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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| 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, | ) | Consolidated<br>No. 215, 2019<br>No. 216, 2019 |
| v. | ) | |
| 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<br><br>C.A. No. 10477-CB |
| Defendants and Counterclaim Plaintiffs-Below/Appellees, | ) | |
| and | ) | |
| DESIGN WITHIN REACH, INC., | ) | |
| Intervenor and Counterclaim-Petitioner/Appellee. | ) | |

# REPLY BRIEF OF APPELLANT ANDREW FRANKLIN

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## SUMMARY OF ARGUMENT

It is now undisputed that Glenhill used its control of DWR to benefit itself to the detriment of the Company and its minority stockholders. Defendants do not dispute that, after NASDAQ rejected Glenhill's request to engage in a self-dealing transaction without a stockholder vote, Glenhill took the Company dark, delisted its stock, and engaged in a series of insider transactions without disclosure to the minority stockholders. Instead, Defendants, in a profound understatement, claim they "fell short of perfection."[1] Defendants' misuse of Sections 204/205 is just the latest chapter in their course of misconduct, as they attempt to use those statutes not to correct a technical mistake by the Board, but to rewrite an agreement "to authorize retroactively an act that was never taken but that the corporation now wishes had occurred…." *Nguyen v. View, Inc.*, 2017 WL 2439074, at *10 (Del. Ch. June 6, 2017). Sections 204/205 do not allow the renegotiation of third-party contracts and the judgment must be reversed.

As an initial matter, Defendants do not dispute that the trial court ruled in their favor on an argument that was waived below—that the COD contained a mistake—and, by doing so, committed error. Indeed, Defendants do not even address this dispositive point or the cases cited in Appellant Andrew Franklin's Opening Brief

[1] Answering Brief of Appellees Herman Miller, Inc., HM Catalyst, Inc. and Design Within Reach, Inc. ("Answering Brief" or "AB") 15.

("Opening Brief" or "OB").[2] Moreover, the court's decision ignored the proper scope and remedial purpose of Sections 204/205, as well as basic principles of Delaware contract law. The court's legal error allowed Defendants to go back in time and amend the COD to grant Glenhill terms that were concededly never considered, let alone negotiated at arm's-length to reach an agreement supported by mutual consideration. This is not the purpose or function of Sections 204/205.

The Answering Brief, filed only by Herman Miller and not the conflicted insiders, adopts this flawed application of Sections 204/205, arguing that the statutes can remedy, in essence, any defect. But Sections 204/205 can only remedy technical defects that render otherwise proper corporate acts void or voidable. They are not a license to unilaterally rewrite clear contracts between Delaware corporations and third parties. Despite Defendants' dispositive concession to the trial court that the COD contained no mistake and meant "what its plain language says,"[3] the court improperly allowed Defendants to renegotiate their contract under the guise of Sections 204/205 to provide additional rights to Glenhill in the event of a reverse split of Preferred Stock. But the fact that Glenhill entered into a contract with terms it found unfavorable years later is not grounds for reforming the COD, and Herman Miller advances no other rationale for retroactively amending that contract.

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[2] Unless otherwise indicated, defined terms are adopted from the Opening Brief, emphases are added, and internal quotation marks omitted.

[3] A1577; A1609-A1610.

Herman Miller's core argument is that relief is permissible under Sections 204/205 because there was a so-called "failure in 2010—at the time of the Reverse Splits—to prevent the Reverse Splits from causing an unintended dilution of Glenhill's Series A preferred interest…."[4] No matter how much Herman Miller tries to downplay it, this was not a technical mistake that can be ratified under Sections 204/205. Instead, this was a failure of Glenhill and DWR to consider, negotiate, and reach an agreement supported by consideration concerning an amendment to the COD. Because these acts admittedly never occurred, Sections 204/205 do not apply. Moreover, the notion that there was a "mistake" in connection with the Reverse Split, as opposed to a failure to amend the COD in the first place, is contradicted by Defendants' concession below: the lack of anti-dilution protection for the Preferred Stock in the case of a Reverse Split effectuated the parties' intentions under the COD.[5] Having waived this argument below, and failed to contest this waiver on appeal, Defendants cannot resurrect it now.

