IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: NATIONAL CITY CORPORATION SHAREHOLDERS LITIGATION.	§	Nos. 542 and 543, 2009
JULIEN J. McCALL, JR., LEON ATAYAN, THOMAS O'ROURKE and WILLIAM E. MANBY,	§	CONSOLIDATED
Objectors Below, Appellants,	§	Court Below—Court of Chancery of the State of Delaware
and	§	C.A. No. 4123
PETER VADAS and DR. DANIEL ROCKER,	§	
Objectors Below, Appellants,	§	
v.	§	
DAVID ANDERSON, Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiff Below, Appellee,	§	
and	§	
NATIONAL CITY CORPORATION, JON E. BARFIELD, JAMES S. BROADHURST, CHRISTOPHER M. CONNOR, BERNADINE P. HEALY, JEFFREY D. KELLY, ALLEN H. KORANDA, MICHAEL B. McALLISTER, PAUL A. ORMOND, PETER E. RASKIND, GERALD L.	§	

SHAHEEN, RICHARD E.	§
THORNBURGH, JERRY SUE	§
THORNTON, MORRY WEISS, and	§
THE PNC FINANCIAL SERVICES	§
GROUP, INC.,	§
	§
Defendants Below,	§
Appellees.	§

Submitted: June 25, 2010
Decided: June 29, 2010

Before **STEELE**, Chief Justice, **HOLLAND, BERGER, JACOBS** and **RIDGELY**, Justices, constituting the Court *en Banc*.

O R D E R

This 29th day of June 2010, it appears to the Court that:

(1) These consolidated appeals contest the Court of Chancery's approval of a class action settlement resolving litigation challenging the decision of the board of directors of National City Corporation to approve a merger transaction with The PNC Financial Services Group, Inc. All of the appellants objected to the settlement. The appellants McCall, Atayan, O'Rourke and Manby will be referred to as McCall. The appellants Vadas and Rocker will be referred to as Vadas.

(2) This Court heard oral arguments *en banc* on June 2, 2010. During those arguments, we were informed that the Vadas appellants had dismissed their related federal action in the United States District Court for the Northern District of Ohio, without prejudice. That dismissal was disclosed during the oral argument by the McCall appellants' pro hac vice counsel and was unknown to Vadas' Delaware

counsel, who was present at the oral argument but made no argument on behalf of the Vadas appellants.

(3) Following oral arguments this Court directed the Delaware attorney for Vadas to answer two questions:

> First, does your client, Vadas, wish to pursue his appeal in the Supreme Court of the State of Delaware?
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> Second, if your client, Vadas, wishes to pursue his appeal in the Supreme Court of the State of Delaware, why did the appeal not become moot when the federal action in Ohio was dismissed?

(4) In his June 7 letter response filed with this Court, Vadas states that he wants to pursue his appeal and argues that his appeal is not moot because he "need not be a named plaintiff or class representative in the pending federal security actions in order to establish his standing for this appeal." That argument is not supported by the record. Vadas' objections to the settlement in the Court of Chancery and the basis for the arguments set forth in the opening brief that he filed with this Court were all predicated upon his then-pending federal action in the United States District Court for the Northern District of Ohio.

(5) In his first argument on appeal, Vadas' opening brief asserts that he should be permitted to opt out of the settlement because the class representative did not adequately represent his interests. That argument was based on the fact that he had filed his own complaint relating to the merger in the federal court for the Northern District of Ohio.

> Those shareholders who voted in favor of the merger were undoubtedly well represented. *Those who opposed the merger but did nothing in furtherance of this opposition also were well represented.* However, those like Mr. Vadas who took affirmative steps and brought an action demanding injunctive relief and monetary damages were NOT well represented. They should have an opportunity to opt-out of the class and the settlement and to pursue their remedies at their own expense in a different forum.
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> ***
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> In the instant case, Mr. Vadas was in an entirely different posture than most of the other members of the class, and certainly in a different posture than the class representatives. He had instituted a suit, had demanded monetary as well as injunctive relief, and had challenged the "golden parachute" element of the proposed transaction. *Therefore, he should be entitled to opt out of the class and to pursue his remedies on his own.*

In response to Vadas' June 7 letter, the appellees argue "now that Vadas has dismissed his lawsuit, he is similarly situated with '[t]hose who opposed the merger but did nothing in furtherance of this opposition.' For this reason, his first argument point—inadequate representation—is now moot." We agree.

(6) Vadas' second argument was also predicated upon the pendency of his federal complaint in Ohio. The Summary of Argument in Vadas' opening brief states:

> II. The Chancellor abused his discretion when he overruled Vadas' Objections because ... a party who has a suit then pending should be permitted to "opt out" of the class and pursue his claim for monetary damages on his own.

Accordingly, in this appeal, the voluntary dismissal of Vadas' federal action in Ohio also makes his second argument moot.

(7) In asking this Court to consider the merits of his appeal—notwithstanding his voluntary dismissal of the federal action in Ohio—Vadas' June 7 letter argues: "so long as Mr. Vadas is a class member whose monetary damages claims are subject to the broad releases in the settlement erroneously approved by the Court of Chancery, he is entitled to the due process protection provided under *Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)."

(8) Vadas did not make that argument in the opening brief that he filed with this Court. Moreover, the record reflects that neither *Prezant* nor *Shutts* were cited by Vadas in either his opening brief in this Court or in his brief to the Court of Chancery. Vadas' attempt to make a new argument in his June 7 letter that was not presented in his opening brief is precluded by Supreme Court Rule 14, and this Court's decision in *Roca v. E.I. du Pont de Nemours & Co.*[1]

(9) During oral arguments on June 2, McCall's attorney relied upon *Phillips Petroleum Co. v. Shutts* and other cases that were not cited in McCall's opening brief. If those cases were additional authority that supported an argument which was fairly presented in McCall's opening brief, it was incumbent upon McCall's attorney to provide this Court and opposing counsel with copies of those cases prior to oral argument. McCall did not comply with that proper appellate

[1] *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242-43 (Del. 2004).

procedure. Moreover, those new legal authorities were cited to support a legal argument that was not fully and fairly presented in McCall's opening brief. Arguments that are not presented in an appellant's opening brief are waived on appeal. New legal arguments cannot be presented for the first time at oral argument.[2] Therefore, we will not consider the new arguments presented by McCall for the first time at oral argument.

(10) We have concluded that the judgments of the Court of Chancery should be affirmed on the merits, as to all appellants, for the reasons stated in its opinion dated July 31, 2009. Alternatively, as to the Vadas appellants, we have also concluded that their appeal is moot.

(11) We have concluded that the judgment of the Court of Chancery should be affirmed on the merits as to the cross-appeal for the reasons stated in the court's opinion dated July 31, 2009.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgments of the Court of Chancery are AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

[2] *Id.*