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,	§	No. 33, 2021
Plaintiff-Below, Appellant,	§	Court Below: Court of Chancery of the State of Delaware
v.	§	
RONALD J. SOMMERS, as Chapter 7 Trustee for Nominal Defendant-Below ERIN ENERGY CORPORATION,	§	C.A. No. 11963
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.	§	

Submitted: September 22, 2021
Decided: December 9, 2021

Before **SEITZ**, Chief Justice; **VALIHURA**, and **TRAYNOR**, Justices.

Upon appeal from the Court of Chancery. **REVERSED** and **REMANDED**.

Michael J. Barry, Esquire, Rebecca A. Musarra, Esquire, Grant & Eisenhofer P.A., Wilmington, Delaware. *Of Counsel*: David Tejtel, Esquire (*argued*), Friedman Oster & Tejtel PLLC, Bedford Hills, New York *for Appellants*.

Myron T. Steele, Esquire, Jaclyn C. Levy, Esquire, Potter Anderson & Corroon LLP, Wilmington, Delaware. *Of Counsel*: David T. Moran, Esquire, Christopher R. Bankler, Esquire (*argued*), Jackson Walker L.L.P., Dallas, Texas *for Appellees Kase Lukman Lawal and CAMAC Energy Holdings, Limited*.

Srinivas M. Raju, Esquire, Robert L. Burns, Esquire, Andrew J. Peach, Esquire, Richards, Layton & Finger, P.A., Wilmington, Delaware. *Of Counsel*: Greg Waller, Esquire, Hunton Andrews Kurth L.L.P., Houston, Texas *for Appellees John Hofmeister, Ira Wayne McConnell, and Hazel O'Leary*.

David J. Teklits, Esquire, Kevin M. Coen, Esquire, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware. *Of Counsel*: Mark Oakes, Esquire, Ryan Meltzer, Esquire, Norton Rose Fulbright US LLP, Austin, Texas *for Appellees Lee P. Brown, William J. Campbell, and J. Kent Friedman*.

VALIHURA, Justice:

Introduction

In this appeal, Appellants claim that their well-pleaded claims arising from a controlling stockholder's "egregious, self-dealing transaction that bankrupted a Delaware corporation" have been condemned to perish in a "procedural blackhole."

In 2017, the Court of Chancery held that Plaintiff Robert Lenois ("Lenois") had pled with particularity that the controlling stockholder of Erin Energy Corporation ("Erin" or the "Company") had acted in bad faith.[1] It further held that Lenois had pled either "very serious claims of bad faith" or "a duty of care claim" against the remainder of Erin's board in connection with two integrated transactions.[2] In those transactions, the controller allegedly obtained an unfair windfall by selling certain Nigerian oil assets to Erin. The trial court dismissed the derivative claims on standing grounds, *i.e.*, holding that demand was not excused.

Lenois timely appealed that decision. During the pendency of the appeal, Erin voluntarily filed for bankruptcy. The Chapter 7 Trustee, Ronald J. Sommers, obtained the permission of the Bankruptcy Court to pursue, on a direct basis, the claims that had been asserted in the *Lenois* action in the Court of Chancery (the "Chancery Action"). As a result of the bankruptcy proceedings, which now vested the Trustee with control over the claims, this Court determined, on May 18, 2020, that the sole issue on appeal, namely, whether the

[1] App. to Opening Br. A518–A580 [hereinafter, "A----"] (*Lenois v. Lawal*, 2017 WL 5289611 (Del. Ch. Nov. 7, 2017) [hereinafter, the "2017 Opinion"]).

[2] A575–A576 (2017 Opinion).

trial court was correct that Lenois had failed to adequately plead demand futility, was moot.[3] We remanded the case to the Court of Chancery to resolve two pending motions — a Rule 60(b) motion and the Trustee's motion pursuant to Rule 25(c) to be substituted for nominal defendant Erin and then realigned as plaintiff (the "Realignment Motion"). The Court of Chancery denied the Rule 60(b) motion and summarily denied the Rule 25(c) motion.

We now reverse and hold that the Court of Chancery should have granted the Trustee's Substitution and Realignment Motion. The Trustee was vested with the legal right to control the derivative litigation as this litigation was part of the bankruptcy estate's assets. Further, the Trustee obtained an order from the Bankruptcy Court to pursue these claims. The Appellants refiled both motions in this Court during the pendency of the appeal to make clear the Trustee's desire to prosecute the claims directly on behalf of the estate. The parties and the Trustee agreed that the question at issue on appeal — whether demand was excused — was now moot. We ordered that dismissal of the appeal would return jurisdiction to the Court of Chancery where the Trustee's motions remained pending.

Rather than address the motions at the appellate level, we remanded the case to the Court of Chancery to rule on those motions in the first instance. Because the dismissal was being challenged on appeal when the bankruptcy petition was filed, and because we remanded the case for further proceedings, we do not agree with Appellees that the case

[3] Lenois also asserted direct claims challenging certain disclosures in a proxy statement that solicited stockholder approval for the transaction at issue. Those claims were dismissed by the Court of Chancery and were not subject to the appeal.

was "finally over." Implicit in our remand order was the recognition that the case remained open, that there were pending motions to be resolved and that one possible outcome was that the Trustee would be allowed to prosecute the claims, which he had the right to control. The 2017 dismissal with prejudice, in any event, was with prejudice as to Lenois only.[4] Given the circumstances, we think the Trustee should have been permitted to be substituted for nominal defendant Erin, realigned as plaintiff, and allowed to proceed. After all, Appellees told the Court of Chancery in a March 3, 2020 hearing that they did not dispute that the Trustee could be substituted for Erin.

Given the highly unusual facts presented here, this opinion should pose no threat to the finality of judgments as Appellees portend. Rather, it is an equitable resolution of a confluence of unusual procedural circumstances specific to this case. In particular, the complications arose after the nominal defendant was thrown into bankruptcy proceedings (allegedly as a result of the controller's actions) during the pendency of an appeal challenging dismissal of Lenois's derivative claims solely on derivative standing grounds and during which appeal, Lenois was divested of standing due to that intervening bankruptcy. Under these circumstances, the Trustee's persistent requests to pursue these serious claims as the legal representative of the bankrupt estate, after obtaining permission from the Bankruptcy Court to do so, should be, and hereby is, granted.

[4] *See* Del. Ch. Ct. R. 15(aaa) ("In the event a party fails to timely file an amended complaint or motion to amend under this subsection (aaa) and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) or 23.1, such dismissal shall be *with prejudice* (and in the case of complaints brought pursuant to Rules 23 or 23.1, *with prejudice to the named plaintiffs only*) unless the [Court of Chancery,] for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances.") (emphasis added).

I. Relevant Facts and Procedural Background[5]

A. The Parties to the Appeal and Underlying Transactions

Erin is an oil and gas exploration company. Kase Lukman Lawal ("Lawal") was the Company's Chairman and Chief Executive Officer. At the time of the challenged transactions, Lawal is alleged to have been the Company's controlling stockholder. Lawal and his family owned a majority of CAMAC International Limited ("CIL"), which indirectly owned 100% of Defendant CAMAC Energy Holdings Limited ("CEHL"). Lawal and CEHL owned 58.86% of the Company's outstanding shares prior to the transactions challenged in Lenois's Complaint.

In June 2013, Public Investment Corporation Limited ("PIC"), a quasi-public South African pension fund manager, and Lawal, on behalf of Allied Energy Plc ("Allied"), a wholly owned subsidiary of CEHL, negotiated a transaction through which PIC would invest $300 million in the Company in exchange for a 30% ownership stake in Erin. Erin would then transfer the money invested by PIC and additional Erin stock to Allied in exchange for certain oil assets held by Allied (the "Assets").