Herman Miller likewise does not rebut Franklin's contention that the trial court erred in implicitly ratifying a series of additional equity issuances to Glenhill and other DWR insiders. Instead, Herman Miller seeks to impose an improper standard of review, incorrectly claims that these issues were not preserved for

[4] AB8.
[5] A1590.

appeal, and offers a hodge-podge of non-existent "equities" arguments.[6] None of these arguments defend specific aspects of the court's decision, and none withstand minimal scrutiny.

Finally, Herman Miller claims that Plaintiffs are not entitled to attorneys' fees because they did not agree to be bought off. Herman Miller makes this position clear: "the analysis of a fee award might well be different" if "[P]laintiffs [had] forgone objection to the Ratification Resolutions."[7] As discussed in the Opening Brief, the pursuit of meritorious claims cannot be a basis to deny a fee award, and to do so would disincentivize long-term minority stockholders from pursuing such claims.

In short, the trial court's decision improperly allowed conflicted insiders to rewrite the terms of an admittedly unambiguous third-party contract to preserve a windfall using statutes that do not apply. Reversal is required.

[6] AB28-34.
[7] AB37-38.

## ARGUMENT

### I. The Trial Court And Defendants Stretched Sections 204/205 Beyond Their Breaking Point

Reversal is required because Sections 204/205 do not allow a Board to "authorize retroactively an act that was never taken but that the corporation now wishes had occurred." *Nguyen*, 2017 WL 2439074, at *10. Because no amendment to the COD was ever contemplated or adopted, Delaware law does not permit Defendants to go back in time prior to the Reverse Split and pretend they amended the terms of the admittedly unambiguous COD. Doing so exceeds the scope and proper purpose of Sections 204/205.

#### A. *De Novo* Review Applies

Because there is no merit to its legal arguments, Herman Miller improperly invokes this Court's decision in *Numoda II*, seeking to apply the more favorable abuse of discretion standard. There, the Supreme Court reviewed factual determinations made by the trial court in applying a factor-by-factor analysis under Section 205(d). *See In re Numoda Corp.*, 2015 WL 6437252, at *3-11 (Del. 2015) ("*Numoda II*") ("As a factual matter, the Court of Chancery had ample evidence…to support its findings…"). Here, in contrast, as Defendants concede, this appeal concerns whether Sections 204/205 apply as a threshold matter.[8] That is a question of law subject to *de novo* review.

[8] AB5,22.

### B. Defendants Concede The Trial Court Erred By Relying On A Waived Argument

As demonstrated in the Opening Brief, the trial court relied on an argument that Defendants waived below. Defendants conceded to the court that the COD, which provided no anti-dilution protection for the Preferred Stock in a Reverse Split, contained no mistake and meant "what its plain language says."[9] Despite this dispositive concession, the court ratified an amendment to the COD to include the same protection Defendants admitted they failed to secure at the bargaining table. Herman Miller does not even address this point or discuss Franklin's cited cases, thereby conceding that the court committed error.[10]

### C. Defendants Cannot Use Sections 204/205 To Amend A Contract Retroactively

In order to issue additional shares to Glenhill sufficient to support the Merger, Defendants had to find a way to amend the unambiguous COD. Defendants claimed that the 2013 Issuance was a defective corporate act because the Company issued more shares to Glenhill than it was entitled to receive. But the COD only entitled Glenhill to receive 54,965 shares of common stock after the Reverse Split.

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[9] A1577; A1609-A1610.

[10] *See Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 508 (Del. 2019) (reversing judgment where court relied on argument that "conflicts with the positions the [appellees] actually did take" and then abandoned before the trial court); *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief.").

