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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE AMC ENTERTAINMENT HOLDINGS, INC. STOCKHOLDER LITIGATION	)	No. 385, 2023
	)	On Appeal from Consol. C.A. No. 2023-0215-MTZ in the Court of Chancery of the State of Delaware

PLAINTIFFS-APPELLEES' ANSWERING BRIEF ON APPEAL

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Edward Timlin
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

FIELDS KUPKA & SHUKUROV LLP
William J. Fields
Christopher J. Kupka
Samir Shukurov
141 Tompkins Ave, Suite 404
Pleasantville, NY 10570
(212) 231-1500

SAXENA WHITE P.A.
David Wales
10 Bank St., 8th Floor
White Plains, NY 10606
(914) 437-8551

– and –

Adam Warden
7777 Glades Rd., Suite 300
Boca Raton, FL 33434
(561) 394-3399

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Gregory V. Varallo (Bar No. 2242)
Daniel E. Meyer (Bar No. 6876)
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3600

GRANT & EISENHOFER P.A.
Michael J. Barry (Bar No. 4368)
Kelly L. Tucker (Bar No. 6382)
Jason M. Avellino (Bar No. 5821)
123 Justison Street, 7th Floor
Wilmington, DE 19801
(302) 622-7000

SAXENA WHITE P.A.
Thomas Curry (Bar No. 5877)
824 N. Market St., Suite 1003
Wilmington, DE 19801
(302) 485-0483

Attorneys for Plaintiffs-Appellees

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Plaintiffs-Appellees Allegheny County Employees' Retirement System ("Allegheny") and Anthony Franchi (together, "Plaintiffs") respectfully submit this opposition to Rose Izzo's ("Appellant") Appeal (Filing ID 71084083, the "Appeal") and Opening Brief in support of her Appeal (Filing ID 71524402, the "Brief" or "Br.").

NATURE OF PROCEEDINGS

This action challenged AMC Entertainment Holdings, Inc.'s ("AMC" or the "Company") planned dilutive conversion of its AMC Preferred Equity Units ("APEs") into common stock (the "Conversion"). Through the settlement negotiated by Plaintiffs (the "Settlement"), common stockholders received nearly seven million additional shares, increasing their *pro forma* ownership of post-Conversion AMC by nearly 3%. Plaintiffs achieved this recovery even though AMC's common stockholders' (the "Class") voting rights claim was statutorily mooted during pendency such that, absent the Settlement, AMC likely could have resubmitted the Conversion and secured approval under a relaxed voting standard with the Class receiving nothing. Plaintiffs' second claim—that creation of the APEs required a separate class vote of the common stock (the "Common Stock")—

also faced significant risk, as the Court of Chancery (the "Trial Court") ultimately found it "would not have succeeded under current Delaware law."[1]

Moreover, the parties negotiated the Settlement against the backdrop of AMC's fraught financial condition. Even as theater attendance improved from the aftermath of COVID-19 shutdowns through the Trial Court approval of the Settlement on August 11, 2023, the heavily leveraged AMC has had to rely on equity financing to avoid bankruptcy. Because Plaintiffs' challenge to the Conversion would have frustrated AMC's ability to raise capital, Plaintiffs faced risk under the "compelling justification" prong of their voting rights claim and, *a fortiori*, the "balance of the equities" prong for securing an injunction. As borne out by documents unearthed in discovery, entry of an injunction increased the risk that the Class's equity investment would go to zero.

In considering the Settlement, the Trial Court took exceptional pains to accommodate Class members, going above and beyond due process's baseline requirement of an opportunity to be heard. The Settlement attracted unprecedented attention from AMC's passionate retail stockholders. The Trial Court required individualized mailed notice of the proposed Settlement and received thousands of submissions. Each compliant submission was considered by a special master duly

[1] Memorandum Opinion, issued August 11, 2023 (Trans. ID 70619302) ("MO") at 51.

appointed to assist with stockholder engagement (the "Special Master") and, ultimately, the Trial Court, which conducted a two-day hearing affording any *bona fide* objector the opportunity to be heard. Only four, including Appellant, appeared.

The Trial Court issued two opinions, spanning almost 180 pages, addressing not only those issues raised on Appeal but also other objector arguments and issues raised by the Trial Court *sua sponte*. Ultimately, the Trial Court reached the only viable conclusion: the Settlement was fair, reasonable, and adequate under the circumstances.

Just one objector—Appellant—filed a timely appeal. Even she has not challenged the substantive fairness of the Settlement in light of the substantial hurdles in prosecuting the claims asserted. Rather, Appellant makes three narrow arguments for overturning the Trial Court's decision. Each lacks merit.

First, Appellant contends the Settlement's release (the "Release") encompasses "future" claims and claims predicated on "tangential" facts. This is plainly wrong. The Release includes two conjunctive limitations, common in releases approved by Delaware courts, that narrow its scope to claims founded on (i) facts alleged in Plaintiffs' complaints and (ii) relating to ownership of AMC Common Stock during the Class Period (defined below). The Trial Court correctly

determined these limitations disposed of Appellant's arguments.[2] On appeal, Appellant renews her misplaced challenge based on supposition that a future court ***might*** afford the Release an overbroad interpretation. This is not a proper challenge.[3]

Second, Appellant complains that the Trial Court did not grant broad opt-out rights. Appellant does not, however, appeal or otherwise challenge the propriety of Class certification under Court of Chancery Rules 23(b)(1) and (b)(2). Thus, it is uncontested that no ***mandatory*** opt-out was required. Appellant nonetheless maintains the Trial Court abused its discretion by not affording a discretionary opt-out to pursue unspecified damages claims. Yet Appellant has not identified any actual claim she would assert (other than speculating broadly about hypothetical claims that might exist), much less one that would predominate over the Class's equitable voting rights claim. Appellant's "right" to pursue worthless, unarticulated claims should not impede meaningful, classwide recovery, particularly when

[2] The Trial Court only approved the Settlement after the Release was revised to address a scope issue it raised *sua sponte* (*see In re AMC Ent. Hldgs., Inc. S'holder Litig.*, 299 A.3d 501, 523-36 (Del. Ch. July 21, 2023)), rebutting Appellant's suggestion that the Trial Court failed to sufficiently scrutinize the Release.

[3] *C.f.* MO at 105 n.381 ("It is strange that [Appellant] would appeal the Court's July 21 Opinion on this basis…. The defendants asserted that the Release does ***not*** encompass [future] claims, arguing that the Release's language 'makes clear that [it] does not apply to future events.' …. And the July 21 Opinion held that the Release does not encompass future claims…. Any party wielding the Release to defeat a 'future claim' would have to overcome this holding, as well as the defendants' statements that it did not apply." (fourth alteration in original; citations omitted)).

allowing some subset of over three million retail stockholders was impracticable. Declining to afford a valueless opt-out in these circumstances is no abuse of discretion.

Finally, Appellant asserts the Trial Court abused its discretion in deeming Plaintiffs adequate class representatives based on their *prima facie* showing that they: (i) were not economically antagonistic to the Class; (ii) had retained competent counsel; and (iii) had adequately monitored that counsel. The second and third elements are not on appeal.

Appellant contends that because Plaintiffs did not suffer huge losses by purchasing at high prices driven by retail investor enthusiasm for a "short squeeze" prior to the APE issuance, they are economically antagonistic to those Class members who did. This argument fails. Plaintiffs' interests with respect to the claims asserted in the complaints are identical—economically and otherwise—to those of absent Class members. In this regard, the Trial Court recognized the Conversion would affect Plaintiffs' shares in the same manner as all other shares.

Once *prima facia* adequacy is established, the burden shifts to the opposing party to provide some basis for disqualification. Appellant contends Plaintiffs must establish the Settlement consideration is "what would be desired by other members of the class." The Trial Court did not abuse its discretion in determining that Class members would desire the Settlement consideration—that is, additional shares that

offset some dilution suffered from a Conversion that could have been approved without consideration under a new, more permissive statutory voting standard.

