EFiled: Apr 07 2021 04:26PM EDT
Filing ID 66479222
Case Number 33,2021 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT LENOIS, on behalf of himself and all other similarly situated stockholders of ERIN ENERGY CORPORATION, and derivatively on behalf of ERIN ENERGY CORPORATION,

Plaintiff-Below, Appellant,

and

RONALD J. SOMMERS, as Chapter 7 Trustee for Nominal Defendant-Below ERIN ENERGY CORPORATION,

Movant-Below, Appellant,

v.

KASE LUKMAN LAWAL, LEE P. BROWN, WILLIAM J. CAMPBELL, J. KENT FRIEDMAN, JOHN HOFMEISTER, IRA WAYNE McCONNELL, HAZEL R. O'LEARY, and CAMAC ENERGY HOLDINGS, LIMITED,

Defendants-Below, Appellees,

and

ERIN ENERGY CORPORATION,

Nominal Defendant-Below, Appellee.

PUBLIC VERSION AS E-FILED: APRIL 7, 2021

No. 33, 2021

Appeal from the Court of Chancery of the State of Delaware,
C.A. No. 11963-VCF

APPELLANTS' OPENING BRIEF

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DATED: March 23, 2021

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NATURE OF PROCEEDINGS

This appeal will determine whether well-pleaded claims arising from a controlling stockholder's egregious, self-dealing transactions that bankrupted a Delaware corporation will be condemned to perish in a procedural blackhole.

In 2017, the Court of Chancery held that Plaintiff Robert Lenois ("Lenois") had "pled with particularity" that the controlling stockholder of Erin Energy Corporation ("Erin") "acted in bad faith."[1] It also held that Lenois had pled ***either*** "very serious claims of bad faith" or "a duty of care claim"[2] against the rest of Erin's Board in connection with two integrated transactions through which the controller secured an unfair windfall by unloading certain Nigerian oil assets (the "Assets") on Erin (the "Transactions"). Nevertheless, the trial court concluded it was not "allowed to imply a bad faith violation instead of a care violation" by a Board majority,[3] and thus dismissed the meritorious derivative claims—which are

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[1] A562; *see also, e.g.*, A520-A521 ("[T]he complaint is replete with allegations of bad faith against [the controller], including that he attempted to dominate the process, withheld material information from the board, and rushed the board into the unfair Transactions"); A563 (the controller "really was negotiating with himself in shifting around assets for his own benefit."); *id.* (the controller "knowingly and purposefully created an information vacuum").

[2] A575; *see also, e.g.*, A520 (the Committee "relied on [the controller] as the sole voice for—and, more importantly, information source from—the two [transactional counterparties], despite a potential misalignment of incentives for the controller"); A563 ("[B]y the end of the process, Director Defendants lacked [a litany of vital information related to the Transactions]").

[3] A575.

undisputedly subject to entire fairness—on the sole basis that demand was not excused (the "MTD Decision").[4]

Plaintiff timely appealed the MTD Decision (the "First Appeal"). After the First Appeal was fully briefed and pending oral argument, Erin filed for bankruptcy protection due to remarkable events arising from the Transactions. Specifically, to enforce a judicial finding that the controller never actually completed payment for the Assets before flipping them to Erin for a massive profit, the Nigerian Navy forcibly seized certain of the Assets, resulting in Erin ceasing operations.

Upon his appointment, Ronald J. Sommers, the Chapter 7 Trustee for Erin ("Trustee"), was vested with sole authority to pursue on a ***direct*** basis the meritorious claims regarding the Transactions that Lenois had asserted ***derivatively***. As such, the Trustee's appointment also rendered the sole basis for the MTD Decision—*i.e.*, demand excusal—a legal nullity. Thus, on May 18, 2020, this Court dismissed the still-pending First Appeal as moot, clearing the way for Trustee to finally hold Defendants accountable for their fiduciary breaches.[5]

This Court recognized that the lone basis for the MTD Decision is now a legal nullity. Despite this, on remand the trial court resuscitated the irrelevant MTD Decision by denying (i) the Motion for Relief from Judgment pursuant to Court of

[4] A518-A580.

[5] A1534-A1538.

Chancery Rule 60(b) (the "Motion for Relief") filed by Lenois and by Trustee; and (ii) Trustee's motion to substitute into this action (the "Action") for Erin, and realign himself as a plaintiff to pursue—on a ***direct*** basis—the meritorious claims Lenois previously asserted derivatively (the "Realignment Motion").[6]

The trial court's erroneous decision created a bizarre legal blackhole that has prevented the authorized representative of a corporation from pursuing the well-pleaded claims of bad faith disloyalty against a controller who drove that corporation into bankruptcy. In denying Trustee's request for Rule 60(b)(6) relief, the trial court disregarded black-letter Delaware law establishing a corporation's inherent authority to control derivative claims. It also erroneously concluded that there was nothing "extraordinary" about the unprecedented circumstances here—*i.e.*, bad faith controller misconduct that precipitated military action, bankrupting a Delaware corporation and thus vesting a bankruptcy trustee with authority to ***directly*** prosecute claims challenging that misconduct, which claims were (i) dismissed solely on now-irrelevant demand excusal grounds, (ii) timely appealed, and (iii) under appeal when Trustee inherited them. Further, the trial court's characterization of the claims here as "inchoate" finds no support in the record and is contradicted by numerous filings in which Trustee repeatedly and unwaveringly has asserted a desire to pursue these

[6] Ex. A, Memorandum Opinion dated Dec. 31, 2020 (Del. Ch. C.A. No. 11963-VCF) (cited herein as "Op. at ___").

claims on behalf of Erin and its bankruptcy estate to preserve valuable assets for Erin's creditors.

The trial court then compounded its error by denying Trustee's Realignment Motion solely on the basis of its erroneous denial of the Motion for Relief, finding that denial of the Motion for Relief left no reason for Trustee to substitute into the Action.

Relief under Rule 60(b)(6) is reserved for precisely the type of extraordinary circumstances present here. A bedrock tenet of Delaware law is that "equity will not suffer a wrong without a remedy."[7] It would be the paragon of inequity to leave Erin without a remedy for its controller's bad faith misconduct on the untenable basis that the bankruptcy precipitated thereby created a procedural blackhole that allows the controller to evade all accountability.

[7] *Weinberger v. UOP, Inc.*, 1985 WL 11546, at *9 (Del. Ch. Jan. 30, 1985), *aff'd*, 497 A.2d 793 (Del. 1985) (TABLE).

SUMMARY OF ARGUMENT

The Court of Chancery erred in denying Trustee's Motion for Relief and Realignment Motion.

1. In denying Trustee's Motion for Relief, the Court of Chancery failed to account for the rights of Erin itself and ignored that Trustee assumed control over Erin (and all of the legal and equitable interests of Erin as of the filing of its bankruptcy case) while this Action was the subject of an active appeal.

