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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	)	No. 33, 2021
RONALD J. SOMMERS, as Chapter 7 trustee for Nominal Defendant-Below ERIN ENERGY CORPORATION	)	Court below: Court of Chancery C.A. No. 11963-VCF
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.	)	

APPELLEES' ANSWERING BRIEF

POTTER ANDERSON & CORROON LLP
Myron T. Steele (#00002)
Jaclyn C. Levy (#5631)
Hercules Plaza, 6th Floor
1313 North Market Street
Wilmington, DE 19801
(302) 984-6000

Attorneys for Appellees Kase Lukman Lawal and CAMAC Energy Holdings, Limited

OF COUNSEL:

David T. Moran
Christopher R. Bankler
JACKSON WALKER L.L.P.
2323 Ross Avenue, Suite 600
Dallas, TX 75201
(214) 953-6000

RICHARDS, LAYTON & FINGER, P.A.
Srinivas M. Raju (#3313)
Robert L. Burns (#5314)
Andrew J. Peach (#5789)
One Rodney Square
920 North King Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Defendants John Hofmeister, Ira Wayne McConnell, and Hazel O'Leary

OF COUNSEL:
Greg Waller
HUNTON ANDREWS KURTH L.L.P.
600 Travis Street, Suite 4200
Houston, TX 77002
(713) 220-4200

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
David J. Teklits (#3221)
Kevin M. Coen (#4775)
1201 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 658-9200

Attorneys for Defendants Lee P. Brown, William J. Campbell, and J. Kent Friedman

OF COUNSEL:

Mark Oakes
Ryan Meltzer
NORTON ROSE FULBRIGHT US LLP
98 San Jacinto Boulevard
Suite 1100
Austin, TX 78701

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NATURE OF PROCEEDINGS

Original Plaintiff Robert Lenois and non-party Ronald J. Summers, court appointed bankruptcy trustee (the "Trustee") for the estate of Erin Energy Corporation ("Erin"), appeal the denial of: (1) their motion for relief under Court of Chancery Rule 60(b)(6) and (2) the Trustee's motion to substitute for Erin and realign as Plaintiff in this dismissed case.

The convoluted attempts by Lenois and the Trustee to undo the November 2017 final judgment previously sought and obtained by the Trustee's predecessor, Erin, began in July 2019, a year and a half after the Court of Chancery dismissed Lenois' derivative claims. Since that time, Lenois and the Trustee, through their shared counsel, have filed at least six motions in three different courts seeking to uproot that judgment for only one discernable purpose: to avoid the admitted time-bar to any separate suit that the Trustee may file. *See* Opening Br. at 32-34.

Lenois' persistence is particularly troubling. In January 2019, he asked the bankruptcy court overseeing Erin's bankruptcy (the "Bankruptcy Court") to "lift the Automatic Stay" in this action, for the "purpose of presenting [allegedly] new evidence to the Court of Chancery, moving to vacate its judgment . . . and prosecuting the Derivative Action to its conclusion." A1389. The Bankruptcy Court refused to grant that relief to Lenois to further pursue this action. A1410.

Undeterred by federal law or the absence of permission, Lenois (through his shared counsel with the Trustee) filed the motion anyway, seeking relief from the final judgment in the Court of Chancery under Rule 60(b). A595. But as the Court of Chancery observed, it lacked jurisdiction over Lenois' motions because Lenois' appeal of the November 2017 dismissal was then pending in this Court.

Lenois and the Trustee therefore returned to this Court, and asked it to essentially decide the issues that the Trustee and Lenois had pending with the Court of Chancery. In this Court, all parties agreed that Lenois lacked standing to continue pursuing this case due to Erin's bankruptcy. *See* A1536. This Court accordingly dismissed Lenois' appeal as moot. *Id.*

In the same order, this Court also denied the Trustee's request to vacate the judgment, finding that vacatur was not warranted because the judgment did not "determine the Trustee's right" to assert the claims previously asserted derivatively by Lenois. A1537. Rather, the matter would "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." A1537-38.

Finally, on December 31, 2020, after this Court declined the Trustee's request to vacate the judgment and substitute as plaintiff, the Court of Chancery denied the Trustee's request for relief and substitution in a thoughtful, comprehensive, 38-page opinion. Despite Lenois' admitted lack of standing in the first appeal, and the

Trustee's status as a non-party, now both purport to appeal that decision to this Court.

SUMMARY OF ARGUMENT

The Court of Chancery acted within its considerable discretion when it declined to find extraordinary circumstances justifying relief from a correctly decided, unappealable judgment. The Trustee cites no cases awarding the relief he seeks, and as the Court of Chancery reasoned, granting the Trustee's motion would significantly undermine the finality of judgments in Delaware corporate law. The Trustee also distorts the standard of review in an effort to avoid the deference due to the Court of Chancery, characterizing virtually every statement by the Court of Chancery as embodying an "error of law" subject to *de novo* review. Despite this framing, the Trustee failed to identify a single governing legal standard that the Court of Chancery misstated or misapplied.

The Court of Chancery also acted within its discretion by denying the Trustee's requested substitution into this dismissed, moot case, which would admittedly serve no purpose without relief from the final judgment. The sum total of the Trustee's efforts has been six procedural motions filed in three different courts—draining already scarce judicial resources.

In accordance with Supreme Court Rule 14(b)(iv), Defendants admit or deny Plaintiffs' summary as follows:

1. Denied. The Court of Chancery reasonably concluded that no extraordinary circumstances justified upending a correctly decided judgment that the

Trustee's predecessor obtained, particularly when the judgment at issue presents no legal bar to assertion of the underlying claims in a new action.

First, this Court has squarely held that Rule 60(b)(6) is not a vehicle to unwind prior litigation decisions. *See Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 386 (Del. 2013). This applies even when the litigant's choices result in a limitations bar. *Id.*

***Second*,** the Trustee cites no cases to support the relief he now seeks. The Court of Chancery properly declined to endorse the Trustee's self-fulfilling proposition that every case becomes "extraordinary" due to the "absence of factually or procedurally identical cases," which turns the well-established and demanding Rule 60(b)(6) legal standard on its head.

Third, the Court of Chancery carefully applied this Court's prior holding that the judgment presents no legal bar to the Trustee filing a new action. The Court of Chancery reasonably concluded that the Trustee and Lenois "have not satisfied their burden to establish that granting relief . . . is necessary to permit claims by the Company against Defendants." Op. at 31.

Finally, the Court of Chancery did not ignore any "highly unique facts" presented by this case or misinterpret arguments of counsel in reaching its well-reasoned conclusion. Instead, the Court of Chancery properly rejected the Trustee's claim that the change of corporate control created by the appointment of a

bankruptcy trustee warrants vacatur of a final judgment. The Court of Chancery properly highlighted the significant blow that granting relief would deal to the finality of judgments in Delaware based merely on change in corporate control.