Appellant points to objector submissions as purportedly conclusive evidence that the Class did not support the Settlement but would have the Court ignore that millions of stockholders did ***not*** object. Appellant effectively argues for a rule prohibiting settlement class certification if some small minority of class members—here, about 0.1%—disagree with the litigation strategy of representative plaintiffs. This is not, and should not be, the law.

This Appeal rests on little more than Appellant's resolute denial of AMC's precarious financial position and studious ignorance of developments in the law directly applicable to the Class's claims. Plaintiffs recovered millions of shares for the Class where no other stockholder identified, much less advanced, a superior theory of recovery. Appellant advances no basis to conclude that the Trial Court abused its discretion in finding the Settlement fair, reasonable, and adequate.

SUMMARY OF ARGUMENT

1. **Denied**. The Trial Court committed no error in approving the Release, which did not "aris[e] out of tangential facts and future events."

The Release was cabined to claims that: (i) are connected to or based upon allegations in Plaintiffs' complaints; and (ii) relate to Common Stock ownership from August 3, 2022 through the Conversion (the "Class Period"). This is an appropriate scope supported by ample precedent. Examples of hypothetical claims posited by Appellant either fall outside the scope of the Release or concern the factual predicate of Plaintiffs' complaints and, thus, are properly released. Likewise, the Release only extends to a limited universe of claims derived from core facts in existence as of the Settlement's effective date.

2. **Denied**. The Trial Court did not abuse its discretion in certifying the Class without opt-outs rights.

Plaintiffs' claims for breach of fiduciary duty arising from subversion of stockholder voting rights were equitable in nature. The Class was therefore properly certified under Court of Chancery Rules 23(b)(1) and (b)(2). Classes certified under these provisions do not carry mandatory opt-out rights, regardless of whether the equitable relief afforded can be quantified monetarily.

Although Delaware courts can grant discretionary opt-out rights, the Trial Court did not abuse its discretion in declining to do so here. Neither Appellant nor

any other stockholder has identified any cognizable damages claim, much less one that should stand in the way of valuable equitable relief for the entire Class. The Company would not agree to an unworkable framework calling for distribution of Settlement shares to some, but not all, beneficial owners of Common Stock, and the Trial Court did not abuse its discretion in approving classwide equitable relief. The Settlement stands in stark contrast to circumstances where a discretionary opt-out is appropriate.[4]

3. **Denied**. The Trial Court did not abuse its discretion in determining that Plaintiffs were adequate Class representatives.

Plaintiffs' interests aligned entirely with those of the Class. Having retained competent counsel and displayed familiarity with the facts and issues relevant to the litigation, Plaintiffs met their *prima facie* burden of adequacy. Appellant identified no antagonism between Plaintiffs and the Class or any other basis for this Court to conclude that the Trial Court abused its discretion in finding Plaintiffs adequate class representatives. Certain objectors' disagreement with Plaintiffs' strategy does give rise to a due process violation.

[4] *See, e.g.*, *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 436 (Del. 2012) (allowing a 24.5% stockholder to opt out of a settlement to pursue post-closing damages where parties negotiated equitable, therapeutic modifications to merger transaction terms).

FACTUAL AND PROCEDURAL BACKGROUND

A. With Limited Options to Raise Cash, AMC Creates the APEs

When the COVID-19 pandemic shut down theaters, AMC—the world's largest cinema chain—avoided bankruptcy only because retail investors (calling themselves "Apes") banded together to bid up AMC shares and squeeze short sellers.[5] The Company capitalized on this price increase by selling its remaining authorized shares, grossing nearly $1.9 billion but exhausting its authorized Common Stock reserves.[6]

In January and June 2021, AMC's board of directors (the "Board") proposed amendments to AMC's Certificate of Incorporation (the "Certificate") to increase the number of authorized shares of Common Stock.[7] But when the proposals looked unlikely to pass—due in large part to the expected poor turnout of AMC's stockholder base, comprising 85% retail investors—the Board withdrew them.[8]

AMC's debt and liquidity concerns mounted but it remained unable to raise capital.[9] In November 2021, the Company's banker, Citigroup, began work on

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[5] A296.

[6] A297.

[7] Op. at 8-9.

[8] Op. at 8-10.

[9] A299 (citing documents reflecting that AMC needed "$800M incremental cash to service debt after balance sheet restructuring" and reflecting the "Pathway to

"Project Popcorn," a prospective issuance of an alternative form of equity convertible into Common Stock.[10] By March 2022, AMC looped in its proxy solicitor, D.F. King, as well as its transfer agent, Computershare.[11] The Board ultimately resolved to issue APEs, each representing an interest in 1/100th of a share of AMC Series A Convertible Participating Preferred Stock.[12] AMC would issue a "special dividend" of one APE for each outstanding Common Stock share.[13]

CEO Adam Aron hyped APEs in an August 2022 "tweetstorm." But nowhere in that "tweetstorm," the press release, the "APE FAQ," or any other public statement did the Board disclose that the applicable deposit agreement required Computershare to vote uninstructed APEs proportionally with instructed APEs ("mirrored voting"), effectively giving APEs voting power superior to the common shares.[14] Instead, AMC disclosed that APEs had the same voting power as Common Stock.[15] AMC structured APE voting rights this way to bypass the requirements of 8 *Del. C.* § 242(b) ("Section 242(b)") and push through a share increase.

Recovery" was to "Raise additional capital (preferred share structure)" allowing to "Repay debt" and "Refinance/restructure debt").

[10] A299.

[11] A300.

[12] Op. at 11-12.

[13] Op. at 12.

[14] A303; Op. at 13.

[15] Op. at 13.

On September 26, 2022, AMC disclosed it would be selling up to 425,000,000 APEs in at-the market ("ATM") offerings.[16] This ATM program was discontinued when the price of APEs dropped below one dollar.[17]

B. Aron and the Board Effect the Antara Transaction to Force through the Certificate Amendments

At a December 21, 2022 meeting, the Board approved amendments to AMC's Certificate that would: (i) increase the authorized number of shares of Common Stock to a number sufficient to convert all APEs into Common Stock; and (ii) effect a 1-for-10 reverse stock split of AMC equity (the "Reverse Split," and together with the Conversion, the "Proposals").[18] Upon approval, the Proposals would unlock hundreds of millions of treasury shares, allowing AMC to raise cash to fund its operations—albeit at the expense of stockholder dilution. The stockholder vote on the Proposals was scheduled for March 14, 2023.[19]

At the same meeting, "Aron updated the board on a proposed financing transaction with [hedge fund] Antara Capital [("Antara")], which had been introduced to AMC by Citi."[20] Through this financing (the "Antara Transaction")

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[16] A304.

[17] Op. at 15; A305.

[18] Op. at 15-16.

[19] Op. at 18.

[20] A306.

and certain ATM purchases, Antara acquired hundreds of millions of APEs, which it agreed to vote for the Proposals.[21] This arrangement, combined with the deposit agreement's mirrored-voting provision, rendered approval a *fait accompli*.[22]

C. The Books and Records Inspections, the Commencement of Litigation, the *Status Quo* Order, and the Special Meeting

After the Proposals were announced, AMC stockholders Usbaldo Munoz, a former plaintiff, and Franchi served books and records inspection demands pursuant to 8 *Del. C.* § 220.[23] The Company produced Board materials concerning APEs, the Antara Transaction, and the Proposals.

On February 20, 2023, Munoz and Franchi filed a complaint challenging the Board's actions.[24] Allegheny filed its own complaint the same day.[25] In both complaints, Plaintiffs asserted claims that the Board, without any compelling justification, had acted with the primary purpose of frustrating the franchise of stockholders, who had twice rejected proposals to increase the number of shares of authorized Common Stock—a result that would follow from the recapitalization.[26]

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[21] Op. at 16-17.

[22] Op. at 16-17.

[23] Op. at 19.