The Court of Chancery's decision that the change in control effected by Erin's bankruptcy was not sufficiently "extraordinary" to justify relief under Rule 60(b)(6) contravened Delaware law—which recognizes that derivative claims remain assets of a corporation and transfer freely in changes of control, including corporate mergers—and ignored the highly unique facts present in this Action. The undisputedly well-pleaded claims asserted derivatively in this Action challenged unfair Transactions that ultimately drove Erin into bankruptcy. Trustee assumed legal control over those derivative claims while their dismissal—solely on demand futility grounds—was the subject of an active appeal before this Court. This Court lost jurisdiction to consider the merits of that appeal only because Trustee's determination to prosecute those claims ***directly*** rendered the lone issue on appeal (*i.e.*, demand futility) a legal nullity. These circumstances are extraordinary. The Court of Chancery criticized Trustee for not citing prior cases where a bankruptcy

trustee assumed control over derivative litigation while the action was on appeal.[8] The absence of factually or procedurally identical cases demonstrates the extraordinary circumstances here. The Court of Chancery also erred by, *inter alia*, by misinterpreting commentary elicited from counsel at oral argument, and misapprehending the risk of challenges to the "finality of judgments" while ignoring the significant harm attendant to denying relief here, including the controller's avoidance of liability, significant rewards to the wrongdoers for their misconduct, and the dissipation of extremely valuable bankruptcy assets.

2. The Court of Chancery abused its discretion in denying Trustee's Realignment Motion, which would have permitted Trustee, on behalf of Erin's bankruptcy estate, to proceed as a plaintiff to prosecute this Action. Erin's bankruptcy vested in Trustee the legal right to control all bankruptcy assets, including pending derivative claims.[9] The claims originally asserted derivatively in this Action were dismissed by the Court of Chancery solely on demand futility grounds. This Court later ruled that Trustee's desire to pursue the claims directly rendered the demand futility issues moot, thus depriving this Court of subject-matter

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[8] Op. at 29.

[9] *See Prod. Res. Grp. LLC v. NCT Grp., Inc.*, 863 A.2d 772, 793 n.65 (Del. Ch. 2004) ("'The Trustee can bring any suit [the company] could have brought, including suits against directors and controlling shareholders for breach of fiduciary duty.'") (quoting *Brandt v. Hicks, Muse & Co., Inc.*, 208 B.R. 288, 300 (Bankr. D. Mass. 1997)).

jurisdiction to consider the fully briefed appeal that was awaiting oral argument when Erin filed for bankruptcy protection. The trial court recognized that Trustee had standing,[10] but held that "Rule 25(c) substitution would not 'facilitate the conduct of the case' because the Memorandum Opinion is a final judgment that is no longer subject to appeal and the denial of the Motion for Relief [under Rule 60] brings this action to a close." Among other things, this holding ignores that the appeal was dismissed as moot ***because*** Trustee determined to take control of the Action and proceed directly.

Trustee's Realignment Motion should have been granted because Trustee is vested with the right to control Erin's legal interests in its property, including the claims in this Action, as a matter of law. The Court of Chancery denied the Realignment Motion for reasons of "convenience and economy," because, given the denial of the Motion for Relief, substitution would not "facilitate the conduct of the case."[11] Because the denial of the Motion for Relief was erroneous, so was the denial of the Realignment Motion.

[10] Op. at 20 n.42.

[11] *Id.* at 37.

STATEMENT OF FACTS

A. LAWAL UNILATERALLY ORCHESTRATES THE TRANSACTIONS

Erin was an oil and gas exploration company focused on sub-Saharan Africa.[12] In 2010, Erin's CEO and Chairman, Lawal, acquired control over Erin by having Lawal-controlled CEHL sell to Erin a 40% interest in an oil mining lease ("OML") and oil production sharing contract (the "PSC") with NAE (together the "Assets").[13] This sale provided Lawal with 62.7% control over Erin.[14]

In June 2012, Lawal and Allied Energy Plc. ("Allied")—another Lawal-controlled company—acquired all of NAE's remaining interests in the Assets not already owned by Erin but paid only $100 million of a reported $250 million purchase price.[15] The remaining unpaid balance was the subject of confidential arbitration in London, a fact that was concealed from Erin's public stockholders until the Assets were seized to satisfy the arbitration award, precipitating Erin's bankruptcy.[16]

One year later, and without the Erin Board's knowledge or authorization, Lawal secretly hatched a plan to sell the remaining interests of the Assets to Erin at

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[12] A58-A114 (the "Original Complaint") at A66 at ¶10.

[13] A62-A63 at ¶2; A0071-A0072 at ¶¶26-27.

[14] A62-A63 at ¶2.

[15] A63-A64 at ¶4.

[16] A596 at ¶2.

a substantial premium.[17] Because Erin lacked the cash to fund the acquisition, Lawal arranged for the Public Investment Corporation Limited ("PIC"), a South African quasi-public entity, to take a 30% stake in Erin in exchange for $300 million in cash, the entirety of which would be immediately funneled to Lawal/Allied.[18] On June 14, 2013, Lawal and PIC presented Lawal's proposed $300 million transaction to Erin's Board.[19]

B. THE SPECIAL COMMITTEE EXPRESSES SEVERE CONCERNS OVER LAWAL'S ACTIONS

Following receipt of Lawal's proposal, the Board formed the Special Committee consisting of Hofmeister, McConnell, and O'Leary.[20] From the outset of the process, the Committee catalogued its severe deficiencies. For instance, at the July 8, 2013 Committee meeting, Hofmeister:

> expressed his concern that certain steps noted for previous times in the draft [transaction] timeline had seemingly been completed without the Committee's review and comment, even though the Committee is the party that should be responsible for making these decisions and driving the transaction.[21]

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[17] A74 at ¶35.

[18] *Id.*

[19] A74 at ¶36.

[20] A74 at ¶37.

[21] A75-76 at ¶40.

Nevertheless, the Committee forged ahead without adequate information under Lawal's inexplicably accelerated timeline.[22]

In September 2013, the Committee lay dormant and failed to hold any meetings.[23] Exploiting the Committee's inaction, Lawal unilaterally negotiated with PIC ***on behalf of Erin*** such that, as the Court of Chancery found, Lawal "was negotiating with himself in shifting around assets for his own benefit."[24] Specifically, Lawal promised PIC a set number of shares in Erin ***before*** receiving any authorization from the Committee, locking Erin into the Transactions and eviscerating Erin's ability to negotiate with PIC in a meaningful way.[25] Once the Committee learned of Lawal's unilateral, unauthorized negotiations with PIC, Committee member O'Leary expressed "concern over the fact that the Committee was not able to deal directly with the PIC."[26] Lawal's status as the quintessential abusive and exploitative controller was underscored by defense counsel's alarming revelation during oral argument on Defendants' motions to dismiss that, upon consummation of the Transactions, Lawal terminated his Chief Financial Officer and

[22] A87-A95 at ¶¶71-89.