On June 14, 2013, Allied and PIC presented the proposed transactions to the Erin board of directors (the "Board"). On June 17, 2013, the Board formed a Special Committee

[5] The underlying facts of this case are extensive. The specifics have been provided in the 2017 Opinion dismissing Lenois's derivative claims as well as the Court of Chancery's December 31, 2020 Memorandum Opinion (the "2020 Opinion") denying the motions leading to this appeal. However, this Opinion summarizes the underlying facts of the case only to the extent necessary to address the current appeal. Portions of the background facts are drawn from the 2017 Opinion, the 2020 Opinion, Plaintiff Lenois's Complaint, and the Supplement to the Complaint.

consisting of Defendants John Hofmeister, Ira Wayne McConnell, and Hazel R. O'Leary to consider and negotiate the proposal.

On November 18, 2013, after five months of negotiations with Lawal and Allied, the Special Committee approved and recommended to the Board a series of related transactions with PIC and Allied (the "Transactions"). The Transactions provided for: (1) PIC to invest $270 million in Erin in exchange for approximately 377 million shares of Erin; (2) Erin to pay $170 million in cash and provide a $50 million convertible subordinated note to Allied; and (3) Erin to issue additional stock and a stock dividend, ultimately resulting in post-closing Erin ownership of approximately 30% for PIC, 60% for Allied/CEHL, and 13% for other stockholders. The Transactions also provided that Allied would fund the drilling costs of a particular oil well (with Erin to bear the costs of completion for the well) and that certain contract rights would be terminated in exchange for Erin's agreement to make two $25 million payments to Allied. The Board approved the Transactions, with Lawal and Defendant Lee P. Brown recusing themselves.

On January 15, 2014, Erin filed a proxy statement with the United States Securities and Exchange Commission (the "SEC") recommending that Erin stockholders approve certain proposals necessary to effectuate the Transactions (the "Proxy"). On February 13, 2014, Erin held a special meeting of stockholders to vote on a Transfer Agreement, a Share Purchase Agreement, and an amendment to the Company's certificate of incorporation. The proposals were subject to approval by a majority of the minority of stockholders. Each of the proposals received the requisite stockholder approvals, and the Transactions closed about a week later.

On July 30, 2015, nearly a year-and-a-half after the Transactions closed, Lenois made a stockholder demand to inspect Erin's books and records pursuant to 8 *Del. C.* § 220. Counsel for Lenois and Erin negotiated and ultimately agreed upon the scope of the production in response to the demand. Erin produced minutes and presentations of board meetings and other records specifically requested by Lenois. Lenois did not request any version of the contracts related to the Transactions or any attachments to the contracts.

B. The First Round of Litigation

On February 5, 2016, Lenois filed a Verified Class Action and Derivative Complaint in the Court of Chancery (the "Complaint"). The Complaint named as defendants the members of Erin's board of directors who approved two integrated transactions which, according to Lenois, funneled hundreds of millions of dollars of value from Erin to Lawal, Erin's founder, controlling stockholder, and then-chief executive officer and Board Chairman. The Complaint also named as a defendant a Lawal affiliate, CEHL.

The Complaint contained four counts. Counts I and II were styled as derivative claims: Count I asserted a derivative claim for breach of fiduciary duty against Lawal and CEHL as the Company's controlling stockholders and Count II asserted a derivative claim for breach of fiduciary duty against the Company's directors for permitting Lawal to steer the transactions process. Counts III and IV were styled as class action claims: Count III asserted a direct claim for breach of fiduciary duty against the Company's directors and Count IV asserted a direct claim against Lawal as a controlling stockholder for aiding and abetting the other directors' breaches of fiduciary duty. The Complaint alleged that the Transactions were subject to and could not withstand entire fairness scrutiny because they

were transactions between the Company and its controlling stockholder. The Complaint branded the Special Committee process as "fatally flawed," accusing the Special Committee of relying on conflicted management, lacking time to properly consider the complex transactions presented, being misled and threatened by Lawal, and not being fully informed.

Erin's definitive proxy statement filed with the SEC on January 15, 2014 represented that Allied had acquired the Assets in June 2012 "for $250 million in cash, subject to certain adjustments."[6] On April 7, 2017, Lenois moved to supplement his Complaint with new allegations based on information obtained through a recent publicly filed question-and-answer session at a stockholder meeting of Eni, S.p.A. ("Eni"), the parent company of the original owner of the Assets, Nigerian Agip Exploration Limited ("NAE"). In that session, Eni disclosed that Allied paid NAE only $100 million of the $250 million owed for the Assets, with the remainder "the subject of recovery by means of a legal action."[7] Based upon that newly obtained information, Lenois alleged that the Special Committee had acted in bad faith by knowingly disclosing that Allied acquired the Assets for $250 million in cash, subject to certain adjustments. On May 23, 2017, the court granted Lenois's motion to supplement the Complaint because "there was no reasonable

[6] *See* A73 (Compl. ¶ 31); *see also* A262–A272 (Pl.'s Mot. for Leave to Suppl. the Compl., at 2–12).

[7] A280–A281 (Pls.' Mot. for Leave to Suppl. the Compl., Ex. A ¶ 3).

way for [Lenois] to ascertain this information [in the question-and-answer session] until [the disclosure of the question-and-answer session]."[8]

On March 3, 2016, Defendants filed a Motion to Dismiss. Although the Court of Chancery heard from three different sets of defendants who shared similar but not identical positions, their main argument was that Lenois's derivative claims should be dismissed for failure to make a demand pursuant to Court of Chancery Rule 23.1. Defendants also moved to dismiss the direct disclosure claims under Court of Chancery Rule 12(b)(6), arguing that the alleged damages from the disclosure claims flow to Erin.

On April 7, 2017, Lenois filed a supplement to the complaint to add allegations based upon facts discovered following completion of the briefing on defendants' motion to dismiss.

On November 7, 2017, the Court of Chancery granted Defendants' Motion to Dismiss. The Court of Chancery held that Lenois had pleaded with particularity that Lawal had acted in bad faith. But the court held that Lenois failed to make a demand, and that demand was not excused as futile because Lenois failed to plead non-exculpated claims against a majority of Erin's directors. Specifically, the Court of Chancery held that:

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

[8] A516–A517 (Order Granting Pl.'s Mot. for Leave to Suppl. the Compl.).

second scenario is true, Plaintiff likely would have very serious claims of bad faith against Director Defendants.[9]

It held that Lenois had pleaded either "very serious claims of bad faith" or a "duty of care claim" against the remainder of Erin's board (other than Lawal). Nevertheless, the court concluded that it was not "allowed to imply a bad faith violation instead of a care violation" by a Board majority and thus, it dismissed the derivative claims.

In the MTD Decision, the trial court stated that:

- "[T]he complaint is replete with allegations of bad faith conduct against [the controller], including that he attempted to dominate the process, withheld material information from the board, and rushed the board into the unfair Transactions.";[10]

- The controller "really was negotiating with himself in shifting around assets for his own benefit.";[11]

- The controller "knowingly and purposefully created an information vacuum.";[12]

- The Committee "relied on the controller as the sole voice for—and, more importantly, information source from—the two [transactional counterparties], despite a potential misalignment of incentives for the controller.";[13]

- "[B]y the end of the process, Director Defendants lacked information regarding how and why the parties involved were chosen, the timeline and the seeming need for speed for the transaction, the agreements surrounding stock issuances, PIC generally, the credibility of PIC's threat to withdraw, whose interests Lawal represented at each step,

[9] A575 (2017 Opinion at 58) (emphasis added).

[10] A520–A521 (2017 Opinion at 3–4).

[11] A563 (2017 Opinion at 46).

[12] *Id*.

[13] A520 (2017 Opinion at 3).