[24] *Munoz et al. v. Adam M. Aron, et al.*, C.A. No. 2023-0216-MTZ (Del. Ch.).

[25] *Allegheny Cty. Emps.' Ret. Sys. v. AMC Entm't Holdings, Inc., et al.*, C.A. No. 2023-0215-MTZ (Del. Ch.).

[26] *See Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

Plaintiffs sought equitable relief to protect stockholders' voting rights. Allegheny also sued for violation of Section 242(b), arguing that only common stockholders had voting rights at the time that AMC created and issued the APEs and, thus, a separate vote of the common stockholders was required to authorize the APEs.

On February 27, 2023, the Court entered a *status quo* order allowing AMC to hold the special meeting but prohibiting AMC from amending the Certificate pending a ruling on Plaintiffs' to-be-filed preliminary injunction motion (the "*Status Quo* Order"), which was set for hearing on April 27, 2023.[27] On March 14, 2023, the Proposals passed at the special meeting.[28] Without the mirrored voting and the Antara Transaction, the Proposals would not have passed—a fact acknowledged by AMC internally.[29]

D. Plaintiffs' Litigation Efforts, Arm's-Length Negotiations, a Mediation Administered by Former Vice Chancellor Slights, and the Settlement

On March 2, 2023, the two actions were consolidated and a scheduling order providing for expedited discovery and briefing was entered.[30] Defendants produced, and Plaintiffs reviewed, over 56,000 pages of documents.[31] Plaintiffs also served

[27] Op. at 21.

[28] *Id.*

[29] *Id.*

[30] A311.

[31] *Id.*

subpoenas on Citigroup, D.F. King, Antara, and Broadridge (a proxy voting tabulator).[32] These third parties produced 2,500 pages of documents by the time the term sheet was signed.[33] Plaintiffs produced over 3,700 pages of documents.[34] Plaintiffs were preparing to take six and defend three depositions, in an eight-day span, with a fact discovery deadline of April 6.[35] All the while, Plaintiffs worked with experts from Loop Capital (a financial consulting expert) and Okapi Partners (a proxy solicitor), whom they expected to provide reports and testimony.[36]

As Plaintiffs reviewed document discovery and prepared to take depositions, they unearthed facts that might preclude victory on a preliminary injunction motion.[37] While discovery revealed substantial evidence that the Board engineered the recapitalization primarily to impact the expected vote of stockholders, Plaintiffs also reviewed financial materials that supported a compelling justification for the Board's actions, namely: without further equity raises, AMC might lack the capital necessary to continue operations. Plaintiffs thus confronted two opposing risks. On the one hand, if the Board successfully demonstrated a compelling justification,

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[32] *Id.*

[33] A311-12.

[34] A312.

[35] *Id.*

[36] *Id.*

[37] A318, A322.

Class members would recover nothing. On the other, if Plaintiffs secured an injunction and AMC could not raise additional capital through equity issuances, stockholders might see their positions zeroed out in bankruptcy.

Had there been a preliminary injunction hearing, AMC would have focused on its existential need to immediately raise capital.[38] AMC's documents showed that, without equity raises, AMC might run out of liquidity by late 2023.[39] And while Plaintiffs could have pointed to a few documents challenging the existence of an exigency when the Board weaponized the APEs and agreed to the Antara Transaction, other documents—including 2023 projections—confirmed that,

[38] A322. Appellant's rosy depiction of AMC's financial condition relies on a cherry-picked line from a single nonpublic document and ignores a wealth of contrary data. Br. at 13-14 (observing that, "[b]y February 2023, AMC already anticipated a quarter-end cash balance of $428.6 million—almost double the December prediction"). AMC's actual first quarter 2023 results showed that the Company remained roughly $237.3 million "cash-flow negative" for the quarter, with only $496 million in cash plus $208 million undrawn in its revolver, even after substantial APE sales. B0007. Appellant also ignores that a major contributor to AMC's cash position was its $80.3 million in APE sales during the first quarter of 2023 (with a total of $309.1 million raised since the September 2022 inception of the ATM) and that, as of the end of the first quarter 2023, there were no additional APE units available to be issued under the program – meaning the artificial boost in AMC's cash position would soon end, absent passage of the Proposals. *Id.* at 3.

[39] A323 (citing 10/12/22 Aron text message explaining that AMC needed to raise cash because "Disney shifted a $350 million movie from 2023 to 2024"; "Current industry box office forecast for next year is now more like $9.5 billion — not the $[1]0.5 billion people hoped"; AMC needed to refinance its European debt which likely cost between "$50-$100 million of cash"; and "[s]urging interest rates could increase our interest expense by $40-$60 million next year").

without equity raises, AMC would likely find itself in bankruptcy.[40] Consequently, enjoining the Proposals or invalidating the APEs likely would not have been in the Class's best interests, as a permanent injunction cutting off AMC's ability to conduct equity raises might wipe out the Class's entire equity investment.[41] Indeed, the Court held in its MO, "[t]he *Blasius* claim may very well have been defeated on the merits by the defendants showing their actions were reasonable in relation to the legitimate objective of raising essential capital. Or, if an injunction would have put AMC into bankruptcy, the equities might have foreclosed injunctive relief."[42]

At the same time, Plaintiffs recognized the uphill battle they faced with Allegheny's novel Section 242(b) claim, which hinged on whether the APE issuance adversely affected the "powers, preferences or special rights" of Common Stock by

[40] A322-23. The discovery record indicated that, without APE sales, AMC would have been out of cash in the second quarter of 2023 and, even with $480 million in APE proceeds, likely only had another couple quarters of cash runway. A385. As a supposed alternative to an equity raise, Appellant points to a single intra-Antara email speculating that AMC could borrow more. Appellant adduces no evidence that Antara's conjecture was feasible. Antara relied on a supposition that the Company could simply "amend" agreements with debtholders, without explaining how. A386. Taking on more debt—currently at least $5 billion—where AMC's market capitalization at the time was approximately $4 billion, was never a viable liquidity management plan. A387.

[41] A374.

[42] MO at 87.

relegating the common stockholders to a minority of the Company's voting power.[43] Longstanding interpretations of Section 242(b)(2), including in *Hartford Accident & Indemnity Co. v. W. S. Dickey Clay Manufacturing Co.*[44] and *Orban v. Field*,[45] support that the creation of a new class of stock that merely harms the "relative position" of a preexisting class of stock does not trigger a class vote.

During expedited litigation, the parties retained former Vice Chancellor Joseph R. Slights III as a mediator.[46] They proceeded with a formal mediation session on March 28 and extensive follow-up negotiations over the following days.[47] The parties executed a settlement term sheet on April 2 and filed a Stipulation of Settlement on April 27.[48]

Under the terms of the Settlement, AMC agreed to distribute almost seven million shares of Common Stock to existing common stockholders, at a ratio of one share of Common Stock for every 7.5 shares of Common Stock held, after the

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[43] AMC's Certificate contains a specific exemption from Section 242(b)(2)'s baseline requirement of separate class votes to approve any increase in the number of authorized shares of Common Stock. As such, AMC did not need to solicit a separate vote of the Common Stock. B0068.

[44] 24 A.2d 315 (Del. 1942).

[45] 1997 WL 153831 (Del. Ch. Apr. 1, 1997).

[46] A313.

[47] *Id.*

[48] *Id.*

Reverse Split but before the Conversion.[49] In exchange, common stockholders would release all claims asserted in or relating to the allegations in the complaints that "relate to the ownership of Common Stock and/or [APEs] during the Class Period."[50]

On April 3, Plaintiffs moved to lift the *Status Quo* Order, but the Court denied that motion on April 5.[51] After giving the parties guidance on the type and form of notice, the Court issued a Scheduling Order for the proposed Settlement on May 1.[52]

E. The Objections, Settlement Hearing, Conversion, and Appeal

Due to AMC's unique stockholder base, including millions of retail investors, announcement of the Settlement opened the courthouse doors to an unprecedented number of objections driven by online discussion boards and content producers. Most of the substantive objections followed wide-ranging templates covering grievances with markets generally, complaints with AMC management specifically, and certain conspiracy theories. Other comparatively targeted objections took issue with the form and manner of Class notice or nonrecovery for the fall in the price of Common Stock since the introduction of APE units.

