Matulich*—that there was no dispute concerning the validity of the consent right—is a red herring. AB 34. Indeed, *Matulich* would be *less* instructive if there were a dispute regarding the validity of the consent right as its import lies in holding a valid consent right is not a voting right with implications for the process requirements of the DGCL. Nor does Plaintiff, with respect to the Charter Consent Right, have any response to the conclusion that following *Matulich* in no way implicates the policy behind §242, which is to prevent stockholders from acting without prior board action and the board from acting unilaterally without stockholder approval, so that "the stockholders control their own destiny through informed voting." *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996). Revealing her inability to address *Matulich* substantively, Plaintiff resorts to four process arguments. Each is unavailing.

First, Plaintiff argues that, because *Matulich* was not cited in the portion of Defendant's briefs addressing §142, Defendant waived the right to cite it with respect to the Officer Consent Right. AB 33-34. Plaintiff did not include any allegation regarding §142 in her Complaint, causing Defendant to observe that her claim appeared linked to the argument that the Officer Approval Right violated the Bylaws, which Defendant noted was incorrect because the Officer Approval Right is simply a contractual consent right. A0146-47, A0158 (DOB at 15-16 n.8, 27). Plaintiff's Reply Brief, while stating she had not waived the ability to make a §142 claim, did not make any substantive §142 arguments. A1750 (PRB at 11 n.30). The only time Plaintiff's counsel referenced §142 at the hearing, he stated that he viewed the claim as "essentially parallel to our 141 challenges." A1861-62 (transcript refers to §242, but context demonstrates discussion refers to Officer Consent Right). It was only the Opinion—and not Plaintiff—that argued the Officer Consent Right violates §142 as an invalid "mechanism" for changing officers. Op. at 86. *Matulich* shows that is not so.

Second, regarding the Charter Consent Right, Plaintiff argues that Defendant's textual argument (*i.e.*, that the Consent Right does not require the board to obtain the Holders' approval before adopting a resolution approving a charter amendment) is new. Not so. *See* A0148 (observing Board could pursue change in control, subject to Holders consent); A1748 (responding to sequencing argument);

A1708 (highlighting specific language of Stockholder Agreement requiring consent only *prior to the occurrence* of an event); A1888 (discussing specific "permit the occurrence of" language). Plaintiff's argument regarding the reference to a separate publicly available agreement to illustrate Defendant's point comes with particular ill-grace given that Plaintiff herself introduced a new document in the form of the 14a-8 Letter. Plaintiff also argues that, because section 1.01(*l*) of the Stockholders Agreement (a section she did not challenge) requires the Holders' consent before *the Company* may agree or commit to do something, it must apply to board resolutions. AB 37. But a *board resolution* is not a commitment to do anything. *See* 8 *Del. C.* §242(c) ("The resolution authorizing a proposed amendment to the certificate of incorporation may provide that . . . notwithstanding authorization of the proposed amendment by the stockholders of the corporation . . . the board of directors . . . may abandon such proposed amendment without further action by the stockholders."); *cf.* 8 *Del. C.* §146 (permitting a corporation to agree to submit a matter to a vote of stockholders regardless of whether the board subsequently determines that such matter is no longer advisable).

Third, Plaintiff claims the court *did* address *Matulich*—even though it is not referenced once in the Opinion—because the court stated the Charter Consent Right is "not an additional vote." AB 37 (citing Op. at 80-81). But that is precisely

the point; the court made that statement without addressing its implications under *Matulich*.

Fourth, Plaintiff claims Defendant "concedes the court's interpretation" by observing that consent rights over mergers seemingly authorized by §122(18) may not be permitted until after a merger agreement is signed. AB 38. But as reflected in the case cited by Defendant (yet omitted through ellipses by Plaintiff), there are three requirements for statutorily approving a merger under §251: (i) board approval, (ii) signing the merger agreement, and (iii) stockholder vote. *Tansey v. Trade Show News Networks, Inc.*, 2001 WL 1526306, at *4 (Del. Ch. Nov. 27, 2001). Observing that the court's analysis could, by equating a contractual consent right with interfering with this statutory approval sequence, require allowing a corporation to enter into a merger agreement (potentially including a termination fee) *before* the consent right would apply in no way concedes that the first two steps—board approval and signing the merger agreement—should be collapsed.

B. *The Court's Analysis Is Indefensible As Public Policy.*

The Opening Brief explains why the Vice Chancellor's analysis has implications beyond this case and undercuts the will of the General Assembly set

forth in §122(18). Plaintiff does not, because she cannot, dispute this substantively. Instead, she again resorts to procedural arguments.

First, she argues that Defendant waived the argument by not raising it below. Nevermind that substantive briefing was complete and oral argument was heard (February 8, 2024) before SB313 was even introduced to the General Assembly (May 23, 2024) and that the Opinion was issued only five days after that introduction (May 28, 2024).