In short, the Court of Chancery reached the correct result, and Lenois and the Trustee have identified no instance where that decision was arbitrary or capricious. The Court of Chancery's decision therefore should stand as a valid exercise of sound judicial discretion.

2. Denied. The Court of Chancery did not abuse its discretion in denying the Trustee's motion for substitution and realignment. Such relief would serve no purpose without relief from the Final Judgment as Lenois and the Trustee concede. *See* Opening Br. at 40. Absent some legitimate purpose that would be advanced, substitution under Rule 25(c) is not proper, let alone required. Because the Court of Chancery had already concluded no basis existed to vacate the final judgment and reopen proceedings, the Vice Chancellor reasonably concluded that the Trustee's requested substitution and realignment "would not facilitate the conduct of the case," which has been closed for over three years. Op. at 37.

COUNTERSTATEMENT OF FACTS

The Court of Chancery dismissed this case in November 2017. A580. That judgment is final. This Court dismissed Lenois' appeal, and also denied the Trustee's request for vacatur. A1537-38. The Trustee and Lenois now seek to uproot that final judgment, not because anything was wrongly decided, but because the Trustee acknowledges that a new action filed by him would be barred by laches and the statute of limitations. A595; A1539; Op. at 3. Because a suit by the Trustee would be too late, the Trustee and Lenois have spent the last three years filing a spate of contradictory motions in multiple courts—this Court, the Court of Chancery, and the Bankruptcy Court—draining already scarce judicial resources.

I. The underlying transactions.

The transactions underlying this litigation are themselves over seven years old. Lenois and the Trustee have abandoned in this Court the Rule 60(b)(2) and 60(b)(3) arguments advanced below. In this Court, Lenois and the Trustee have reduced this appeal to their request for relief under Rule 60(b)(6). Accordingly, the Trustee and Lenois had no need to devote a substantial portion of their brief to a dramatized retelling of a story. However, given Lenois and the Trustee's extensive recitation of the "facts," Defendants provide the following counterstatement for completeness of the record.

A. The initial proposal.

In June 2013, non-parties Allied Energy Plc ("Allied") and Public Investment Corporation Limited ("PIC"), presented a proposal to Erin's admittedly majority disinterested board of directors. That proposal, which included an investment in Erin of several hundred million dollars, was described in detail in then Vice Chancellor Montgomery Reeves' Final Judgment. A527.

B. Erin forms a Special Committee that vets and renegotiates the proposal.

Erin's Board authorized formation of a special committee (the "Special Committee") to review, evaluate, and negotiate the proposal. B17. That independent Special Committee was nothing short of robust: it included a former president of Shell Oil Company, Defendant John Hofmeister, and the former United States Secretary of Energy, Defendant Hazel O'Leary. B28.

The Special Committee retained Canaccord Genuity Limited ("Canaccord") as its independent financial advisor and Andrews Kurth LLP as independent legal counsel. B27-28. Between its formation and approval of the Transactions, the Special Committee held nineteen meetings over six months to review, evaluate, and negotiate the proposal. B28-43, B64-65.

Independent financial advisor Canaccord reviewed the Transactions and concluded that each was, in its words, "fair, from a financial point of view," to Erin and its stockholders. B44. This final opinion came after Canaccord initially "refused

to bless the first proposal." A568. Thus, contrary to assertions by Lenois and the Trustee, Canaccord did not simply rubber stamp the Transactions, but rather performed a probing, detailed review. *See id.* After material changes were made to the Transactions, and Canaccord concluded the Transactions were fair. Ultimately, as recognized by then Vice Chancellor Montgomery Reeves, Canaccord did not conclude that Erin was overpaying for the Assets. *See* A571 ("Plaintiff overstates the information on the slide [which] shows a range of values for both the assets . . . and the consideration paid").

The Special Committee then approved the Transactions, as did Erin's Board on November 18, 2013. B44; A541. Dr. Lawal did not participate in voting on the Transactions when approved by the Special Committee or the Board of Directors. B44-45. On February 13, 2014, a special meeting of Erin's stockholders likewise approved the Transactions, with approximately 99.5% of the voted shares cast in approval, including a "majority of the minority." Op. at 6-7.

Importantly, as the Court of Chancery observed in the Final Judgment, no party has ever disputed that Erin maintained a disinterested, independent Board at all times. A545.

C. The Transfer Agreement addresses pending disputes between Allied and NAE.

Allied had previously acquired the Assets from Nigerian AGIP Exploration Ltd. ("NAE") through an amended Sale and Purchase Agreement ("SPA") dated

June 28, 2012. *See* B212. The SPA set the purchase price for the Assets at $250 million—payable in installments by Allied, plus certain adjustments. B213. Allied paid the initial $100 million in accordance with the SPA. *Id*. The remaining three $50 million installments were due December 31, 2013; December 31, 2014; and December 31, 2015. *Id.*

On September 18, 2013, ***before*** any of those three remaining installments became due, NAE filed an arbitration against Allied (the "Arbitration"). A603. NAE alleged that Allied owed approximately $55 million for the adjustments to the SPA purchase price, not as to installments not then due. A1074. Allied denied those allegations, and asserted a counterclaim against NAE. *Id*.

These nascent arbitration proceedings were pending when the Transactions were considered and approved by the Board in November 2013. The Transfer Agreement contained additional protections for Erin, including indemnification from Allied for "any NAE Claim." A908.

II. The Final Judgment and post-judgment proceedings.

Lenois filed his Complaint on February 5, 2016, asserting derivative and direct claims stemming from the Transactions. Op. at 7. Lenois failed to make demand on Erin's Board before filing suit. Op. at 7-8.

Erin and the other Defendants moved to dismiss all of Lenois' claims. A522-23. On November 7, 2017, the Court of Chancery granted the Defendants' motions

(the "Final Judgment"), holding that "demand is not excused as futile because Plaintiff [Lenois] fails to plead non-exculpated claims," and that Lenois' "direct disclosure claims fail because the alleged injury is to the Company." *Id.* Lenois only appealed dismissal of the derivative claims to this Court.[1]

A. Erin files for bankruptcy.

On April 25, 2018, while Lenois' appeal to this Court was pending, Erin filed a bankruptcy petition in the United States Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Court"). Op. at 11. The Bankruptcy Court converted Erin's bankruptcy from Chapter 11 to Chapter 7, and appointed the Trustee on July 12, 2018. A601.

The cause of Erin's bankruptcy, according to the Trustee's filings in the Bankruptcy Court, was NAE's "wrongful attachment and seizure of approximately 380,000 barrels of crude oil owned by [Erin]." B258. "These events directly led to [Erin]'s bankruptcy filing," and Erin "has substantial claims against NAE as a consequence," which the Trustee is currently pursuing in an adversary proceeding in the Bankruptcy Court. B259.

[1] Hence, the disposition of the disclosure claim based upon challenges to the Proxy is final. *See* A522.