[23] A79 at ¶49.

[24] A75-A87 at ¶¶39-70; A563.

[25] A82-A85 at ¶¶58, 62, 65.

[26] A80-A81 at ¶54.

General Counsel for failing to sufficiently manipulate the Transactions' process in his favor.[27]

After learning about Lawal's unauthorized communications with PIC, the Committee documented its concerns with Lawal's conduct in the minutes of its October 30, 2013 meeting, memorializing that: (i) "Lawal had not proceeded in a manner consistent with the goals of the Committee";[28] (ii) "Lawal had been continually pressuring the Committee,"[29] which caused the Committee to "question[] the immediacy on which Dr. Lawal had insisted";[30] and (iii) Lawal failed to provide "information,"[31] which "made it very difficult for the Committee to make informed decisions relating to the Proposed Transaction."[32]

C. CANACCORD CANNOT ISSUE A FAIRNESS OPINION BUT THE COMMITTEE STILL SURRENDERS TO LAWAL'S PRESSURE

On October 31, 2013, Lawal threatened the Committee that PIC would terminate discussions if PIC did not hear back the very next day by 10:00 a.m.[33] Even though the Committee "did not fully understand why the SPA needed to be

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[27] A143.

[28] A86-A87 at ¶70.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] A87-A88 at ¶72.

executed [so quickly]"[34] the Committee capitulated to Lawal's demands.[35] The Special Committee agreed to recommend that Erin accept a payment of $270 million from PIC in exchange for 376,884,422 Erin shares, the ***exact number*** that Lawal had unilaterally promised PIC.[36] Erin would then acquire the Assets from Lawal/Allied in exchange for $170 million in cash, a $100 million note (thus representing the entirety of PIC's capital investment) plus 622,835,270 shares of common stock.[37] The terms of this arrangement, however, were so egregiously unfair that the Special Committee's financial advisor, Canaccord, would not issu

the terms of the agreement

required Erin to pay Lawal/Allied consideration worth between ***$425.6 million*** (using a discounted cash flow or DCF analysis) and ***$647 million*** (using the publicly traded price of Erin's stock).[39]

To salvage the deal, Lawal agreed to lower the amount of the note to $50 million and reduce the number of new shares to be issued to him to maintain Allied's

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[34] A86-A87 at ¶70.

[35] A87-A88 at ¶72.

[36] *Id.*

[37] A88-A89 at ¶74.

[38] A90 at ¶77.

[39] A90-A91 at ¶¶78-79.

ownership at around 57% with no dilution.[40] This meant that, for assets valued at $217.3 million, Erin would pay Allied consideration worth between $303.5 million (DCF) and $416.1 million (market), still representing an overpayment of between ***$86.2 million and $198.8 million***.[41] Nevertheless, because under this revised scenario Erin would retain $50 million of the cash infusion from PIC, Canaccord deemed the transaction "accretive" to Erin and issued a fairness opinion, even while acknowledging Erin's massive overpayment.[42] On November 20, 2013, the Board approved the Transactions.[43]

On January 15, 2014, Erin filed with the SEC a definitive proxy statement (the "Proxy") recommending that Erin's stockholders approve the Transactions.[44] The Proxy failed to disclose, among other things, that (i) Lawal/Allied had not paid $250 million (plus adjustments) in cash for the Assets, but instead just $100 million;[45] and

[40] A92 at ¶83.

[41] A94-A95 at ¶87.

[42] A65 at ¶6; A91 at ¶81; A94-95 at ¶¶86-87.

[43] A95 at ¶88.

[44] A96-A97 at ¶91; A64-A64 at ¶4; A68 at ¶13.

[45] A96 & A100 at ¶90 & ¶98.

(ii) Lawal made relentless threats and browbeat the Special Committee.[46] Stockholders approved the Transactions on February 13, 2014.[47]

D. THE COURT OF CHANCERY DISMISSES THE COMPLAINT SOLELY ON DEMAND FUTILITY GROUNDS

On July 30, 2015 and February 5, 2016, respectively, Lenois sent Erin a books-and-records demand relating to the Transactions and filed the Original Complaint.[48]

Following briefing and oral argument on Defendants' motions to dismiss the Original Complaint, Lenois discovered new information strongly supporting his claims.[49] The Court of Chancery granted Lenois's motion to supplement the Original Complaint with this new information,[50] and on June 23, 2017, Defendants moved to dismiss the Complaint.[51]

On November 7, 2017, the Court of Chancery granted Defendants' motions to dismiss.[52] In its decision, the Court of Chancery correctly recognized that Lenois

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[46] A96-A97 at ¶91.

[47] A100 at ¶98.

[48] A599 at ¶¶10, 12.

[49] A279-A282 at ¶¶1-6.

[50] A516-A517.

[51] *See* A42-A46.

[52] A518-A580.

had "pled with particularity" that controller Lawal had "acted in bad faith."[53] Specifically, the Court found that Lawal (i) unilaterally negotiated with PIC ***on behalf of Erin***, such that he "really was negotiating with himself in shifting around assets for his own benefit";[54] (ii) withheld critical information from the Committee, thereby "knowingly and purposefully creat[ing] an information vacuum,"[55] and (iii) exerted enormous and undue pressure on the Committee, thereby "plac[ing] [the Committee] on the back foot."[56]

Despite acknowledging the extent and severity of Lawal's misconduct, the Court of Chancery dismissed the Complaint solely on the grounds that the Complaint failed to overcome demand futility. The Court of Chancery held that:

> As to the question of demand futility, namely, whether this Court will leave the decision of whether to pursue this litigation with the Erin Board, Plaintiff argues that one of two "inferences must be true: either (1) the Special Committee *did not know* that Lawal/Allied only paid $100 million of the $250 million agreed price for the Assets, or (2) the Special Committee *did know* that Lawal/Allied did not actually 'pay $250 million in cash' for the Assets and intentionally misled stockholders in the Proxy." ***I agree with Plaintiff that these are the only two possibilities. I further note that, if the second scenario is true, Plaintiff likely would have very serious claims of bad faith against Director Defendants***.[57]

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[53] A562.

[54] A563.

[55] A563-A564.

[56] A564.

[57] A575 (emphasis added)

The Court of Chancery nevertheless dismissed the case because it determined that it was unable to determine that the Director Defendants had committed a bad faith fiduciary breach, rather than a due care violation.[58]

Lenois timely filed his First Appeal, and the matter was fully briefed and set for argument on May 16, 2018.[59]

E. AFTER THE NIGERIAN GOVERNMENT SEIZES CERTAIN OF THE ASSETS, THE APPEAL GETS STAYED DUE TO ERIN'S BANKRUPTCY

On January 31, 2018, Nigerian soldiers landed helicopters on the oil platforms leased by Erin's Nigerian subsidiary and, with weapons drawn, seized the oil stored aboard, which had been extracted pursuant to the OMLs that were the subject of the Transactions (the "Seizure").[60] This Seizure occurred pursuant to a final judgment in an arbitration that found that Lawal's Allied and CEHL had failed to pay the agreed-upon purchase price of $250 million (plus adjustments) for the Assets acquired from NAE in 2012.[61] Ultimately, the Seizure forced Erin and its affiliates to cease operations.[62]

Three months after the Seizure, on April 25, 2018, Erin filed a petition for

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[58] A575-A576.

