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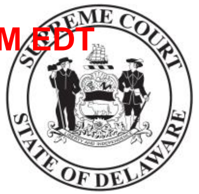

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES ALMOND AS TRUSTEE FOR THE ALMOND FAMILY 2001 TRUST, ALMOND INVESTMENT FUND LLC, CHARLES ALMOND, and ANDREW FRANKLIN,	)	
Plaintiffs and Counterclaim-Defendants Below/Appellants,	)	
v.	)	No. 216, 2019
GLENHILL ADVISORS LLC, GLENHILL CAPITAL LP, GLENHILL CAPITAL MANAGEMENT LLC, GLENHILL CONCENTRATED LONG MASTER FUND LLC, GLENHILL SPECIAL OPPORTUNITIES MASTER FUND LLC, JOHN EDELMAN, GLENN KREVLIN, JOHN MCPHEE, WILLIAM SWEEDLER, WINDSONG DB DWR II, LLC, WINDSONG DWR, LLC, WINDSONG BRANDS, LLC, HERMAN MILLER, INC., and HM CATALYST, INC.,	)	Court below: Court of Chancery of the State of Delaware C.A. No. 10477-CB
Defendants and Counterclaim Plaintiffs-Below/Appellees,	)	
and	)	
DESIGN WITHIN REACH, INC.,	)	
Intervenor and Counterclaim-Petitioner/Appellee.	)	

<u>OPENING BRIEF OF APPELLANT ANDREW FRANKLIN</u>

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Emerald Partners v. Berlin,
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In re Genelux Corp.,
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In re Numoda Corp. S'holders Litig.,
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202 A.3d 482 (Del. 2019)..28, 36

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NATURE OF THE PROCEEDINGS

Plaintiff Andrew Franklin ("Franklin" and with Charles Almond and his affiliated entities, "Plaintiffs") appeals from a post-trial judgment of the Court of Chancery that improperly applied the statutorily-defined scope of Sections 204 and 205 of the DGCL ("Sections 204/205") and well-settled principles of Delaware contract law to award an undeserved windfall of millions of invalid shares in Design Within Reach, Inc. ("DWR" or the "Company") to Glenhill Capital LP (with its affiliated entities, "Glenhill"). As the trial court found, Glenhill, DWR's former majority stockholder, had a long history of self-dealing transactions and disregarding corporate formalities, which the court's decision incorrectly validated. By using Sections 204/205 to endorse this misconduct, the court ignored basic principles of contract law, and turned the narrowly-designed scope and remedial purpose of Sections 204/205 into an offensive tool used to effect substantive and retroactive changes to long-settled corporate transactions.

Defendants spilled much ink below convincing the trial court that their heroics saved the Company. But they cannot escape the undisputed fact that they used their control to line their pockets to the detriment of the minority stockholders. Defendants initially tried to disenfranchise DWR's stockholders by seeking permission from NASDAQ to engage in a change-of-control transaction without a stockholder vote. After that request was denied, Glenhill took the Company dark by

delisting its shares and terminating the registration of its common stock. Under the cover of darkness, Defendants engaged in a series of self-dealing transactions that benefited only themselves. To cover up their misdeeds, they ignored all corporate formalities, failing to keep minutes of *any* Board meetings or file *any* of the required notices to non-consenting stockholders.

In further disregard for the rights of DWR's minority stockholders, Defendants issued millions of shares to themselves in violation of DWR's Charter. This misconduct, which Plaintiffs only discovered during this litigation, permitted DWR's subsequent sale (the "Merger") to Herman Miller, Inc. (with its affiliates, "Herman Miller") to be improperly effectuated through a Section 253 short-form merger, depriving DWR's minority stockholders of pre-Merger disclosures and a vote on the transaction. At a minimum, Glenhill and other DWR insiders engineered a $131 million windfall for themselves at the expense of the Company's minority stockholders.

The trial court's decision relies on two principal errors. *First*, this is a contract case that should have been decided on the principles of contract construction. Indeed, the legislature adopted Sections 204/205 to permit Delaware corporations to remedy only "technical mistakes" that rendered void otherwise proper corporate acts that impact innocent stockholders, *In re Numoda Corp. S'holders Litig.*, 2015 WL 402265, at *8 (Del. Ch. Jan. 30, 2015) ("*Numoda I*"), but the statutes are not a

"license to cure just any defect." *Nguyen v. View*, 2017 WL 2439074, at *10 (Del. Ch. June 6, 2017). Here, the court acted far beyond the narrowly-defined scope of Sections 204/205 to ratify purportedly defective corporate acts where there was neither an "act" nor a "failure of authorization," as these statutes require.

The decision below allowed Herman Miller to ratify a 2013 issuance of DWR common stock to Glenhill (the "2013 Issuance"), in which Glenhill and DWR's directors received 5,351,439 shares. But nearly 4 million of those shares were improperly issued through the putative conversion of DWR preferred stock Glenhill obtained in 2009 (the "Preferred Stock"). The trial court's ratification impermissibly re-wrote the terms of an undisputedly clear and unambiguous Certificate of Designation (the "COD") between DWR and Glenhill. Defendants conceded that the COD is unambiguous on its face and contains no mistake.

The COD, which governed the terms of Glenhill's Preferred Stock, is a 24-page, single-spaced agreement negotiated by counsel. The COD specified what would happen to the Preferred Stock if certain events were to later occur, such as a reverse split of the Company's common stock. However, the COD was intentionally silent concerning Glenhill's rights if there was a reverse split of the Preferred Stock itself. Until this litigation, Defendants never attempted or even contemplated amending the COD. That was no mistake: the COD was structured to incentivize Glenhill to convert its Preferred Stock to common to prevent the payment-in-kind

interest on the Preferred Stock from "PIK'[ing] the Company literally to death at some point."[1]

In 2010, DWR implemented a 50-to-1 reverse stock split of both its common stock and the Preferred Stock (the "Reverse Split"). The Reverse Split drastically reduced the number of DWR common shares into which the Preferred Stock could convert, and DWR reduced its authorized shares outstanding accordingly. However, in the 2013 Issuance, Glenhill-controlled DWR purported to convert the 1 million shares of Preferred Stock Glenhill claimed to hold as if the Reverse Split had never occurred—i.e., 1 million shares instead of the 20,000 shares of Preferred Stock to which Glenhill was contractually entitled under the COD. They did so as if they had negotiated an amendment to the COD to "eliminate" the effect of the Reverse Split of the Preferred Stock.[2]

During the litigation, recognizing the significance of this error, DWR, now controlled by Herman Miller, but with Glenhill's directors still on the Board, purported to use Sections 204/205 to avoid the consequences of Glenhill's previous failure to negotiate an amendment to the COD. Post-trial, the trial court then improperly validated this failure to amend. In reaching this conclusion, and granting

[1] A2426.
[2] Aug. 17, 2018 Opinion ("Op.") 44-45.

Glenhill a windfall of millions of shares, the court committed two fundamental errors.

As an initial matter, the failure to negotiate an amendment to a contract with a third party is not a "defective corporate act" under Sections 204/205. Indeed, the *failure* to amend a contract is not an "act" at all, and Sections 204/205 "cannot be used to authorize retroactively an act that was never taken but that the corporation now wishes had occurred." *Nguyen*, 2017 WL 2439074, at *10. At any point prior to the Merger, Glenhill could have negotiated and reached an agreement with DWR addressing the impact of a reverse split of Preferred Stock, but they never did or even thought to do so. Sections 204/205 were not intended to allow parties to go back in time and renegotiate their agreements to grant themselves terms never obtained at the bargaining table.