B. The Trustee's procedural gambits begin.

Six months after the Trustee's appointment, *Lenois* sought permission from the Bankruptcy Court to file the 60(b) Motion now under review, "and continue to pursue the Derivative Action to its conclusion for the benefit of Erin's bankruptcy estate." A1401. Among other things, Lenois' counsel in the Bankruptcy Court, the same counsel he shares with the Trustee in this litigation, argued to the Bankruptcy Court in January 2019 that the "Trustee likely cannot assert the claims asserted in the Derivative Action . . . because the three-year statute of limitations . . . has now expired." A1400-01. The Bankruptcy Court declined to grant Lenois the relief he requested. A1410. It bears emphasis—Lenois filed the 60(b) Motion and is pursuing this appeal, despite having failed to obtain permission, and the Bankruptcy Court specifically denying him leave to do so. *See id.* That ruling remains undisturbed.

Following that denial, Lenois and his counsel, who had just argued to the Bankruptcy Court that Lenois was "***the only party*** who can continue to litigate [this case]," B279 (emphasis added), approached the Trustee, and changing course, "convinced [the Trustee] that the claims in this action have merit and should be pursued." Op. at 3. But the Trustee "recognized . . . that due to the passage of time, asserting the claims in a separate action could give rise to a defense of laches," *id.*, and therefore applied for authorization to employ Lenois' counsel as his own counsel

in this case. The Bankruptcy Court concluded that the Trustee was the legal successor to Erin and thus granted approval on July 8, 2019. A1383. In short, the Trustee's involvement in this case is a purely strategic ploy aimed at circumventing the admitted bars of limitations and laches. *See id.*

As a result, in July 2019, nearly six years after the relevant transactions, two years after the Final Judgment, and one year after his appointment, the Trustee thrust himself into this moot, decided case. Disregarding Lenois' then-pending appeal in this Court, the Trustee and Lenois filed a motion to substitute for Lenois, and assume "exclusive control over the litigation." A1512 (the "Substitution Motion"). In a contemporaneously filed motion, the Trustee and Lenois jointly sought relief from the Final Judgment under Court of Chancery Rule 60(b). A595 (the "60(b) Motion"). Lenois argued that allegedly new and wrongfully withheld evidence excused pre-suit demand as a matter of law. A597-98. In the same motion, the Trustee argued that he, not Lenois, "now control[led] the derivative claims," and purported to retroactively waive the demand futility issue altogether. A606.

The motions were fully briefed, and the Court of Chancery heard oral argument on March 3, 2020. At the hearing, the Court of Chancery questioned the propriety of the Motions given the pending appeal in this Court and Erin's bankruptcy. The Vice Chancellor then asked whether "Mr. Lenois [had] standing to assert the appeal," to which the shared counsel for Lenois and the Trustee conceded:

"Mr. Lenois doesn't have that right." A1309. The Court of Chancery also questioned its own jurisdiction in light of the pending appeal, asked whether a limited remand was appropriate; and directed supplemental briefing on the issue. A1327.

C. The Trustee pursues vacatur of the Final Judgment in two courts; both courts deny it.

The same day he filed the supplemental briefing directed by the Court of Chancery (in which he argued that the trial court retained jurisdiction to vacate the Final Judgment and substitute him for Lenois), the Trustee filed new motions in this Court seeking essentially the same relief—to vacate the Final Judgment and align the Trustee as plaintiff-appellant, though in this Court, the Trustee sought to substitute for Erin rather than Lenois. A1331. Their shared counsel argued that the Trustee held "exclusive control over all of Erin's legal rights and remedies," A1333, and that Lenois' "issue of demand futility . . . is now moot." A1340.

Defendants opposed vacatur, and moved to dismiss the appeal as moot, noting that the parties agreed Lenois lacked standing due to Erin's bankruptcy. B309. And in response to the Trustee's purported "decision to assume control over this Action" and waive "the [Rule] 23.1 defenses that formed the basis of" the Final Judgment—essentially the same argument he presented under Rule 60(b)(6) below and presses again in the present appeal—Defendants pointed out that a voluntary bankruptcy is not an event justifying vacatur under this Court's decision in *Advanced Radio*

Telecom Corp. v. CL Invs., L.P., 807 A.2d 1128 (TABLE), 2002 WL 1484504 (Del. 2002). *See* A1419.

On May 18, 2020, this Court dismissed Lenois' appeal as moot.[2] This Court also declined to grant the Trustee's requested vacatur of the Final Judgment or substitution, observing in particular that the Final Judgment does not adjudicate the Trustee's right or prevent him from pursuing the underlying claims. A1537. Rather, this Court remanded to the Court of Chancery, where the matter "will more appropriately be determined." A1537-38.

The Trustee filed yet another motion in the Court of Chancery, this time seeking to substitute for Erin rather than Lenois, and to realign himself as Plaintiff. A1539. On December 31, 2020, the Court of Chancery denied both that motion and the 60(b) Motion. Op. at 38. (the "Post-Judgment Order").

The Court of Chancery thoroughly dispatched Lenois' and the Trustee's primary arguments that the Arbitration between NAE and Allied constituted newly discovered evidence under Rule 60(b)(2), or that this information was wrongfully

[2] As referenced in the contemporaneously filed motion to dismiss, Lenois' present appeal should be dismissed in its entirety because he admittedly lacks standing to continue in this case after Erin's bankruptcy, and his demand futility arguments are moot, as this Court has already held and is now law of the case. *See* A1309, A1409; *Police & Fire Ret. Sys. of Det. v. Callen*, 44 A.3d 922 (TABLE), 2012 WL 1594881, at *2 (Del. 2012); *Gunn v. U.S. Bank Nat'l Ass'n*, 23 A.3d 865 (TABLE), 2011 WL 209023 (Del. 2011); *Del. Dept. of Nat'l Res. & Env. Control v. Food & Water Watch*, ---- A.3d ----, 2021 WL 405842, at *4 (Del. Feb. 3, 2021).

concealed under Rule 60(b)(3). *See* A606-09. As Defendants pointed out below, and the Court of Chancery concluded in its unchallenged disposition of those arguments, the Arbitration was hardly new evidence, and nothing was fraudulently concealed: (1) the relevant information "was within Erin's possession, and Erin's knowledge is imputed to the Trustee;" (2) the publicly filed Transfer Agreement references the Arbitration "no less than four times," making it easily discoverable by Lenois and others; and (3) there was absolutely no evidence that any Defendant "acted with *scienter*" in omitting the Arbitration information from the Proxy or the § 220 production that Lenois, through his counsel, negotiated and agreed to. *See* Op. at 19-27; B1444-47; B130.