In order to escape the COD's preclusive effect, Defendants had to convince the trial court to use a time machine and go back to 2010 to amend that contract. This was legal error. Sections 204/205 do not grant courts discretion to retroactively rewrite contracts with third parties, and Herman Miller cites no authority to support such relief.[11] Recognizing that the court's actions were impermissible, Herman Miller asserts that the "[t]he trial court was not asked to and did not validate the failure to amend the certificate."[12] That is demonstrably false.

The order implementing the trial court's post-trial opinion—which Herman Miller ignores but which Defendants drafted and submitted to the court for adoption—expressly ratifies both the Reverse Split and the "***accompanying changes to the adjustment provisions of the [COD]***" as an independent defective corporate act.[13] Defendants have admitted that this is precisely what they did: "there 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***."[14] This retroactive amendment provided Glenhill with a contractual right for which it never bargained. This was the only way the court could have provided Defendants with

[11] Defendants make the absurd and irrelevant claim that "the Company faced a significant breach of contract claim by Glenhill" if it issued void stock. AB12. Glenhill controlled the Company and could not possibly assert a breach claim.
[12] AB22-23.
[13] Order¶3(c).
[14] A1623.

the shares they needed to effect the Merger, and it was improper under Sections 204/205.

### i. This Is A Contract Case; The Plain Terms Of The COD Control

The COD contained no "mistake," as Defendants conceded. It is an unambiguous contract that provided DWR and Glenhill with a clearly bounded set of rights and obligations. Sophisticated counsel for Glenhill drafted the COD, and the Board approved a 50-1 reverse split of both Preferred Stock and common stock.[15] The reasons why Defendants structured the COD as they did are undisputed, as they do not contest that Glenhill informed NASDAQ that it expected 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."[16] Moreover, the parties' prior course of conduct demonstrated that they knew how to amend the COD, as they did so multiple times prior to the Merger.[17] These facts are undisputed, and show that it was improper to use Sections 204/205 to rewrite the COD.

Herman Miller does not rebut the well-established rule that Delaware courts cannot rewrite contracts to supply terms not obtained at the bargaining table, *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) ("Parties have a right to enter into good

[15] A1223-24; AB14. Glenhill and DWR are not without a remedy, as they may have claims against their counsel, but they have no right to invoke Sections 204/205.
[16] A2426.
[17] B185-B186.

and bad contracts, the law enforces both."), or that contracts governing preferred stock must be strictly construed, *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990) (enforcing "the rule that stock preferences are to be strictly construed."). Nor do Defendants contest the plain language of the COD, particularly given their concessions to the trial court. Instead, Herman Miller claims that Franklin seeks to invoke the law as it stood prior to Sections 204/205. This is wrong, and Herman Miller's strawman argument fails.

Sections 204/205 changed the law to allow companies to, under limited circumstances, remedy technical defects that rendered transactions void, such as the failure to adopt a resolution authorizing the issuance of preferred stock, as was the case in *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991). *See* 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, 403 (2014) ("[S]ection 204 implicitly preserves the common law rule that ratification operates to give original authority to an act that *was taken* without proper authorization…."). Other technical defects include where counsel prepares a non-voting stock certificate instead of a voting-stock certificate, *In re Numoda Corp. S'holders Litig.*, 2015 WL 402265, at *12 (Del. Ch. Jan. 30, 2015) ("*Numoda I*"), or adds a typographical error in an Asset Purchase Agreement, *In re Genelux Corp.*, 126 A.3d 644, 653-54 (Del. Ch. 2015).

