IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

Corpus Christi Firefighters' Retirement System, Plaintiff-Appellant/Cross-Appellee, v. **Macellum Capital Management, LP, et al.,** Defendants-Appellees/Cross-Appellants.	Case No. 24-AP-000269 REGULAR CALENDAR

MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES

Pursuant to Ohio Rule 17 of Appellate Procedure, Investor Choice Advocates Network ("ICAN") respectfully moves for leave to file an amicus brief in support of Ancora Holdings, Inc., Ancora Advisors LLC, Ancora Institutional LP, Ancora Merlin, LP, Ancora Catalyst Institutional, LP, Ancora Catalyst, LP, Ancora Catalyst SPV I LP, Ancora Catalyst SPV I SPC Ltd, Macellum Capital Management, L.P., Macellum Capital Management, LLC, Macellum Opportunity Fund, L.P., Macellum

Management LP, Macellum Advisors GP, LLC, Frederick DiSanto, Jonathan Duskin, and Aaron Goldstein (collectively, "Appellees").

As set forth in the proposed amicus curiae brief attached hereto, ICAN urges this Court to affirm the trial court's judgment, rather than adopting Appellant's interpretation of Ohio's greenmail statute. As a nonprofit advocate for expanding choices available to ordinary investors and entrepreneurs, ICAN submits that Appellant's interpretation is against public policy in that it would punish and chill non-manipulative exercises of ordinary and lawful shareholder activity that causes no harm to (and may benefit) public companies or their shareholders.

For those reasons and the reasons set forth in the accompanying brief, ICAN respectfully requests that this Court grant its motion for leave and accept the attached amicus curiae brief.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF INVESTOR CHOICE ADVOCATES NETWORK IN SUPPORT OF DEFENDANTS-APPELLEES

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I. Statement of Amicus Interest

The Investor Choice Advocates Network ("ICAN") is a nonprofit organization focused on public interest litigation. ICAN's mission emphasizes opening investment, entrepreneurship, and the economy to all: it believes in access to the market, freedom for individuals to make informed decisions about their investments, and the ability of investors and entrepreneurs to make their voices heard.

This case, *Corpus Christi Firefighters' Retirement System v. Macellum Capital Management et al.*, speaks to the heart of that mission. Specifically, this case involves an attempt to weaponize a never-before-litigated Ohio statute to penalize the exercise of ordinary and lawful shareholder activity; in essence, to take away shareholders' rights. The precedent set by this case, should this Court adopt the Appellant's proposed interpretation of Ohio Revised Code 1707.043, would bring to a screeching halt beneficial shareholder activity: communications with boards of directors, public filings with the SEC, and creative ideas to

unlock value and drive growth. This outcome would be contrary to the free market that is at the heart of the American dream.

II. Appellant's Proposed Interpretation Would Chill Proxy Contests and Shareholders' Ability to Participate in Corporate Governance.

The shareholder voice is an integral part of corporate governance, and Appellant's proposed interpretation of R.C. 1707.043 could silence that voice, to the detriment of shareholders, corporations, and communities. Specifically, Appellant's arguments before the trial court attempted to characterize normal, legitimate shareholder activity—communicating with the Board, filing public documents with the SEC, and proposing changes to the Board—as "manipulative" and barred under the law. In granting Appellees' motion for summary judgment, the trial court rejected Appellant's characterization, finding that Appellees simply engaged in a nonmanipulative, nondeceptive proxy contest, urging the Big Lots Board to take action that would benefit the company and therefore increase the company's stock price. Contrary to the trial court's findings, Appellant described Appellees' conduct as "threaten[ing] a change-of-

control contest to force corporate conduct that would result in an immediate increase in Big Lots's stock price." Pl. Opp. to Def. Mot. for S.J., at 2. By mischaracterizing Appellees' conduct and misreading R.C. 1707.043, Appellant would jeopardize all manner of shareholder activity, including shareholder conduct that benefits the company.

For example, Appellant's interpretation would adversely impact shareholder voting. A central shareholder right is the right to elect directors. *See*, *e.g.*, R.C. 1701.55. This is possibly the *most* important shareholder right: directors manage the business, direct the governance of that business, and even have the authority to remove other directors. *See* R.C. 1707.058(B). In fact, election of directors is one of the few things that shareholders *can* vote for. *See* Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. Davis L.R. 407, 417-18 (2006) (noting that "shareholders generally can vote only on matters submitted to them by directors," "shareholders can neither propose their own transactions or charter amendments, nor modify those proposed by directors," and shareholders generally "can neither vote against board-sponsored candidates nor propose alternatives."). The ability to vote for directors is

therefore one of the few methods shareholders can use to ensure that their voices are heard.