[59] A586-A587; A588-A589.

[60] A596 at ¶¶1-2.

[61] *Id.*

[62] *Id.*

relief under Chapter 11 of the Bankruptcy Code.[63] On April 27, 2018, this Court stayed Lenois's First Appeal.[64] On July 12, 2018, the Bankruptcy Court converted Erin's bankruptcy from a Chapter 11 to a Chapter 7 liquidation case, and appointed Ronald J. Sommers as Erin's Trustee pursuant Bankruptcy Code section 703.[65]

F. TRUSTEE, ON BEHALF OF ERIN AND ERIN'S BANKRUPTCY ESTATE, FILES FOR RELIEF IN THE COURT OF CHANCERY TO PROSECUTE ERIN'S CLAIMS

Following his appointment, Trustee determined that Lenois's derivative claims represented a substantial asset of Erin's bankruptcy estate and should be prosecuted for the benefit of that estate. After receiving approval from the Bankruptcy Court on July 8, 2019, to move forward with the claims,[66] Trustee filed on July 11, 2019 (a) the Realignment Motion under Rule 25(c);[67] and (b) together with Lenois, a Motion for Relief from Final Judgment pursuant to Rule 60(b) (previously defined as the "Motion for Relief").[68] In support of the Motion for Relief, Trustee asserted, *inter alia*, that relief was warranted under Rule 60(b)(6) because Trustee "now controls the derivative claims, believes they should be

[63] A596 at ¶1.

[64] A590.

[65] A1333 at ¶4.

[66] A1382-A1386.

[67] A591-A594.

[68] A595-A610.

prosecuted, and waives the Rule 23.1-based argument pursuant to which the Court dismissed the claims."[69]

On March 3, 2020, the Court of Chancery heard oral argument and requested briefing on whether it had jurisdiction given the pendency of the Appeal.[70] After oral argument on the Motion for Relief and Original Substitution Motion, but before the Court of Chancery issued a decision, Trustee filed with this Court a Motion to Substitute Party and Realign Trustee as Plaintiff (the "Supreme Court Realignment Motion")[71] and a Motion to Vacate Dismissal and Remand (the "Vacatur and Remand Motion"),[72] in which Trustee argued that his desire to directly prosecute the previously derivative claims rendered the demand futility issue pursuant to which those claims were dismissed—and thus the First Appeal, which challenged only the trial court's demand futility ruling—moot.

G. THIS COURT DISMISSES THE APPEAL AS MOOT AND REMANDS TO THE COURT OF CHANCERY

On May 18, 2020, this Court dismissed the First Appeal as moot (the "Remand Order").[73] The Remand Order affirmed the exact Rule 60(b)(6) argument Trustee

[69] A606 at ¶29.

[70] A1222-A1330.

[71] A1331-A1337.

[72] A1338-A1345.

[73] A1534-A1538.

asserted in the Motion for Relief, *i.e.*, that, given Trustee's control over Erin and Erin's bankruptcy estate, the "question at issue on appeal—whether demand was excused—is now moot."[74] However, this Court declined to order vacatur of the Court of Chancery's Opinion in light of the fact that "the issue of whether the plaintiff-stockholder was excused from making demand . . . does not determine the Trustee's right" to bring claims.[75] This Court reasoned that "it is unnecessary for us to decide whether the Trustee should be substituted for Erin and realigned as 'plaintiff' on appeal" because "Trustee's right to proceed will more appropriately be determined by the Court of Chancery in the first instance . . .."[76]

H. THE COURT OF CHANCERY DENIES TRUSTEE'S MOTION FOR RELIEF AND REALIGNMENT MOTION

On May 20, 2020, Trustee filed with the Court of Chancery an Amended Motion for Substitution and Realignment (the "Realignment Motion," and together with the Motion for Relief, the "Motions"), which sought to (i) substitute Trustee for Erin, instead of Lenois; (ii) realign Trustee as plaintiff, and (iii) open the now-moot dismissal claims so that Erin may directly pursue the claims that Lenois had previously asserted.[77] The Court of Chancery held oral argument on the Motions on

[74] A1536 at ¶4.

[75] A1537 at ¶5.

[76] A1537-A1548 at ¶5.

[77] A1539-A1546.

August 27, 2020.[78] On December 31, 2020, the Court of Chancery denied the Motions.[79] This appeal followed.

[78] A1588-A1651.

[79] Ex. A (Op.).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING RULE 60(b)(6) RELIEF WHERE THE SOLE BASIS FOR DISMISSAL HAD BEEN MOOTED

A. QUESTION PRESENTED

Whether the Court of Chancery erred in denying the Motion for Relief where, because of the extraordinary circumstances of this case—including a disloyal controller who secretly cheated creditors and drove Erin into bankruptcy, and Trustee's vesting of live and undisputedly well-pleaded claims for fiduciary breaches that were dismissed on demand futility grounds that are undisputedly now legally irrelevant—denying relief would result in "manifest injustice."

This issue was preserved for appeal. *See, e.g.*, A605; A1196; A1198-A1199; A1252-A1253; A1256-A1257; A1594-A1595.

B. SCOPE OF REVIEW

While many denials of Rule 60(b)(6) relief are subject to an abuse-of-discretion standard, "a claim that the trial court employed an incorrect legal standard . . . raises a question of law that this Court reviews *de novo.*"[80] Here, Lenois and

[80] *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 638 (Del. 2001) (citing *Ison v. E.I. duPont De Nemours & Co., Inc.*, 729 A.2d 832, 847 (Del. 1999)); *see also Belfint, Lyons & Schuman P.A. v. Pevar*, 2004 WL 542083, at *2 (Del. Mar. 10, 2004) ("Appellate review of legal issues is *de novo.*"); *cf. Ungar v. Palestine Liberation Org.*, 599 F.3d 79, 83 (1st Cir. 2010) (applying the parallel federal rule and indicating that the abuse-of-discretion standard "is not monolithic: within it, embedded findings of fact are reviewed for clear error, questions of law are reviewed

Trustee primarily challenge the Court of Chancery's legal rationale for its denial of relief, including its determination that the transfer of claims to a bankruptcy trustee could never constitute extraordinary circumstances under Rule 60(b)(6).[81]

C. MERITS OF ARGUMENT

1. The Extraordinary Circumstances Surrounding The Misconduct And Its Disclosure Warrant Rule 60(b)(6) Relief

(a) This Case Presents Rare Circumstances Justifying Relief

Rule 60(b)(6) relief is reserved for "extraordinary circumstances," empowering courts "to vacate judgments whenever such action is appropriate to

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de novo, and judgment calls are subjected to classic abuse-of-discretion review") (citing *R&G Mortg. Corp. v. FHLMC*, 584 F.3d 1, 7-8 (1st Cir. 2009)).