> and perhaps even the reasons for and implications of the prior payment issue between Allied and Eni."[14]

Finally, the Court of Chancery held that Lenois's direct disclosure claims were dismissed for failure to state viable disclosure claims.

C. The First Appeal and Intervening Events

Lenois filed a timely notice of appeal on November 20, 2017.

On January 31, 2018, the Nigerian government landed helicopters on the oil platforms leased by Erin's Nigerian subsidiary and seized the oil stored there (the "Seizure"). This Seizure occurred pursuant to a final judgment in an arbitration that found that Lawal's Allied and CEHL had failed to pay the agreed-upon purchase price of $250 million (plus adjustments) for the Assets acquired from NAE in 2012. Ultimately, the Seizure forced Erin and its affiliates to cease operations.

D. The 2018 Bankruptcy Proceedings

Following the Seizure of Assets, on April 25, 2018, after the completion of briefing but before oral argument in this Court, Erin filed for bankruptcy under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the "Bankruptcy Court").

The next day, counsel for Lenois advised this Court of Erin's bankruptcy filing and the action in Delaware was automatically stayed. The Clerk of this Court confirmed that the appeal was stayed and directed the Appellees to file status reports with this Court every six months.

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[14] A563–A564 (2017 Opinion at 46–47).

On July 17, 2018, the Bankruptcy Court converted Erin's bankruptcy from a Chapter 11 case to a Chapter 7 case pursuant to the Bankruptcy Code. On the same day, the Bankruptcy Court appointed Ronald J. Sommers as successor Trustee (the "Trustee") for Erin. Since that time, Erin has been under the control of the Trustee.

On October 31, 2018, counsel for Appellees advised this Court of the conversion of the bankruptcy case from a Chapter 11 to a Chapter 7 bankruptcy. On May 7, 2019, the same counsel advised this Court that the Chapter 7 proceeding remained pending and that there was no set time for its completion.

On January 29, 2019, Lenois filed a motion in the Bankruptcy Court seeking relief from the automatic stay.[15] In that motion, Lenois stated that, "revival of the Derivative Action appears to be the *only* way to preserve the asset [the Chancery Action] for Erin's bankruptcy estate."[16] He requested the stay be lifted to allow him "to present new evidence to the Court of Chancery, move the Court of Chancery to vacate dismissal of the Derivative Action, and prosecute that action to seek a recovery for Erin's bankruptcy estate."[17] The

[15] A1466–A1485 (Opp'n of Defs.-Appellees to Mot. to Substitute Party and Realign Trustee as Pl., Ex. 1).

[16] A1469 (Opp'n of Defs.-Appellees to Mot. to Substitute Party and Realign Trustee as Pl., Ex. 1 ¶ 3).

[17] *Id*.

Bankruptcy Court initially granted the motion.[18] But after a hearing held on February 22, 2019, Lenois's motions were abated.[19]

After Lenois's motions were abated, the Trustee requested leave from the Bankruptcy Court to obtain counsel. On July 8, 2019, the Bankruptcy Court approved the Trustee's retention of counsel to represent the interests of the Estate to continue to prosecute the claims in the *Lenois* action pending in the Court of Chancery.[20]

Three days later, on July 11, 2019, the Trustee filed in the Court of Chancery a Motion to Substitute Trustee as Plaintiff pursuant to Court of Chancery Rule 25(c). In this motion, the Trustee asked to be substituted for *Lenois* (as opposed to Erin). Appellants also filed a motion for relief from final judgment pursuant to Court of Chancery Rule 60(b).

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[18] The order granting Lenois's motion appears to have been filed in the Bankruptcy Court on February 15, 2019. *See* A1499–A1503 (Order Granting Robert Lenois's Mots. for (I) Relief from the Automatic Stay [ECF No. 532] and (II) Allowance of Administrative Expense Claims Under 11 U.S.C. § 105(A) [ECF No. 533]).

[19] It appears the Bankruptcy Court determined it was unable to authorize Lenois to prosecute claims that the Trustee owns. Specifically, the Bankruptcy Court stated: "That's the same problem. I don't see how I can authorize somebody that doesn't own it, to prosecute it. The Trustee owns it." A1409 (Tr. of Bankruptcy Ct. 14:6–8).

[20] Specifically, that order stated:

> ORDERED, ADJUDGED, AND DECREED that Ronald J. Sommers, Chapter 7 Trustee of the ERN Estate (the "Trustee"), is hereby authorized to employ Contingency Counsel as special counsel pursuant to 11 U.S.C. §§ 327(a), 327(e) and 328(a), as of the date hereof, to represent the ERN Estate and to prosecute the action pending in the Court of Chancery of the State of Delaware and captioned *Lenois v. Lawal, et al.*, Del. Ch. No. 11963-VCMR/Del. No. 482, 2017 (the "Action") on behalf of the Trustee and the ERN Estate, under the terms and conditions set forth in the Application and the Engagement Letter attached to the Application as Exhibit A;

A1384–A1385 (Order Granting Trustee's Appl. for Authorization to Employ Grant & Eisenhofer P.A., Friedman Oster & Tejtel PLLC, and Andrews & Springer LLC as Special Litigation Counsel, at 2–3).

The Trustee and Lenois presented three reasons for vacatur and relief from the Court of Chancery's 2017 Opinion. First, they argued that the bankruptcy effectively removed the board's control and decision-making abilities and transferred the power to the Trustee. As controller of the claims, the Trustee sought to prosecute the claims.[21] Second, the Trustee argued that "newly-discovered evidence, neither known to nor knowable by Lenois prior to issuance of the [2017] Opinion, demonstrates that Director Defendants acted in bad faith and implicates nonexculpated claims against a majority of Erin's board."[22] Third, the Trustee argued that "Erin wrongfully withheld [the 'newly discovered evidence'] from its production in response to Lenois's Section 220 demand" and that Erin's "'cherry-picked' production created a misleading and incomplete record that deceived Lenois and [the Court of Chancery]."[23]

On November 11, 2019, counsel for Appellees advised this Court that on July 11, 2019, the Trustee had filed a motion "to be substituted for plaintiff Robert Lenois" in the Chancery Action. Counsel also advised this Court that Lenois and the Trustee filed a motion for relief from final judgment, seeking relief from the Court of Chancery's 2017

[21] The Trustee argued that the "Trustee now controls the claims, believes they represent a substantial asset of Erin's estate and should be prosecuted, and waives the Rule 23.1-based demand futility argument pursuant to which the [Court of Chancery] dismissed the derivative claims. Enforcement of the Judgment would squander an asset of the Bankruptcy Estate and be inequitable to Erin and its creditors." A597 (Mot. for Relief from Final J. ¶ 5).

[22] A597 (Mot. for Relief from Final J. ¶ 6).

[23] A597–A598 (Mot. for Relief from Final J. ¶ 7). In particular, Lenois argued that "Director Defendants created a false record, then used that false record to obtain dismissal of [Lenois's] claims." A609 (Mot. for Relief from Final J. ¶ 36).

Opinion. Additionally, counsel advised that both motions were currently pending before the Court of Chancery.