No technical defect exists here. The Board could not unilaterally rewrite a third-party contract. Such an amendment could only be obtained through an arm's-length negotiation and a valid agreement among the parties to alter its terms, with supporting consideration. *See CertiSign Holding, Inc. v. Kulikovsky*, 2018 WL 2938311, at *25 (Del. Ch. June 7, 2018) ("Even assuming I could find that the terms of the assumption were sufficiently definite to allow for specific enforcement, it is difficult to discern how the parties exchanged legal consideration."). This Court in *Oxbow* made clear that Delaware courts are precluded from rewriting contracts. There, the trial court improperly relied on the implied covenant of good faith and fair dealing to add terms not obtained at the bargaining table. 202 A.3d at 500. Here, the trial court did the same thing, except it used Sections 204/205 to improperly rewrite the parties' agreement in violation of Delaware law.

**ii. The Validations Exceed The Scope Of Sections 204/205**

The trial court improperly invoked Sections 204/205, which are "designed to remedy the technical validity of the act or transaction." H.B. 127 Syn., 147th Gen. Assemb., Reg. Sess. (Del. 2013). They are not a "license to cure just any defect." *Numoda I*, 2015 WL 402265, at *8.

*First*, the failure to amend the COD cannot be a defective corporate act under Sections 204/205 because there was no "act" to ratify.[18] Herman Miller continues

[18] OB5.

to point to "the ***absence*** in 2010 of an attempted amendment of the certificate of designation" as a failure of authorization.[19] But the trial court's ratifications necessitate validating an amendment to the COD, which is exactly what the court did in its implementing order.[20] Indeed, Defendants have previously conceded that the parties did not even "[think] to bargain in 2009" over the impact of a potential reverse split of the Preferred Stock.[21] Because that amendment never occurred, it cannot be an "act" under Sections 204/205. *Nguyen*, 2017 WL 2439074, at *10.

The trial court was therefore precluded from reaching back before the Reverse Split to improperly remedy Defendants' failure to amend the COD. This is precisely the holding in *CertiSign*, where the court refused to ratify a non-existent transaction. 2018 WL 2938311, at *27 ("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."). Herman Miller makes no attempt to distinguish *Nguyen*, *Numoda*, or *CertiSign*, all of which are directly on point thereby conceding that its arguments are contrary to the law. It is irrelevant that Glenhill could have improperly leveraged its

[19] AB23.
[20] Order¶3(c).
[21] A1590.

power as DWR's controlling stockholder to force an amendment to the COD, since it did not do so here.[22]

*Second*, the failure to negotiate an amendment to the COD is not a technical defect that Sections 204/205 can address. *Numoda I*, 2015 WL 402265, at *9. Despite filing at least three briefs on the issue, Defendants have never identified any technical defect.

*Third*, Sections 204/205 specifically require a "defective corporate act" that is void or voidable due to a "failure of authorization." Herman Miller bootstraps a litany of purportedly defective corporate acts to a single purported failure of authorization, sometimes identifying it as "the failure to amend the certificate" but also calling it "the failure to paper the Reverse Splits correctly."[23] But at no point have Defendants ever argued that these events made the 2013 Issuance void or voidable, which is a facial requirement to apply Sections 204/205. Defendants' failure to preserve this issue means that Sections 204/205 cannot apply here, because there was no failure of authorization rendering the 2013 Issuance void or voidable.

To the extent Herman Miller now claims that the Reverse Split was the failure of authorization, it is wrong because the Reverse Split did not result in a defective corporate act from a failure of authorization. Rather, the Reverse Split resulted from

[22] AB23n.11.
[23] AB4,22.

the application of the plain terms of a third-party contract. In any event, the trial court had to (and did) amend the COD in order to reach Defendants' desired result in connection with the Reverse Split. But, as detailed above, the court lacked authority to rewrite the negotiated terms of the COD.

### D. Sections 204/205 Were Not Designed To Protect Defendants

Herman Miller does not dispute, and therefore concedes, that Sections 204/205 are not intended to protect parties like Defendants who are complicit in failing to comply with Delaware law. *Numoda II*, 2015 WL 6437252, at *3. Defendants seek to obtain a benefit from their years-long failure to comply with corporate formalities concerning their own insider transactions. Herman Miller misses the point entirely, arguing that "205(a) authorized DWR and the defendants below to seek relief under Section 205."[24] The fact that the statute *allows* parties to seek relief for technical violations in order to facilitate equitable outcomes does not mean they are *entitled* to such relief.[25] Here, Defendants' undisputed course of self-dealing misconduct[26] precludes them from invoking Sections 204/205, which were created to allow Delaware corporations to remedy technical violations.[27]

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[24] AB26.