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[49] A316.

[50] A209; A410.

[51] A313; B0075-B0080.

[52] A313.

In response to the unprecedented retail stockholder engagement, the Court appointed Corinne Elise Amato, Esq. as Special Master to review and make recommendations on stockholder objections, motions to intervene, and related materials.[53] On June 21, the Special Master filed her report and recommendations (the "R&R"), which considered more than 3,500 communications from approximately 2,850 stockholders.[54] The 87-page R&R concluded: "I do not believe that any Objections to the consideration exchanged in the Settlement have merit."[55]

The Settlement Hearing was held under heavy public scrutiny on June 29 and 30.[56] The Court's initial Opinion, entered July 21, rejected the Settlement due to a specific clause in the Release.[57] The original Release covered both claims associated with Common Stock and "claims associated with preferred interests [*i.e.*, APE units] that common stockholders might also hold."[58] The Court ruled that "[t]he plaintiffs, as common stockholders representing common stockholder class members, cannot

[53] Op. at 25-26.

[54] Op. at 29-30.

[55] R&R at 5.

[56] Jennifer Kay, Mike Leonard, *AMC, Pension Fund Defend APE Deal Opposed by Meme Stock Base*, BLOOMBERG (June 29, 2023), https://news.bloomberglaw.com/us-law-week/amc-investors-urge-judge-to-approve-fiercely-contested-ape-deal.

[57] Op. at 34-60.

[58] Op. at 4.

release direct claims appurtenant to the preferred units. This is so even if some common stockholder class members happen to also hold preferred units."[59]

The parties filed an amended Release the next day, excising the clause releasing APE claims.[60] On August 11, the Court issued its MO approving the Settlement and lifted the *Status Quo* Order.

The Reverse Split became effective on August 24, with the Conversion occurring the next day.[61] On or about August 28, AMC issued 6,897,018 shares of Common Stock to Class members as required by the Settlement.[62]

Appellant filed her Notice of Appeal on October 13, 2023.[63]

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[59] Op. at 5.

[60] MO at 3-4.

[61] B0085.

[62] *Id.* at 3.

[63] B0093-B0391. On Appeal, Appellant attempts to make hay of the "Barbenheimer" craze and Taylor Swift concert film that unexpectedly drove up box office receipts. Br. at 25. Appellant's reliance on these phenomena, which are irrelevant to the propriety of the Settlement at the time it was entered, ignores that AMC had—as of December 11—raised $865 million of gross equity capital in 2023. By point of comparison, the Company reported cash and cash equivalents of $729.7 million as of September 30, 2023. In other words, AMC ***still*** bled cash during this period while selling almost a billion dollars' worth of equity. Any attempt to reframe the analysis as one of "optimists" and "pessimists" ignores the difference between "solvency" and "insolvency" that kept the Class from losing everything in bankruptcy.

ARGUMENT

I. OBJECTOR'S CRITICISM OF THE RELEASE IS GROUNDLESS.

A. Question Presented

Whether the Court of Chancery erred in approving the Release.

B. Scope of Review

This Court reviews *de novo* the application of legal precepts to relevant facts in evaluating the propriety of a settlement release.[64]

C. Argument Merits

"In general, Delaware law favors settlement of litigation."[65] A release necessarily accompanies any settlement. Indeed, this Court has observed: "In any settlement of litigation, including class actions, a release of claims is an essential, bargained-for element."[66] Although "the scope of a release of claims cannot be limitless," "a settlement can release claims that were not specifically asserted in the settled action [if] those claims are 'based on the same identical factual predicate or the same set of operative facts as the underlying action.'"[67]

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[64] *In re Philadelphia Stock Ex., Inc.*, 945 A.2d 1123, 1145 & n.46 (Del. 2008) ("*PHLX*").

[65] *Griffith v. Stein*, 283 A.3d 1124, 1133 (Del. 2022) (collecting cases).

[66] *PHLX*, 945 A.2d at 1145.

[67] *Id*. at 1144-46 (quoting *UniSuper, Ltd. v. News Corp.*, 898 A.2d 344, 347 (Del. Ch. 2006)).

The Release, which accords with recent precedent involving alleged breaches of fiduciary duty,[68] provides:

> "Released Plaintiffs' Claims" means any and all actions, causes of action, suits, liabilities, claims, rights of action, debts, sums of money, covenants, contracts, controversies, agreements, promises, damages, contributions, indemnities, and demands of every nature and description, whether or not currently asserted, whether known claims or Unknown Claims, suspected, existing, or discoverable, whether arising under federal, state, common, or foreign law, and whether based on contract, tort, statute, law, equity, or otherwise (including, but not limited to, federal and state securities laws), that Plaintiffs or any other Settlement Class Member: (i) asserted in the *Allegheny* Complaint or the *Munoz* Complaint; or (ii) ever had, now have, or hereafter can, shall, or may have, directly, representatively, derivatively, or in any other capacity that, in full or part, concern, relate to, arise out of, or are in any way ***connected to or based upon the allegations, transactions, facts, matters, occurrences, representations, or omissions involved, set forth, or referred to in the Complaints and that relate to the ownership of Common Stock during the Class Period***, except claims with regard to enforcement of the Settlement and this Stipulation.[69]
>
> The Trial Court properly determined that the Release "comports with Delaware law: it is supported by consideration, does not release tangential claims, and only releases claims based on the identical factual predicate asserted in the complaints."[70]

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[68] *See, e.g.*, B0392-B0499 (*Multiplan* stipulation) (releasing claims (i) asserted in the Complaint or (ii) that relate to the facts and allegations at issue in the Complaint and relate to ownership of the subject securities); B0500-B0613 (*Straight Path* stipulation) (same); B0614-B0709 (*Pivotal* stipulation) (same); B0710-B0761 (*Hawkes* stipulation) (same).

[69] A208-09 (emphasis added).

[70] MO at 49 (emphasis added).

Appellant mistakenly argues that the Release extends to "claims based on tangential facts."[71] Appellant also claims that the Release extends to future events.[72] The Trial Court correctly rejected both arguments:

> … Izzo argued the Release improperly releases tangential and future claims, while the parties assert the scope of the release is "appropriate" and "typical." Izzo argues the Release encompasses claims "that could arise based on a future event," citing the language in the Release that it applies to any claim settlement class members "ever had, now have, or hereafter can, shall, or may have." This reading misinterprets the Release. ***The language Izzo cites is subject to two conjunctive limitations***: (i) the claim must be "connected to or based upon the allegations, transactions, facts, matters, occurrences, representations, or omissions involved, set forth, or referred to in the Complaints;" and (ii) the claim must "relate to the ownership of" AMC equity "during the Class Period." ***These two limitations make clear the Release does not apply to future events***.[73]

Conspicuously, Appellant failed to confront this reasoning in her Brief, instead largely rehashing her arguments below. As recognized by the Trial Court and further detailed below, the Release is proper.

1. The Release does not apply to "tangential" claims

Appellant first complains that the Release inappropriately releases claims arising out of "tangential facts." Not so. Indeed, Appellant's own proffered examples only undermine her argument.

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[71] Br. at 21.

[72] *Id*.

[73] MO at 58, n. 186 (emphasis added and record citations omitted).

Facts are not tangential if they were "fact[s] upon which [the] claims for relief were predicated."[74] Such facts do not even need to form the basis for the specific relief requested; they must only provide "the 'but for' factual foundation of the conduct that does form the subject of the claims for relief."[75] Under this standard and taking into account the actual language of the Release, Appellant's examples either would not be released or would be released appropriately.[76]

First, Appellant concocts derivative claims concerning AMC's investment in Hycroft. But, as Appellant recognizes, that investment occurred ***prior to*** the Class Period, and the Release only covers claims "relat[ing] to the ownership of Common Stock ***during the Class Period***."[77] Appellant cannot salvage this example by transmuting a standing requirement for derivative actions into a substantive bar of ***all*** claims over the duration of the Class Period. That is not what the Release says (or is intended to do). The Release simply does not cover these theoretical claims.