During argument on those motions held on March 3, 2020, the Court of Chancery expressed concern regarding its jurisdiction and its preference that an application be made to this Court for a limited remand.[24] During that argument, counsel for defendants agreed that the Trustee could be substituted for *Erin*, but not for *Lenois*. Specifically, defense counsel acknowledged that:

> The Bankruptcy Court judge authorized my friends here to represent the ERN estate, not the plaintiff Robert Lenois. And that's the key basis of our contention and the key basis of the dispute with regard to the 25(c), Your Honor. They asked the Bankruptcy Court to represent the Erin estate. *We don't dispute that they can represent the Erin estate*, but they're not seeking to substitute in for Erin in this case; they're seeking to substitute in for Lenois.[25]

On March 17, 2020, the Trustee filed a motion in this Court seeking to be substituted for *nominal defendant Erin* as the real party in interest and to be realigned "as a plaintiff to directly pursue the action previously asserted derivatively on behalf of Erin."[26] The Trustee explained that he, as the trustee, had the right to control the Chancery Action on behalf of the bankruptcy estate. He stated further that the "Trustee has determined that this Action, brought derivatively by Plaintiff, represents a substantial asset of the Erin bankruptcy estate and that the Action should be prosecuted on behalf of the estate."[27] The Trustee, therefore,

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[24] A1326–A1327 (Mar. 3, 2020 Tr. 105:19–106:17).

[25] A1318 (Mar. 3, 2020 Tr. 97:3–12) (emphasis added).

[26] A1332 (Mot. to Substitute Party and Realign Trustee as Pl., at 2).

[27] A1334 (Mot. to Substitute Party and Realign Trustee as Pl., at 4).

sought "to be realigned as a plaintiff in this Action with exclusive control over this litigation."[28]

On the same day, the Trustee also filed in this Court a Motion to Vacate Dismissal and Remand seeking vacatur of the 2017 Opinion. Again, the Trustee expressed its unequivocal desire to prosecute the claims asserted in the Chancery Action:

> Erin's bankruptcy vested in Trustee the right to control this Action. Because Trustee now controls this Action and believes that it should be prosecuted, the issue of demand futility upon which the Court of Chancery dismissed this Action and which is the subject of this Appeal is now moot. Because Erin's Chapter 7 conversion vested control over this Action in Trustee as a matter of law, and because Trustee has determined to prosecute this Action, the Court of Chancery's order dismissing the derivative Action for lack of presuit demand under Rule 23.1 should be vacated, and this Action should be remanded to the Court of Chancery for further proceedings.[29]

The Trustee argued further that, because the Trustee had determined to realign the nominal defendant Erin as plaintiff and assume control of the Chancery Action, the issue of demand futility that was the subject of the appeal was moot, and thus, the case should be remanded to the Court of Chancery.[30]

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[28] A1334 (Mot. to Substitute Party and Realign Trustee as Pl., at 4) (citing *In re Penn Cent. Sec. Litig.*, 335 F. Supp. 1026, 1035 (E.D. Pa. 1971)).

[29] A1340 (Mot. to Vacate Dismissal and Remand ¶ 5).

[30] In support of its position, the Trustee cited *Telxon Corp. v. Bogomolny*, 792 A.2d 964, 968 (Del. Ch. 2001) where, after the corporation's board of directors changed following a merger, the new board asserted control over pending derivative claims that the director defendants previously had moved to dismiss for lack of presuit demand. The Court of Chancery permitted the new board to assume control of, and prosecute, the case. The Trustee also cited *Stotland v. GAF Corp.*, 469 A.2d 421, 423 (Del. 1983) where this Court held that the company's appointment of a special litigation committee to review a derivative claim in response to a litigation demand rendered moot a stockholder's appeal from the dismissal of that derivative claim under Rule 23.1. This Court dismissed the appeal and remanded the case to the Court of Chancery for further proceedings.

On April 21, 2020, the Defendants filed their opposition papers. They argued, among other points, that the Trustee's cited authorities did not address a trustee's authority to take over a derivative suit that the corporation and its former directors had successfully moved to dismiss. The Defendants also filed a Motion to Dismiss the Appeal.

E. Dismissal of the First Appeal and Remand

In an order dated May 18, 2020 (the "Remand Order"), this Court dismissed the appeal as moot and remanded the case to the Court of Chancery for further proceedings. We noted that "[t]he parties and the Trustee agree that the question at issue on appeal — whether demand was excused — is now moot."[31] Accordingly, the appeal, "must therefore be dismissed."[32]

As for the motion for substitution, we said that

> [b]ecause there will be no further proceedings before this Court in this appeal, it is unnecessary for us to decide whether the Trustee should be substituted for Erin Energy and realigned as a "plaintiff" on appeal. Rather, dismissal of the appeal *will return jurisdiction to the Court of Chancery, where the motion for substitution that the Trustee filed in that court is pending*.[33]

Despite the Trustee's request that this Court vacate the Court of Chancery's decision, this Court declined to order vacatur. We explained that "[t]he rule of vacatur exists 'for the protection of a party whose desire for appellate review has been thwarted' and is usually invoked when there is a companion litigation pending between the same

[31] A1536 (Remand Order ¶ 4).

[32] *Id.*

[33] A1536–A1537 (Remand Order ¶ 4) (emphasis added).

parties 'to eliminate what would otherwise be the procedural bar of *res judicata*.'"[34] Applied to the facts before it in this case, we held that

> [n]either 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 the plaintiff-stockholder 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.[35]

Rather, this Court held that "the Trustee's right to proceed will more appropriately be determined by the Court of Chancery in the first instance, in the context of the motions that are pending before that court, including the motion for relief from judgment."[36] Accordingly, the matter was remanded to the Court of Chancery for further proceedings.

F. The Court of Chancery Proceedings Following Remand

On May 20, 2020, the Court of Chancery permitted the parties to file supplemental submissions addressing the pending motions in light of this Court's Remand Order. Later that same day, the Trustee filed the Amended Motion for Substitution and Realignment in the Court of Chancery seeking to substitute itself *for Erin* rather than *Lenois* and realign as plaintiff to pursue directly the claims previously asserted derivatively on behalf of Erin.

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[34] A1537 (Remand Order ¶ 5). Appellees argue that the 2017 Opinion "did not adjudicate the merits of the derivative claims" and, therefore, it "need not be vacated for the Trustee to pursue the allegedly 'meritorious claims'" if he chooses. Ans. Br. at 27. We agree.

[35] A1537 (Remand Order ¶ 5).

[36] A1537–A1538 (Remand Order ¶ 5). The Trustee tried to "cut through the procedural fog" and explained that the Trustee amended his motion to substitute based on a representation made by defense counsel. Specifically, "defense counsel represented that the appropriate procedural mechanism for trustee to continue the prosecution of these derivative claims 'would simply be that the company is taking control and moving to realign itself as perhaps an additional plaintiff or as a plaintiff in charge of the case.'" A1593 (Aug. 27, 2020 Tr. 6:4–9).

The Trustee's Amended Motion to Substitute in the Court of Chancery mirrored Trustee's Motion to Substitute Party and Realign Trustee as Plaintiff in this Court.[37]

The Court of Chancery heard oral argument on August 27, 2020.[38] During the hearing, the court asked whether the Trustee could employ Rule 60(b)(6) "[i]n order to evade a statute of limitations defense in the event that the company decided to bring the claims in a separate action."[39] The court then focused on a set of hypothetical facts. Specifically, the court took the pending appeal out of the equation and then questioned whether, under that hypothetical set of facts, the Trustee would have the right under Rule

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[37] At oral argument the Trustee explained that he believed he was already a party in this action, since he "undisputedly stepped directly into the shoes of Erin" but just in case the court had any "concerns on that issue, the motion [for substitution] retains a belt-and-suspenders request to formally substitute trustee into the action for Erin." A1594 (Aug. 27, 2020 Tr. 7:3–6).

[38] The court questioned whether the Trustee's motion for substitution was contingent upon the Trustee's Rule 60(b)(6) motion. A1607 (Aug. 27, 2020 Tr. 20:16–17). Then, the court suggested that the company could have previously asserted the claims. At the hearing the court stated the following:

> THE COURT: You cited these are extraordinary circumstances, but the trustee took over the right to assert the claims on behalf of the company. But the company, which was a party to this action, always had the authority to assert the claims. So the only reason why the trustee is before me trying to take over the claims and assert them in this action is because there was a bankruptcy and the trustee was appointed. But the right to bring the claims that your client inherited have always been extant.

