In the

Supreme Court of Ohio

UNITED TELEPHONE CREDIT UNION, INC.,	:	Case No. 2006-1174
Plaintiff-Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
KENNETH A. ROBERTS, Acting Deputy Superintendent of Credit Unions,	:	Court of Appeals Case Nos. 05AP-827 and 05AP-870
and	:	
AMERICAN MUTUAL SHARE INSURANCE CORPORATION,	:	
Defendants-Appellees.	:	

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INTRODUCTION

This case involves one person's attempt to rewrite basic principles of corporate governance, so that she may unilaterally direct the filing of a lawsuit in a credit union's name, without approval of a board of directors and without any source of authority other than her status as a *former* director of the credit union. Worse yet, she seeks to claim such unilateral control so that she may file (again, in the credit union's name) not just any lawsuit, but specifically a lawsuit that challenges special government oversight of the credit union, so that she then might have control of the credit union's finances as well as control of its legal strategy. On top of that, the particular government oversight at issue—the placement of this credit union into a conservatorship, under which an outside conservator was temporarily put in charge of the credit union—was triggered in response to self-dealing and other questionable financial transactions by this former director, her husband and co-director, Martin J. Hughes, Jr., and others. Thus, not only would it violate the statutes at issue to grant a former director such unilateral power, but it would violate sound public policy and common sense to do so.

As explained below, the statutes at issue do not allow such unilateral control by a former director, acting without board approval. Consequently, the Court should reject this attempt by Natalie Hughes, a former director of the United Telephone Credit Union (UTCU), to claim that she had the power to direct litigation in UTCU's name. Specifically, the Court should hold that neither an ex-director nor a sole director may file a challenge to a conservatorship order under R.C. 1733.361(A)(2).

This case began when the Ohio Department of Commerce Division of Financial Institutions ("DFI"), which regulates credit unions in Ohio, discovered questionable transactions at UTCU. For example, Martin Hughes moved stock that UTCU owned, worth over $2 million, into Natalie Hughes's personal account. She initially paid nothing for the stock, and six months later she

belatedly paid UTCU a little over $200,000 for the shares. This transaction, along with earlier findings of IRS noncompliance and other accounting irregularities, led DFI to determine that it needed to appoint a conservator, under R.C. 1733.361, to oversee UTCU's affairs—specifically, to ensure that decisions were made for the good of UTCU's members, not for its directors' personal interests. In February 2003, DFI appointed Defendant-Appellee American Mutual Share Insurance Company ("ASI") as UTCU's conservator.

Ohio law specifically provides an immediate, one-time opportunity for a credit union to challenge a conservatorship order. R.C. 1733.361(A)(2) says that a credit union may file such a challenge within 30 days of such a conservatorship order. The statute then directs the common pleas court hearing the challenge to move the case ahead of all other civil cases and to resolve the challenge quickly. After that 30-day period, the statute does not provide for any later attempt by the credit union's directors or members or others to lift the conservatorship. Rather, the conservatorship ends when DFI finds it appropriate to do so, under R.C. 1733.361(D). And R.C. 1733.361(E) authorizes the conservator to propose to DFI a plan to terminate the conservatorship. Here, a challenge in UTCU's name was initially filed within the 30-day window, but it was voluntarily dismissed three months later, in May 2003.

The filing at issue in this appeal occurred in May 2004, when Natalie Hughes, who by that time had been removed from her position as a director of UTCU, unilaterally directed counsel to "refile" a challenge to the conservatorship order. Hughes had been removed as a director ten months earlier, in July 2003, by DFI. Meanwhile, the board's other directors had left of their own volition or consented to removal. Thus, no one denies that the purported refiling here was not approved by UTCU's board, or by its members through any official action, or by any other method other than Hughes's individual instructions. Thus, the first issue before the Court is

whether Natalie Hughes, as a sole ex-director, had the power to direct counsel to file a lawsuit under 1733.361(A)(2) in UTCU's name—and the answer is "no."

The Court should affirm the decision of the appeals court, which properly held that nothing in R.C. 1733.361(A)(2), nor any other provision in Chapter 1733, allowed ex-director Hughes to direct the refiling at issue. The plain text of R.C. 1733.361(A)(2) says that the credit union itself must file. The other provisions of Chapter 1733 specify that a credit union, like other corporations, acts through its board of directors, when a quorum meets and a majority of that quorum authorizes action. Hughes seeks an exemption from this plain language, and from our common understanding of corporate governance, because, she says, she and UTCU faced exigent circumstances. More specifically, she urges the Court to adopt what might be called a "necessity" rule or the "no way out" rule: she claims that *someone* has to be allowed to file, and since no other directors remained, the task and power must fall to her as a last resort.