[81] *DV Realty Advisors LLC v. Policemen's Annuity and Ben. Fund of Chicago*, 75 A.3d 101, 109 (Del. 2013) (distinguishing between, on the one hand, factual findings subject to a "clearly erroneous" standard, and, on the other, legal conclusions about whether those facts amounted to "good faith"); *see also Christeson v. Griffith,* 860 F.3d 585, 588 (8th Cir. 2017) (in the context of a habeas petition, indicating that the "ultimate conclusion on the existence of extraordinary circumstances" is reviewed *de novo*); *Girts v. Yanai*, 600 F.3d 576, 583 (6th Cir. 2020) (indicating that, in the context of a habeas petition, he "legal conclusion concerning whether [] facts rise to the level of 'extraordinary circumstances" should be reviewed *de novo*) (citing *United States v. Jeross*, 521 F.3d 562, 581-82 (6th Cir. 2008) (applying *de novo* review to evaluate, in the context of sentencing guidelines, whether "extraordinary circumstances" were present)). *De novo* review is particularly important where, as here, there has never been a final determination regarding the merits of the MTD Decision.

accomplish justice."[82] That is precisely what this case presents. Here, after the Court of Chancery recognized the force of Lenois's allegations concerning Lawal's disloyal acts,[83] Erin ultimately went bankrupt as a result of Lawal's bad faith misconduct, which resulted in the Nigerian military's seizure of certain of the Assets.[84] Erin's bankruptcy filing undisputedly[85] vested Trustee with authority to prosecute, on a ***direct*** basis, Erin's previously derivative claims challenging that misconduct.[86] Because Trustee was vested with control of the pending claims which were ***not*** subject to any demand excusal defense and which undisputedly pleaded with particularity serious misconduct (that ultimately precipitated Erin's bankruptcy), Rule 60(b)(6) relief should have been granted to prevent the manifest injustice associated with squandering valuable assets of the bankruptcy estate (and its creditors) and allowing the abusive controller from evading any accountability for the disaster he brought upon Erin.

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[82] *Jewell v. Division of Social Servs.*, 401 A.2d 88, 90 (Del. 1979) (quoting *Klapprott v. United States*, 335 U.S. 601, 615 (1949)).

[83] A562-A564.

[84] A596 at ¶¶1-2.

[85] A1419 at ¶7; A1458.

[86] *See Prod. Res. Grp. LLC v. NCT Grp., Inc.*, 863 A.2d 772, 793 (Del. Ch. 2004) (indicating that fiduciary claims were "an interest in property which passed to the bankruptcy estate" and that the Trustee could "bring any suit [the company] could have brought").

(b) The 2017 Dismissal Rested Entirely On A Now-Undisputedly Irrelevant Issue

In its MTD Decision, the Court of Chancery acknowledged that Lenois had (i) "pled with particularity" that controller Lawal had "acted in bad faith"[87] ***and*** (ii) had pleaded either bad faith or care violations by the rest of the Board.[88] The Court of Chancery nevertheless dismissed the Action solely on the basis of a purported failure to plead demand excusal under Court of Chancery Rule 23.1.[89]

Trustee undisputedly was vested with control of the claims in this Action.[90] Because Trustee is statutorily vested with the power—and is authorized—to pursue those claims directly and seeks to do so, this Court dismissed Lenois's appeal, as "the question at issue on appeal—whether demand was excused" had been mooted.[91] In doing so, the Court observed that "the issue of whether the plaintiff-stockholder was excused from making demand in order to bring derivative fiduciary-claims does

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[87] A562.

[88] A575-A576

[89] A575-A576.

[90] A1419 at ¶7; A1458; *see also* Op. at 33 ("The Supreme Court's Remand Order reflects an acknowledgment, and Defendants do not contend otherwise, that Trustee has control over the claims previously asserted in the *Lenois* action."); 11 U.S.C. § 541(a)(1).

[91] A1536. Notably, Appellees admit this. A1569 ("the legal issue on which dismissal has been predicated has now been rendered moot").

not determine the Trustee's right to bring those fiduciary-duty claims."[92] The Court's Remand Order did nothing to disturb the Court of Chancery's determination—as expressed in the MTD Dismissal—that Lenois sufficiently pleaded bad faith claims against Lawal and fiduciary breach claims against the rest of the Board.

These extraordinary circumstances warrant Rule 60(b)(6) relief. Trustee controls the valuable fiduciary claims, wishes to pursue them, and, because he stands in Erin's shoes, is not subject to a Rule 23.1 defense. The lone obstacle that prevented these undisputedly well-pleaded claims from going forward—the demand futility question—is now irrelevant. Trustee can and should be realigned as plaintiff and permitted to prosecute the claims; for that to occur, the Rule 60(b)(6) relief should be granted. It would be manifestly unjust to squander this valuable asset of Erin's bankruptcy estate by permitting Lawal and his cohorts to escape accountability after imposing on Erin the egregiously unfair Transactions that ultimately precipitated Erin's ruin.

[92] A1537 at ¶5.

2. In Denying the Motion for Relief, The Court of Chancery Erred In Several Ways

(a) The Court of Chancery Erred In Basing The Denial On Its Assessment That Bankruptcy Alone Is Not an "Extraordinary" Event

The Court of Chancery denied the Motion for Relief because, it stated, "Erin's bankruptcy is not an extraordinary event requiring relief under Rule 60(b)(6)."[93] But this reasoning misconstrued Trustee's argument. Trustee never argued that the bankruptcy alone justified relief; instead, Trustee consistently cited a constellation of remarkable circumstances that, ***with*** the bankruptcy, constitute extraordinary circumstances warranting relief. Specifically: (i) undisputedly well-pleaded claims of bad faith against an abusive controlling stockholder, and ***either*** bad faith or care violations against the rest of the Board;[94] (ii) ***the dismissal of those claims solely for a reason that this Court correctly determined is now legally irrelevant***;[95] (iii) a bankruptcy arising from the same unfair Transactions challenged by those meritorious claims;[96] (iv) the timely appeal of those claims, which appeal was still live when Trustee, upon appointment, was vested with control over Erin's

[93] Op. at 29.

[94] A601; A1609-A1610.

[95] A1595, A1603, A1608-A1610.