Because shares are widely dispersed, the voting power of one share is limited; shareholders therefore tend to vote by proxy. Velasco, at 417. A proxy contest therefore typically arises when shareholders are seeking change; for example, when the current Board is making decisions that are impeding the growth or well-being of its company. Proxy contests "provide an avenue" to keep directors accountable. Velasco, at 426. A proxy contest therefore inherently involves an attempt to change the way the company is being run—what Appellant calls a "contest to force corporate conduct"—for the better. Since stock price is a typical indicator of a company's health, the preferred outcome for a proxy contest is therefore a rise in stock price—a healthier company. What Appellant describes as "expressly what the Statute forbids" is *exactly what is meant to happen in a proxy contest*.

In seeking to penalize non-manipulative proxy contest conduct that causes no concrete harm to investors, Appellant's proposed interpretation would cause uncertainty around precisely what proxy conduct is

permitted. As the Supreme Court observed in *Karlan v. City of Cincinnati*, 416 U.S. 924, 925 (1974): "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." (*citing Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (*quoting Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), and *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Rather than risk exposure to liability because of differing interpretations of which non-manipulative, unharmful conduct might be prohibited under Appellant's proposed application of R.C. 1707.043, shareholders are likely to "steer far wide of the unlawful zone" and avoid proxy conduct altogether.

Appellant's position on R.C. 1707.043 would apply that statute to every well-run, well-intentioned proxy contest, to every proxy contest that wanted to implement productive change at a company, to every proxy contest that wanted to shake up a tired Board, to every proxy contest that wanted to help. And in doing so, Appellant's position on R.C. 1707.043 would effectively chill those proxy contests, inappropriately silencing

shareholder voices and removing shareholders' primary tool for holding directors accountable.[1]

III. Appellant's Proposed Interpretation Would Harm Ohio Businesses and Communities, Which Rely on Shareholder Activism for Creative Ideas and Innovation.

Adopting Appellant's interpretation and effectively banning nonmanipulative, unharmful proxy contests or other exercises of shareholder rights would be hugely detrimental, not just to the shareholders whose rights would be taken away, but to the businesses and communities who depend on those shareholders to hold directors accountable for driving growth.

In this case, specifically, Appellees' ideas did not harm Big Lots. It would be inappropriate and a misplaced application of Ohio law to penalize Appellees for engaging in legal, unharmful (and possibly valuable) activity that ultimately could have benefitted Big Lots and its

[1] *See also Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 662-63 (Del. Ch. 1988) (striking down a board's efforts to prevent shareholders from implementing a proposal made by a 9% shareholder "exercising power for the primary purpose of foreclosing effective shareholder action").

shareholders. ICAN has spoken out before against attempts to chill legal activity in the securities markets: for example, ICAN recently filed an *amicus* brief protesting the imposition of significant monetary remedies in the absence of investor harm or deceptive conduct. *See* Brief of *Amicus Curiae* Investor Choice Advocates Network in Support of Defendants-Appellants' Opening Brief, *U.S. Securities & Exchange Commission v. Spartan Securities Grp., Ltd.*, 11th Cir. No. 22-13129, (Jan. 24, 2023). This is the same song.

Empirical evidence shows that the exercise of shareholder rights—shareholder activism—is beneficial to companies. *See* Paul Rose and Bernard S. Sharfman, *Shareholder Activism as a Corrective Mechanism in Corporate Governance*, 2014 B.Y.U. L.R. 1015, 1039-1040 (2015) (noting that "significant wealth enhancement has been found" where activism leads to "changes in business strategy")[2]. Importantly, this

[2] *See also* Alon Brav et al., Hedge Fund Activism, Corporate Governance, and Firm Performance, 63 J. FIN. 1729 (2008); Christopher P. Clifford, Value Creation or Destruction? Hedge Funds as Shareholder Activists, 14 J. CORP. FIN. 323, 324 (2008) (finding that firms targeted by hedge funds for active purposes earn larger, positive returns than firms targeted by hedge funds for passive purpose).

evidence also shows that this benefit is not short-lived. *See id.* at 1042 ("[C]ertain types of offensive shareholder activism are beneficial for shareholders."). Shareholder voting is a way to bring new ideas to a business. It is also a way for shareholders to speak. To vote is to speak, and to deny shareholders the right to speak goes against the core, fundamental principles of our economy.

IV. Conclusion

For all the reasons set forth above, ICAN respectfully requests that this Court affirm the interpretation of R.C. 1707.043 adopted by the trial court, which is the logical and best interpretation and one which will ultimately serve the interests of the businesses and people of Ohio. To do otherwise and adopt the incorrect interpretation put forth by Appellant would harm and chill legitimate conduct by investors, which would be against public policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record through this Court's electronic filing system.

Respectfully submitted,

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