A1614 (Aug. 27, 2020 Tr. 27:4–13). Counsel for Lenois and the Trustee responded that this suggestion failed to consider that the company and/or board members were unable to bring the claims due to the controlling chairman, Lawal. *See* A1614 (Aug. 27, 2020 Tr. 27:14–28:7). They further argued that "what we have here is an exercise of that fundamental authority that belongs to the corporation to assert control over derivative claims," and "that authority continues to exist in a situation where the corporation has initially opposed the claims. . . ." A1616 (Aug. 27, 2020 Tr. 29:12–17).

[39] A1615 (Aug. 27, 2020 Tr. 28:18–21). The court suggested that the Trustee was filing a Rule 60(b) motion instead of filing a new action in order to avoid a statute of limitations defense. A1615 (Aug. 27, 2020 Tr. 28:18–29:8); *see also* A1616 (Aug. 27, 2020 Tr. 29:1–3) (The Court stated: "You have aligned with the Trustee in an effort to try to avoid a statute of limitations defense that could be asserted."); A1617 (Aug. 27, 2020 Tr. 30:18–19).

60(b)(6) to substitute into the action and reopen the judgment.[40] Under that hypothetical set of facts, the Trustee agreed that, without a pending appeal, he would have to file a separate cause of action (that may or may not be barred by laches and the statute of limitations). However, Movant's counsel attempted to refocus the court's inquiry on whether the Trustee may substitute into the action and control the *pending litigation*:

> [MOVANT'S COUNSEL]: But that is not the case that we have here. These were live claims that had not even received appellate court review; and in lieu of actually reviewing the substantive claims themselves, the Supreme Court said Rule 23.1 is irrelevant here. And yes, the trustee has authority to prosecute these claims and assert control over those claims.
>
> So in Your Honor's hypothetical, where this truly is a final judgment, where the deadline to appeal passed, nobody appealed it, yes, I absolutely agree that would be a far more difficult argument for Rule 60(b)(6) relief.
>
> THE COURT: Very well.[41]

On December 31, 2020, the Court of Chancery denied the Trustee's motions.[42] The court stated that "[a]t oral argument, Movants' counsel acknowledged that, for the Trustee to take over the derivative claims and to litigate them in this action, they need to prevail on the Rule 60(b) motion."[43] The court apparently read our Remand Order to mean that the

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[40] A1615 (Aug. 27, 2020 Tr. 28:8–12) (The Court: "Well, let's take the Supreme Court out of this. Let's say that there was no appeal. Would that give you the right under 60(b)(6) to come in to essentially reopen the judgment and assert the company's claims in this action?").

[41] A1621 (Aug. 27, 2020 Tr. 34:1–13).

[42] The Trustee's Motion for Relief set forth three grounds for relief under Rule 60(b): "newly discovered evidence" (Rule 60(b)(2)); "fraud" (Rule 60(b)(3)); and "any other reason justifying relief from the operation of the judgment" (Rule 60(b)(6)). Appellants pursue only the Rule 60(b)(6) ground on this appeal.

[43] Opening Br. Ex. A, at 15. The court based this assumption of the following oral argument dialogue:

Trustee's ability to proceed was contingent upon the Motion for Relief,[44] and its analysis assumed that Trustee's substitution motion was contingent on prevailing on their Rule 60(b) motion.[45] Because the court denied Movant's Rule 60(b) motion, the court declined to analyze the Motion for Substitution and Realignment and summarily dismissed it. The court reasoned that the 2017 Opinion "is a final judgment that is no longer subject to appeal" due to the denial of the Motion for Relief and therefore "the denial of [that motion] brings this action to a close."[46]

This appeal followed.

G. Contentions on Appeal

Appellants raise the following issues on appeal. First, they contend that the Court of Chancery erred in denying their Rule 60(b)(6) motion because the court failed to account

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> THE COURT: [Movant's Counsel], I understand your argument that the trustee now owns the company's claims. But there's a final order that's been entered in this Court to dismiss. And the Supreme Court, as I read the Supreme Court's order, remanded solely for the purpose of considering those two motions.
>
> You have to get past Rule 60(b) in order to take over the claims in this action. Right?
>
> [MOVANT'S COUNSEL]: Yes, Your Honor. Yes, Rule 60(b) would need to be -- we would need relief under Rule 60(b) to proceed, *most likely*.

A1607 (Aug. 27, 2020 Tr. 20:10–20) (emphasis added).

[44] Opening Br. Ex. A, at 33–35; *see id.* at 16 ("The Remand Order also indicates that the Trustee's ability to proceed is contingent upon the Motion for Relief: '[T]he Trustee's right to proceed will more appropriately be determined by the Court of Chancery in the first instance, in the context of the motions that are pending before that court, including the motion for relief from judgment.'").

[45] *Id.* at 37–38. On appeal, the Trustee argues that "[c]ounsel certainly did not concede, as the Court of Chancery misinterpreted, that Trustee's right to substitute into the Action and realign as plaintiff depended on obtaining relief under Rule 60." Opening Br. at 40.

[46] Opening Br. Ex. A, at 37–38.

for the rights of Erin and ignored that the Trustee assumed control over Erin while the Chancery Action was the subject of an active, pending appeal. Appellants assert that this error was based, in part, on the Court of Chancery misunderstanding certain of their responses at oral argument. Second, Appellants contend that when Erin filed its voluntary bankruptcy petition, it triggered the Trustee's appointment and rendered the sole basis for the dismissal (demand futility) a legal nullity. They argue that these facts rise to the level of "extraordinary circumstances" that warrant Rule 60(b)(6) relief. Finally, Appellants contend that the Court of Chancery abused its discretion by not permitting the Trustee to substitute in for Erin and realign as plaintiff to prosecute the Chancery Action. They argue that the Rule 25(c) motion should have been granted because the Trustee is vested with the right to control Erin's legal interests in its property, including the claims in the Chancery Action, as a matter of law.

II. Standard of Review

We review the Court of Chancery's legal conclusion regarding the application of Rule 60(b) in this matter *de novo*,[47] and its decision to deny the Trustee's Motion for Substitution and Realignment under an abuse of discretion standard.[48]

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[47] *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995) (citing *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992)).

[48] *ClubCorp, Inc. v. Pinehurst, LLC*, 2011 WL 5554944, at *6 (Del. Ch. Nov. 15, 2011) ("Substitution of a party under Rule 25(c) is committed to the discretion of the [Court of Chancery]."). Court of Chancery Rule 25(c) provides that, "[i]n case of any transfer of interest, the action may be continued by or against the original party, unless the Court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." Del. Ch. Ct. R. 25(c); *see also Stornawaye Cap. LLC v. Smithers*, 2010 WL 673291, at *2 (Del. Ch. Feb. 12, 2010) (The decision of whether to grant a motion to substitute is "committed to the Court's discretion Court of Chancery Rule 25(c).").

III. Analysis

The parties have found no authority directly on point addressing the precise issues in this case. The court below appears to have limited its focus on whether the Trustee could establish "extraordinary circumstances" under a Rule 60(b) analysis. It also appears that the court was focused on a situation not involving a pending appeal, but rather, one where the appeal period has passed.[49] However, the precise question here is whether a Chapter 7 trustee may substitute and realign in place of the nominal defendant corporation to directly pursue the derivative plaintiff's claims after the claims were dismissed on Rule 23.1 demand futility grounds, *which dismissal was the subject of a pending appeal* that became moot upon the nominal defendant's bankruptcy filing allegedly precipitated by the controller's actions. We conclude that the Trustee should be substituted and realigned as plaintiff in the Chancery Action to enable him to pursue the derivative claims previously asserted by Lenois.