[96] A606 at ¶29; A1198-A1199 at ¶5; A1609-A1610.

property;[97] (v) Trustee's waiver of Rule 23.1 (*i.e*, demand futility) defenses, and this Court's determination that the Rule 23.1 issue is now moot;[98] and (vi) the manifest injustice that will result if Defendants evade all accountability for their misconduct and the resulting catastrophic impact on Erin.[99]

It simply cannot be that this Court was deprived of subject-matter jurisdiction to consider the merits of the First Appeal of the Memorandum Opinion dismissing this Action because Trustee sought to assume control over the Action, yet Trustee is barred from prosecuting this Action because the Memorandum Opinion is no longer subject to appeal. This Court's observation that Trustee's right to prosecute the claims here is not constrained by whether Plaintiff Lenois adequately pleaded demand futility implicitly recognized this point: Even without vacatur of the underlying dismissal order, Trustee should be allowed to prosecute the claims.[100] The MTD Decision was the subject of an active appeal when Trustee assumed control of the previously-derivative claims. The fact that this Court lacked

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[97] A1599-A1601; A1612-A1613.

[98] A1198 at ¶4, A1608.

[99] A597 at ¶5; A1198 at ¶5; A1610.

[100] As this Court noted, vacatur is a unique remedy usually only invoked when there is more than one litigation between the parties and for which res judicata may be an issue. A1547-A1548 at ¶5. Here, there was neither (i) other litigation among the parties nor (ii) any concern that the irrelevant issue of demand futility would have preclusive effect. *Id.*

jurisdiction to consider the merits of that First Appeal ***because*** Trustee sought to prosecute the dismissed claims cannot be the reason Trustee is barred from assuming control over and prosecuting the undisputedly well-pleaded claims.

The trial court's ruling also disregarded the foundational principle of Delaware law that corporate boards retain the inherent authority to control derivative litigation initiated on the company's behalf. This principle was recognized in *Zapata*, where this Court ruled that "[e]ven though demand was not made in this case and the initial decision of whether to litigate was not placed before the board, [the] board . . . retained all of its corporate power concerning litigation decisions."[101] This principle was also demonstrated in *Telxon*, where the Court of Chancery affirmed that "the board of directors retains the inherent power to manage derivative claims when, for example, a new disinterested majority is selected or when a special litigation committee appointed by the board decides to dismiss or settle [the] litigation."[102] Here, Trustee stands in the shoes of Erin and inherited the Board's full power to decide to pursue or terminate the undisputedly well-pleaded claims.

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[101] *Zapata Corp. v. Maldonado*, 430 A.2d 779, 785 (Del. 1981).

[102] *Telxon Corp. v. Bogomolny*, 792 A.2d 964, 973 (Del. Ch. 2001) (internal citations omitted).

(b) The Court of Chancery Erroneously Held That Granting Relief Would Open The Floodgates

The Court of Chancery held that granting relief "would enable companies to disturb the finality of judgments merely because of a commonplace change in control."[103] Denying relief on this basis was clear error not just because of the unprecedented and unique circumstances here, but also because, in so ruling, the Court of Chancery ignored that the claims were ***not subject to a final judgment***.[104] Instead, the claims were timely appealed and were still awaiting a decision from this Court at the time Trustee was vested with control over them, thus mooting the appeal by mooting the sole basis for their dismissal. Because the judgment concerning the claims was never final, granting relief could ***not*** serve as a precedent for "disturb[ing] the finality of judgments."

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[103] Op. at 30.

[104] *See Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 579 (Del. 2002) ("A final judgment is generally defined as one that determines the merits of the controversy or defines the rights of the parties and leaves nothing for future determination or consideration.") (citing *Showell Poultry, Inc. v. Delmarva Poultry Corp.*, 146 A.2d 794, 796 (Del. 1958)).

(c) The Court of Chancery Clearly Misinterpreted Movants' Argument And Made Unsupported Assumptions

The Court of Chancery also clearly erred by denying relief on the basis of (i) a clear misinterpretation of a response from Movants' counsel at oral argument, and (ii) an assumption that lacks any support and clearly contradicts the record.

The Court of Chancery held that Trustee's claims were "inchoate" and therefore that "[g]ranting relief from judgment in this circumstance to permit Trustee to potentially assert a claim in this action 'depending on the avenue taken by the corporation' would exercise an extraordinary power in the service of an inchoate claim."[105] But the claims are clearly not inchoate, and the trial court wrongly characterized them as such because it misperceived that "at oral argument, counsel for Movants noted that the Trustee may not ultimately attempt to assert claims by Erin against Defendants."[106]

The referenced statement by Movants' counsel had nothing to do with the intentions of Trustee or Erin concerning this Action. At oral argument, the Court of Chancery asked for Movants' counsel's view concerning why this Court's remand order in *Stotland*[107] included certain language that was not included in this Court's

[105] Op. at 32.

[106] Op. at 32.

[107] *Stotland v. GAF Corp.*, 469 A.2d 421, 423 (Del. 1983).

order remanding ***this*** Action. In response, counsel addressed (i) the intentions of the ***relevant corporation in Stotland***; and (ii) counsel's perception of why this Court included certain language ***in the Stotland decision***. As the transcript of the argument makes clear, nothing in counsel's response addresses—much less introduces any conceivable ambiguity about—Trustee's strong and unwavering desire to prosecute Erin's claims against Defendants:

> THE COURT: ***I would like for you to give me your take on the last paragraph of Stotland and how it compares to this case, where in Stotland, the Delaware Supreme Court remanded the case to the Court of Chancery with instructions to retain jurisdiction pending action by, I think it was, a committee of the board to consider a demand that the stockholder plaintiff had sent***. I don't have that in the Delaware Supreme Court's remand order. It was remanded for me to deal with the two issues that were before me, one being the Rule 60(b) motion and the other being the motion to substitute the trustee for the stockholder plaintiff. ***How do I read the significance of that?***
>
> COUNSEL: ***Your Honor, so I think that the key distinction here is that <u>in this case</u> there are two clear motions that are pending that require adjudication***. And that is sort of what's on the Court's plate very clearly. ***So the Supreme Court said you have these pending motions. Address them and determine whether the trustee should go forward***. And I find it very hard to believe that the Supreme Court meant, and if Your Honor finds that the trustee should go forward and prosecute these claims, it doesn't matter. The case is over. ***So I think the pendency, the retention of jurisdiction moving forward is necessarily implied in the Supreme Court's order.***
>
> ***<u>And then the question about why the language is different in Stotland</u>, it's important to keep in mind, <u>in Stotland</u>, the corporation asserted control over the claims but had not yet said what it intended to do with them. It did not say whether it wanted to realign as a plaintiff and prosecute them. It did not say whether it wanted to dismiss the claims. It did not say whether it wanted to simply let the plaintiff take the helm***

> ***again and lead these claims. So I think the reason the language is structured here is because it needed to be clear that we don't know exactly what is going to happen with those claims. We don't know what decision will be made by the corporation, but the Court of Chancery needs to retain jurisdiction to deal with any issues that may arise depending on the avenue taken by the corporation.***[108]

The Court of Chancery mischaracterized Trustee's claims here as "inchoate" based on the court's misapprehension that counsel's commentary regarding the situation ***in Stotland*** in fact referred to ***this Action***. Read in context, counsel's statement that "we don't know exactly what is going to happen with those claims" clearly referred to the situation in *Stotland*. The discussion reflected counsel's perception of ***this Court's rationale*** when including certain language in the ***Stotland*** decision, and had nothing to do with the intentions of Trustee or Erin here.