Second, Appellant complains that the Release would encompass "[a]ny derivative challenge to AMC's decisions to grant awards under or amend the

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[74] *PHLX*, 945 A.2d at 1148.

[75] *Id*.

[76] Notably, "preclusive effect ... is not an issue for this Court or the Court of Chancery to decide." *Id*. at 1147.

[77] Br. at 22.

Company's long-term incentive plan."[78] Not so. The specific allegations in the Complaint concern "adjustments that would need to be made to equity awards under the Company's long-term incentive plan to account for the APEs."[79] That fact plainly is not "tangential"—it is directly tied to the creation of the APEs. And, as explained in more detail below, the Release does not cover award grants or amendments to the long-term incentive plan ***after*** the effectuation of the Settlement.

Third, Appellant complains that the Release covers claims concerning August 8, 2023 statements by Adam Aron about the Company's positioning for "sustained long term success" despite "liquidity hurdles."[80] While it is not clear what the basis for that claim would be, "liquidity hurdles" were the "'but for' factual foundation" for creation of the APEs.[81] Accordingly, it is proper under established law for the Release to cover such posited claims.

2. The Release does not apply to "future" claims

Appellant also claims the Release covers "claims based on a set of operative facts that will occur in the future."[82] Appellant's contentions on this score have narrowed from what she argued below and now focus exclusively on the period

[78] Br. at 23.

[79] A170.

[80] Br. at 23.

[81] *PHLX*, 945 A.2d at 1148.

[82] Br. at 24.

between the conclusion of the Settlement Hearing (June 30, 2023) and the effectuation of the Reverse Split (August 23, 2023).[83] Even considering this shorter window, Appellant still misreads the Release and argues contrary to Delaware authority and long-acknowledged public policy.

As Appellant implicitly concedes, the Release does not release claims based on a future nucleus of fact that arises ***after*** effectuation of the Reverse Split (due to the "two conjunctive limitations"[84] noted by the Trial Court). Thus, this construct accords with Delaware law[85] and settlements routinely approved by the Court of Chancery.[86] Appellant's purported authority to the contrary is inapposite. In *Griffith*, the impermissible release covered claims related to a ***future*** vote on an incentive plan that would occur ***eight months after effectuation of the settlement***.[87]

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[83] Br. at 24-26.

[84] MO at 58, n. 186.

[85] *See PHLX*, 945 A.2d at 1146 (quoting *UniSuper*, 898 A.2d at 347) ("[A] release is overly broad if it releases claims based on a set of operative facts that will occur in the future. If the facts have not yet occurred, then they cannot possibly be the basis for the underlying action.")).

[86] *See, e.g.*, B0392-B0499 (*Multiplan* stipulation) ("hereafter can, shall, or may have…."); B0500-B0613 (*Straight Path* stipulation) ("in the future could, can, or might be asserted"); B0762-B0806 (*Capital Bank* stipulation) ("may hereafter exist"); *see also New Enters. Assoc. 14, L.P. v. Rich*, 295 A.3d 520, 535 n.8 (Del. Ch. 2023) ("A release can extinguish claims based on past conduct that a party might learn of or assert in the future, but it cannot cover claims based on future conduct") (citing *Christiana Care Health Servs. v. Davis*, 127 A.3d 391, 395 (Del. 2015)).

[87] 283 A.3d at 1135.

Similarly, the release rejected in *UniSuper* covered a rights plan to be voted on ***five months after the settlement***.[88]

Appellant, therefore, falls back on challenging the release of claims during the interim period between the Settlement Hearing and the effectuation of the transactions contemplated by the Settlement. Appellant cites ***zero authority*** in support of this argument, which, practically speaking, would be unworkable. Under Appellant's construct, either trial courts would have to approve settlements on the day of settlement hearings—inappropriately straining judicial resources—or there would be odd, temporal gaps in releases that could very well preclude pre-closing settlements. Given that "a settlement release is an essential, bargained-for element" that is "intended to accord defendants 'global peace,'"[89] defendants would likely never agree to a pre-closing settlement under Appellant's proffered framework—in clear contravention of Delaware's strong interest in settlements.[90]

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[88] 898 A.2d at 348.

[89] *Griffith*, 283 A.3d at 1134.

[90] *See id.* at 1133 (citations and internal quotation marks omitted) ("Settlements are encouraged because they voluntarily resolve disputed matters. They also promote judicial economy because litigants are generally in the best position to evaluate the strengths and weaknesses of their case.").

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING A NON-OPT-OUT SETTLEMENT CLASS.

A. Question Presented

Whether the Trial Court abused its discretion in certifying a non-opt-out class.

B. Scope of Review

"For th[e Supreme] Court to set aside a settlement which has been found by the Court of Chancery to be fair and reasonable, the evidence in the record must be so strongly to the contrary that the approval of the settlement constituted an abuse of discretion."[91]

In weighing settlement approval, the Court of Chancery "looks to the facts and circumstances upon which the claim is based, [looks to] the possible defenses thereto, and then exercises a form of business judgment to determine the overall reasonableness of the settlement."[92] In its fiduciary role, the Court "determine[s] whether the settlement falls within a range of results that a reasonable party in the position of the plaintiff, not under any compulsion to settle and with the benefit of the information then available, reasonably could accept."[93] Accordingly, the evidence that a settlement is outside the range of reasonable results must be so strong

[91] *Kahn v. Sullivan*, 594 A.2d 48, 59 (Del. 1991) (citations omitted).

[92] *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986).

[93] *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1064 (Del. Ch. 2015) (citation omitted).

that approval of the settlement would be an abuse of discretion.[94] Whether to afford class members the ability to opt out is likewise committed to the discretion of the Court of Chancery.[95]

C. Argument Merits

The Trial Court did not abuse its discretion in approving a Settlement that guaranteed Class members recovery of a meaningful portion of the Company's equity without a logistically unworkable opt-out "right."

Appellant complains that the Settlement denied her due process because she could not opt out to press a claim for damages. Appellant does not, however, challenge the Trial Court's (correct) decision to certify the Class under Rules 23(b)(1) and (b)(2). Nor does she contest that due process only "mandates a right to opt out of a Rule 23(b)(2) class" where a class's claims are "wholly or predominantly for money judgments."[96] The claims here were equitable—hence the motion for a preliminary injunction—challenging the Board's subversion of Class voting rights; as was the relief, which involved the issuance of stock. While Appellant offers much rhetoric describing an opt-out to "preserve[] valuable rights," she offers no substance

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[94] *Kahn*, 594 A.2d at 59.

[95] *Nottingham Partners v. Dana*, 564 A.2d 1089, 1098 (Del. 1989) ("Certification of a class pursuant to Rule 23(b)(2) makes the giving of notice and the opportunity to opt out discretionary.").

[96] *Id.* at 1098-99 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.10 (1985)).

concerning what those rights might be.[97] This is because no viable claim for damages lies against the released parties.

The Special Master recognized this, stating "[t]he equitable nature of the underlying claims and the form of relief—issuance of the Settlement Shares—[did] not lend itself to an opt-out process," and no objector "cited any controlling law or provided any persuasive reason to permit opt outs from the Settlement."[98] The Special Master methodically surveyed claims that were not pleaded by Plaintiffs and observed that objectors failed to identify viable avenues of relief sounding in purported violation of stock exchange rules, fraud, and conspiracy.[99] With specific regard to Appellant's additional "claims" asserted below, the Special Master: (i) concluded that any argument that Section 242(b) entitled class members to a separate vote on the issuance of APEs "had little merit";[100] (ii) observed that Appellant "did not explain the basis for … theoretical remedies" including "disgorgement of Defendants' AMC equity, bluepenciling the Computershare deposit agreement, enjoining Antara from voting, or compelling AMC to issue additional shares to unwind the APE issuance"; [101] and (iii) determined that

[97] Br. at 34 *et seq.*

[98] R&R at 71-72.