A. The Final Judgment Was Subject to a Pending Appeal

Appellees argue that, "[t]here is simply not a case for the Trustee to pursue—there has been a Final Judgment dismissing the case, followed by [the Delaware Supreme Court's] order dismissing an appeal from that Final Judgment, and also denying vacatur."[50]

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[49] For example, during the August 27, 2020 hearing the Vice Chancellor stated: "I think the issue is whether -- let's take your hypothetical that a board turns over and a board decides to assert the company's claims that had been previously dismissed on 23.1 grounds, whether it's one year ago, two years ago, or three years ago, and then seeks to come back into the same case under Rule 60(b)(6) in order to avoid the statute of limitations. That's the issue that I have before me." A1617 (Aug. 27, 2020 Tr. 30:12–21).

[50] Answering Br. at 25.

Appellees' assertion fails to consider two important points. First, Appellees fail to consider that an appeal was pending when the bankruptcy petition was filed, and they fail to account for this Court's Remand Order, which expressly returned jurisdiction to the Court of Chancery to decide the pending motions before it.

With the parties finding no cases on point, we have looked for analogous situations faced by other appellate courts where plaintiffs have sought to pursue postjudgment action on a dismissed complaint. Although we also found nothing precisely on point, we observe that a number of federal appellate courts have addressed the circumstances under which a plaintiff's claims can be pursued, following dismissal of plaintiff's complaint by a trial court. Typically, further action in the form of amendment of a complaint, for example, is not allowed after affirmance of a dismissal of a complaint.[51] But a number of federal appellate decisions distinguish cases where, on the one hand, a dismissal is *immediately appealed* from cases where, on the other hand, the complaint is dismissed without a timely appeal or further immediate action, and the plaintiff then later attempts to pursue the claims.[52] Several appellate courts have held that cases involving a timely appeal from a

[51] *See, e.g., Royal Bus. Grp., Inc. v. Realist, Inc.*, 933 F.2d 1056, 1066 (1st Cir. 1991) (When a party elects to appeal rather than amend a complaint, it does not behoove a party to suggest at a later date that it could have satisfied the district court's concerns by amending the complaint.); *James v. Watt*, 716 F.2d 71, 78 (1st Cir 1983) (admonishing that courts should not routinely allow plaintiffs to "pursue a case to judgment and then, if they lose, to reopen the case by amending their complaint to take account of the court's decision"), *cert. denied*, 467 U.S. 1209 (1984).

[52] *See Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 521 (7th Cir. 2015) ("It is true that when a district court has entered a final judgment of dismissal, the plaintiff cannot amend under Rule 15(a) unless the judgment is modified, either by the district court under Rule 59(e) or 60(b), or *on appeal*.") (emphasis added); *Camp v. Gregory*, 67 F.3d 1286, 1289 (7th Cir. 1995) (noting that when a final judgment is entered dismissing the case, "the

motion to dismiss allow the appellate court, "in its discretion and in the interests of justice" to "affirm the dismissal of the complaint, yet nonetheless permit further amendment of it," whereas cases involving a dismissal, with no timely appeal, require the plaintiff to satisfy the "more stringent requirements that apply to motions for relief from judgment."[53]

For example, in *Degnan v. Publicker Industries, Inc.*,[54] the plaintiff, who claimed he was wrongly induced by his employer to take early retirement benefits, framed his complaint exclusively as a claim of common-law misrepresentation under state law. Defendants removed the case to federal court and sought dismissal arguing that the claim was preempted by the Employee Retirement Income Security Act ("ERISA"). The district court held that plaintiff's claims were preempted and dismissed the complaint. Plaintiff appealed, and after the parties had briefed the appeal, but two weeks prior to oral argument, the Supreme Court of the United States issued an opinion indicating that, in certain circumstances, an individual plan participant or beneficiary may be able to obtain equitable relief under the ERISA statute itself for harm caused by an employer's breach of its fiduciary obligations. Considering the Supreme Court's ruling, the First Circuit asked the parties to prepare to discuss the case at oral argument. After oral argument, the First Circuit ordered supplemental briefing to further address the recent Supreme Court ruling.

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plaintiff must either *appeal the dismissal* or seek to have the case reopened so that she may pursue amendment of the complaint") (emphasis added).

[53] *Fisher v. Kadant, Inc.*, 589 F.3d 505, 510–11 (1st Cir. 2009) (citing *U.S. ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 723 (1st Cir. 2007), *overruled on other grounds by Hagerty ex rel. U.S. v. Cyberonics, Inc.*, 844 F.3d 26 (1st Cir. 2016)).

[54] 83 F.3d 27 (1st Cir. 1996).

The First Circuit concluded that, while on appeal, an issue had arisen as to whether plaintiff could state a claim in light of the recent decision by the Supreme Court of the United States. Because the plaintiff had framed his case as a common law cause of action for misrepresentation, rather than a statutory ERISA-based claim for breach of fiduciary duty, the First Circuit gave plaintiff an opportunity to supplement his factual allegations by remanding the matter and directing the district court to grant plaintiff permission to file an amended complaint. The First Circuit acknowledged that typically a failure to amend a complaint and a later affirmance of its dismissal on appeal bar later action by the plaintiff. But the First Circuit invoked an exception to the general rule that "an appellate court has the power, in the interest of justice, to grant leave to amend if the circumstances warrant."[55] Noting the "highly idiosyncratic posture" of the case, the court stated that, "it is appropriate for an appellate court to consider granting the type of extraordinary relief that the plaintiff requests here—permitting an amendment even after affirmance of an order of dismissal—when an important new decision intervenes."[56] Accordingly, the First Circuit affirmed the dismissal of the complaint in part and remanded the case to the district court with an express direction that it permit the plaintiff to file an amended complaint limited to the new issue. In doing so, the First Circuit observed that "[t]his approach finds ample support in other appellate authority . . . and in the spirit that pervades the Civil Rules[.]"[57]

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[55] *Id.* at 29 (citing *Rivera-Gomez v. de Castro*, 843 F.2d 631, 636 (1st Cir. 1988)); *see also Bryan v. Austin*, 354 U.S. 933 (1957) (*per curiam*) (case remanded with leave to amend complaint in light of change in state law occurring after district court decision).

[56] *Degnan*, 83 F.3d at 29–30.

[57] *Id.* at 29; *see also Becnel v. Deutsche Bank AG*, 838 F. Supp. 2d 168, 172 (S.D.N.Y. 2011) (noting that "Rule 15's liberal amendment policy does not entirely disappear once final judgment

Similarly, in *Rivera-Gomez v. de Castro*,[58] the United States Court of Appeals for the First Circuit again relied on the interest of justice exception to permit plaintiffs to pursue amended claims on remand following its affirmance of the complaint's dismissal. Plaintiffs filed their complaint alleging that they were discharged because of their political leanings. Plaintiffs amended their complaint once as a matter of right. After filing an answer, Defendant moved for judgment on the pleadings contending that the suit was time-barred. While briefing the motion for judgment on the pleadings, plaintiffs filed a rebuttal brief without leave of court. The district court, in its discretion, refused to consider the rebuttal brief. After the district court granted defendants' motion for judgment on the pleadings, plaintiffs asked that the rebuttal brief be considered a motion for reconsideration of the opinion. The district court denied plaintiffs' request.