Hughes's plea for an exemption should be rejected. First, nothing in the text of the statute allows for such an exemption. Further, she is simply wrong when she says that no other option existed after the board dwindled away. Chapter 1733 expressly provides for regeneration of a board, by appointment of new directors, so that a new board could exercise whatever powers are available to it. Here, because of the conservatorship, such a new board would have been limited to filing a conservatorship challenge (subject to the deadline). In any case, the availability of *that* path means that Hughes's demand for unilateral power, without board backing, is not only unauthorized by the statutes, but it is also not necessary. For the same reason, her alternate attack—that the statutory scheme violates due process—also fails. In the ordinary case, the provision for a conservatorship challenge affords all the process that is due. And in an extraordinary case of a dwindling board, the option to refill the board also satisfies due process.

Finally, although DFI urges the Court to reject Hughes's propositions of law if the Court reaches them, DFI urges the Court to instead take another path, and to affirm the judgment below on an alternate basis—namely, that the refiling here was invalid no matter who authorized it, because the 30-day deadline had long passed. And Ohio's savings statute does not apply to this particular deadline. Ohio's general savings statute, R.C. 2305.19, typically allows a plaintiff to dismiss a case and refile it within a year of the dismissal, even if the original statute of limitations expires by the time of refiling. But the savings statute does not apply to all statutory actions. As the Court has held, the savings statute does not apply when "application of the savings statute so adversely affects the [purpose of the statute or cause of action at issue] that the legislature could not have intended to apply the savings statute to [such lawsuits]." *Allen v. McBride,* 105 Ohio St. 3d 21, 2004-Ohio-7112 at ¶ 21. Here, the General Assembly left no doubt that it wanted *immediate* resolution of a conservatorship challenge, as shown by the 30-day deadline and the requirement that the court decide the case quickly. Thus, it defies common sense to suppose that the same General Assembly that wants such quick resolution would also intend to allow a year-long delay, during which the conservator, members, creditors, and debtors would all act under a cloud of uncertainty as to who is, or will soon be, in charge. The whole idea of a conservatorship is to restore stability to an ailing institution, so extending a period of uncertainty undercuts the entire statutory scheme. Thus, the savings statute does not apply, and the refiling occurred too late, no matter who filed it.

In sum, the Court should affirm the dismissal of Hughes's purported lawsuit in UTCU's name. She had no power to direct the filing, and it was simply filed too late.

STATEMENT OF THE CASE AND FACTS

The United Telephone Credit Union has some 5000 members. As UTCU is chartered by the state, it is subject to R.C. Chapter 1733. The Department of Commerce, Division of Financial Institutions ("DFI") regulates credit unions, including UTCU. Ohio law requires credit unions, like other corporations, to act by and through a board of directors. Martin J. Hughes, Jr. was a founding member of UTCU in 1957. Supp. 8.[1] He controlled UTCU as the president of the board of directors for over 40 years. See Supp. 25. Martin Hughes was also UTCU's volunteer manager until 1999, when he became its paid employee. See Supp. 18. The rest of the five-member UTCU board always comprised some combination of Martin Hughes's long-time friends, union subordinates, neighbors, and family members. The board for many years included his wife, Natalie Hughes. She moved to the center of this case when Martin Hughes was declared mentally incompetent in 2003. Supp. 47.

A. Due to the Hughes family's financial improprieties, DFI put UTCU into supervision and then conservatorship.

As UTCU board members, Martin and Natalie Hughes owed UTCU duties of good faith, fair dealing, full disclosure, and other common-law fiduciary duties. See R.C. 1733.05; OAC 1301:9-2-13(B). As the court of appeals found, however, "in 2001, a number of questionable occurrences and practices were discovered during a routine examination of UTCU conducted by DFI." *United Tel. Credit Union, Inc. v. Roberts* (10th Dist.), 2006 Ohio App. Lexis 2032, 2006-Ohio-2198, ¶ 3. In July 2002, UTCU executed a Supervisory Agreement putting it into supervision under R.C. 1733.325. The Supervisory Agreement resulted from improper accounting, IRS noncompliance, self-dealing and misappropriation of credit union funds, as well as improper investments and breaches of fiduciary duty on the part of management and the board

[1] Unless otherwise indicated, "Supp." refers to UTCU's supplement.

of directors. Supp. 63. The board at that time consisted of Martin and Natalie Hughes, his cousin Daniel Hughes, and two neighbors, Shannon Gould and Kathryn Munteanu. Supp. 71. The Supervisory Agreement specified the corrective actions required of UTCU, but the board failed to implement these corrective actions. Supp. 2-3.