[99] *Id.* at 62-64.

[100] *Id.* at 70 n.227.

[101] *Id.* at 61-62 n.188.

Appellant's inflated "damages" figure double-counted for APEs received by Class members in the initial "dividend" of APEs to holders of Common Stock.[102]

The Trial Court correctly agreed with the Special Master's conclusion that this Action and the Settlement were equitable in nature and that "an opt-out right is not feasible".[103] As the Trial Court explained, "the claims and the relief sought are class-wide," and "[i]f Plaintiffs had prevailed and the Court granted injunctive relief, the entire class would have benefitted from that relief."[104] Equitable claims and relief predominate the Rule 23 analysis, as lifting the *Status Quo* Order to allow the Reverse Split and Conversion to proceed was a central part of the Settlement.

In all her filings, Appellant has yet to identify any actionable damages claim or detail how such a claim would be successfully litigated—indeed, Appellant does not even state that she would bring such a claim if allowed to opt out. Appellant complains of the decrease in stock price following the Conversion, but Plaintiffs are unaware of any Delaware precedent that would support a claim for market capitalization losses.[105] Certainly, no such outcome has ever come from a *Blasius* or Section 242(b) claim. Appellant also suggests that there were damages at the time

[102] *Id.* at 37-39.

[103] MO at 26.

[104] *Id.*

[105] Br. at 32.

of the Conversion, but—as there was then effective price parity between Common Stock and APEs—it is unclear what such damages would be. To the extent Appellant believes there are claims against Antara, Antara is not a party to the Release. There are no viable unjust enrichment claims against the Board, as its members faced the same economic dilution from the Conversion and Reverse Split as Class members, as confirmed by the beneficial ownership figures in the amended 10-K that AMC filed with the SEC on April 28, 2023.

At its core, Appellant's argument that the Trial Court abused its discretion by refusing to allow opt-outs is the same argument this Court rejected in *PHLX*, where, like here, the underlying claims and relief were primarily equitable.[106] After explaining that it was, as a general rule, not an abuse of discretion to deny an opt-out under Rule 23(b)(2) where an action is primarily equitable, the Court held that the Court of Chancery did not "abuse[] [its] discretion by not granting an opt-out right under Rule 23(b)(2)" because "any settlement of this litigation would have to afford the defendants 'complete peace'" and "[g]ranting an opt-out right would leave the Objectors, who appear to hold over 40% of the Exchange's Class A shares, free to assert, against the defendants, the identical claims being settled in a different

[106] *PHLX*, 945 A.2d at 1137 ("the primary relief sought in the initial and amended complaints was equitable").

forum."[107] As the Court explained, "[t]hat almost certain outcome would utterly defeat the purpose of the settlement, and was a risk that the defendants were not willing to take."[108] The Court further explained that the Court of Chancery then properly approved a non-opt-out settlement "[g]iven the economic benefits afforded by the settlement in relation to the perceived minimal value of the claims being surrendered."[109]

This logic applies to the Settlement here—with even greater force, as the *PHLX* objectors represented almost 40% of the outstanding class shares, while the timely submissions here represent a fraction of a percent of AMC's total shares. Absent global peace that allowed the Conversion and Reverse Split, AMC would not have settled. While Appellant may disagree, Plaintiffs were justified in concluding that foregoing a Settlement that benefitted the entire Class so that certain objectors could pursue non-viable damages claims would be irrational.

While Plaintiffs' claims were not of "minimal value," they faced very significant risks, and the Settlement shares were a substantial "get" in exchange for the "give." The Trial Court noted the Section 242(b)(2) claim "would not have

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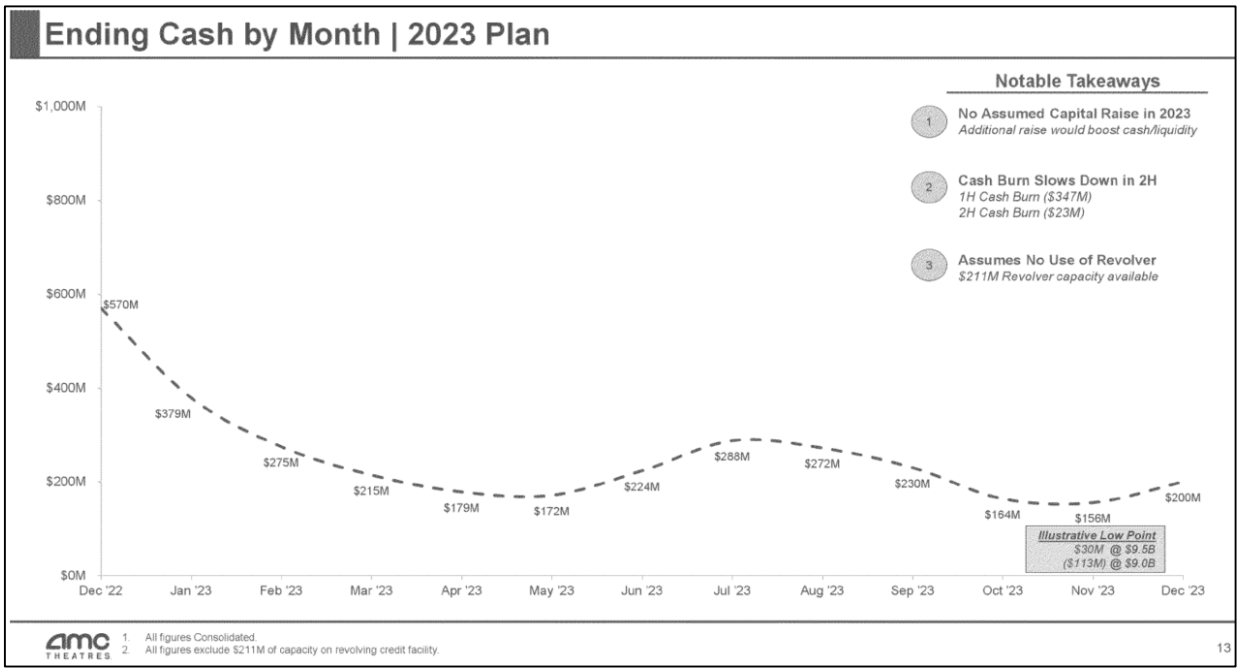
[107] *Id.*

[108] *Id.*

[109] *Id.*

succeeded under current Delaware law."[110] Plaintiffs' fiduciary breach claim also faced serious risk at the time of Settlement, as the Trial Court also recognized.[111] For instance, Defendants might have shown a "compelling justification" for their actions under *Blasius* in light of AMC's financial situation.[112] Per AMC's internal "2023 Plan" created in mid-December 2022, AMC would have had just $179 million by April 2023 with no additional cash infusions:[113]



Between the execution of the Stipulation and the Settlement Hearing, changes in the law further weakened this claim. The first was an opinion of this Court

[110] MO at 51.

[111] *Id.* at 73-78.

[112] *Id.* at 73-78.

[113] B0823.

concerning board actions that interfere with the stockholder franchise.[114] Absent the Settlement, Defendants may have argued that, under *Coster IV*, their actions were subject to a comparatively permissive standard of scrutiny.[115]

The second change was a revision to the DGCL that would have enabled the Board to potentially sidestep any voting rights claim.[116] The previous share increase proposals had garnered the support of a majority of "votes cast" but did not carry because unvoted "broker non-votes" had the effect of votes against the proposals under the prior statutory "majority of outstanding shares" standard. Were the Settlement not approved, however, Defendants could have attempted to simply resubmit their proposed recapitalization under the new, less stringent, "votes cast" standard and effectuate the recapitalization without any consideration for the Class.