Moreover, a defective corporate act cannot be ratified under Sections 204/205 unless there was also a "failure of authorization." As Defendants stipulated and as the trial court found, the COD was clear and unambiguous; it contained no mistake and fully implemented the parties' intentions. The court's results-driven decision to undo the effect of the Reverse Split on the Preferred Stock, by finding that it was the parties' "intended result,"[3] was directly contrary to the COD's plain language and Defendants' admission that the COD accurately reflected the parties' understanding

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[3] Op.3.

of the terms of Glenhill's Preferred Stock. Further, Defendants' admission that the COD is unambiguous on its face waived any argument that the COD did not reflect the parties' intent, as the court incorrectly found.[4] The COD cannot be retroactively amended simply because Glenhill is now unhappy with the effect of the Reverse Split.

In essence, the trial court improperly used Sections 204/205 to replace traditional remedies for a claimed mistake in a contract, such as reformation. Of course, no reformation claim was ever asserted here, as Defendants could not have met the high bar for obtaining that relief. The court's over-extension of Sections 204/205 was error, as those narrowly-tailored statutes cannot be used to retroactively amend a third-party contract that the parties conceded was unambiguous.

Second, the trial court erred by implicitly ratifying a series of additional equity issuances to Glenhill and other DWR insiders for which DWR never even sought ratification. The court ratified invalid options that were issued in violation of the Company's option plan, cancelled in connection with the Merger, but then paid out as cash bonuses (the "Bonuses"). The court also validated DWR's award to Glenhill of another 432,397 shares of DWR Preferred Stock (the "PIK Shares"), as a purported "true-up" payment for dividends that Glenhill had never elected to receive, as the COD required, and to which it was therefore not entitled. Finally, the court's

[4] Op.44.

decision also validated, without analysis, a convertible note that was never approved by DWR's Board and exceeded DWR's authorized share limits. DWR's Board engaged in further subterfuge by backdating its authorization of these 1.4 million shares from that note.

The ratification of Defendants' self-dealing conduct caused substantial harm to DWR's minority stockholders. In combination, those errors permitted Herman Miller, DWR's post-Merger controller, to retroactively obtain the shares it needed to satisfy the 90% threshold requirement for effecting the Merger without a stockholder vote under Section 253, while improperly and substantially enriching Glenhill. Because the Merger was never lawfully consummated, Plaintiffs are entitled to rescissory damages. At a minimum, the trial court's decision deprived DWR's minority stockholders of millions by allowing Glenhill and DWR insiders to receive merger consideration for invalid shares that were never properly ratified, and improperly shifted the benefit of the invalid shares to those insiders.

Finally, the trial court also erred by rejecting Plaintiffs' application for a fee award. The court found that Plaintiffs satisfied every element of the corporate benefit doctrine, but denied a fee award simply because Plaintiffs litigated their claims through trial. Plaintiffs are aware of no Delaware decision holding that a party loses its entitlement to fees solely by taking viable claims to trial, and such a rule improperly penalizes litigants for pursuing facially viable claims.

The trial court's improper application of Sections 204/205 requires reversal, judgment should enter against DWR and Herman Miller on their Section 205 counterclaim, in favor of Franklin, and the case should be remanded to determine damages.

SUMMARY OF ARGUMENT

I. The trial court erred by utilizing Sections 204/205 to retroactively validate the improper issuance of 5.3 million shares of DWR common stock. This is a contract case; Sections 204/205 do not apply. But even assuming those sections applied, the court improperly ratified Glenhill's failure to negotiate an amendment to an undisputedly clear and unambiguous third-party contract. A failure to amend a contract cannot be a defective corporate act under Sections 204/205 where, as here, there is no evidence that anyone ever intended to amend it in the first place. Moreover, because Defendants conceded that the COD was clear and contained no mistake, there was no failure of authorization, as required to invoke Sections 204/205, and Defendants waived any argument that the COD failed to reflect the parties' clear intent. The fact that Defendants wished they had negotiated and agreed to amend the COD is not a technical mistake that provides a basis to ratify the 2013 Issuance. At a minimum, the minority stockholders suffered substantial damages, as they would have been entitled to a far greater share of the Merger proceeds that were instead improperly granted to Glenhill and DWR insiders.

II. The trial court further erred in validating a series of additional improper equity issuances without even analyzing the issuances under Sections 204/205. The court impliedly and incorrectly allowed invalid options, which were cancelled and replaced by the Bonuses because they exceeded the option plan's limits, to

nonetheless count for purposes of the Merger. The court also awarded Glenhill PIK Shares it never elected to receive, as the plain terms of the COD required. In addition, the court validated shares from a convertible note, even though neither the note nor the issuance were properly authorized. In combination, without these erroneous rulings, including the improperly validated Preferred Stock, Defendants lacked the required 90% threshold under Section 253 to avoid a stockholder vote and the requisite disclosures. Plaintiffs are therefore entitled to rescissory damages or, at a minimum, millions in additional merger consideration.

III. The trial court erred in denying an award of attorneys' fees to Plaintiffs, despite holding that Plaintiffs satisfied the elements of the corporate benefit doctrine. The court incorrectly held that it would be "inequitable" to award fees because Plaintiffs actually litigated their claims, and did not cave when DWR and Herman Miller counterclaimed seeking to validate plainly inappropriate and insider-driven conduct. The court's analysis penalized Plaintiffs for their good-faith opposition to the defective ratifications, and will disincentivize future minority stockholders from asserting viable claims.

STATEMENT OF FACTS

A. The Plaintiffs

Plaintiff Andrew Franklin was a long-term DWR stockholder from 2008 until his 14,352 shares of DWR common stock were canceled in connection with the Merger.[5] Franklin, other DWR minority stockholders who assigned their shares to Franklin, and Plaintiff Charles Almond and his affiliates owned approximately 24.6% of DWR's common stock as of 2009.[6]

B. Glenhill Takes Control Of DWR.

DWR, a furniture retailer and Delaware corporation, performed poorly following the 2008 housing crisis.[7] In mid-2009, DWR began negotiating a change-of-control transaction with Glenhill, a hedge fund that owned 17.2% of DWR's stock.[8] Defendant Krevlin controlled and managed the Glenhill Defendants, was the largest investor in the relevant Glenhill funds, and had ultimate investment authority at all relevant times.[9]

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[5] A781-833.

[6] Franklin asserts claims in this action on his own behalf and pursuant to assignments executed by three other DWR stockholders, who collectively held 42,429 common shares as of the Merger. Almond and his affiliates held 94,057 common shares as of the Merger. A1199-1210.

[7] A128.

[8] Op.9. The Glenhill Defendants are Glenhill Advisors, LLC, Glenhill Capital LP, Glenhill Capital Management, LLC, Glenhill Concentrated Long Master Fund, LLC, Glenhill Special Opportunities Master Fund, and the Glenhill Overseas Fund.

[9] A1716,A1718;A1655.