III. This Appeal.

On January 29, 2021, the Trustee, still a non-party, and Lenois, despite his conceded lack of standing and refusal by the Bankruptcy Court to allow him to proceed, noticed the present appeal. It is telling that Lenois and the Trustee have not challenged the Court of Chancery's comprehensive treatment of their primary arguments in the 60(b) Motion. The Rule 60(b)(2) and 60(b)(3) arguments are unchallenged here. Instead, Lenois and the Trustee return to this Court to re-urge under Rule 60(b)(6) what was a single-paragraph argument in their papers filed in the Court of Chancery. A606.

ARGUMENT

I. The Court of Chancery did not abuse its discretion by concluding no "extraordinary circumstances" justified relief from the Final Judgment.

A. Question presented

Did the Court of Chancery abuse its discretion by concluding that no extraordinary circumstances justified upending a final judgment of dismissal that the Trustee's predecessor obtained, particularly when the judgment at issue presents no legal bar to assertion of the underlying claims in a new action? *See* B147-48; B297-302.

B. Scope of review

Under Court of Chancery Rule 60(b)(6), a court "may relieve a party" from a judgment for "any other reason justifying relief from the operation of the judgment." Del. Ch. Ct. R. 60(b)(6). As this Court recently wrote: "Relief under this residual category requires a showing of an 'extraordinary situation or circumstances.'" *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, --- A.3d ---, 2021 WL 419146, at *17 (Del. Feb. 8, 2021). "Rule 60(b)(6) 'encompasses circumstances that could not have been addressed using other procedural methods, [that] constitute an 'extreme hardship,' or [when] 'manifest injustice' would occur if relief were not granted." *Nat'l Indus. Grp.*, 67 A.3d at 386 (citation omitted). "[T]he standard under Rule 60(b)(6) is even more exacting than any other ground for relief provided in the Rule," *Wimbledon Fund LP v. SV Special Situations LP*, 2011 WL 378827, at

*6 (Del. Ch. Feb. 4, 2011) (footnotes omitted), demanding a "stronger showing than that required under the other five subsections," *Okla. Firefighters Pension & Ret. Sys. v. Corbat*, 2018 WL 1254958, at *3 (Del. Ch. Mar. 12, 2018) (quoting *High River Ltd. P'ship v. Forest Labs., Inc.*, 2013 WL 492555, at *9 (Del. Ch. Feb. 5, 2013)). Neither "neglect" by the movant or its counsel nor a litigant's "second-guess[ing]" of "its own litigation strategy after achieving suboptimal results in court" will suffice. *Wimbledon Fund*, 2011 WL 378827, at *6 (footnote omitted). And even if the movant manages to carry this considerable burden, "Rule 60(b)(6) does not apply if there are other forms of relief available." *High River*, 2013 WL 492555, at *10. As such, "[r]elief under Rule 60(b)(6) is an 'extraordinary remedy.'" *Wimbledon Fund*, 2011 WL 378827, at *6 (citations omitted); *accord Shipley v. New Castle Cnty.*, 975 A.2d 764, 767 (Del. 2009) (interpreting the analogous Superior Court Rule 60(b)(6)).

"The decision whether to grant vacatur under Rule 60(b)(6) lies in the sound discretion of the trial court and will be disturbed only for an abuse of that discretion." *Meso Scale*, 2021 WL 419146, at *17 (citation omitted). "An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances, or . . . so ignored recognized rules of law or practice so as to produce injustice.'" *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 633–34 (Del. 2001) (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994)).

The Trustee thus bears an exceedingly high burden on this appeal. He must not only identify a situation or circumstance that might rise to the level of "extraordinary," he must also establish that the Court of Chancery "acted in an arbitrary and capricious manner" when it concluded that no such circumstances exist. *Meso Scale*, 2021 WL 419146, at *20; *see also 3 Penny Theater Corp. v. Plitt Theatres, Inc.*, 812 F.2d 337, 340 (7th Cir. 1987) (a trial court's "Rule 60(b) decision is discretion piled on discretion").

Lenois and the Trustee incorrectly suggest that the Post-Judgment Order may be subject to *de novo* review. While the "legal standard" employed by the trial court is reviewed *de novo*, *see MCA, Inc.*, 785 A.2d at 638, there is no dispute that the Court of Chancery identified and employed the proper legal standard (*i.e.*, "extraordinary situation or circumstances," "extreme hardship," or "manifest injustice"). *See Meso Scale*, 2021 WL 419146, at *17 (quotation marks and citation omitted); *Nat'l Indus. Grp.*, 67 A.3d at 386; Op. at 28-33. Review of the Court of Chancery's decision under that correct standard is for abuse of discretion. *See In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 293 (Del. 2002) ("Since we find it clear that the Chancellor applied the correct legal standard, this Court must now turn to the secondary question of whether the Chancellor abused his discretion . . .").

C. Merits of argument

The Court of Chancery's reasoned analysis cannot be judged as arbitrary or capricious. To the contrary, the Court of Chancery weighed the "two significant public policy objectives" prescribed by this Court: integrity of the judicial process and finality of judgments, *Meso Scale*, 2021 WL 419146, at *17, and reasonably concluded that the Trustee's post-judgment appointment and alleged Rule 23.1 "waiver" is not an event justifying relief from a non-preclusive judgment that the Trustee's predecessor (Erin) actually obtained. Op. at 29-35.

1. Rule 60(b)(6) is not a vehicle for the Trustee to undo final judgments obtained by his predecessor.

At the threshold, the Trustee's purported "waiver of Rule 23.1" cannot justify relief, because Rule 60(b)(6) is not a mechanism for undoing "intentional or willful" acts previously taken during litigation. *Nat'l Indus. Grp.*, 67 A.3d at 386. In *Carlyle*, the movant sought relief under Rule 60(b)(6) "on the basis that enforcing the [judgment] would deny [movant] the right to litigate its claims," which were now allegedly "time-barred except in Kuwait." *Id.* The Court of Chancery denied the motion, finding no authority "for the dubious proposition" that relief was appropriate "because a party, through its own choices, has caused the statute of limitations in the contractually chosen forum to expire." *Id.* This Court agreed, observing that "where, as here, conduct has been intentional or willful, Rule 60(b)(6) cannot be

used to relieve a party from the duty to take legal steps to protect his interests." *Id*. (quotation marks and citation omitted).

Similar considerations support affirmance of the Post-Judgment Order here. The Court of Chancery recognized that prior to the entry of judgment Erin could have pursued claims directly against Defendants in this action or a different action. Op. at 31. But "Erin chose not to do so," and instead "successfully obtained a final judgment." *Id.*

Here, as in *Carlyle*, Rule 60(b)(6) cannot be used to undo these deliberate decisions, even where claims might otherwise be "time-barred." 67 A.3d at 387. The Trustee, like the movant in *Carlyle,* concedes he is time-barred, but stands in Erin's shoes, and cannot escape the consequences of Erin's and his own decisions. *See id.*

The Trustee's arguments to the contrary are baseless, and the Court of Chancery's refusal to indulge them was grounded in well-established law and wise policy. *See id.*

2. The Court of Chancery reasonably concluded that Lenois and the Trustee failed to establish extraordinary circumstances justifying relief.