Second, she argues that SB313 prohibits considering the public policy implications of the court's analysis because it states that §122(18) does not "apply to or affect" this litigation. That, however, simply means that "the law predating the amendments will apply"—*i.e.*, that that the Court cannot deem provisions otherwise invalid to be valid because of §122(18). *See Nat'l Acceptance Co. of Cal. v. Hurm*, 1989 WL 70953, at *4 (Del. Super. June 16, 1989) (holding, in choice of law analysis, that contract must be enforced under statutes effective at relevant time). It *does not mean* this Court must blind itself to the fact that, should it affirm the Court of Chancery's ruling, it would undermine the General Assembly's will that "other provisions of [the DGCL] . . . that generally or specifically empower or authorize a board of directors to authorize or take any action would not prohibit" a §122(18) contract. SB313.

IV. $2.4 MILLION FOR TRIGGERING A PREEXISTING, THEN-SATISFIABLE RIGHT IS EXCESSIVE.

Plaintiff does not dispute that the judgment she obtained triggered an immediate, preexisting and previously disclosed right to a "suitable and equitable" substitute. OB 2. (She half-heartedly suggests that the right was not then-satisfiable through a golden share (AB 41-42), but there is no reason to suggest any of the Challenged Provisions could not be replicated as a "class-based voting right" that the trial court stated would be viable. Op. at 49 n.135.) That is not a "fix-it-after-the-fact" action of Defendant, nor does it depend on the existence of §122(18). It is simply the state of affairs upon entry of judgment, and the court below committed legal error by ignoring it.

Plaintiff's citation to the Court's car wreck analogy proves the point. AB 42 (quoting Fee Tr. at 54). The court stated, "[t]he fact that you get your car fixed doesn't mean you didn't have a wreck and suffer harm." True, but the existence of an enforceable insurance policy would minimize that harm. To borrow from the court's analogy, the Substitution Right—then existent and fully enforceable—mitigates any claimed harm. Unlike in *Tornetta v. Musk*, 326 A.3d 1203 (Del. Ch. 2024), where defendant "d[id] something in response to th[e] judgment" (AB 42 (citing Fee Tr. at 54)), here the Substitution Right existed *before* Plaintiff even brought suit. Defendant cited numerous cases to support taking this

right, and the resultant limited duration of any benefit, into account. OB 39-40. Plaintiff's attempt to distinguish those cases as concerning "settled or mooted claims whose benefits were fixed from the outset," AB 43, fails because that distinction is irrelevant to the purpose for which they were cited.

Regarding *quantum meruit*, Plaintiff states she did quantify the benefits she received, citing her calculation of applying a "1%-5% range for control" to Defendant's then-market cap of $5.76 billion, yielding a range of between $57.6-$288 million. AB 45 (citing A1962-1966). Plaintiff introduced no support for her 1%-5% control range apart from a passing reference to the fee transcript in *Moelis*, and in describing the results of the judgment in her Answering Brief she does not even refer to control as the benefit achieved (AB 44). In any event, if Plaintiff's $57.6-$288 million range is truly the benefit she believes she created by triggering a pre-existing, satisfiable contract right to return to the status quo, that simply demonstrates that a different method is needed in therapeutic benefit cases. *Quantum meruit* provides that method for the reasons set forth in the Opening Brief. OB 41. Plaintiff's attempt to distinguish those cases fails to demonstrate that they do not stand for the proposition that a *quantum meruit*-based approach makes sense where a benefit is not quantifiable (or not quantifiable with certainty).

As to abuse of discretion, Plaintiff's counsel inexplicably devoted thirteen legal professionals to this matter and 77% more hours than the midpoint

amount of hours devoted to similar cases, a substantial amount of which (based on page counts from briefing) was devoted to challenging the Consent Agreement (which, had Plaintiff acknowledged resolved the issue, might have left that Agreement in place). OB 45. Nonetheless, the court decreased Plaintiff's lodestar only by 7% and still applied a 4x multiplier to award $2.4 million for litigation that ended with the stockholders in substantially the same place they were previously. *Id.* That arbitrary decision should be reversed as an abuse of discretion.

V. REMAND IS INAPPROPRIATE.

Apparently concerned the Opinion could be reversed, Plaintiff argues that the case should be remanded to evaluate the equitable defenses. AB 19. But, as the court below observed, "[h]ere, the parties agree on the facts. They only disagree about issues of law." Op. at 15.

Plaintiff also claims the lower court "never reached" her argument that the Challenged Provisions are invalid under §212. AB 10. But Plaintiff did not pursue that claim in any of her substantive briefs. A0155 (DOB 24 n.16); A1716 (DRB 18 n.21); AB 9 (omitting §212 from description of arguments made). It is therefore waived, *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003), and, in any event, fails under *Matulich* as well.

Finally, notwithstanding Plaintiff's repeated suggestion that she raised as-applied claims, s*ee* AB 3, 6, 10, Defendant observed in its pleadings and briefing that Plaintiff cannot point to any allegation raising an as-applied challenge, A0084, A0142, A1700-04 (DRB 2, 4 n.4), and Plaintiff still has not done so.

CONCLUSION

Judgment should be entered for Defendant.

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May 23, 2025

CERTIFICATE OF SERVICE

I hereby certify that, on May 23, 2025 a copy of the foregoing *Appellant's Reply Brief* was served by File & Serve*Xpress* on the following attorneys of record:

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