In addition, when state regulators were examining UTCU's financial dealings, they discovered that in late 2001 Martin Hughes deposited 1742 shares of a UTCU asset, Fahey Bank stock, into an account his wife controlled. At the time she was a director of both Fahey Bank and UTCU, and the bank's major shareholder. Neither of the Hugheses paid anything for the stock. About six months later, after inquiry by DFI examiners, Natalie Hughes paid UTCU $220,475 for the shares, about a tenth of their fair-market value according to an independent appraisal. DFI concluded that the transfer dissipated UTCU's assets and harmed the credit union and its creditors. Supp. 1-2.

Accordingly, the Department of Commerce, Division of Financial Institutions ("DFI") moved to the next step: it put UTCU into conservatorship under R.C. 1733.361. DFI issued the Order Appointing Conservator ("Conservatorship Order,") on February 24, 2003. Supp. 1-3. Superintendent of Financial Institutions F. Scott O'Donnell administers DFI. Defendant-Appellee Kenneth A. Roberts is DFI's Acting Deputy Superintendent for Credit Unions, the primary regulator of state-chartered credit unions. He signed the Conservatorship Order, which appointed Appellee American Mutual Share Insurance Company ("ASI") as UTCU's conservator. Supp. 1-4.

Three days after DFI put UTCU into conservatorship, a complaint filed in UTCU's name asked the Franklin County Court of Common Pleas to remove the conservator, under R.C. 1733.361(A)(2). Supp. 7-23. The statute sets a deadline for such a challenge at 30 days from the

date the conservator is appointed. Not quite three months after filing, on May 20, 2003, the challenge was voluntarily dismissed. Supp. 75. A year after the dismissal, invoking the Ohio savings statute, R.C. 2305.19, Hughes refiled the conservatorship challenge in UTCU's name. Supp. 24-29.

B. Natalie Hughes contested her removal from the UTCU board of directors and authorized refiling the conservatorship challenge without board approval.

By the time of the May 20, 2004 refiling the UTCU board had changed considerably. Martin Hughes was declared legally incompetent and his son Carl became his court-appointed legal guardian in September 2003. Supp. 43. Carl Hughes later agreed to his father's removal from the board. Supp. 48. Daniel Hughes consented to his own removal from the board in February 2004. Supp. 50. And Shannon Gould and Kathryn Munteanu, who had signed the Supervisory Agreement as board members, were no longer on the board at the time of the refiling. Supp. 40, 70. Only Natalie Hughes maintained an appeal from her removal. Supp. 40.

In his capacity as Acting Deputy Superintendent for Credit Unions, on July 23, 2003, Kenneth Roberts had signed the DFI order removing Natalie Hughes from the UTCU board of directors. When she appealed, the common pleas court ordered her reinstated. But the Tenth District Court of Appeals reversed, holding in *Hughes v. Ohio Department of Commerce, Division of Financial Institutions* (10th Dist.), 2005 Ohio App. Lexis 5697, 2005-Ohio-6368, that the trial court lacked jurisdiction because the appeal had not been perfected as R.C. 119.12 required. This Court took jurisdiction of her discretionary appeal, which has been fully briefed and argued. See *Hughes v. Ohio Dep't of Commerce, Div. of Fin. Insts.*, Case No. 2006-0107.

In May 2004 Hughes, acting alone, unilaterally authorized refiling the conservatorship challenge under R.C. 1733.361(A)(2) in UTCU's name.[2] The trial court permitted the conservator, ASI, to intervene. *Hughes*, 2005-Ohio-6368, at ¶ 5, n.5. The parties moved for summary judgment.

C. The trial court ordered the conservator removed, but the court of appeals reversed because Hughes did not have authority to refile the conservatorship challenge.