Rather than address *PHLX*, Appellant relies on *Celera*[117]—an inapposite case.[118] *Celera* involved a proposed settlement of a stockholder's challenge to the adequacy of a cash-out merger. The objection involved the "unique circumstances" of the company's single largest outside investor—eventually holding almost 25% of

[114] *See Coster v. UIP Cos.*, 300 A.3d 656, 672 (Del. 2023) ("*Coster IV*").

[115] *Id*. at 672-673.

[116] 8 *Del. C.* § 242(d)(2).

[117] 59 A.3d at 436.

[118] Plaintiffs cannot locate a single Delaware case since *Celera* that permitted opt-outs from a (b)(1) or (b)(2) class, and Appellant does not cite any.

the company's common stock—buying shares while the case was pending for the purpose of pursuing a damages claim challenging the adequacy of the merger consideration.[119] In addition, the outside investor "prepared independently to prosecute a clearly identified and supportable claim for substantial money damages, and the only claims realistically being settled at the time of the certification hearing nearly a year after the merger were for money damages."[120]

The unique scenario in *Celera* does not exist here. *First*, equitable claims and relief predominate the Rule 23 analysis. *Second*, Appellant has just 0.000006% of the Common Stock of AMC, and while she notes that there was a large number of objectors in the context of a Delaware settlement, only about 2,850 individuals, representing less than a tenth of a percent of AMC's estimated stockholders, made timely submissions. Of those, moreover, only 312 submissions can fairly be interpreted as an opt-out request.[121] This is a far cry from a 25% stockholder. *Third*, unlike in *Celera*, there is no clearly articulated claim for substantial money damages.

Appellant also argues that the Trial Court was wrong on three specific feasibility issues.[122] By trying to isolate each of these issues, however, Appellant

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[119] *Celera*, 59 A.3d at 436.

[120] *Id.*

[121] Other than one short seller, none of the submissions were made by an institution.

[122] *See* Br. at 35-37. For clarity, the three issues all arise in the paragraph that begins with: "More broadly, an opt-out right is not feasible." MO at 32.

ignores the overall context of the Settlement and the Trial Court's overall feasibility analysis. In particular, Appellant ignores the biggest issue, which the Trial Court characterized as "fundamental[]," concerning feasibility: that "the claims and the relief sought are class-wide."[123] Even if it were theoretically feasible to allow an opt-out to pursue a (worthless) damages claim, it was not an abuse of discretion for the Trial Court to decline to allow one to the Rule 23(b)(2) Class.[124] Allowing an opt-out to pursue non-viable damages claims, absent unique circumstances, defeats the efficiency and purpose of the class action mechanism[125] and would have "create[d] a risk of inconsistent judgments, and would [have] ... require[d] 'devotion of scarce judicial resources' to a relatively repetitive exercise."[126]

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The Trial Court rightly recognized that this Action was primarily equitable in nature and an opt-out was not feasible. Appellant identifies no error in its analysis, much less an abuse of discretion.

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[123] MO at 32.

[124] *See PHLX*, 945 A.2d at 1137.

[125] *Nottingham Partners*, 564 A.2d at 1101 ("The ability to opt-out of the class always involves the potential for a multiplicity of lawsuits and variations in adjudication which class actions are intended to prevent.").

[126] *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2022 WL 2236192, at *10 (Del. Ch. June 14, 2022).

III. THE TRIAL COURT CORRECTLY FOUND THAT PLAINTIFFS WERE ADEQUATE REPRESENTATIVES

A. Question Presented

Whether the Trial Court soundly exercised its discretion in determining that Allegheny and Franchi and their counsel fairly and adequately protected the interests of the Class as required by Rule 23(a)(4).

B. Scope of Review

This Court reviews Court of Chancery determinations on Rule 23 class certification, including the adequacy of a class representative, for abuse of discretion.[127] Appellant misconstrues this Court's opinions in *Prezant v. De Angelis*[128] and *Celera*[129] to require *de novo* review of this issue.[130] While due process is reviewed *de novo*,[131] "[t]he adequacy of [] a class representative is a separate issue that remains within the discretion of the Court of Chancery."[132]

The Court will review claims *de novo* to the extent that: (1) objectors contend that the Court of Chancery formulated "incorrect legal precepts or applied those precepts incorrectly"; or (2) class certification implicates due process claims.

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[127] *Celera*, 59 A.3d at 428.

[128] 636 A.2d 915 (Del. 1994).

[129] 59 A.3d at 418.

[130] Br. at 38, 42-45.

[131] *Celera*, 59 A.3d at 428.

[132] *Id*. at 431.

However, "[t]o the extent that the Court of Chancery's decision rests on a finding of fact, [this Court] will not set aside its factual findings 'unless they are clearly wrong and the doing of justice requires their overturn.'"[133]

C. Argument Merits

Appellant argues that Plaintiffs are not adequate Class representatives because their economic interests were supposedly different from those of certain retail stockholders who purchased shares when the stock price was inflated during a short squeeze.[134] Appellant also contends Franchi is not an adequate representative of the Class because he: (1) "is a frequent-filing plaintiff"; (2) did not receive an "APE dividend"; and (3) did not hold shares of AMC Common Stock "at the time of *all* wrongs complained of" in the complaints.[135] The Trial Court appropriately exercised its discretion in rejecting Appellant's arguments.

1. The Trial Court correctly determined that Plaintiffs' interests were not antagonistic to other Class members' interests

The Trial Court relied on well-settled Delaware precedent, including this Court's opinion in *Celera*, in determining that Plaintiffs are adequate Class

[133] *Id*. at 428.

[134] Br. at 43-44.

[135] Br. at 42-43.

representatives.[136] "Delaware courts have articulated a three-part test to establish the adequacy of the class representatives": (1) "the representative[s'] interests must not be 'antagonistic to the class'"; (2) "the plaintiffs must retain 'competent and experienced counsel to act on behalf of the class'"; and (3) "the class representatives must 'possess a basic familiarity with the facts and issues involved in the lawsuit.'"[137] "The class representative need not be 'the best of all representatives, but [rather] one who will pursue a resolution of the controversy in the interests of the class.'"[138] Once *prima facie* evidence of adequacy is established by the settlement's proponent, the burden of disqualifying the class representative shifts to any persons opposing class certification.[139]

The Trial Court correctly determined that Plaintiffs made a *prima facie* showing of their adequacy, which Appellant failed to rebut.[140] Appellant's argument

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[136] MO at 15-25.

[137] *Buttonwood Tree Value P'rs, L.P. v. R. L. Polk & Co.*, 2022 WL 2255258, at *10 (Del. Ch. June 23, 2022) (citation omitted).

[138] *Id*. at *9 (citation omitted).

[139] *Van De Walle v. Unimation, Inc.*, 1983 WL 8949, at *5 (Del. Ch. Dec. 6, 1983). *See also Celera*, 59 A.3d at 428-32.

[140] While Appellant asserts that this burden shift has not been adopted by this Court in the context of an objector, the Court applied it in the context of defendants challenging class certification. *Van De Walle*, 1983 WL 8949, at *5. Appellant's suggestion that adequacy is different where an objector opposes it simply ignores that in both situations plaintiffs must demonstrate their adequacy under Rule 23. Rule 23 does not have special adequacy requirements where there is an objector. In

that the Trial Court erred in "disregarding the economic antagonism between Franchi and Allegheny, on the one hand, and other class members—like Izzo and Munoz—who made their investments during the COVID pandemic" misses the mark.[141] The Trial Court rejected Appellant's challenges to Plaintiffs' motives and qualifications because "Plaintiffs suffered the same type of harm proportionate to their common stock holdings as every other class member" and Appellant did "not demonstrate[] that Plaintiffs' interests are not aligned with the class in remedying that harm."[142] Moreover, "[t]he mere fact that Plaintiffs traded differently than other members of the class does not make their interests in the shares they hold antagonistic to those of their fellow stockholders."[143] Thus, the Trial Court soundly exercised its discretion in finding no antagonism between Plaintiffs and the Class.[144]

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addition, in *Celera*, the Court treated the objector as having the burden after plaintiff demonstrated they were adequate. 59 A.3d at 428-32 (rejecting arguments by objector that plaintiff was not adequate). From a practical standpoint a burden shift of some type must occur, as once a plaintiff demonstrates they are adequate they have met their burden and, unless an objector demonstrates otherwise, a court will find the plaintiff adequate.