NASDAQ rules required DWR to obtain stockholder approval for any change-of-control transaction.[10] Seeking to disenfranchise its stockholders, DWR sought an exemption from the NASDAQ rules requiring a vote. After NASDAQ rejected that request, DWR went dark, delisting itself in July 2009 and terminating the registration of its common stock with the SEC in October 2009.[11]

Freed from NASDAQ's rules, Glenhill and DWR implemented a conflicted transaction in which Glenhill acquired roughly 90% of the Company's equity for $15 million, receiving both common shares and the Preferred Stock. Glenhill received the Preferred Stock because the Company did not have enough authorized common shares to otherwise effect that transaction.[12] The COD governed the terms of the Preferred Stock. DWR and Glenhill negotiated the 24-page, single-spaced COD, but it was principally drafted by Glenhill's lawyers.[13] The COD contains an adjustment for the price of the Preferred Stock in the event of a reverse split of *common stock*, but no corresponding adjustment for a reverse split of the *Preferred Stock*.[14]

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[10] NASDAQ Rule 5635(b).
[11] A1657.
[12] A184-754.
[13] A1223-24.
[14] Op.13.

C. The Plain Language Of The COD Governed The Terms Of The Preferred Stock.

The COD contained provisions governing how the Preferred Stock could be granted, counted, and converted.

1. The Impact Of A Stock Split

COD Section 6(a) defined how the Preferred Stock could be converted into DWR common shares (the "Conversion Formula").[15] Section 6(a) also stated that the calculations made on the required conversion notice "control in the absence of manifest or mathematical error."[16] The stated value of the Preferred Stock ($12.69) divided by the conversion price ($0.09235) must be multiplied by the number of preferred shares.[17]

The COD included detailed provisions addressing what would happen to the Preferred Stock if certain events occurred. Those events included a potential reverse split of DWR's common stock, which is unsurprising given that DWR's counsel had informed NASDAQ when seeking an exemption that a reverse split of its common stock was highly likely.[18]

No Defendant has ever claimed that the COD's failure to account for the Preferred Stock in case of a Reverse Split was a scrivener's or other error. No

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[15] A755-80.
[16] *Id.*
[17] *Id.*
[18] A437.

Defendant has ever sought reformation of that contract. To the contrary, Defendants told the trial court that Section 7(a) is "unambiguous" and it "means what its plain language says."[19] In other words, Defendants admitted that the failure of the COD to contain an adjustment to the conversion formula for the Preferred Stock in the event of a reverse split of the Preferred Stock was no mistake.

Consistent with those admissions, the trial court denied as moot Plaintiffs' Motion *in Limine* seeking to exclude evidence showing a mistake in the COD, concluding that Defendants "made it clear they're not seeking to" introduce such evidence.[20] The absence of an adjustment provision in the COD provided a powerful incentive for Glenhill to convert the Preferred Stock as soon as possible, which prevented the Preferred Stock from "PIK[ing] the Company literally to death at some point," as the court recognized.[21]

Upon any conversion of Glenhill's Preferred Stock, COD Section 6(d) limits the issuance of common shares to conform to the number authorized by the Company.[22]

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[19] A1609-A1610;A1577.
[20] A1627.
[21] A2426.
[22] A769.

2. The Conversion Notice

Under COD Section 6(a), Glenhill "had to" execute a conversion notice to convert its Preferred Stock into DWR common shares: It states that "[h]olders shall effect conversions by providing the Corporation with the form of conversion notice attached hereto as Annex A."[23] The conversion notice contains several requirements used to calculate the conversion price described in Section 6(a), including the number of shares of Preferred Stock to be converted, their stated value, and the applicable conversion price.[24] Consistent with its practice of ignoring corporate formalities and in violation of the COD, Glenhill never executed or submitted the Annex A conversion notice ("Annex A") in connection with the 2013 Issuance.

3. Glenhill Never Elected To Receive Its PIK Shares.

The COD entitled Glenhill to annual dividends on its Preferred Stock, at a 9% interest rate, to be paid-in-kind. However, the accrual of PIK Shares was not automatic; rather, COD Section 6(a) required Glenhill to make an affirmative election to receive its PIK Shares, and to provide DWR with written notice of its election.[25] It is undisputed that Glenhill never elected to accrue its PIK Shares or accrete the outstanding stated value, and that the Company never issued any PIK Shares. As Defendants conceded: "There's a lot of talk about, you know, there never

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[23] Op.11-12;A755-80.
[24] A765-66.
[25] A765-66.

were 1.4 million shares. Well, okay. That's true."[26] Nothing in the COD permits Glenhill to later receive a "true-up" payment of PIK Shares. According to the plain language of Section 6(a), Glenhill's failure to elect its PIK Shares prevented their accrual.

D. DWR Effects A Reverse Split.

In August 2010, DWR effected a 50-1 Reverse Split of both its common shares and Preferred Stock.[27] The Reverse Split was effected through documents prepared by DWR and Glenhill's shared counsel, and DWR's Board and Glenhill reviewed those documents prior to their execution.[28] The Reverse Split did not convert the Preferred Stock to common stock, or otherwise combine DWR's preferred and common shares. Although Defendants claim to have been unaware of the impact of the Reverse Split, this is belied by the very Charter amendment approved by the directors and the Company's financial statements, which reflect the reduction of the Company's authorized common shares from 30 million to 600,000 and its authorized Preferred Stock from 1.5 million to 30,000.[29]

[26] Op.44n.173;A2195.
[27] Op.21.
[28] A852-77;A878-92.
[29] Op.21-22;A896.

E. DWR Directors Negotiate A Conflicted Personal Investment In DWR.

Defendant Sweedler was a managing member of Windsong Brands (with the other Windsong entity Defendants, "Windsong"), and a Glenhill-appointed DWR director from 2009 until the Merger.[30] In early 2010, Glenhill and DWR's directors, including Sweedler, purported to negotiate a $5 million convertible debt investment (the "Windsong Note").[31] The "terms of the Windsong Note were the product of a conflicted and deficient process" and "all members of the Board were conflicted" for purposes of that transaction.[32] Intent on enriching themselves, the directors neither solicited external investors nor consulted financial advisors.[33]

For $5 million, Glenhill and the DWR insiders received first-lien priority on DWR's intellectual property, interest on the Windsong Note, and the right to convert the Windsong Note into over 1 million DWR common shares, which dwarfed the authorized 600,000 post-split common shares.[34] The DWR insiders set the terms of the Windsong Note so that it would convert into common stock at the same price as Glenhill's Preferred Stock from the 2009 Transaction, with the DWR insiders to receive 1.4 million DWR common shares upon conversion.[35] The Windsong Note

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[30] A1655.
[31] A843-51.
[32] Op.18,72.
[33] Op.18.
[34] *Id.*
[35] Op.19-20.

established a conversion price of $4.57 per share, while the Company's stock was trading at $23.50, granting the conflicted insiders a substantial and immediate windfall.[36] Consistent with its failure to observe corporate formalities, the Board never approved the Windsong Note.

F. DWR Directors Sell Stock To Themselves.

In 2012, DWR directors negotiated yet another self-dealing transaction (the "2012 Financing"). "As with the Windsong Note, the 2012 Financing was the product of a conflicted and deficient process."[37] Once again, "all members of the Board were conflicted."[38] The Company again solicited no external investors and consulted no financial advisors.[39] In the 2012 Financing, DWR sold $2.5 million of common shares at $4.49 per share to Glenhill and to Glenhill director-appointees Sweedler, Edelman, and McPhee.[40] Despite the Company's improved performance as the housing market recovered, DWR's insiders priced this self-issuance *lower* than the Windsong Note from two years earlier.[41] Windsong also lowered the conversion price of the Windsong Note to $3.53, extended the maturity date for the

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[36] Op.19. These values reflect the adjusted price per share following the Reverse Split.
[37] Op.27.
[38] Op.72.
[39] A1707, A1889-90; Op.28.
[40] Op.25.
[41] Op.19.