[25] H.B.127 Syn. ("Defective corporate acts, even if ratified under this section, are subject to traditional fiduciary and equitable review.").

[26] Franklin's Opening Brief details the now undisputed years-long self-dealing behavior by Glenhill and DWR insiders spanning multiple transactions. Op.18,72.

[27] The use of 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

## II. The Trial Court Erred By Implicitly Awarding Glenhill Additional Shares To Which It Was Not Entitled And By Validating Without Analysis Defendants' Treatment Of The Invalid Options

Herman Miller does not defend the trial court's improper decision to award Glenhill and other DWR insiders nearly 4 million shares of invalid stock, or the court's implicit decision to allow Defendants to include the Invalid Options in DWR's fully-diluted share count. These errors allowed Defendants to reach the 90% threshold necessary to consummate the Merger pursuant to Section 253. Herman Miller instead asserts improper procedural arguments, selective quotations from the COD, and irrelevant strawman arguments.[28] These arguments fail, and the court's rulings should be reversed.

### A. *De Novo* Review Applies

Here again, Herman Miller attempts to apply the wrong standard of review. The trial court's implicit ratification of the 2013 Issuance, and its improper inclusion of the Invalid Options in DWR's fully-diluted share count, are issues of law that are

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strike down their own prior actions for self-interested reasons." *Numoda II*, 2015 WL 6437252, at *2 n.4. Indeed, three of the insider Defendants, constituting half of DWR's post-Merger Board, voted to self-ratify all of this challenged misconduct. OB23.

[28] Herman Miller mischaracterizes the record by stating that the 2009 Transaction was approved by the DWR stockholders in 2009. AB12n.2. In support of this false statement, Herman Miller cites materials from the June *2010*, not June 2009, DWR stockholder meeting. Of course, the June 2010 meeting occurred long after Glenhill had already obtained majority control of the Company. In addition, the June 2010 stockholder meeting is irrelevant to shares converted from the Windsong Note, which allegedly happened prior to that meeting.

reviewed *de novo*. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002) ("This Court reviews *de novo* the Court of Chancery's interpretation of written agreements and Delaware law.").

### B. Glenhill Was Not Entitled To Receive The PIK Shares

DWR awarded Glenhill roughly 1.2 million common shares in the 2013 Issuance in exchange for the PIK Shares that Glenhill never elected to receive, and to which it was not entitled. The trial court incorrectly validated that award without addressing whether Glenhill was entitled to those shares or whether they were otherwise awarded properly. Herman Miller does not defend any aspect of the court's ruling on this issue. Instead, it incorrectly claims that this issue was not preserved for appeal, invokes non-existent equities, and raises irrelevant COD provisions.

*First*, Plaintiffs argued below that Glenhill received common shares in exchange for PIK Shares that never existed; indeed, the trial court called it a "core part" of their argument.[29] Plaintiffs also argued below that the 2013 Issuance was

[29] A2114 ("Because no PIK shares had been issued, Glenhill purported to convert 432,397 shares of the Series A Preferred that did not exist."); A2188 ("[A] core part of your challenge seems to be that the PIK'ing component…they have a problem with the PIK'ing component of it.").

improper because awarding the PIK Shares to Glenhill violated the terms of the COD.[30] This issue was preserved for appeal.