Indeed, Trustee—who indisputably now determines whether and what claims will be asserted on behalf of Erin's estate—repeatedly, continuously and unwaveringly has sought to prosecute the claims, and beginning on July 11, 2019 has filed six motions in three different courts, all with the singular purpose of securing the ability to prosecute these specific claims in this Action.[109] Moveover,

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[108] A1648-A1650 (emphasis added).

[109] *See, e.g.*, A595-A610; A591-A594; A1539-A1546; A1338-A1345; A1331-A1337; A1382-A1386 (granting Trustee's Application for Authorization to Employ Special Litigation Counsel). Indeed, the Court of Chancery acknowledged that Trustee filed the Motions "so that Erin may directly pursue in this action the claims that Lenois had previously asserted." Op. at 4.

the trial court itself acknowledged that Trustee intended to pursue the claims.[110] As such, there is nothing remotely "inchoate" about the claims, and the trial court's denial of relief based on its clearly erroneous contrary finding independently warrants reversal.

The trial court also ruled that there was no hardship in the absence of Rule 60(b)(6) relief because, it assumed, Trustee could "***attempt[]*** to assert direct claims on behalf of [Erin] in another action."[111] But the trial court itself recognized that such an action would need to be timely asserted.[112] Defendants consistently have taken the position that such claims—which relate to conduct that occurred in ***2013***—would be time-barred,[113] and the trial court expressly disclaimed any position on the issue.[114] There is, therefore, substantial doubt as to whether newly filed claims asserted by Trustee would be timely. This is of particular concern because of the implications for the notice doctrine of the trial court's own ruling that "Erin's

[110] Op. at 3 ("Lenois and his counsel convinced [the Trustee] that the claims in this action have merit and should be pursued.").

[111] *Id.* at 31-32.

[112] *Id.* at 3 ("The Trustee recognized, however, that due to the passage of time, asserting the claims in a separate action could give rise to a defense of laches.").

[113] *See, e.g.*, A1563.

[114] Op. at 32 n.48 ("The parties have not briefed the merits of whether the claims asserted by the Trustee in a separate action would be time-barred, and the court expresses no opinion on that issue.").

knowledge is imputed to the Trustee."[115] Realignment has been permitted precisely to avoid inequitable extinguishment of claims as a result of timeliness defenses.[116]

(d) Misreading the Record, the Court of Chancery Erroneously Asserted That Trustee Could Have Sought Realignment Sooner

The trial court also erroneously held that Trustee could simply "have sought to realign Erin as the plaintiff prior to the entry of judgment [*i.e.*, the MTD Decision] in this action and to pursue claims directly against defendants in this action or a different action." This is simply wrong.

Trustee could not have realigned before he inherited the claims in this Action. He was not vested with control of the property in Erin's estate until July 12, 2018, eight months ***after*** the MTD Decision.

Until Trustee was vested with control over the claims in the Action, the Board retained the authority to decide whether to realign and pursue these claims. Nothing in the record suggests that the Board would, or could, make a good faith, unconflicted decision to pursue these claims. Before Trustee was vested with control over the claims in the Action, Erin and its decisions about whether to pursue the claims were dictated by a controlling stockholder against whom the trial court had found well-pleaded claims of bad faith and a Board the majority of which were

[115] Op. at 19-20.

[116] *Solomon v. Buckley*, 86 F.R.D. 464, 467 (E.D. La. 1980).

subject to well-pleaded allegations of either bad faith or due care violations. There is no reason to expect that Lawal or the Board would have sought to pursue these claims before Trustee was vested with control over the claims in the Action, and thus the power to make that decision for Erin.

II. THE TRIAL COURT ERRED IN SUMMARILY DENYING TRUSTEE'S REALIGNMENT MOTION

A. QUESTION PRESENTED

Whether the trial court erred in summarily denying Trustee's Realignment Motion on the basis that the trial court's denial of the Motion for Relief—which itself constitutes reversible error—left no reason for Trustee to substitute into the Action and realign as plaintiff.

This issue was preserved for appeal. *See, e.g.*, A1539-1546; A1576-1587; A1595-1607.

B. SCOPE OF REVIEW

Denial of a Rule 25(c) motion is reviewed by this Court for abuse of discretion.[117] However, this Court "evaluate[s] the [trial] court's legal conclusions *de novo* for errors in formulating legal precepts," and should overturn clearly erroneous factual findings.[118]

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[117] *See, e.g.*, *Stornawaye Capital LLC v. Smithers*, 2010 WL 673291, at *2 (Del. Ch. Feb. 12, 2010); *see also, e.g.*, *Chavin v. PNC Bank, Delaware*, 873 A.2d 287, 289 (Del. 2005) (reversal under the abuse of discretion standard is appropriate where "the decision of the trial court was arbitrary, capricious or clearly wrong") (citing *Bennett v. Andree*, 252 A.2d 100 (Del. 1969)).

[118] *Gordon v. State*, --- A.3d ---, 2021 WL 48208, at *6 (Del. Jan. 6, 2021); *Gulf LNG Energy, LLC v. Eni USA Gas Marketing LLC*, 242 A.3d 575, 583 (Del. 2020) (noting that in conducting a review for abuse of discretion, "[e]mbedded legal conclusions are reviewed *de novo*."); *BlackRock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964, 975 (Del. 2020) (same); *Biddle v. Miller*, 2020 WL 3259299, at *2 (Del. June 16, 2020) (TABLE) (noting that in conducting a review for abuse of discretion, the Court will "review *de novo* the legal

Here, where the trial court's denial of the Realignment Motion was entirely predicated on the trial court's denial of the Motion for Relief, reversible error as to denial of the underlying Motion for Relief necessarily establishes reversible error as to denial of the Realignment Motion.

C. MERITS OF THE ARGUMENT

As Defendants acknowledged before the Court of Chancery,[119] Rule 25(c)—which permits substitution of parties upon a "transfer of interest"—is the appropriate procedural mechanism for Trustee to substitute into this Action.[120] Defendants have also conceded that (i) Erin has been a party to the Action from its outset and Trustee now "stands in [Erin's] shoes";[121] and (ii) Trustee inherited the right to prosecute the Action because "[u]pon Erin's bankruptcy, Lenois's putative claims vested in the bankruptcy estate."[122] Thus, as the Court of Chancery explained, "[t]he Supreme Court's Remand Order reflects an acknowledgment, and Defendants do not contend

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principles applied in reaching that decision."); *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 748-79 (Del. 2019) (applying abuse of discretion standard but noting "[q]uestions of law, however, 'are reviewed *de novo*.'").