Windsong Note to October 3, 2013, and Glenhill agreed to convert its Preferred Stock on that same day.[42]

G. Glenhill Backdates Its Conversion Notice.

On October 22, 2013, Glenhill submitted a conversion notice (the "Conversion Notice"), backdated to October 3, purporting to convert its Preferred Stock into roughly 4 million common shares.[43] The Conversion Notice failed to comply with the protocol in COD Section 6(a).[44]

Most importantly, the Conversion Notice purported to convert an improper number of preferred shares.[45] Following the Reverse Split, Glenhill had only 20,000 shares of Preferred Stock. Those 20,000 shares should have converted into 54,965 shares of DWR common stock.[46]

Instead of the 54,965 shares to which Glenhill was actually entitled, the Conversion Notice purported to convert its Preferred Stock into over *3.9 million* common shares. That reflected a conversion of both the 1 million shares of Preferred Stock Glenhill held prior to the Reverse Split, as well as over 400,000 additional PIK Shares that Glenhill had never elected to receive.[47] Thus, the defective

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[42] Op.26.
[43] Op.29-30.
[44] *Compare* A918, *with* A765-66 and A780.
[45] A919.
[46] A770.
[47] A2195 (conceding that the conversions were "actually a pre-split number.").

Conversion Notice purported to convert 1,432,397 shares of Glenhill's Preferred Stock even though the Charter (as amended during the Reverse Split) authorized only 30,000 preferred shares.[48] Glenhill's defective Conversion Notice purported to give Glenhill an additional 3,881,607 common shares to which it was not entitled, worth at least $93 million in the Merger.

H. DWR Also Backdates A Charter Amendment.

Glenhill and DWR's directors converted both Glenhill's Preferred Stock and the Windsong Note into DWR common shares as of October 3 and 8, respectively.[49] The 2013 conversions resulted in the 2013 Issuance, in which Glenhill and other DWR insiders received over 5.3 million DWR common shares, even though DWR's Charter authorized only 1.6 million common shares.[50] On October 30, DWR retroactively filed a Charter amendment purporting to increase the number of the Company's authorized common shares from 1.6 million to 7.5 million shares.[51] To paper over the fact that the 2013 Issuance violated the Charter, Glenhill backdated the Board's written consent authorizing that increase to October 3.[52]

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[48] Op.21-22.
[49] Op.29-30.
[50] *Id.*
[51] Op.30.
[52] Op.30-31.

I. DWR Issued Invalid Stock Options.

DWR also violated its organizational documents in other material ways. DWR issued options to employees, including its directors, pursuant to the Company's stockholder-approved option plan.[53] In connection with diligence concerning the Merger, DWR determined that 200,763 options (the "Invalid Options") had been granted in excess of the number of shares authorized under DWR's plan.[54] Those shares were therefore invalid, as DWR and Herman Miller understood.[55] DWR told Herman Miller about the Invalid Options weeks before the Merger.[56]

As a result, Glenhill and DWR's other insiders negotiated yet another self-interested deal, this time awarding themselves $4 million in Bonuses, equivalent to the value of the Invalid Options.[57] Herman Miller then deducted those payments from its purchase price for DWR, forcing DWR's minority stockholders to bear the pro rata burden of paying the Bonuses.[58]

But they did not stop there. Despite converting the Invalid Options to a liability, the Stock Purchase Agreement for the Merger created the fiction that the

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[53] Op.32.
[54] A1194.
[55] A934-35.
[56] A936-39.
[57] A1187-98.
[58] A993;A1533.

Invalid Options would nevertheless be treated "on an as-if-valid basis" as outstanding shares for purposes of DWR's enterprise value, equity value, fully-diluted share count, and per-share merger consideration.[59] None of this was disclosed to stockholders in connection with the Merger, which Defendants conceded at trial.[60]

J. Herman Miller Acquires DWR.

The Merger closed on July 28, 2014.[61] Herman Miller acquired DWR for an equity value of $170.4 million.[62] DWR's minority stockholders (including Plaintiffs) received $23.93 per share.[63]

Herman Miller and Glenhill entered into a voting agreement. Edelman and McPhee rolled their collective 14% equity interest into the Merger, once again receiving a benefit not shared with the minority stockholders.[64] Those agreements purportedly provided Herman Miller with support from over 90% of DWR's pre-Merger stockholders, and Herman Miller used that ostensible support to consummate the Merger through Section 253 without a stockholder vote or the

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[59] A993.
[60] A1982.
[61] Op.32.
[62] Op.31.
[63] *Id.*
[64] A940-83.

typical merger-related disclosures. In reaching the 90% threshold, Herman Miller counted all of the invalid issuances.

K. Herman Miller Purports To Ratify Certain "Defective Corporate Acts."

Plaintiffs commenced this action in December 2014. During discovery, Plaintiffs uncovered the previously-concealed conflicted insider transactions and invalid corporate acts, including the 2013 Issuance and the defective conversion notice, detailed above. Discovery also revealed that there were no Board minutes evidencing *any* of these insider transactions or required Section 228(e) disclosures. Not one.[65] As a result, Plaintiffs asserted a claim that the Merger was invalid. The DWR Board then purported to act pursuant to Section 204 to ratify certain of the numerous invalid stock issuances to try to save the already-closed Merger.

On February 25, 2016, DWR's counsel served the required Section 204 notice.[66] At that time, the DWR Board had six members, including Krevlin, Edelman, and McPhee.[67] Despite serving as DWR directors at the time of the conflicted transactions, being substantial beneficiaries of those self-dealing transactions, and being defendants in the litigation challenging their misconduct, Krevlin, Edelman, and McPhee voted in favor of the ratifications. Thus, the

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[65] A1276;A1726.
[66] A1277-1317.
[67] Op.34.

resolutions were not approved by a majority of disinterested directors. The Section 204 Notice acknowledges that all of the corporate acts that Plaintiffs alleged were defective were, in fact, defective; and DWR's conversion of Glenhill's Preferred Stock did not comply with the COD. DWR then intervened in this litigation as a nominal defendant, and DWR and Herman Miller counterclaimed seeking judicial validation of the ratifications.

After extensive discovery and a trial, and notwithstanding this well-documented and undisputed history of self-dealing transactions and disregard for corporate formalities, the trial court issued its decision on August 17, 2018, ratifying the Reverse Split and the "accompanying changes to the adjustment provisions of the certificate of designation," as well as the 2013 Issuance, based solely on its finding that the Reverse Split led to a "plainly unintended consequence."[68] Despite the fact that Defendants were unable to satisfy Section 253's requirements, the court held that Plaintiffs were not entitled to rescissory damages.[69] By decision dated April 10, 2019, the court found that Plaintiffs had satisfied the elements for a fee award under the corporate benefit doctrine, but rejected their claim solely because Plaintiffs litigated their claim through trial and opposed the ratifications.[70]

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[68] Post-Trial Order ("Order") 2-3;Op.44.
[69] Op.80.
[70] Jan. 9, 2019 Fee Opinion ("Fee.Op.") 7,18.