The trial court determined that the savings statute, R.C. 2305.19, applied to the refiled action, rejecting Roberts's argument that the court lacked subject-matter jurisdiction. The trial court also agreed with Hughes that the 2003 Conservatorship Order was invalid because Roberts did not have authority to sign it. The court ordered ASI removed as conservator. Finally, the trial court held that Hughes as a single director could authorize refiling the conservatorship challenge on UTCU's behalf. Decision and Order, *United Tel. Credit Union, Inc. v. Kenneth A. Roberts* (July 26, 2005), Franklin C.P. No. 04CVH05-5436. On appeal, the Tenth District Court of Appeals did not reach the question of Roberts's authority to remove Hughes as a director or the question of whether the savings statute applied to extend the 30-day deadline to challenge a conservatorship. The court of appeals reversed because it was Hughes who acted without authority. *United Tel. Credit Union*, 2006-Ohio-2198 at ¶ 19. The credit union had not approved the refiling in the manner mandated by R.C. Chapter 1733. *Id.* at ¶ 14, 18. Hughes's unilateral approval of the refiling was not the act of the credit union, and she lacked standing—whether as a UTCU director, ex-director, or member—to refile the action herself. *Id.* at ¶ 13-14, 17. Declaring the remaining assignments of error moot, the court of appeals remanded the action to the trial court to dismiss the complaint. *Id.* at ¶ 2.

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[2] At her deposition, Hughes testified that she authorized her attorney to refile the conservatorship challenge, but when questioned further on this point, she equivocated. See ASI Brief at 7-8.

This Court accepted jurisdiction of Hughes's discretionary appeal on Propositions of Law I and II. See *10/4/2006 Case Announcements*, 2006-Ohio-5083.

ARGUMENT

Defendant-Appellee Kenneth A. Roberts's Proposition of Law No. 1:

A credit union may file a challenge to a conservatorship under R.C. 1733.361(A)(2), only if the filing is properly authorized by the board of directors. Neither a single director or ex-director may unilaterally direct a filing in the credit union's name.

Although United Telephone Credit Union ("UTCU") is designated as the plaintiff here, in fact it was not UTCU that refiled this action. Instead, a former director, Natalie Hughes, acting on her own without legal authority to sue in UTCU's name, directed the filing. R.C. Chapter 1733 permits a credit union to challenge the appointment of a conservator by the same method a credit union exercises its other corporate powers: by a majority vote of a quorum of its board of directors. Absent a specific exception—and no exception came into play here—a credit union can act *only* through its board of directors, in compliance with R.C. 1733.15(A) and .17. Because UTCU's board of directors did not approve the refiling in the only way permitted by the Revised Code, the actual plaintiff is not the credit union. It is instead Hughes, a natural person. The court of appeals correctly concluded that she had no standing to challenge the conservatorship under R.C. 1733.361(A)(2), so the challenge should have been dismissed.

A. The plain text of Chapter 1733's corporate governance provisions allows a credit union to challenge a conservatorship only when the board of directors authorizes the challenge, but not at the behest of a single director or ex-director.

This appeal turns on the answer to one question: Who has authority to act in the name of a credit union? Hughes says that she does, but the statutes say otherwise. Try as she might to misread them, they are written in clear and straightforward prose. Chapter 1733 contains safeguards to prevent a single director from assuming the powers of a corporate board of directors, and such safeguards advance the sound policy of protecting credit union members' assets. R.C. 1733.15(A) and 1733.17 ("the Board Control provisions") protect credit union assets by delineating the conditions under which a credit union can act *as* a credit union. The General

Assembly intended the Board Control provisions to apply to R.C. 1733.361(A)(2) conservatorship challenges.

The general rule for credit union governance is set out in R.C. 1733.15(A)(1): "the corporate powers of a credit union shall be exercised, its business conducted, and its property controlled by a board of directors, provided that the number of directors fixed by the articles or regulations shall not be less than five." And R.C. 1733.17 sets the specific requirements for the board to act on behalf of the credit union: "The act of a majority of the directors present at a meeting at which a quorum is present is the act of the board, . . ." These provisions are clear and unambiguous. They apply to all of the acts undertaken in the credit union's name, absent a specific statutory exception.