The Court of Chancery's conclusion that "Erin's bankruptcy is not an extraordinary event requiring relief under Rule 60(b)(6)" was based on sound judgment: granting the Trustee's requested relief would "have broad implications in

the bankruptcy context and beyond." Op. at 29. Bankruptcy itself is an everyday occurrence, and as the Court of Chancery observed, similar transfers of corporate control occur in a variety of commonplace settings: "in corporate mergers under 8 *Del. C.* § 259," and when "the makeup of the board" changes. *Id.* at 29–30.

Adopting the Trustee's Rule 60(b)(6) argument would therefore "enable companies to disturb the finality of judgments merely because of a commonplace change in control," resulting "in many final judgments becoming the subject of Rule 60(b) motions to vacate." *Id.* at 30 (quoting 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2864 (3d ed.)). Moreover, the Court of Chancery also noted that relief from the Final Judgment is ***not*** required for the Trustee to file the underlying claims, *id.* at 31-33, and that Erin, into whose shoes the Trustee now steps, had an opportunity to realign and assert the claims, but chose not to.[3] *Id.* The substantial harm in granting relief therefore outweigh any potential benefits, which are nonexistent. *See id.* This is a measured assessment of the competing policies at play in the Rule 60(b)(6) analysis that more than satisfies the deferential standard of review. In sum, the opinion below was comprehensive and

[3] Lenois and the Trustee mistakenly suggest that in this portion of the Post-judgment Order, "[t]he trial court . . . erroneously held that Trustee could simply 'have sought to realign Erin.'" Opening Br. at 34. This is incorrect. The Post-Judgment Order very clearly states that "***the Company*** could have sought to realign," Op. at 31. (emphasis added), which is unassailably true.

correct. Lenois and the Trustee fail to even begin to meet their burden of demonstrating that the decision was arbitrary or capricious.

This Court's opinion in *Bachtle v. Bachtle*, 494 A.2d 1253 (Del. 1985), is instructive. The movant in *Bachtle* sought "to reopen a property division judgment" based on "the subsequent sale price of [a] marital residence." *Id.* at 1254. In concluding that the situation was not "extraordinary" under the identically worded Family Court Rule 60(b)(6), the trial court acknowledged the "surprise and dismay" of the movant, but also observed the "danger in affording relief":

> If this judgment were opened, when might parties to marital litigation expect that a judgment on ancillary matters would become final and conclusive? If I abandon the clear guide post of date of entry of a final judgment, where do I draw the outside line for granting relief or do I draw a line at all []. . . I must not create a precedent that would enable dissatisfied litigants to relitigate property valuations . . .

Bachtle v. Bachtle, 468 A.2d 302, 305 (Del. Fam. Ct. 1983), *aff'd*, 494 A.2d 1253 (Del. 1985). These concerns compelled the trial court to deny the 60(b)(6) motion. *Id.* at 305–06.

This Court affirmed, placing great emphasis on the fact that "a final judgment had been entered," and the appeal "followed by approximately nineteen months." *Bachtle*, 494 A.2d at 1256–57. Simply put, "[t]here must be an end to litigation," and the trial court's reasoned denial was a valid act of judicial discretion. *Id.* at 1256.

Similarly, here, this appeal comes over three years after entry of final judgment. *See id.* at 1255. In the Court of Chancery, the Trustee and Lenois "cited no authority for the proposition that the mere transfer for the right to assert previously dismissed derivative claims through a bankruptcy trustee warrants relief under Rule 60(b)(6)." Op. at 29. They still have not done so on this appeal, and counsel for Defendants have located none. In short, there is no established law suggesting, much less holding, that a court must adopt the Trustee's position, leaving the trial court to reach its own reasonable conclusion. *See id*.

The Court of Chancery, like the trial court in *Bachtle*, therefore weighed the threat to finality of judgments against the need for relief and the fairness of the original proceedings. Op. at 29-30. As in *Bachtle*, this careful consideration and sound methodology fall within the bounds of judicial discretion. 494 A.2d at 1256–57. "There must be an end to litigation," *see id.* at 1256, and this litigation has run its long, weary course.

Bereft of any legal precedent for their arguments, the Trustee and Lenois incorrectly suggest that the Court of Chancery committed "clear error" because it "ignored that the claims were not subject to a final judgment" due to Lenois' appeal. Opening Br. at 29. This misstates Delaware law. The Final Judgment was certainly

"final."[4] In any event, Lenois' appeal was dismissed well before the Post-Judgment Order below denying the Rule 60(b) Motion was entered by the Court of Chancery. There is simply not a case for the Trustee to pursue—there has been a Final Judgment dismissing the case, followed by this Court's order dismissing an appeal from that Final Judgment, and also denying vacatur. A1537.

3. The Court of Chancery reasonably concluded that the ancillary circumstances identified by Lenois and the Trustee did not justify relief.

Aware that their central premise cannot justify the relief they seek, Lenois and the Trustee attempt to cobble together a "constellation" of irrelevant and illusory circumstances that supposedly qualify as extraordinary. *See* Opening Br. at 26. But the Court of Chancery, which acknowledged all of these arguments and assertions, reasonably concluded that the circumstances identified fail to meet the high Rule 60(b)(6) standard.

[4] Lenois did not file an interlocutory appeal. His appeal, then, can only be from a final judgment. *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 579 (Del. 2002) ("[a]n aggrieved party can appeal to this Court only after a final judgment is entered by the trial court.") (citing Del. Cost. Art. IV, § 11(1)(a)); *Braddock v. Zimmerman*, 906 A.2d 776, 783–84 (Del. 2006) ("a final judgment results . . . whenever a complaint is dismissed without prejudice *unless* the plaintiff is expressly granted leave to amend within a time certain") (emphasis in original).

a. Mootness does not require vacatur of the Final Judgment, as this Court previously held.

Lenois and the Trustee wrongly suggest that the Final Judgment should be vacated because it resolves an issue that is now admittedly "legally irrelevant"—demand futility. Opening Br. at 26–27. But mootness is, of course, not a basis to vacate a judgment that has no preclusive effect. This Court observed as much when it first declined the Trustee's request to vacate the Final Judgment, which is only appropriate "when the interests of justice so require":

> We decline to order vacatur in the circumstances of this case. Neither the Trustee nor the plaintiff-stockholder contend that the parties are involved in other litigation in which the Court of Chancery's decision concerning demand futility will have preclusive effect. Similarly, the issue of whether [Lenois] was excused from making demand in order to bring derivative fiduciary-duty claims does not determine the Trustee's right to bring those fiduciary-duty claims.

A1537.