*Second*, Herman Miller improperly relies on Defendants' own corporate governance failures, downplaying Glenhill's undisputed failure to make the PIK election as a mere "[f]ailure to make a paperwork election."[31] This undisputed "failure" is dispositive. Defendants concede that Glenhill failed to elect the accrual of its PIK Shares, as the COD required, and because of that failure never received any PIK Shares prior to the 2013 Issuance. As Defendants' counsel conceded to the trial court, "There's a lot of talk about, you know, there never were 1.4 million shares. Well, okay. That's true."[32] They further conceded that: "I think what the record reflects is that [Plaintiffs' counsel] is correct that no PIK shares were ever issued."[33]

Nor can Defendants invoke equity. These failures, which no Defendant now defends, occurred while Glenhill controlled DWR and while it failed to implement any corporate governance, causing the Company to enter into numerous conflicted

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[30] A2140-A2144. To dispose of yet another Herman Miller strawman argument, Franklin is clearly ***not*** arguing that the PIK Shares "stood on a different footing than [the Chancellor's] ability to validate other shares issued in the 2013 Issuance." AB31. Nor is Franklin re-litigating a breach of fiduciary duty claim concerning the Windsong Note. Rather, Franklin continues to argue that Glenhill is not entitled to shares that were improperly awarded in the 2013 Issuance, including the PIK Shares.
[31] AB31.
[32] A2195; Op.43n.173.
[33] A2194.

insider transactions that enriched Glenhill. Equities cannot validate a stock award to which Glenhill was not entitled under the terms of the COD.

*Third,* Herman Miller raises a host of irrelevant and selectively quoted COD provisions in an effort to avoid Defendants' concessions to the trial court. It notes DWR's obligation under the COD to issue valid common shares upon conversion of the Preferred Stock was "absolute and unconditional,"[34] citing Section 6(c)(iii), but omits language from that very section stating that DWR's obligations to Glenhill are "***in accordance with the terms hereof***." Herman Miller also cites Section 11(b), but omits the remainder of that provision, which begins "[e]xcept as expressly provided [in the COD]," and ends, "herein prescribed." Herman Miller's selective editing cannot modify Glenhill's obligations under the COD to affirmatively elect to accrue and receive the PIK Shares.

Herman Miller also incorrectly cites Section 3(a)(i) of the COD and claims that provision shows Glenhill was "entitled to receive" cumulative dividends on its Preferred Stock. But those dividends were not automatic.[35] Glenhill failed to take the contractually-prescribed steps necessary to enforce its rights under the COD, and then used its control to cause DWR to purport to convert PIK Shares that never existed and to which Glenhill was not entitled.

[34] AB31.
[35] OB15,42.

### C. The Windsong Note Is Invalid Because It Was Never Duly Adopted

Herman Miller offers no substantive defense to Franklin's arguments concerning DWR's improper award of roughly 1.4 million common shares to Glenhill and other DWR insiders pursuant to the Windsong Note, instead incorrectly claiming that Plaintiffs failed to preserve this argument below. But Plaintiffs have argued throughout this litigation that the Windsong Note was not properly authorized, and that the shares awarded pursuant to that agreement were invalid.[36]

It is now undisputed that there are no minutes of *any* DWR Board meeting, including concerning the Windsong Note. Indeed, Defendants could not produce any document whatsoever, much less a valid board resolution, authorizing this transaction, which the trial court held was "the product of a conflicted and deficient process."[37] Because Herman Miller cannot show that the Windsong Note was validly approved, it is left to claim that it was "misleading"[38] for Franklin to assert that Defendants never produced signed resolutions. The basis for this argument is a set of resolutions produced by a third party that no DWR director signed and no party to this action ever produced (and thus are not DWR corporate records).[39] The

[36] A2103 ("There is no record evidence that the Board adopted a resolution approving the Windsong Note."); A2158 ("These amendments permitted Glenhill and the Individual Defendants and their affiliates to reap the benefits of the improper Conversion, Windsong Note and its adjustment in the 2012 Financing.").
[37] Op.18.
[38] AB32n.18.
[39] A834-A842.