The text of R.C. 1733.361(A)(2) contains no such exception: "Within thirty days after the date of the order of appointment of a conservator, the credit union may commence a civil action in the court of common pleas of Franklin [C]ounty to obtain an order compelling the superintendent to remove the conservator." Moreover, when there is less than a full complement of directors, as can happen in the lead-up to a conservatorship, the Board Control provisions still apply. R.C. 1733.17 and 1733.12 provide for regeneration of the board. If qualified board members are willing to join the board, a credit union can then act on the authority of its board, including challenging a conservatorship.[3] UTCU could not as a matter of law challenge its conservatorship without following the Board Control provisions.

Cloaking herself in the authority of UTCU, Hughes nevertheless purported to challenge the UTCU conservatorship by refiling this conservatorship challenge. But she acted alone and

[3] The General Assembly did not guarantee every corporate board that it would always be able to find people willing to fill vacancies. Chapter 1733 affords an opportunity to replace directors so as to take board action; the rest is up to those involved.

without even minimally complying with the statutory requirements that would have qualified the refiling as the credit union's act. In fact, there was not even a meeting of the board of directors at which the decision *could* have been made. The court of appeals correctly concluded that UTCU did not authorize the 1733.361(A)(2) conservatorship challenge to be refiled.

1. A credit union must comply with the credit union governance provisions, R.C. 1733.15(A) and 1733.17, to contest a conservatorship.

The plain language of the conservatorship challenge statute, R.C. 1733.361(A)(2), defeats Hughes's attempt to argue that the statute permitted her to refile on UTCU's behalf unilaterally. She responds that because (A)(2) does not specifically *prohibit* a conservatorship challenge without board approval in compliance with the Board Control provisions, it must *permit* such a challenge in the name of a credit union on no more than her say-so. She is wrong. First, as Hughes admits, the Board Control provisions "apply generally to the manner in which a board of directors may take action." Appellant UTCU's Brief at 5. As a result, absent a specific exception, the necessary Board Control provisions must apply to the particular act here—challenging a conservatorship in court. By well-established principle, the parts of a statutory scheme must be read together:

> Statutes or sections of statutes which expressly refer to each other or by implication relate to each other or which relate to the same person or to the same class of persons or things, or to the same subject or object may be regarded as *in pari materia*, as many statutes which relate to similar things, subjects or objects. Sections have been considered *in pari materia* which are parts of the same law or act.

Suez Co. v. Young (1963), 118 Ohio App. 415, 423 (citing *State ex rel. Crawford v. Indus. Comm'n* (1924), 110 Ohio St. 271, 280; *State v. Smith* (1931), 123 Ohio St. 237, paragraph one of the syllabus; *Brand v. Safford* (1928), 118 Ohio St. 56, 65; *State ex rel. Darby v. Hadaway* (1925), 113 Ohio St. 658, 659-660; *State ex rel. Greisinger v. Grand Rapids Bd. of Education* (1949); 88 Ohio App. 364, 369; and *Smith v. Ray* (1947), 83 Ohio App. 61, 71). Applying the *in*

pari materia principle, "recourse may be had to the several sections or statutes for the purpose of arriving at a correct interpretation of any particular one." *Suez Co.*, 118 Ohio App. at 423-424. Hughes's misreading of 1733.361(A)(2) stands this time-tested principle on its head.

The General Assembly demonstrated its willingness to write exceptions into Chapter 1733 when it meant to do so, as Chapter 1733 contains express exceptions to the Board Control provisions by which a credit union acts *as* a credit union. Hughes's merit brief points to a prominent example: R.C. 1733.361(A)(3), which immediately follows the very subsection under which she claims standing to challenge the conservatorship. It provides that "[t]he credit union may consent to the appointment of a conservator by resolution of the majority of the board of directors on the date of the order of appointment." Hughes then admits that if the legislature had intended (A)(2) to read the same way, it would have "expressly provided" accordingly. Appt's Brief at 5. Her admission is exactly right. Because (A)(3) specifies that a credit union takes official action to consent to a conservatorship by a method different from the Board Control provisions, they do not apply to (A)(3).

Hughes is also mistaken about the application to this case of *State ex rel. Antonucci v. Youngstown City School District Board of Education*, 87 Ohio St. 3d 564, 2000-Ohio-246. *Antonucci* refused to read a limitation into a statute when the legislature does not expressly place it in the statute. To read the quorum requirement out of 1733.17 would be inconsistent with *Antonucci*.