[141] Br. at 42.

[142] Br. at 24.

[143] *Id*.

[144] Prior to Munoz's withdrawal, Appellant was all too ready to claim he was not adequate either based on his trading through a margin account. A464. Now, Appellant claims without evidence that Munoz must have opposed the Settlement—notwithstanding counsel's clear explanation to the Trial Court to the contrary—in support of her tortured antagonism argument. Br. at 44. The only conclusion to draw

The Court's analysis can end there, because Allegheny alone is an adequate Class representative. However, Appellant's additional challenges to Franchi's fitness fare no better.

In finding Franchi was an adequate Class representative, the Trial Court first determined that, under Delaware law, direct claims—like those asserted here—run with the stock, not the holder.[145] In doing so, the Trial Court properly relied upon this Court's decision in *Urdan v. WR Capital Partners, LLC*[146] and the Court of Chancery's prior decision in *In re Activision Blizzard, Inc. Stockholder Litigation*.[147,148] Thus, as the Trial Court determined, Franchi "is a member of the class with standing to bring claims on behalf of the class."[149] Indeed, Franchi's holdings, which did not include any APEs, "in a sense" made him "better suited to represent the claims of the common [stockholders, *i.e.* the Class] because he does not hold competing APE interests," which would have offset a portion of the dilution

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from Appellant's shifting position and unseemly accusations is that Appellant simply believes that anyone who agrees with her is adequate and anyone who does not, is not. Appellant's mere disagreement with Plaintiffs' strategy—which provided a real recovery to Class members—does not impugn Plaintiffs' adequacy.

[145] MO at 21.

[146] 244 A. 3d 668, 677 (Del. 2020).

[147] 124 A.3d at 1049.

[148] MO at 21, n.79.

[149] MO at 21-22.

suffered by Class members.[150] Like this Court in *Celera*, the Trial Court found Appellant's "frequent-filer" argument unpersuasive and declined the "invitation to bar a repeat litigant from serving as a class representative."[151] Accordingly, Appellant has not shown that the Trial Court abused its discretion in determining the Franchi was an adequate Class representative under Rule 23(a).

2. The Trial Court did not err in rejecting Appellant's legal challenges to Plaintiffs' adequacy

Appellant further argues that the Trial Court erred in its interpretation of this Court's opinion in *Prezant*, which she contends renders Plaintiffs inadequate Class representatives as a matter of law simply because a small faction of Class members objected to the Settlement.[152] That is simply not the holding of *Prezant*. Indeed, such a holding would eviscerate the ability to settle or otherwise resolve class actions.

In *Prezant*, the Court of Chancery approved a settlement over the objections of appellants, a group of class members who were plaintiffs in a first-filed action pending in Illinois. The Court of Chancery did not make an explicit determination that the named plaintiff in the second-filed Delaware action, De Angelis, was an adequate class representative. Indeed, the Court of Chancery made findings from

[150] *Id*. at 18.

[151] *Celera*, 59 A.3d at 431.

[152] Br. at 39-40.

which it could be inferred that De Angelis was "an *inadequate* representative." On appeal, this Court reviewed the Court of Chancery's decision *de novo* because "[t]he adequacy of the class representative has a constitutional dimension. The Due Process Clause of the United States Constitution requires 'that the named plaintiff at all times adequately represent the interests of the absent class members.'"[153] This Court held that "[b]ecause adequacy of a class representative is a requirement of Court of Chancery Rule 23 and is constitutionally mandated, a determination to that effect is essential to court approval of a class action settlement." Thus, the Court of Chancery's decision was reversed and the case was remanded for an appropriate determination.

Here, the Trial Court carefully considered arguments concerning Plaintiffs' adequacy and, unlike in *Prezant*, found them adequate.[154] Thus, the Trial Court complied with the requirements of due process. And contrary to Appellant's assertion, the interests of all Class members were represented. Indeed, the Trial Court specifically considered each of the objections, including those asserted by Appellant, who was represented by counsel who lauded herself as the objectors' "voice in [the] courtroom."[155] Objectors were given the ability to access and review

[153] *Prezant*, 636 A.2d at 923 (*citing Phillips Petroleum*, 472 U.S. at 812).

[154] MO at 11-26.

[155] A772.

the discovery record.[156] Plaintiffs' counsel fielded phone calls and emails from objectors and assisted with the submission of objections for consideration. The requirements of due process were satisfied here.

For similar reasons, Appellant's reliance on *Dierks*[157] is misplaced. In *Dierks*, the United States Court of Appeals for the First Circuit applied a "typicality" analysis and found that the suing plaintiffs could not be adequate representatives of the class they purported to represent—namely, all former employees of Amerotron who were "seeking one or the other of two alternative constructions of the [pension] plan."[158] The proposed class necessarily included former employees who sought a form of relief that was diametrically opposite to the relief sought by the suing plaintiffs. As the court explained:

> In the case at bar, while the suing plaintiffs may have been of the opinion that wise management or other factors would cause the fund to grow, others could well have thought that a vested obligation in a fixed amount would be more desirable than to incur investment risks. Under such circumstances the court could not have found that plaintiffs were 'typical' of the former Amerotron employees whom they purported to represent; they were typical of only one of two conflicting groups. Under the Rule, and as a matter of due process, plaintiffs could not represent both groups.[159]

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[156] Br. at 10-11. Objectors willing to agree to the same trading restrictions as Plaintiffs could have also obtained access to the discovery record.

[157] *Dierks v. Thompson*, 414 F.2d 453 (1st Cir. 1969).

[158] *Id*. at 455.

[159] *Id*. at 456.

Notably, despite this finding, the court certified the class because the defendants represented the interests of the class members whose interests were not represented by the suing plaintiffs.

Here, Appellant raised no such "typicality" argument before the Trial Court and, thus, did not preserve it for appeal.[160] Even so, Plaintiffs suffered the same type of harm proportionate to their Common Stock holdings as every other Class member, including the objectors. Thus, unlike in *Dierks*, their interests, including the harm sought to be remedied, were aligned those of the objectors.

[160] *See, e.g.*, *Urdan v. WR Capital Partners, Ltd. Liab. Co.*, 244 A.3d 668, 676 n.18 (Del. 2020) ("The . . . argument was not raised below and is therefore waived.").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the Trial Court's judgment.

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Of Counsel:

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Edward Timlin
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

FIELDS KUPKA & SHUKUROV LLP
William J. Fields
Christopher J. Kupka
Samir Shukurov
141 Tompkins Ave, Suite 404
Pleasantville, NY 10570
(212) 231-1500

SAXENA WHITE P.A.
David Wales
10 Bank St., 8th Floor
White Plains, NY 10606
(914) 437-8551

– and –

Adam Warden
7777 Glades Rd., Suite 300
Boca Raton, FL 33434
(561) 394-3399

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

By: */s/ Gregory V. Varallo*
Gregory V. Varallo (Bar No. 2242)
Daniel E. Meyer (Bar No. 6876)
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3600

GRANT & EISENHOFER P.A.

By: /s/ *Michael J. Barry*
Michael J. Barry (Bar No. 4368)
Kelly L. Tucker (Bar No. 6382)
Jason M. Avellino (Bar No. 5821)
123 Justison Street, 7th Floor
Wilmington, DE 19801
(302) 622-7000

SAXENA WHITE P.A.

By: */s/ Thomas Curry*
Thomas Curry (Bar No. 5877)
824 N. Market St., Suite 1003
Wilmington, DE 19801
(302) 485-0483

Attorneys for Plaintiffs-Appellees