Dutifully applying this Court's holding, the Court of Chancery made the same observation in denying the 60(b) Motion:

> [N]othing in the [Final Judgment] . . . prevents the Trustee from attempting to assert direct claims on behalf of the Company in another action…[And] nothing in the judgment purports to prevent the Company from pursuing claims against persons who caused the Company to 'squander an asset' of the Company or the bankruptcy estate by not timely pursuing the company's claims that Lenois originally sought to pursue over the Company's objection.

Op. at 31-33.

The Court of Chancery also acknowledged the Trustee's point regarding the "inherent authority to control derivative litigation" enjoyed by corporate boards, Opening Br. at 27–28, noting that "the Company always possessed the authority to assert claims against Defendants." Op. at 32-33. The Court of Chancery simply concluded that the Trustee and Lenois "have not satisfied their burden to establish that granting relief . . . is necessary to permit claims by the Company against Defendants," as required under Rule 60(b)(6) *Id.* at 31 (citing *Nat'l Indus. Grp.*, 67 A.3d at 386). That conclusion is indisputably correct. The interests of justice did not require vactaur in this Court during the first appeal, and the interests of justice did not require it in the Court of Chancery—the effect of the Final Judgment and the Trustee's recycled argument have not changed. *See id.*

b. Lenois and the Trustee misstate the viability and importance of the derivative claims.

The Trustee also attempts to ascribe significance to Lenois' allegedly "well-pleaded claims of bad faith." Opening Br. at 26–27. However, both this Court and the Court of Chancery have recognized that the Final Judgment did not adjudicate the merits of the derivative claims. The Final Judgment therefore need not be vacated for the Trustee to pursue the allegedly "meritorious claims" (despite the conceded time-bar) if he so chooses. *See* A1537.

Of course, Plaintiffs' characterization of the claims is framed by the procedural posture. Absent from Plaintiffs' pleadings is any acknowledgement that the Transactions were approved by: (1) a Special Committee that included a former Secretary of Energy and President of Shell Oil Company, who met nineteen times to review the Transactions and obtained significant concessions including "$100 million in cash," A566; B28-43, B64-65; (2) the Special Committee's independent financial advisor, who found the Transactions "fair"; (3) Erin's admittedly disinterested Board; and (4) a majority of Erin shareholders, including a majority of minority shareholders. *See* B44-45; Op. at 6-7; A545. The merits of the claims are not established—any talk of "squandering" an estate asset is baseless.[5]

Moreover, the Trustee tells a very different story regarding the alleged merits, and the genesis of Erin's bankruptcy, to the Bankruptcy Court, where he is currently pursuing claims against NAE for "wrongful attachment and seizure of [the Assets],"

[5] While legally irrelevant to this appeal, Lenois and the Trustee also repeat the inaccurate allegation that "Lawal terminated his Chief Financial Officer and General Counsel" for their conduct during the Transactions. Yet again Lenois and the Trustee are incorrect. Erin's SEC filings reveal that the CFO did not resign until May 31, 2015 and the General Counsel did not resign until November 13, 2015, more than 18 months and nearly two years, respectively, after the Transactions were approved in November 2013. *See* Erin Energy Corporation's Schedule 14A Information filed with the United States Securities and Exchange Commission on April 29, 2016, at p. 25 (*available at* https://www.sec.gov/Archives/edgar/data/1402281 /000140228116000083/ern2016proxy.htm). This Court can take judicial notice of SEC filings. *See DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 351 n.7 (Del. 2017) ("We take judicial notice of DFC's public filings with the SEC").

which "directly led to [Erin]'s bankruptcy filing." B258-59. The Trustee is pursuing a remedy for the wrongful attachment that sent Erin into bankruptcy against NAE, the responsible party, in the Bankruptcy Court. *See id.* That the Trustee has taken a contrary position in this venue certainly does not establish an abuse of discretion by the Court of Chancery.

4. The Trustee is judicially estopped from "waiving the Rule 23.1 arguments" successfully advanced by Erin.

Ironically, the Trustee is attempting to do perhaps the ***only*** thing that the Final Judgment actually estops him from doing—rejecting the arguments successfully advanced by his predecessor.[6] "Judicial estoppel applies when a litigant's position contradicts another position that the litigant previously took and that the court was successfully induced to adopt in a judicial ruling." *Motors Liquidation Co. DIP Lenders Tr. v. Allstate Ins. Co*., 191 A.3d 1109 (TABLE), 2018 WL 3360976, at *4 (Del. 2018). In *Motors Liquidation*, GM represented to the Superior Court that it would "not seek insurance coverage" under certain insurance policies, and "[would] not do so in any forum with respect to the . . . claims at issue." *Id.* This induced the

[6] While the Court of Chancery opted not to address Defendants' judicial estoppel arguments because alternative bases for denial existed, "[t]his Court may affirm on the basis of a different rationale than that which was articulated by the trial court[] if the issue was fairly presented." *Tiger v. Boast Apparel, Inc.*, 214 A.3d 933, 937 (Del. 2019) (quoting *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015)) (alteration in original). The issue was presented, B299-300, and all of the elements for application of judicial estoppel are apparent in the record and the Post-Judgment Order.

court to grant a stay of the case. *Id.* Four years later, during GM's bankruptcy reorganization, "the rights to any proceeds from the policies were assigned" to a Lenders Trust. *Id*. at *1–2.

When the Trust—the successor to the claims of bankrupt GM—later claimed the coverage previously disavowed by GM under the insurance policies, judicial estoppel prevented the change in position. *See id*. GM's representations disavowing coverage "persuaded, or induced, the Superior Court to grant a stay," which this Court held "estopped the Trust from arguing that any of the claims at issue in this [later] case triggered coverage." *Id*. at *4.

So too here. For years Erin consistently argued that Rule 23.1 barred the derivative claims in this case, which induced the Court of Chancery to render the Final Judgment. A522, A580; Op. at 31; B126. Just as the Trust was bound by GM's pre-bankruptcy positions in *Motors Liquidation*, so too is the Trustee estopped from disavowing the arguments that Erin successfully made here. *Id.*

5. The manufactured controversy regarding statements at oral argument is irrelevant to the correctness of the Order.

The Trustee and Lenois devote significant attention to the Court of Chancery's supposed "misinterpretation of a response from Movants' counsel at oral argument" and alleged "assumption" by the Court of Chancery. Opening Br. at 30-33. Ultimately, this extended analysis about an exchange at oral argument is much ado about nothing. Defendants certainly believe the Vice Chancellor did not misinterpret

the Trustee's counsel. Regardless, whether counsel was referring to the situation in this case or the facts of *Stotland v. GAF Corp.*, 469 A.2d 421 (Del. 1983), the point was ancillary to the Court of Chancery's salient legal observations: that Erin had earlier declined to assert the claims directly, Op. at 32, and "nothing in the judgment purports to prevent the Company from pursuing the claims." *Id.* at 33. The sincerity of the Trustee's desire to pursue the claims is irrelevant to these points: Erin did decline to assume the role of plaintiff in this case, and the Final Judgment itself presents no legal bar to the Trustee. *See id.* Contrary to Appellants' protests, Opening Br. at 30–33, any claims that the Trustee hopes to prosecute in connection with this matter are necessarily "inchoate," Op. at 32; the existing claims against Defendants have been dismissed in a final judgment not subject to further appeal, and no direct claims against Defendants or others have been brought. Plaintiffs' parsing of the hearing transcript simply does not establish an abuse of discretion.