absence of demonstrated corporate approval means that the Windsong Note has no effect.[40]

As a result, the approximately 1.4 million shares issued upon "conversion" of the Windsong Note are invalid and cannot be counted towards Section 253's 90% threshold. The trial court's implicit ratification of these shares was error, and provided Defendants with a windfall.[41]

### D. The Invalid Options Harmed Plaintiffs

Rather than address the issues head on, Herman Miller incorrectly claims that Plaintiffs failed to previously challenge Defendants' inclusion of the Invalid Options in DWR's fully-diluted share count for purposes of the Merger. This issue too was repeatedly raised before the trial court.[42] Herman Miller further claims that no shares were issued to DWR insiders in exchange for the Invalid Options.[43] That is true, but irrelevant. Franklin has never argued that DWR insiders received shares in exchange for the Invalid Options, as those insiders received cash bonuses, and those payments were deducted from the merger consideration.

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[40] *Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d 437, 461 (Del. Ch. 2012) (finding unsigned board resolution invalid "because the filling of vacancies was not accomplished by the vote of a majority of the directors then in office acting at a meeting or by the consent of all directors then in office acting in writing").
[41] Op.36.
[42] A2156; A2165; AR57n.34; AR58.
[43] AB17.

The real issue is that the trial court incorrectly allowed those roughly 200,000 Invalid Options to be included in DWR's fully-diluted share count, as required by Herman Miller and all other Defendants in the Merger agreement.[44] This contributed to Herman Miller's ability to unlawfully effect a short-form merger, and reduced the minority stockholders' per-share merger consideration.[45]

### E. Plaintiffs Are Entitled To Substantial Damages

Without improper ratification of the 2013 Issuances, Glenhill did not have the voting power required to effect the Merger under Section 253, rendering the Merger invalid. The Court should therefore remand this action for calculation of rescissory damages.[46] *Olson v. EV3, Inc.*, 2011 WL 704409, at *11 (Del. Ch. Feb, 21, 2011) (to "the extent a short-form merger closed in reliance on the resulting [likely void] shares, the validity of the Merger could be attacked."); *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1189 (Del. 1988).[47]

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[44] Op.74.

[45] A993; Company counsel's advice that Sellers bear the cost of the Invalid Options was rejected by the interested directors as an impediment to effecting the Merger. A934-35.

[46] This damages claim was expressly preserved below. Plaintiffs have contested the validity of the Merger since their second amended complaint, and pleaded rescissory damages, as the trial court recognized. Op.33,37,80n.266; A2162-67.

[47] Herman Miller claims that Plaintiffs either sold or tendered their shares after the Merger, AB10, but does not assert any waiver defense. If asserted, any waiver argument would fail because Defendants' misconduct remained hidden until Plaintiffs uncovered it during discovery. *See Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 479 (Del. Ch. 2011) ("The waiver principles relied on in *Household* subsequently have been held not to apply to a controlling stockholder freeze-out.").

Herman Miller does not dispute that rescission is the proper remedy for an invalid merger, but instead claims that some lower damages award would be more appropriate, cryptically stating that "several of [Franklin's] numbers are incorrect."[48] However, the amount of any ultimate damages award must be resolved on remand.

[48] AB33n.19.

## III. Plaintiffs Are Entitled To Attorneys' Fees

Herman Miller's only argument against awarding attorneys' fees is that Plaintiffs should be denied fees for pursuing this meritorious litigation.[49] Herman Miller mischaracterizes Plaintiffs' litigation efforts as "creat[ing] risk and uncertainty,"[50] but the opposite is true. It was Defendants who created "risk and uncertainty" through their campaign of undisclosed insider transactions, and their failure to implement proper governance at DWR. As the trial court held and as Defendants conceded, Plaintiffs' efforts in this case undisputedly conferred a benefit on DWR and its stockholders.[51]

### A. *De Novo* Review Applies

Herman Miller incorrectly claims that this is a matter of a discretionary fee award.[52] This appeal turns on the question of whether the trial court properly applied the corporate benefit doctrine, raising a question of law that is reviewed *de novo*. *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010) ("We review a denial of an application for attorneys' fees and costs for abuse of discretion, but we review *de novo* the legal principles applied in reaching that decision.").