Neither federal nor Ohio caselaw endorses Hughes's position on corporate governance. She contends that two federal cases, *Franklin Savings Association v. Office of Thrift Supervision* (D. Kan. 1990), 740 F. Supp. 1531, and *Inland Empire Insurance Co. v. Freed* (10th Cir. 1956), 239 F.2d 289, establish the broad standard that virtually anyone—including a defalcating former

director—can assert the interest of a corporation under a conservatorship or a receivership, respectively. Both cases explicitly reject such broad pronouncements. Instead, they simply recognize that corporate shareholders may sue on their *own* behalf. *Franklin*, 740 F. Supp. at 1534; *Inland*, 239 F.2d at 291-292. Neither supports Hughes's very different argument that a shareholder or former director may step into the *corporation*'s shoes.

Ohio caselaw Hughes relies on offers no support for her position either. *Nottingdale Homeowners Association v. Darby* (12th Dist.), 1986 Ohio App. Lexis 7588, and *Ross v. Roston Elevator Co.* (8th Dist.), 1975 Ohio App. Lexis 6142, dealt with very different fact patterns. *Nottingdale* held that members of a condominium association board of trustees who "took such offices in good faith after being voted into them by the unit owners" and "attempted to act in the best business interest" of the association could bind the association as "de facto trustees" even though not voted in by a quorum of the residents. *Id.* at *7-8. In contrast, Hughes is a single former director, removed from the board by state regulators during a conservatorship. And she acted alone without the authorization of a single other member, much less other directors. *Ross* held simply that the president of a corporation with only two officers could hire an attorney to defend the corporation. *Id.* at *12. Again, the facts diverge radically from those of this case.

Ohio corporate caselaw supports the appeals court's decision here. *McDonald v. Dalheim* (11th Dist. 1996), 114 Ohio App. 3d 543, 546, held that where a majority of four board members was required for a quorum, a vote by two members did not bind the corporation. Similarly, *Wadsworth v. Davis* (1862), 13 Ohio St. 123, 130-131, concluded that a board of directors has the primary authority to file a lawsuit on behalf of the corporation. Corporate law applies to credit unions under R.C. 1733.01(A) and 1733.45 where it does not contradict Chapter 1733.

Accordingly, the Court should affirm the appeals court's decision, which is consistent with the sound principles of Ohio corporate governance.

2. Hughes cannot justify her unilateral refiling of the conservatorship challenge by arguing that the other directors' departures rendered board approval impossible, because Chapter 1733 provides a method to regenerate the board.

Hughes erroneously maintains that the Court should grant her unilateral authority to refile the conservatorship challenge in UTCU's name, despite what the statutes say, because in the exigent circumstances of conservator control, only she could authorize the refiling. But it was self-dealing and other financial wrongdoing that led DFI to appoint a conservatorship in the first place. These were the exigent circumstances, and they made it even more important that one person not be allowed to act in the credit union's name on nothing but her own say-so. Hughes objects that there was no statutory alternative to conferring such power on her. Somebody had to act in UTCU's name to fend off the conservator, she says. She portrays herself as the only person in a position to contest the conservatorship on behalf of the credit union.[4] But this objection is unavailing, because Chapter 1733 provides a two-step method for challenging a conservatorship that complies with the Board Control provisions.

[4] Hughes is flat wrong when she argues (Appt's Brief at 9, note 5) that DFI acknowledged in various ways that "Hughes was the appropriate party to act on behalf of UTCU." DFI did no such thing. Hughes twists DFI's counsel's words in a March 24, 2005 letter to try to manufacture evidence for this baseless contention. Hughes filed this same letter with the trial court, asking it to misconstrue DFI's position by mischaracterizing the letter. DFI responded with a July 15, 2005 filing in which it explained exactly why Hughes was wrong. DFI's response speaks for itself. But should the Court wish to examine the details to see for itself that this is a non-issue, DFI has filed the July 15, 2005 response as the Third Supplement, for the Court's convenience. The filing is titled "Defendant's Objection to Plaintiff's Notice of Filing DFI Legal Opinion on Who May Prosecute Challenge on Behalf of UTCU."

a. In the special circumstances of a conservatorship, any one person's exercise of unilateral decision-making power in the credit union's name is particularly dangerous.