Nor does the alleged assumption made by the Court of Chancery that the Trustee could assert the claims in a new action warrant relief from the Final Judgment. The Court of Chancery's simple recognition "that such an action would need to be timely asserted," is hardly extraordinary—that is the very point of statutes of limitations. Opening Br. at 33. The "substantial doubt as to whether newly filed claims asserted by Trustee would be timely," is simply not enough to establish an abuse of discretion. *Id.* It does not follow that "extreme hardship" or "manifest

injustice" would result absent Rule 60(b)(6).[7] *Nat'l Indus. Grp.*, 67 A.3d at 386. Rather, as the Court observed, "the Company always possessed the authority to assert claims against Defendants," and the Court "expresse[d] no opinion" on whether "claims asserted by the Trustee in a separate action would be time-barred." Op. at 32 & n.48.

The lone case cited by Plaintiffs in this section of their brief, *Solomon v. Buckley*, 86 F.R.D. 464 (E.D. La. 1980), suggests no different result. It does not even involve a final judgment, let alone a request for relief under Rule 60(b)(6). *See id*. It stands at most for the unremarkable proposition that a corporate successor can realign itself and pursue formerly derivative claims directly after a merger but before dismissal—a reality not present here, but in any event a fact pattern that the Court of Chancery explicitly acknowledged in the Post-Judgment Order. Op. at 29.

There is, in sum, no feature of the Post-Judgment Order that "exceeded the bounds of reason," and the ruling should be affirmed as a valid exercise of judicial discretion. *MCA, Inc.*, 785 A.2d at 633–34.

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[7] In any event, taking the Trustee's argument as true, the Trustee failed to explain how the alleged "misinterpretation" and "assumption" constitute reversible error. *Cf. Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004) (erroneous legal ground for dismissing complaint was harmless error because no claim was stated under correct standard); *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140 (Del. 1997) (erroneous language in trial court's opinion concerning pleading standard was harmless error because, "even under the proper pleading standard, the complaint fails to state a claim").

II. The Court of Chancery did not abuse its discretion by refusing to substitute and realign parties in a dismissed, moot case.

A. Question presented

Did the Court of Chancery abuse its discretion by declining to substitute the Trustee into this action and realign the parties, when such substitution and realignment would serve no purpose because the Trustee cannot undo the Final Judgment? B282-91; A1561.

B. Scope of review

"Substitution of a party under Rule 25(c) is committed to the discretion of the Court." *ClubCorp, Inc. v. Pinehurst, LLC*, 2011 WL 5554944, at *6 (Del. Ch. Nov. 15, 2011); *see also Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71–72 (3d Cir. 1993) (substitution under Rule 25(c) is generally left to "the district court's discretion"); 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1962 (3d ed. 2020) (an appellate court "will reverse an order denying substitution under Rule 25(c) only when the trial court has abused its discretion").[8]

C. Merits of argument

The Court of Chancery reasonably concluded that "Rule 25(c) substitution would not 'facilitate the conduct of the case' because the [Final Judgment] is a final

[8] "This Court has found federal authority to be of 'great persuasive weight' in construing analogous Delaware rules of court generally and specifically with regard to Rule 25 motions for substitution of parties." *Roberts v. Roberts*, 737 A.2d 511, 513 (Del. 1999) (quoting *Hoffman v. Cohen*, 538 A.2d 1096, 1098 (Del. 1988)).

judgment that is no longer subject to appeal and the denial of the [60(b) Motion] brings this action to a close." Op. at 37-38. By its express terms, Rule 25(c) "does not require that anything be done after an interest has been transferred," *Luxliner*, 13 F.3d at 71 (quoting 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1958 (2d ed. 1986)); rather, "the action may be continued by or against the original party." Del. Ch. Ct. R. 25(c). The Rule is therefore "merely a procedural device designed to facilitate the conduct of a case," not "alter the substantive rights of parties." *Luxliner*, 13 F.3d at 71-72.

Here, as the Court of Chancery noted, there is not even an action to be continued because all proceedings are closed. The action was dismissed in November 2017, Plaintiff's first appeal was dismissed and Appellants' motion for vacatur was denied in May 2020, and the Court of Chancery found no basis to reopen the judgment in December 2020. The Trustee's substitution would therefore not facilitate anything—it would serve no purpose as the Court of Chancery concluded. Op. at 38.[9]

[9] As a corollary, the Court of Chancery's denial of the Substitution Motion, and the Trustee's resulting status as a nonparty, deprives the Trustee of "standing to take a direct appeal or an interlocutory appeal to this Court." *Townsend v. Griffith*, 570 A.2d 1157, 1158 (Del. 1990). *Coffey v. Whirlpool Corp.*, 591 F.2d 618 (10th Cir. 1979), for example, confirms this analysis. In that case, the Tenth Circuit observed the general rule that "[a] nonparty does not have standing to appeal in the absence of most extraordinary circumstances." *Id.* at 619. "This is not such a case," the court concluded, "since no requirement is imposed upon [the nonparty] to do anything unless and until it becomes a party to the litigation." *Id.* The nonparty was free to

The Trustee's brief admits as much: "to prosecute claims that had been dismissed, Trustee would have to obtain relief from the prior dismissal of this Action." Opening Br. at 40. Rule 25(c) does not provide for substitution as of right. *See Luxliner*, 13 F.3d at 71-72. An inquiry into the purpose served by the substitution, and whether it would facilitate proceedings, is required, and there would admittedly be no purpose here.[10] *See id.*; *accord* Op. at 36-37 (citing *Luxliner*, 13 F.3d at 71; 7C CHARLES ALAN WRIGHT ET AL., *supra*, § 1958). For this reason, the Trustee's effort to tar the Court of Chancery's decision as "summar[y]," devoid of "independent[] or substantive[] analy[sis]" of "the merits of Trustee's Realignment Motion," Opening Br. at 39, misses the mark. The Court of Chancery dutifully applied the law and decided, in its discretion, that permitting the Trustee to substitute for the nominal defendant in an action that was dismissed finally and with

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"file an action in its own name." Likewise here, while Defendants do not waive any defenses they may have if the Trustee does institute a new action, the Post-Judgment Order and Final Judgment leave the Trustee free to attempt to assert claims in a new action filed in his own name. *See id.*; A1537. The Trustee therefore lacks standing as a non-party. *See id.*

[10] Rather than simply substituting his chosen counsel, the Trustee sought substitution in his own name pursuant to Rule 25 to escape the implications of standing in Erin's shoes. Erin cannot claim "newly discovered evidence" under Rule 60(b)(2) based on disclosures in the Transfer Agreement that Erin negotiated, signed, and undisputedly had in its possession. *See* A607. And Erin is judicially estopped from "waiv[ing] the Rule 23.1-based argument" that it successfully advanced in the Court of Chancery—the basis of the Trustee's argument under Rule 60(b)(6). *See* A606; *Motors Liquidation*, 2018 WL 3360976, at *4.

prejudice, and to realign as plaintiff to press a Rule 60(b)(6) motion that it had already found unmeritorious, would be a futile undertaking. The Court's analysis, like the Trustee's briefing, lays bare the fundamental infirmity in the Trustee's case: the Trustee cannot identify any harm from the Court's ruling or any purpose to be served by reversal. *See Tooley*, 845 A.2d at 1039; *Loudon*, 700 A.2d at 140.