[49] AB37-38.
[50] AB38.
[51] AB36.
[52] AB35.

### B. Plaintiffs Should Not Be Penalized For Pursuing Meritorious Claims

Although the trial court concluded, and Defendants conceded, that Plaintiffs conferred a benefit on DWR and its stockholders through this litigation, the court improperly denied a fee award because Plaintiffs pursued their meritorious claims through trial. Herman Miller first seeks to retract its prior concession that Plaintiffs conferred a benefit by arguing that they did not cause the court's validation of certain DWR corporate acts pursuant to Sections 204/205.[53] That is false. As Defendants have conceded,[54] and as the court held, Plaintiffs' litigation efforts uncovered the issues that led to Defendants' Section 204 ratifications and Section 205 counter-claim, and therefore conferred a corporate benefit.[55]

Herman Miller then claims that the analysis would have been different had Plaintiffs agreed to be bought off and "foregone objection to the Ratification Resolutions."[56] But Plaintiffs' pursuit of their claims has no bearing on their fee application, as demonstrated by Herman Miller's failure to cite any cases supporting its position. The corporate benefit doctrine does not require Plaintiffs to either forego their claims or forfeit a fee award. *Olson*, 2011 WL 704409, at *11; *Siegman v. Palomar Med. Techs.*, 1998 WL 409352, at *6 (Del. Ch. July 13, 1998) (granting

[53] AB37.
[54] Fee.Op.7.
[55] Fee.Op.11.
[56] AB37-38.

attorneys' fees to plaintiff who litigated the validity of a stock issuance in excess of the charter). To hold otherwise would disincentivize stockholders from pursuing viable claims and encourage quick settlements designed to secure a fee.

Herman Miller compounds its flawed theory by relying on the fact that this action was brought individually,[57] claiming that "plaintiffs here did not pursue any claims on behalf of a class."[58] This is directly contrary to Delaware law. *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….").

The trial court's decision should be reversed and fees should be awarded.

[57] AB36n.20;AB37.
[58] Fee.Op.17.

## IV. This Court Has Jurisdiction Over Franklin's Appeal

Conceding the weakness of its merits arguments, Herman Miller makes the meritless claim that, because of a clerical error regarding service of Franklin's notice of appeal, this appeal should be dismissed.

*First*, it is undisputed that Franklin's notice of appeal was filed and accepted by this Court within the 30-day time period mandated by Section 145, thereby conferring the Court with jurisdiction. D.I. 1; *State Personnel Comm'n v. Howard*, 420 A.2d 135, 138 (Del. 1980) ("[T]he appellant here has met the jurisdictional requirement imposed by s[ection] 148 by filing a notice of appeal within the prescribed period.").[59]

*Second*, to have an argument for dismissal, Herman Miller would have to establish that the service failure caused it substantial prejudice. *Howard*, 420 A.2d at 137. Tellingly, Herman Miller has not claimed that it was prejudiced. Nor could it. Defendants received notice of Franklin's appeal within the prescribed period when the Court issued the briefing schedule on May 20, 2019.[60] Of course, Defendants have participated in this appeal without prejudice.

[59] 10 *Del. C.* § 148 applies to appeals from Superior Court actions and is identical to 10 *Del. C.* § 145.
[60] D.I. 2.

Given these straightforward and dispositive points, it is unsurprising that Herman Miller cited no cases in which this Court dismissed a timely filed appeal in similar circumstances.

## CONCLUSION

For the reasons stated in the Opening Brief and herein, this Court should reverse the judgment of the trial court, enter judgment for Franklin, and remand the case to determine damages.

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## CERTIFICATE OF SERVICE

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