On appeal, the First Circuit stated that the district court acted "well within its discretion" when it denied plaintiffs' motion for reconsideration, but noted that, "[g]iven the allusions in the amended complaint, and the early stage of the proceedings, [the First Circuit] believe[d] that the [district] court should have afforded substantive consideration

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has been entered[] [i]nstead, courts must consider the nature of the proposed amendment and whether, in light of the general preference to decide cases on the merits, leave to amend should be granted"); *Whitelock v. Leatherman*, 460 F.2d 507, 515 (10th Cir. 1972) (conditionally affirming the district court and directing the court to allow plaintiff to file, within twenty days of the opinion, "a verified amendment to paragraph 1 of his original complaint alleging . . . that at the time of the filing of the original complaint" there was diversity of citizenship with respect to citizenships and not merely diversity of state residences); *Fisher*, 589 F.3d at 510 (citing *U.S. ex rel. Rost*, 507 F.3d at 723); Fed. R. Civ. P. 15(a) (counseling that leave to amend "should [be] freely give[n] . . . when justice so requires"); *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 88 (2d Cir. 1961) (recognizing its power to affirm dismissal of the complaint and allowing the district court to consider an application to amend, but declining to do so in that case).

[58] *Rivera-Gomez*, 843 F.2d 631.

to the rebuttal memorandum at that time."[59] The court found that this matter triggered the exception because the appeal was "in a highly idiosyncratic posture."[60] Therefore, the First Circuit affirmed the dismissal of the amended complaint in part, but "*remand[ed] the case to the district court with an express direction*" to permit plaintiffs to file a second amended complaint limited to the issue raised in the reconsideration motion.

By contrast, in cases where no timely appeal is taken, courts routinely require the plaintiff to seek relief from the judgment under Rule 60. For example, in *Fisher v. Kadant, Inc.*,[61] the district court dismissed the complaint for failure to state a claim upon which relief could be granted. *Plaintiffs did not immediately appeal*. Almost a month after the court entered judgment for the defendants, the plaintiffs moved for reconsideration of the judgment and for leave to file an amended complaint. The district court denied the motion, and the plaintiffs subsequently appealed. Because the plaintiffs did not immediately appeal from the dismissal, the appellate court concluded that plaintiffs would have to seek relief under Rule 60(b).

In *Fisher*, the First Circuit explained that, "[u]nless postjudgment relief is granted, the district court lacks power to grant a motion to amend the complaint under Rule 15(a)."[62] That is because "once judgment has entered, the case is a dead letter, and the district court is without power to allow an amendment to the complaint because there is no complaint

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[59] *Id.* at 634.

[60] *Id.* at 636.

[61] *Fisher*, 589 F.3d 505.

[62] *Id*. at 509.

left to amend."[63] However, the court distinguished cases that involved an appeal from a motion to dismiss, and noted that in that procedural posture, "the court of appeals may, in its discretion and in the interests of justice, affirm the dismissal of the complaint, yet nonetheless permit further amendment of it."[64] But it observed that the case before it was "a horse of a different hue" because "*the plaintiffs did not appeal from the order of dismissal*."[65] Thus, it determined that the plaintiffs' request for leave to amend was "without effect where, as here, *no appeal is taken from the granting of the underlying motion to dismiss*."[66]

Similarly, in *Cruz v. Bristol Myers Squibb Company PR, Inc.*,[67] the procedural posture of the case required plaintiff to seek relief under Rule 60. In 2012, plaintiff's case closed when the appellate court affirmed the circuit court's grant of summary judgment in favor of the defendant. In 2014, nearly three years after judgment was affirmed, plaintiff sought to reopen the case. Plaintiff was required to satisfy Rule 60(b) before the court would set aside the judgment and consider plaintiff's submission.[68]

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[63] *Id*.

[64] *Id*. at 510.

[65] *Id*. (emphasis added).

[66] *Id*. (emphasis added).

[67] 304 F.R.D. 92 (D.P.R. 2014).

[68] Appellees cite to *Bachtle v. Bachtle*, 494 A.2d 1253 (Del. 1985) as being instructive. The movant sought to "reopen a property division judgment" based on "the subsequent sale price of [a] martial residence." *Id*. at 1254. The Family Court denied relief under Rule 60(b)(6). This Court affirmed. But in affirming, this Court observed that "[*t*]*he wife did not appeal the Family Court's decision to this Court*," and that "approximately ten months following the sale of the marital residence (about nineteen months after the Family Court decision), the wife petitioned the

As in *Degnan*, this appeal "is in a highly idiosyncratic posture," and the procedural history before us shares some similarities with *Degnan*, although here it was not a new decision that intervened, but rather, Erin's bankruptcy. Nevertheless, Lenois's complaint was dismissed, and Lenois *immediately appealed* the dismissal. The parties briefed the appeal and were preparing for oral argument. However, a few weeks before oral argument, Defendants voluntarily filed for bankruptcy, which stayed the proceedings before us. Lenois had no authority to proceed before this Court unless given permission by the Bankruptcy Court. The Bankruptcy Court declined to allow Lenois to proceed, but instead appointed a trustee and permitted him to pursue Lenois's claims directly.[69] The Trustee then swiftly tried to preserve Lenois's claims by filing motions in both this Court and the Court of Chancery.[70]

The Court of Chancery, at various points during the August 27, 2020 hearing, reiterated its focus on hypothetical situations not involving a pending appeal, *e.g.*,

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Family Court to reopen the judgment in that [c]ourt so that the sale price of the house could be included in a modified distribution of marital property." *Id*. at 1255 (emphasis added).

[69] It is well established that upon the commencement of a bankruptcy proceeding, derivative claims become the property of the bankruptcy estate and subject to the control of the Bankruptcy Court. *Thornton v. Bernard Techs., Inc.*, 2009 WL 426179, at *3 (Del. Ch. Feb. 20, 2009).

[70] According to the Trustee's representation to the Court of Chancery during the August 27, 2020 hearing:

> Trustee's control over Erin's estate did not vest until July 12 of 2018, and the trustee's motion to retain counsel in this action was not granted until June 26th of 2019. Just two weeks later, on July 10th, 2019, trustee moved for relief in this Court and has diligently pursued that relief ever since.

A1601 (Aug. 27, 2020 Tr. 14:18–24).

situations more analogous to the *Fisher* line of cases.[71] But counsel for Lenois and the Trustee argued that the pendency of the appeal was a distinguishing factor.[72] We agree that the fact that Lenois's timely appeal was pending when the bankruptcy intervened is an important factor in our legal analysis and in our assessment of the equitable considerations involved.

B. Several Factors Contributed to the Procedural Confusion

At the time of the bankruptcy stay, the issue before us on the pending appeal evolved into whether the real party in interest, Erin (now controlled by the Trustee), could proceed with Lenois's claims. By issuing the Remand Order our intention was to have the Court of Chancery address the pending motions in the first instance as opposed to suggesting that resolution of the Rule 25(c) motion was dependent upon a prior resolution of the Rule 60(b)

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[71] As another example, during the August 27, 2020 hearing the Court of Chancery asked:

> If a corporation -- if a stockholder brought derivative claims that were dismissed on 23.1 grounds for failure to plead demand futility, and the case was dismissed, *and years pass*, the board turns over, the company decides that it wants to assert those same claims, it's your argument that the board could file a motion under Rule 60(b)(6) in this [c]ourt, take over the claims, reinstitute the claims under the same civil action number and caption?

A1620 (Aug. 27, 2020 Tr. 33:4–12) (emphasis added).

[72] In response to the Vice Chancellor's question, counsel for Lenois and the Trustee responded:

> So I apologize, Your Honor. I did not understand your hypothetical. *I thought we were talking about the period between dismissal and the deadline for filing appeal*. I agree with you. If there is -- if the deadline to appeal has passed, if there was no appeal, if it's truly a final judgment, as that term has been defined by the Supreme Court of Delaware in *Braddock v. Zimmerman*, for example, where they say there's no longer any future determination or consideration hanging out there, then that is a very different case. *But that is not the case that we have here*.