Courts interpreting Federal Rule of Civil Procedure 25(c), which Court of Chancery Rule 25(c) "closely tracks," *ClubCorp. Inc. v. Pinehurst LLC*, 2011 WL 5554944, at *6 n.15 (Del. Ch. Nov. 15, 2011), have identified only one narrow instance in which post-judgment substitution may be permissible—"for the purpose of subsequent proceedings to ***enforce*** a judgment." *Explosives Corp. of Am. v. Garlam Enters. Corp.*, 817 F.2d 894, 907 (1st Cir. 1987) (emphasis added) (citing 3B J. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 25.03 at 25–27 (1987)); *see also Neal v. Ala. By-Prods. Corp.*, 1990 WL 109243, at *1 n.1 (Del. Ch. Aug. 1, 1990) ("Pursuant to Chancery Rule 25(c), Drummond, as the successor-in-interest to ABC, has been joined as a party defendant for the purpose of enforcement of any judgment."), *aff'd*, 588 A.2d 255 (Del. 1991).

But here, the Trustee does not seek substitution "for the purpose of subsequent proceedings to enforce judgment." *Explosives Corp.*, 817 F.2d at 907. He seeks the opposite—to realign the parties and ***undo*** the Final Judgment. The Trustee cites no authority or precedent for such a dramatic course of action, and for good reason: It

would contravene Rule 25(c)'s character as a purely procedural mechanism. Indeed, it is settled that Rule 25(c) "should not be applied where it would substantively affect the underlying lawsuit." *In re Countrywide Fin. Corp. Derivative Litig.*, 581 F. Supp. 2d 650, 653 n.1 (D. Del. 2008) (citation omitted). To the contrary, "[a] successor" should "take[] over without any other change in the status of the case," and the substituted party's "status in the litigation—like the substantive claims they raise or defend—tracks the positions of the original litigants." *Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc.*, 53 F.3d 851, 852 (7th Cir. 1995). "Any other approach would make a shambles of litigation . . . and require the court to start the case from scratch." *Id.*

The Trustee's cited cases are not to the contrary. They simply recognize a basic precept of Delaware law: corporations can assert control over derivative claims prior to dismissal. *See Telxon Corp. v. Bogomolny*, 792 A.2d 964, 973 (Del. Ch. 2001), and *Harris v. Carter*, 582 A.2d 222, 230 (Del. Ch. 1990). The same is true of *Bluth v. Bellow*, 1987 WL 9369, at *5 (Del. Ch. Apr. 9, 1987), which realigned the corporation as plaintiff where realignment was sought before any motions to dismiss were even filed.[11] *See id.*

[11] Worse still, the Trustee cites *Striker v. Chesler*, 217 A.2d 31 (Del. Ch. 1966), as an opinion by this Court "realigning trustees as plaintiffs to prosecute on a direct basis claims initially asserted derivatively." Opening Br. at 38 n.124. In reality, *Striker* is a Court of Chancery opinion that did not involve a final judgment in which

The Court of Chancery acted within its discretion in denying the Substitution Motion—which would serve no purpose without relief from the Final Judgment.

CONCLUSION

The Trustee and Lenois fall well short of the high burden they bear in establishing an abuse of discretion from the court below holding that "extraordinary circumstances" were not present here. The Court of Chancery's denial of the Rule 60(b) Motion and Substitution Motion should be affirmed. In the alternative, for the reasons set forth above and in Defendants' Motion to Dismiss, this appeal should be dismissed for lack of standing by either purported Appellant.

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the court "***decline[d]*** to permit the trustees who make the pending motion to be realigned as parties plaintiff prior to trial." 217 A.2d at 36 (emphasis added).

POTTER ANDERSON & CORROON LLP

By: */s/ Jaclyn C. Levy*
Myron T. Steele (#00002)
Jaclyn C. Levy (#5631)
Hercules Plaza, 6th Floor
1313 North Market Street
Wilmington, DE 19801
(302) 984-6000

OF COUNSEL:

David T. Moran
Christopher R. Bankler
JACKSON WALKER L.L.P.
2323 Ross Avenue, Suite 600

Dallas, TX 75201
(214) 953-6000

Attorneys for Appellees Kase Lukman Lawal and CAMAC Energy Holdings, Limited

RICHARDS, LAYTON & FINGER, P.A.

By: */s/ Robert L. Burns*
Srinivas M. Raju (#3313)
Robert L. Burns (#5314)
Andrew J. Peach (#5789)
One Rodney Square
920 North King Street
Wilmington, DE 19801
(302) 651-7700

OF COUNSEL:

Greg Waller
HUNTON ANDREWS KURTH L.L.P.
600 Travis Street, Suite 4200
Houston, TX 77002
(713) 220-4200

Attorneys for Defendants John Hofmeister, Ira Wayne McConnell, and Hazel O'Leary

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

By: */s/ David J. Teklits*
David J. Teklits (#3221)
Kevin M. Coen (#4775)
1201 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 658-9200

OF COUNSEL:

Mark Oakes
Ryan Meltzer
NORTON ROSE FULBRIGHT US LLP
98 San Jacinto Boulevard
Suite 1100
Austin, TX 78701

Attorneys for Defendants Lee P. Brown, William J. Campbell, and J. Kent Friedman

Dated: April 22, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April 2021, a copy of the foregoing document was served via *File & ServeXpress* upon the following attorneys of record:

Michael J. Barry, Esq.
GRANT & EISENHOFER P.A.
123 Justison Street
Wilmington, DE 19801

Peter B. Andrews, Esq.
Craig J. Springer, Esq.
ANDREWS & SPRINGER LLC
3801 Kennett Pike
Building C, Suite 305
Wilmington, DE 19807

David J. Teklits, Esq.
Kevin M. Coen, Esq.
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 N. Market Street
Wilmington, DE 19801

Robert Burns, Esq.
RICHARDS, LAYTON & FINGER
One Rodney Square
920 North King Street
Wilmington, DE 19801

/s/ Jaclyn C. Levy
Jaclyn C. Levy (#5631)