ARGUMENT

I. The Trial Court Erred By Ratifying The 2013 Issuance And Glenhill's Failure To Amend The COD.

A. Question Presented

Whether the trial court erred by permitting Defendants to retroactively re-write the COD through its post-Merger ratification of the 2013 Issuance even though (i) Defendants waived any argument that the COD did not reflect the parties' intent when they conceded it was unambiguous and contained no mistake, (ii) the failure to negotiate an amendment to a third-party contract cannot be a defective corporate act for purposes of Sections 204/205, and (iii) there can be no failure of authorization where there is undisputedly no mistake in the COD. This issue was preserved below. A2123.

B. Scope Of Review

The trial court's legal conclusions are reviewed de novo. *Nationwide Emerging Managers, LLC v. NorthPointe Holdings, LLC*, 112 A.3d 878, 889 (Del. 2015).

C. Merits Of Argument

Sections 204/205 were enacted to permit Delaware corporations to correct "technical defect[s]." *In re Numoda Corp.*, 2015 WL 6437252, at *3 (Del. Jan. 30, 2015) ("*Numoda II*"); C. Stephen Bigler & John Mark Zeberkiewicz, *Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other*

Corporate Acts, 69 Bus. Law 393, 414 (2014) ("[T]he statute only addresses technical defects giving rise to a claim that an act is void or voidable."). Section 204/205's application is limited in scope, requiring a "defective corporate act" that is defective because of a "failure of authorization."[71] The purported ratification of the 2013 Issuance violated Sections 204/205 and should be reversed for three reasons.

First, it was improper for the trial court to retroactively amend the COD in order to validate the 2013 Issuance. The court's amendment was predicated on its finding that the COD failed to reflect the parties' intent, an argument that Defendants waived by conceding that the COD contained no mistake and meant what its plain language said.

Second, the trial court incorrectly applied Sections 204/205 to ratify Glenhill's failure to negotiate an amendment to COD Section 7(a), an act that never occurred. *See Numoda I*, 2015 WL 402265, at *9 ("The Court cannot determine the validity of a defective corporate act without an underlying corporate act to analyze."). Because this is a contract case that should have been decided by application of principles of contract construction, the court cannot use Sections 204/205 to add contractual terms to which the contract parties never agreed. *See CertiSign Holding v. Kulikovsky*,

[71] The trial court's analysis and judgment treated Sections 204/205 co-extensively, and Plaintiffs contend that the ratifications are equally improper under both statutes. They are addressed together herein.

2018 WL 2938311, at *27 (Del. Ch. June 7, 2018) ("Nor will the Court employ Section 205 to force a debt assumption upon CertiSign to which the necessary parties never agreed. This is not a case for validation, again, because there was no defective corporate act to validate.").

Third, the COD could not properly be ratified under Sections 204/205 years after it was executed, because the failure to negotiate an amendment to the COD had no bearing on the validity of the 2010 Reverse Split. The failure to comply with the plain terms of a contract with a third party cannot be a failure of authorization under Sections 204/205.

1. The Trial Court Erred By Relying On An Argument Defendants Waived.

The trial court's ratification of the 2013 Issuance was predicated on its erroneous conclusion that the COD failed to reflect the parties' intent.[72] But Defendants waived this argument. In opposition to Plaintiffs' Motion *in Limine*, Defendants conceded that there was no mistake in the COD and it meant what it said. *See* A1577 ("Defendants do not assert mistake or reformation defenses as to the 2009 COD. No one has testified that the 2009 COD contains a 'mistake.'"; "Defendants' position is that the 2009 COD means what its plain language says…"). The court then denied Plaintiffs' motion as moot.[73] Thus, any claim of mistake in connection

[72] Op.43-44.
[73] A1627-A1630.

with the COD was waived, and could not be a proper basis for ratification. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

Because Defendants waived any claim of mistake, the trial court erred when it relied on mistake as a basis to grant ratification, as this Court recently reaffirmed in *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 501 (Del. 2019) (reversing judgment where court relied on argument that was abandoned below).

2. The Trial Court Erred In Validating The Failure To Amend The COD As A Defective Corporate Act.

The trial court validated two key purported corporate acts: the 2013 Issuance and the failure to negotiate an amendment to the COD exempting the Preferred Stock from the Reverse Split. This had the effect of granting Glenhill millions of shares to which it was not entitled. The court did not just characterize Defendants' failure to amend the COD as a failure of authorization for the 2013 Issuance, but also validated DWR's failure to amend the COD as an independent defective corporate act.[74]

Herman Miller needed to re-write the COD to avoid the effect of the Reverse Split of the Preferred Stock. Without the trial court's retroactive re-writing of the

[74] Order2.

COD, Glenhill was only entitled to 20,000 preferred shares following the Reverse Split. But the failure to negotiate an amendment to the COD cannot be ratified as a defective corporate act under Sections 204/205, since there was no act to ratify. As a threshold matter, Sections 204/205 could not properly be applied here.

i. The Trial Court Erred By Applying Sections 204/205.

This is a contract case that should have been resolved by application of principles of contract interpretation and not Sections 204/205. The COD was a detailed contract negotiated by sophisticated parties with the assistance of legal counsel. It is bedrock Delaware law that such contracts must be enforced as written. *See W. Willow-Bay Ct., LLC v. Robino-Bay Ct. Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007) ("The presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when the parties are sophisticated entities that have engaged in arms-length negotiations."). That requirement applies with particular force to the terms of the Preferred Stock, which is strictly construed. *See Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990) (adhering "to the rule that stock preferences are to be strictly construed"); *Matulich v. Aegis Commc'ns Grp.*, 942 A.2d 596, 601 (Del. 2008) ("Any rights, preferences and limitations of preferred stock…will not be presumed or implied.").

Because of the sanctity of written contracts, Delaware courts lack the authority to re-write contracts to supply terms not obtained at the bargaining table. *See Nemec*

v. Shrader, 991 A.2d 1120, 1126 (Del. 2010) ("Parties have a right to enter into good and bad contracts, the law enforces both."); *HC Cos., Inc. v. Myers Indus., Inc.*, 2017 WL 6016573, at *9 (Del. Ch. Dec. 5, 2017) ("The Court cannot re-write the contracts, and it cannot ignore the plain terms of the contracts.").

Defendants conceded that the COD contains no mistake and means what it says; they did not seek reformation or other equitable relief to modify the terms of the COD. Sections 204/205 are not intended to allow courts to implement remedies like the implied covenant of good faith and fair dealing, which allows the court to add new terms to contracts under certain limited circumstances.

Analogizing to the implied covenant of good faith and fair dealing, Defendants claimed "it is practically certain that they would have agreed to clarify the [COD] to ensure economically neutral adjustments to the conversion ratio."[75] There is not a shred of evidence in the record to support this self-serving assertion. Indeed, Delaware law is clear that parties cannot use the implied covenant to grant rights for which they did not negotiate. *See Nationwide*, 112 A.3d at 881 (Delaware law "prevents a party who has after-the-fact regrets from using the implied covenant of good faith and fair dealing to obtain in court what it could not get at the bargaining table.").

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[75] A1590.

Thus, the Court was required to enforce the COD as written and erred by rewriting the COD under the guise of applying Sections 204/205. *See Waggoner*, 581 A.2d at 1135 ("While that omission may have been accidental, given the requirements of Delaware law this Court cannot presume so and thereafter supply the missing provisions.").

ii. Sections 204/205 Cannot Be Used To Ratify An Act That Never Occurred.