A1620–A1621 (Aug. 27, 2020 Tr. 33:13–34:2) (emphasis added).

motion.[73] But it appears that some confusion ensued, perhaps resulting from the language in our Remand Order, and perhaps from the Court of Chancery's interpretation of certain remarks made by Lenois's and the Trustee's counsel during a discussion of whether we intended for the Court of Chancery to retain jurisdiction.

The Vice Chancellor compared our Remand Order with the order issued by this Court in *Stotland v. GAF Corp.*,[74] where this Court had directed the Court of Chancery to retain jurisdiction after we dismissed that appeal as moot. The Vice Chancellor relied on that distinction, in part, in denying relief to the Trustee. Although our Remand Order could have contained a similar retention of jurisdiction provision, it did expressly state that our dismissal "will return jurisdiction to the Court of Chancery, where the motion for substitution that the Trustee filed in that court is pending."[75] We thought it implicit in our Remand Order that one option on remand was allowing the Trustee to proceed with the claims.

Counsel's remarks regarding *Stotland* also could have been more clear. In responding to the Vice Chancellor's questions about *Stotland*, Movant's counsel stated that *in this case*, the Remand Order *implied* the Court of Chancery's retention of jurisdiction in order to move forward with proceedings consistent with the Remand Order. Movant's

[73] *See* A1534–A1538 (Remand Order); A1537–A1538 (Remand Order ¶ 5) ("[T]he Trustee's right to proceed will more appropriately be determined by the Court of Chancery in the first instance, in the context of the motions that are pending before that court, *including the motion for relief from judgment*.") (emphasis added).

[74] *Stotland*, 469 A.2d 421.

[75] A1537 (Remand Order ¶ 4).

counsel then argued that the language might have been different in *Stotland* because there the corporation had not yet said what it intended to do, *i.e.*, whether it would realign as plaintiff and prosecute the claims or seek dismissal of them.

It appears to us that the Trustee is correct that the Court of Chancery mistook the Movant's description of the corporation's position in *Stotland* for the Trustee's position in this case. But again, we do not fault the Vice Chancellor as the transcript reveals that in discussing the distinction in *Stotland* where the corporation had not decided on a course of action, Movants' counsel shifted to the present tense in saying: "we don't know what decision will be made by the corporation but the Court of Chancery needs to retain jurisdiction to deal with any issues that may arise depending on the avenue taken by the corporation."[76] The Vice Chancellor apparently thought Movant's counsel was referring

[76] The following transpired at oral argument:

> THE COURT: [Movant's counsel], I would like for you to give me your take on the last paragraph of *Stotland* and how it compares to this case, where in *Stotland*, the Delaware Supreme Court remanded the case to the Court of Chancery with instructions to retain jurisdiction pending action by, I think it was, a committee of the board to consider a demand that the stockholder plaintiff had sent. I don't have that in the Delaware Supreme Court's remand order. It was remanded for me to deal with the two issues that were before me, one being the Rule 60(b) motion and the other being the motion to substitute the trustee for the stockholder plaintiff. How do I read the significance of that?
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> [MOVANT'S COUNSEL]: Your Honor, so I think that the key distinction here is that in this case there are two clear motions that are pending that require adjudication. And that is sort of what's on the Court's plate very clearly. So the Supreme Court said you have these pending motions. Address them and determine whether the trustee should go forward. And I find it very hard to believe that the Supreme Court meant, and if Your Honor finds that the trustee should go forward and prosecute these claims, it doesn't matter. The case is over. So I think the pendency, the retention of jurisdiction moving forward is necessarily implied in the Supreme Court's order.

to Erin's position *in this case*. Then based upon this apparent misunderstanding, the Court of Chancery held that Trustee's claims were "inchoate," stating that "[g]ranting relief from judgment in this circumstance to permit the Trustee to potentially assert a claim in this action 'depending on the avenue taken by the corporation' would exercise an extraordinary power in the service of an inchoate claim."[77] However, we do not think that is an accurate characterization of the Trustee's position here as the Trustee was steadfast and consistent in stating his desire to pursue the derivative claims that had been asserted by Lenois. Although this confusion occurred in the context of the Rule 60(b) analysis, which we do not address for the reasons stated above, it obviously complicated an already complicated matter.

In hindsight, perhaps our order could have been more explicit regarding the Court of Chancery's retention of jurisdiction, and perhaps, in view of the procedural complications, we should have short-circuited the process by simply directing the Court of Chancery to allow the substitution and an amendment to enable the Trustee to pursue the derivative claims directly.

> And then the question about why the language is different in *Stotland*, it's important to keep in mind, in *Stotland*, the corporation asserted control over the claims but had not yet said what it intended to do with them. It did not say whether it wanted to realign as a plaintiff and prosecute them. It did not say whether it wanted to dismiss the claims. It did not say whether it wanted to simply let the plaintiff take the helm again and lead these claims. So I think the reason the language is structured here is because it needed to be clear that we don't know exactly what is going to happen with those claims. We don't know what decision will be made by the corporation, but the Chancery Court needs to retain jurisdiction to deal with any issues that may arise depending on the avenue taken by the corporation.

A1648–A1650 (Aug. 27, 2020 Tr. 61:8–63:6).

[77] Opening Br. Ex. A, at 32.

With the case before us once again with the Trustee still attempting to pursue Lenois's claims, rather than allowing the action to abate due to the bankruptcy filing—an intervening event occurring through no fault of Lenois—in the interest of efficiency and justice, we direct that the Court of Chancery permit the Trustee to be substituted into the action, realigned as plaintiff, and to allow any conforming amendments to the complaint to accomplish that realignment so that the Trustee can pursue the claims previously asserted by Lenois.[78]

IV. Conclusion

We believe that this is an equitable resolution of the procedural conundrum precipitated, in part, by the bankruptcy that occurred through no fault of the plaintiff. We also believe that it is consistent with our preference to resolve matters on their merits rather than have a case abate due to circumstances not of the plaintiff's making.[79] Accordingly,

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[78] Given that the plaintiff did not appeal the dismissal of the direct claims in Count III and IV, we are assuming that those claims would not be part of any further action.

[79] For example, Delaware courts have long recognized the public policy of allowing an action to proceed in certain circumstances when it is abated for reasons other than the merits. The Delaware Savings Statute is a legislative example of this principle. *See, e.g.*, 10 *Del. C.* § 8118 (the Delaware Savings statute); *Gosnell v. Whetsel*, 198 A.2d 924, 926 (Del. 1964) (the Delaware Savings statute "is designed to allow a plaintiff, within prescribed limitations, one year to file a second cause of action following a final judgment adverse to his position if such judgment was not upon the merits of the cause of action."). The Savings Statute, which is liberally construed, "reflects a public policy preference for deciding cases on their merits," and alleviates the harsh consequences of the statute of limitations when an action, through no fault of the plaintiff, is technically barred. *Reid v. Spazio*, 970 A.2d 176, 180 (Del. 2009). *See also Howmet Corp. v. City of Wilmington*, 285 A.2d 423, 427 (Del. Super. Ct. 1971) (noting that controversies should be decided upon the merits rather than upon procedural technicalities). Further, the statute's grace period is tolled during the pendency of appeals. *Reid*, 970 A.2d at 181–82 ("allowing a plaintiff to bring his case to a full resolution in one forum before starting the clock on his time to file in this State will discourage placeholder suits, thereby furthering judicial economy"). When the Savings Statute is applied, "the prejudice to defendants is slight because in most cases, a defendant will be on notice that the plaintiff intends to press his claims." *Id.* at 182.

we **REVERSE** and **REMAND** with directions to the Court of Chancery to proceed consistently with this Opinion. We express no view as to whether the Trustee's claims are meritorious or likely to be so.