[119] A1565 at ¶12 (arguing that substitution was not available under Rule 17(a) because the transfer of interest "occurred after the commencement of the suit," and citing *Shock Bros., Inc. v. Raskin*, 1991 WL 166076, *1 (Del. Super. July 24, 1991), which held that Rule 25(c) was the appropriate vehicle for a bankruptcy trustee to substitute into an action).

[120] *See, e.g.*, *Shock Bros*, 1991 WL 166076, at *1.

[121] A1419 at ¶ 7.

[122] A1460.

otherwise, that Trustee has control over the claims previously asserted in the *Lenois* action."[123] Trustee's substitution for Erin under Rule 25(c) is therefore proper.

Further, it is well established that upon substituting into the Action for Erin in order to prosecute, on a direct basis, "the claims previously asserted [derivatively] in the *Lenois* action," Trustee may realign itself as a plaintiff in the Action.[124] Indeed, Defendants expressly conceded below that (i) they "don't dispute that [Trustee] can represent the Erin estate," and (ii) the proper procedural mechanism for Trustee to prosecute the previously derivative claims "***would simply be that the company is taking control and moving to realign itself as perhaps an additional plaintiff or as a plaintiff in charge of the case***."[125]

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[123] Op. at 33 (emphasis removed). The trial court also expressly recognized that Trustee "appears to possess standing to pursue the Motion for Relief." *Id.* at 20 n.42 (citing *Heyman v. M.L. Mktg. Co.*, 116 F.3d 91, 95 (4th Cir. 1997)).

[124] *Striker v. Chesler*, 217 A.2d 31, 35 (Del. 1966) (realigning trustees as plaintiffs to prosecute on a direct basis claims initially asserted derivatively); *Telxon*, 792 A.2d at 968 (upholding reconstituted board's realignment of itself as a plaintiff to prosecute on a direct basis claims initially asserted derivatively); *Bluth v. Bellow*, 1987 WL 9369, at *4 (Del. Ch. Apr. 9, 1987) (realigning reconstituted board as a plaintiff to prosecute on a direct basis claims initially asserted derivatively); *see also Harris v. Carter*, 582 A.2d 222, 230 (Del. Ch. 1990) (recognizing that a reconstituted board "may move the court to take control of the [derivative] litigation by being re-aligned as a party plaintiff").

[125] *See* A1318-A1319 (emphasis added).

The Court of Chancery elected not to independently or substantively analyze the merits of Trustee's Realignment Motion.[126] Instead, the Court of Chancery summarily denied substitution—and never even addressed realignment—on the sole basis that having already denied the Motion for Relief, allowing Trustee to substitute into the Action would not "facilitate the conduct of the case[.]"[127] The Court of Chancery's decision was erroneous for two reasons.

First, the Court of Chancery erroneously concluded that granting the Motion for Relief was a prerequisite to granting the Realignment Motion. It did so by taking out of context an answer to a question posed to Trustee's counsel during oral argument, and treating it as a concession that consideration of the Realignment Motion was contingent on opening the judgment under Court of Chancery Rule 60. The Court of Chancery also interpreted this Court's Remand Order as establishing some kind of directive that granting the Realignment Motion was "contingent" on granting the Motion for Relief under Rule 60.[128]

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[126] Op. at 35-38.

[127] *See id.* at 37-38 ("***Rule 25(c) substitution would not 'facilitate the conduct of the case' because*** the Memorandum Opinion is a final judgment that is no longer subject to appeal and the ***denial of the Motion for Relief brings this action to a close. The Motion to Substitute is therefore denied.***") (emphasis added).

[128] *Id.* at 15-16 & n.40.

During oral argument, the Court of Chancery asked Trustee's counsel whether obtaining relief under Rule 60 was necessary for Trustee to prosecute the claims asserted derivatively in this Action, to which counsel responded affirmatively:

> THE COURT: You have to get past Rule 60(b) in order to take over the claims in this action, right?
>
> COUNSEL: Yes, Your Honor. Yes, Rule 60(b) would need to be – we would need relief under Rule 60(b) to proceed, most likely.[129]

By acknowledging that Trustee's ability to "proceed" in this Action would depend on obtaining relief under Rule 60, counsel merely recognized that to prosecute claims that had been dismissed, Trustee would have to obtain relief from the prior dismissal of this Action. Counsel certainly did not concede, as the Court of Chancery misinterpreted, that ***Trustee's right to substitute into the Action and realign as plaintiff*** depended on obtaining relief under Rule 60.

Similarly, this Court's determination that "the Trustee's right to proceed will more appropriately be determined by the Court of Chancery in the first instance, in the context of the motions that are pending before that court, including the motion for relief from judgment" did not establish Rule 60(b) relief as a prerequisite to allowing Trustee to substitute for Erin pursuant to the control vested in him by the

[129] A1607.

bankruptcy laws. Instead, this Court simply instructed that Trustee's motions should be considered, in the first instance, by the trial court.

Second, the Court of Chancery's decision to treat granting the Motion for Relief as a prerequisite to consideration of the merits of Trustee's Realignment Motion ignores that the filing of the voluntary bankruptcy petition, the subsequent conversion of the bankruptcy to a Chapter 7 liquidation, and the appointment of the Trustee, vested control over this Action in Trustee as a matter of law. Trustee's Realignment Motion should have been granted, and the Court of Chancery should have then proceeded to examine ***Trustee's*** Motion for Relief under Rule 60.

Finally, because, as discussed above, the trial court predicated its denial of the Realignment Motion entirely on its erroneous denial of the Motion for Relief, denial of the Realignment Motion is itself reversible error.[130] That is, because the denial of the Motion for Relief was erroneous, so was the denial of the Realignment Motion.

[130] *See, e.g.*, *Freeman United Coal Min. Co. v. Indus. Comm'n*, 720 N.E.2d 1063, 1066 (Ill. 1999) (government agency's decision was incorrect as a matter of law because it was predicated upon arbitrator's incorrect legal conclusions); *Deutsche Bank Nat'l Tr. Co. v. Stone*, 174 So.3d 550 (Fla. Dist. Ct. App. 2015) (trial court's error in involuntarily dismissing action "was compounded by the fact that the trial court based its decision . . . on its incorrect ruling regarding the admissibility of the notice of default letter"); *Chavin*, 873 A.2d at 289-91 (finding abuse of discretion where "there [wa]s no record support for the trial court's conclusion").

CONCLUSION

The decision of the Court of Chancery should be reversed. Trustee should be substituted for Erin and realigned as Plaintiff, the dismissal effected by the Memorandum Opinion should be opened due to extraordinary circumstances pursuant to Rule 60(b)(6), and Trustee should be allowed to prosecute this Action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael J. Barry, do hereby certify that on this 7th day of April 2021, I caused a copy of the foregoing **Public Version of Appellants' Opening Brief** to be filed and served via File & Serve*Xpress* upon the following counsel:

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