Even assuming Sections 204/205 apply, they are limited to the validation of a defective corporate act or, in other words, "a bona fide effort bearing resemblance to a corporate act but for some defect that made it void or voidable." *Numoda I,* 2015 WL 402265, at *10; *In re Baxter Int'l, Inc.*, C.A. No. 11609-CB (Del. Ch. Jan. 15, 2016), Transcript at 81 ("Section 205 confers power on the Court that is broad and flexible but not without limits.").

A defective corporate act must be one "purportedly taken by or on behalf of the corporation." *Numoda I*, 2015 WL 402265, at *9. In the absence of an underlying corporate act, the Court cannot apply Sections 204/205. *Id.* ("The Court cannot determine the validity of a defective corporate act without an underlying corporate act to analyze."); *CertiSign*, 2018 WL 2938311, at *27 ("This is not a case for validation … there was no defective corporate act to validate.").

Here, there was no corporate act. In fact, there was no act at all. Rather, the trial court used Sections 204/205 to purportedly "fix" a COD that is "unambiguous,"

unmistaken, and "means what its plain language says." Glenhill admittedly wished it had negotiated and reached agreement on a term in the COD addressing the impact of a reverse split of the Preferred Stock, but it never did.[76] Indeed, Defendants admitted that the parties had not "thought to bargain in 2009 over that specific eventuality…."[77]

In order to achieve Defendants' wishes, Glenhill would have had to propose an amendment to the COD, appoint a Special Committee, conduct negotiations over a proposed amendment, reach agreement on terms, and provide consideration to support an amendment. *See CertiSign*, 2018 WL 2938311, at *25, 27 (declining to validate an assumption agreement under Section 205 where the court was unable to "discern how the parties exchanged legal consideration"). It is undisputed that not a single one of those events ever occurred.

Sections 204/205 were not intended to allow parties to go back in time and renegotiate their agreements to grant themselves terms for which they did not bargain. That is exactly what Glenhill did: "[T]here could have been an amendment immediately before the reverse stock split was undertaken to insert such a change, and that is, in fact, what we did via the ratification."[78] Based on Glenhill's own admission, there was *no defective act* the trial court could properly ratify. *See*

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[76] A1799.
[77] A1590.
[78] A1623.

Nguyen, 2017 WL 2439074, at *10 (Section 204 "cannot be used to authorize retroactively an act that was never taken but that the corporation now wishes had occurred").[79] This was the precise ruling in *CertiSign*. 2018 WL 2938311, at *25 (petitioner's evidence "lack[ed] the specificity required to evidence a binding agreement that can be specifically enforced by the Court or validated under Section 205.").

iii. Defendants Are Not The Types Of Parties That Sections 204/205 Were Designed To Protect.

In *Numoda II*, the Court explained that "Sections 204 and 205 were adopted in part to address situations that had arisen in prior cases … where parties who are complicit in failing to comply with the DGCL's requirements refuse to participate in the validation of their own past intended actions because they have come to have personal reasons to wish to disclaim their prior promises and actions." 2015 WL 6437252, at *3. These statutes are intended to protect innocent parties. As in *Numoda*, Defendants are seeking to obtain a benefit from their own failure to comply with corporate formalities concerning their own insider transactions and, more egregiously, ask the Court to re-write a facially unambiguous contract. The use of

[79] The 2013 Issuance's failure to comply with the COD does not render it a defective corporate act subject to Sections 204/205 ratification. Balotti & Finkelstein, §7.28[B] ("Section 204 should not be read as creating a negative implication that failure to comply with any plan or agreement, of itself, necessarily renders any particular act void or voidable.").

Sections 204/205 to resolve failures in corporate formalities is improper when parties who seek to "wield equity as a sword endeavor to use it to strike down their own prior actions for self-interested reasons." *Id.* at *2 n.4.

Here, the ratification at issue was approved by directors with a conflict of interest in the underlying transactions. Through the ratification, Defendants were permitted to go back in time and adopt an amendment to the COD they never negotiated. The minority stockholders, in contrast, were wholly deprived of any equitable remedy, because the ratification was accomplished after the Merger.

Once the litigation exposed Defendants' self-interest and wholesale disregard for corporate formalities, they continued the same course of conduct; they acted to adopt measures to protect their unlawful Merger and self-dealing transactions. Defendants claimed, and the trial court found, that the Merger eliminated Plaintiffs' standing to challenge the retroactively adopted amendment.[80] This cannot be what the Delaware Legislature intended when it adopted Section 204/205. The statute was not intended to immunize acts of self-dealing from judicial review. *See* H.B. 127 Syn., 147th Gen. Assemb., Reg. Sess. (Del. 2013) ("Defective corporate acts, even if ratified under this section, are subject to traditional fiduciary and equitable review.").

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[80] Op.55-56.

Defendants are simply not the class of parties intended to be protected by Section 205. *See Numoda II*, 2015 WL 6437252, at *3. ("Because [defendants] are themselves responsible for not adhering to corporate formalities and because they acquiesced in the stock grants they now dispute, they are poorly positioned here to argue that past informal grants and returns of Numoda Corp.'s stock were invalid."). It is inappropriate to permit Defendants to turn Sections 204/205 into a trap door to escape the consequences of their own misconduct.

3. The Failure To Amend The COD Cannot Be Ratified Because The Contract "Means What Its Plain Language Says."

The parties' failure to negotiate an amendment to COD Section 7(a) is not a defective corporate act for purposes of Sections 204/205 for yet another reason: complying with the plain terms of a third-party contract cannot be a predicate failure of authorization.[81] As drafted by Glenhill, Section 7(a) only adjusted the conversion mechanism for Glenhill's Preferred Stock into common shares in the event of a reverse split of DWR's common stock. It was silent as to the potential reverse split of the Preferred Stock, and did not purport to prevent DWR from implementing such a split or to specify the terms on which such a split could occur.[82]

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[81] That the COD was incorporated into the Charter does not change this analysis, as charters are contracts and must be read on their face where no ambiguity or mistake exists. *See Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996).
[82] COD Section 6(d) entitled "Issuance Limitations" imposes select limitations on COD conversions, but not for issuances that violate the COD's conversion formula.

A clear contractual conversion mechanism is not a technical defect that satisfies the requirements of Sections 204/205. *See Numoda I,* 2015 WL 402265, at *9. The statutes have a limited ability to correct defective corporate acts based on the bedrock corporate law principles of predictability and certainty. *See id*. at *10 ("[I]t is unlikely that the General Assembly intended the legislation to extend far beyond failures of corporate governance features.").

Glenhill's concession that the COD was "unambiguous," unmistaken, and "means what its plain language says" is fatal to the purported ratification. *See Oxbow*, 202 A.3d at 500 (holding that "the only reading that gives meaning" to the contractual clauses at issue is the "plain language" of the agreement). The purpose of Sections 204/205 is "to facilitate correction of mistakes made in the context of a corporate act without disproportionately disruptive consequences." *Numoda I*, 2015 WL 402265, at *8. The trial court erred by nevertheless finding that the consequences of COD Section 7(a) were "plainly unintended" and that the transaction was "mistakenly" structured as a "double dilution."[83] *See Oxbow*, 202 A.3d at 507 (courts "should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it.").

See Waggoner, 581 A.2d at 1134 (adhering "to the rule that stock preferences are to be strictly construed.").

[83] Op.44,22-23.

Indeed, this case is unlike *Numoda II*—the only case in which this Court has considered Sections 204/205—because there is no evidence in the record to support the finding that the DWR Board intended the COD to say anything other than what it did. *See* 2015 WL 6437252, at *3. A mistake can be ratified when counsel prepares a non-voting stock certificate instead of a voting-stock certificate, *Numoda I*, 2015 WL 402265, at *12, or inserts a typographical error in an asset purchase agreement, *In re Genelux Corp.*, 126 A.3d 644, 653 (Del. Ch. 2015). The trial court could not correct an error that never existed.

In essence, the trial court's error converted DWR and Herman Miller's defective Section 205 counterclaim into an unpleaded claim for reformation of the COD. But no such claim was asserted below. Nor would that claim have been credible, as reformation requires a mistake to be proven by clear and convincing evidence. *See Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151–52 (Del. 2002). Since Defendants have conceded there was no mistake here, the heightened standards for reformation could not be met.

Sections 204/205 were not intended to replace traditional equitable remedies, such as reformation. Under the guise of a Section 204/205 ratification, the trial court reformed the COD to add new terms, and by doing so, committed error.

4. The Section 205 Factors Do Not Support Ratification.

In an attempt to bolster its ruling, the trial court applied the Section 205(d) factors and found that they supported ratification.[84] The court's superficial examination of these factors turned on its erroneous conclusion that the COD mistakenly failed to effect the parties' intent because it did not adjust for the Preferred Stock.[85] But as detailed above, Defendants conceded there was no mistake in the COD and never sought to negotiate an amendment to the COD. Thus, any argument that the Section 205(d) factors supported ratification must be rejected.

In sum, the minority stockholders suffered substantial damages, as they would have been entitled to a far greater share of the Merger proceeds that were instead improperly granted to Glenhill and DWR insiders.

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[84] Op.49-54.

[85] Op.51-52.

II. The Trial Court's Implicit Ratification Of The Invalid Options, PIK Shares, And The Windsong Note Violated Delaware Law.

A. Question Presented

Whether the trial court erred by ratifying certain shares awarded to Glenhill and other DWR insiders including: (i) the Invalid Options issued in violation of DWR's option plan and paid out as Bonuses that were nonetheless included in DWR's fully-diluted share count in the Merger; (ii) PIK Shares that Glenhill failed to elect in accordance with the terms of the COD; and (iii) the self-dealing Windsong Note that was never properly adopted by the DWR Board. These issues were preserved below. A2156, A2115, A2145.

B. Scope Of Review

The trial court's legal conclusions are reviewed de novo. *Nationwide,* 112 A.3d at 889. The court's application of its legal conclusions to the factual record is a mixed question of law and fact that is also reviewed de novo. *Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996).

C. Merits Of Argument

The trial court erred by validating a series of additional equity issuances to Glenhill and the DWR insiders for which DWR never even sought ratification, but which the court impliedly ratified without a Section 204/205 analysis. Because none of the issuances were authorized by DWR's governing documents, they cannot properly be counted for purposes of Section 253's 90% threshold.

1. The Trial Court Erred By Treating The Invalid Options As Valid For Purposes Of The Merger.

The trial court erred by treating 200,763 DWR stock options as validly issued for purposes of the Merger. DWR never sought ratification of those shares, and the court never addressed this issue in its Opinion. Instead, the court impliedly ratified the Invalid Options simply by including them in DWR's fully-diluted share count for the Merger.[86] These shares, like the rest of the shares ratified by the court, contributed to Herman Miller's ability to effectuate a short-form merger.

DWR realized prior to the 2014 Merger that the options were invalid, because they were issued in excess of the limits of the plan.[87] *See Sanders v. Wang*, 1999 WL 1044880, at *10 (Del. Ch. Nov. 8, 1999) (shares awarded in excess of plan limits were invalid and must be disgorged). Recognizing that those options were invalid,[88] DWR and Herman Miller agreed to cancel them and instead give option holders an equivalent cash Bonus. Those cash payments became a liability of DWR. Even though DWR and Herman Miller cancelled those options, they ***were still counted toward the Merger***:[89]

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[86] Op.74. Company counsel's advice that Sellers bear the cost of the Invalid Options was ultimately rejected by the interested directors as an impediment to effecting the Merger. A934-35.

[87] Despite Sections 204/205 becoming effective three months before the Merger and discovery of the Invalid Options, Defendants chose to conceal an unlawful "fix" rather than use the statute to attempt to cure the Invalid Options.

[88] A934-35.

[89] A993.

> [T]he parties hereby…accept[] a change of control cash bonus in lieu of any Company Options that were promised to such Representative will be treated for all purposes of the calculations pursuant to this Agreement (including for purposes of determining the Equity Value and the number of Fully-Diluted Shares and payments with respect thereto, payments made by Buyer to the Company pursuant to Section 1.2(b)….

In other words, Herman Miller counted the shares for purposes of the fully-diluted share count, even though those shares were so obviously invalid that DWR had already paid the Bonuses. By failing to address this issue, and then validating this conduct on an implied basis, the trial court erred.

But that was not the only harm this implied ruling caused. By including the Invalid Options in the share count, DWR reduced the minority stockholders' share of the merger consideration by making them bear the pro rata cost of those shares worth $4 million. As a result, DWR's minority stockholders received a lower per-share value for their shares from the sale. Moreover, by failing to provide truthful disclosures about the Invalid Options, stockholders were denied the most basic information about the Merger, including: the correct share count, the correct equity value, the correct enterprise value, and the correct merger consideration per share.

2. The Trial Court Erred By Granting Glenhill PIK Shares.

Nor could the PIK Shares count toward the 90% threshold because they were never validly issued to Glenhill. The issuance of the PIK Shares in the 2013 Issuance violated well-settled principles of Delaware contract law. In that issuance, Glenhill

purported to convert 1,432,397 shares of Preferred Stock, which included 432,397 PIK Shares that converted to nearly 1.2 million common shares. Herman Miller discovered this defect in its pre-Merger due diligence.[90]

As detailed above, COD Section 3(a)(i) gave Glenhill two options to collect in-kind annual dividends: "At the option of the Holder, such dividends shall accrue to the next Dividend Payment Date or shall be accreted to, and increase, the outstanding Stated Value." The COD does not mandate the grant of accrued PIK Shares nor does it grant accrued PIK Shares by default. Rather, Section 11(a) required Glenhill to affirmatively elect in writing that it accrued the dividend or had it accrete to the stated value. Glenhill did neither. *See Matulich*, 942 A.2d at 602 ("The Court of Chancery held that the Certificate of Designation, read as a whole and giving meaning to each provision, specifically limits the rights of the holders of Series B Preferred Stock….").

With regard to accrual, Glenhill does not dispute that it did not receive PIK dividends before the 2013 Issuance.[91] With regard to accretion to the stated value, Glenhill never invoked any increase in stated value. Indeed, the Conversion Notice Glenhill provided in connection with the 2013 Issuance simply purported to convert 1,432,397 shares of Preferred Stock into 3,936,571 common shares. Because the

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[90] A939.1.
[91] Op.44,n.173; A2195.

COD dictates the conversion price, the stated value is the only missing variable in the conversion formula. Applying the conversion formula in COD Section 6(a), the only stated value Glenhill could have used to determine that its shares would convert into 3,936,571 common shares is $12.69, which is the original stated value of the Preferred Stock. Because Glenhill was never entitled to the PIK shares, Plaintiffs were damaged and the trial court erred when it counted them for purposes of Section 253.

3. The Trial Court Erred By Granting The Windsong Note Ratification That DWR Never Sought.

The Windsong Note accounted for 1,414,168 shares of the 2013 Issuance, well in excess of the outstanding shares authorized by DWR's Charter.[92] Despite Plaintiffs' repeated inquiries throughout this litigation into whether a valid board resolution authorizing the Windsong Note existed, Defendants never produced one and never sought to ratify the Windsong Note pursuant to Section 204. *See Smith v. Van Gorkom*, 488 A.2d 858, 878 (Del. 1985) ("The defendants' unexplained failure to produce and identify the original Merger Agreement permits the logical inference that the instrument would not support their assertions in this regard.").

Because the Windsong Note was never duly adopted, the 1.4 million common shares issued upon the "conversion" of the Note are invalid and thus do not count

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[92] A915.

toward Section 253's 90% threshold. Nonetheless, the trial court impliedly ratified the self-dealing Windsong Note and its shares without any basis, granting Defendants relief they never sought in the form of a windfall of over $33 million.[93]

4. Plaintiffs Are Entitled To Substantial Damages.

As a result of the errors detailed in Arguments I and II, far fewer than 90% of DWR's validly issued shares were actually voted in favor of the Merger. Because Defendants needed the improperly ratified issuances to satisfy the 90% threshold, the Merger was illegal, entitling Plaintiffs to rescissory damages, which is the appropriate remedy for an unlawful merger. *See Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1189 (Del. 1988) ("If the merger was not lawfully effected, [plaintiff] should be entitled to recover rescissory damages…."); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 1995 WL 376919, at *2 (Del. Ch. June 15, 1995) ("A merger that fails to comply with the statutory requirements for a merger is *void ab initio*.").

Herman Miller could not have lawfully effected a Section 253 merger without the trial court's improper collective ratification of:

- 2.7 million DWR common shares improperly issued to Glenhill in exchange for its Preferred Stock, in violation of the COD;
- 1.2 million DWR common shares improperly issued to Glenhill in exchange for its PIK Shares that it had never elected or held;
- 1.4 million DWR common shares improperly converted from the Windsong Note, which was not authorized by the Board and, but for the improper backdating, exceeded DWR's authorized shares.

[93] Op.36.

In the absence of these issuances, the Merger was illegal, because it lacked 90% support.[94]

In addition, Defendants' treatment of the Invalid Options—canceling the shares, paying Bonuses instead, but counting the cancelled shares for the vote—shows that this was not an innocent mistake and that they had unclean hands. Because of DWR's failure to observe formalities and its failure to disclose the self-dealing transactions, Herman Miller and DWR's insiders were desperate to effect a short-form merger and avoid the thorny disclosures typically made to stockholders. Thus, Herman Miller and DWR unlawfully closed the Merger without the requisite vote.

Thus, the trial court erred by failing to award damages, including rescissory damages. At the very least, the court's improper use of Sections 204/205 wrongly shifted $131 million in merger consideration to Glenhill and DWR insiders from minority stockholders.

[94] Sellers claimed to own 96% of DWR's fully-diluted common shares as of the Merger, and claimed that 6,624,470 DWR shares were issued and outstanding as of the Merger. A984-A1186. Together, the conversions of the additional 980,000 Preferred Stock shares (into 2.7 million common shares), the 432,397 PIK Shares (into 1,188,331 common shares), and the 1,414,168 common shares from the Windsong Note totaled 5,295,774.4. Without these shares, Sellers had only 1,088,093 of 1,328,696 issued and outstanding shares, or 81.2% of the voting power as of the Merger.

III. The Trial Court Erred By Rejecting Plaintiffs' Claim For A Fee Award.

A. Question Presented

Whether the trial court erred by rejecting Plaintiffs' application for attorneys' fees, despite finding that Plaintiffs had satisfied the corporate benefit doctrine and had asserted meritorious challenges to defective corporate acts such that Herman Miller took action to address those claims.[95] These issues were preserved below. A2511-65.

B. Scope Of Review

The court's failure to properly apply the legal principles is reviewed *de novo*. *Nationwide,* 112 A.3d at 889.

C. Merits Of Argument

The trial court expressly concluded that Plaintiffs satisfied the elements of the corporate benefit doctrine, and conferred a corporate benefit on DWR through their litigation efforts.[96] It is undisputed that without the litigation brought by Plaintiffs, Herman Miller would not have tried to ratify the wrongful acts at issue in this litigation.[97] Defendants did not contend otherwise.[98]

The trial court deviated from well-established precedent by creating a new exception to the corporate benefit doctrine to deny Plaintiffs' fee application because

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[95] Fee.Op.2.
[96] Fee.Op.2.
[97] Fee.Op.7.
[98] *Id*.

Plaintiffs provided "steadfast opposition" to Herman Miller's improper attempt to ratify the defective acts.[99] But punishing Plaintiffs for having pursued their claims through trial is inappropriate. *See Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1166 (Del. 1989) ("If, as here, the shareholder commences an individual action with consequential benefit…there is no justification for denying recourse to the fee shifting standard which has evolved for the therapeutic purpose of rewarding individual effort which flows to a class.").

The trial court did not hold that Plaintiffs litigated their claims in bad faith, or that their arguments were frivolous. In fact, the court denied Defendants' summary judgment motion on those exact claims.[100] It was therefore inappropriate for the court to penalize Plaintiffs for pressing their claims and not capitulating merely because the conflicted DWR directors approved a post-Merger, litigation-driven ratification in order to protect themselves from liability, which far exceeded the proper scope of Sections 204/205, as detailed above. *See Olson v. EV3, Inc.*, 2011 WL 704409, at *11 (Del. Ch. Feb. 21, 2011) (awarding attorneys' fees for conferring a "significant corporate benefit" where "[t]o the extent a short-form merger closed in reliance on the resulting shares, the validity of the Merger could be attacked"); *Siegman v. Palomar Med. Techs.*, 1998 WL 409352, at *6 (Del. Ch. July 13, 1998)

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[99] Fee.Op.19.
[100] A1414.

(granting attorneys' fees to plaintiff who litigated the validity of a stock issuance in excess of the company's charter).

Plaintiffs are not aware of any Delaware decision holding that a party loses its entitlement to fees solely by taking viable claims to trial. This ruling inappropriately penalizes litigants for pursuing meritorious claims, and disincentivizes minority stockholders from asserting facially viable claims. *See In re Colfax, Inc.*, C.A. No. 10447-VCL (Del. Ch. Apr. 2, 2015), Transcript at 35-36.[101] The trial court therefore erred in denying Plaintiffs' request for fees.

[101] The Fee Decision also referenced the fact that Plaintiffs pursued claims only on their own behalf (and for Franklin's assignees). Fee.Op.13,17. This Court has repeatedly rejected the argument that the corporate benefit doctrine does not apply to individual claims. *See Tandycrafts*, 562 A.2d at 1166 ("[T]here is no class action or derivative suit prerequisite to an award of attorneys' fees under the common benefit exception.").

CONCLUSION

This Court should reverse the judgment of the Court of Chancery, enter judgment for Mr. Franklin, and remand the case to the Court of Chancery to determine damages.

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CERTIFICATE OF SERVICE

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