To portray herself as UTCU's lone champion, Hughes attempts to cast DFI as a regulatory bully: "UTCU's board of directors had been reduced to a single member (Mrs. Hughes) largely through the acts of the state and the reality of the situation facing a credit union under *regulatory assault*." (Appellant's Brief at 2, emphasis added.) Two board members were left "[d]uring protracted regulatory supervision of UTCU affairs," and DFI "pursued removal proceedings against the three remaining directors." *Id.* In Hughes's version of the facts, DFI created extraordinary circumstances that justify her taking action as she did. The UTCU board was depleted by departures of members that she blames on "the state as it continued its takeover." *Id.* at 6.

Hughes neglects some inconvenient facts. First, UTCU *consented* to the July 2002 Order of Supervision, in which it agreed to correct the problems caused by mismanagement of UTCU funds, among other issues. It failed to live up to this agreement. Second, DFI did not remove board members Munteanu and Gould. They left on their own. Third, Martin Hughes could not remain on the board of directors, not because of DFI's so-called "regulatory assault," but because a court declared him legally incompetent, and his son *consented* to his removal. Fourth, Daniel Hughes also *consented* to his removal.

More fundamentally, though, Hughes turns the equities upside-down when she attempts to use the conservatorship to justify the consolidation of the board's powers in a single person, herself. A credit union in conservatorship has a *greater* need to protect itself from control by a maverick director, or worse, a maverick ex-director. Permitting such unilateral control puts the credit union at greater risk of harm because the credit union cannot protect itself from that one person's pursuing his or her own interests, rather than the credit union's. That is why the

purposes of 1733.361(A)(2) cannot be equated with those of (A)(3). Subsection (A)(3) permits a quorum of the directors in office on the day the conservatorship is ordered to consent to the conservatorship on its behalf. Thus, if only one director remained in office, that one person could consent. That is a very different scenario from that of (A)(2). That one director challenging the conservatorship could be a rogue director. He or she could commit the credit union to filing—and refiling—a challenge to a conservatorship that might have been imposed because of that very director's financial misdealing. The General Assembly did not intend to leave a credit union unprotected in such a situation.

b. Chapter 1733's provisions for regenerating a credit union board of directors protect it from the dangerous consequences of allowing others to exercise corporate authority during a conservatorship.

Hughes ignores Chapter 1733's provisions for regenerating a depleted board of directors so that it can comply with the normal corporate governance statutes. Thus, she is wrong to claim that there was no other way to exercise the option of challenging the conservatorship in court, leaving it to her to act on behalf of the credit union. The alternatives Hughes presents—either reading the statute to allow only the conservator to challenge the conservatorship, or let her take matters into her own hands—constitute a false choice.

To be sure, a conservatorship does alter the governance of a credit union in most respects, as 1733.361(B) provides. It shifts power from a failed board to a conservator under DFI's supervision. But this shift does *not* strip the credit union's board of directors of the power to challenge the conservatorship under (A)(2). Hughes correctly points out that conferring on the conservator exclusive power to challenge itself in court would be absurd. As the case she herself cites puts it, courts "must construe the applicable statute and rule to avoid such unreasonable or absurd results." *State ex rel. Asti v. Ohio Dep't of Youth Servs.*, 107 Ohio St. 3d 262, 2005-Ohio-6432, ¶ 28. But she construes the statute so as to admit of another absurd result: that despite the

safeguards inherent in a duly constituted board of directors, she must be allowed to wield exclusive decision-making power under (A)(2) at a time when allowing one person to do so would be most dangerous.

The simplest and most sensible construction of 1733.361(A)(2) in light of the conservator's powers under 1733.361(B)(2) is that the credit union may approve a filing of an (A)(2) conservatorship challenge if its board acts within the requirements of the Board Control provisions. The statutory mechanism permits a single director to begin the process of regenerating the board:

> [A] majority of the entire authorized number of directors is necessary to constitute a quorum for a meeting of directors *except that a majority of the directors in office constitute a quorum for filling a vacancy on the board.*

(Emphasis added.) When the only person who continued to assert the authority of the directors dwindled to one—Hughes—she would have constituted the majority of the directors in office and thus a quorum of one, authorized by the statute to choose one new board member. Together the two would have constituted a quorum to choose a third director. Once enough vacancies had been filled in this way to constitute a quorum of the entire number of authorized directors, at a board meeting they could have voted on a resolution to refile the conservatorship challenge. And if a majority of the quorum voted for it, the refiling would be the credit union's official act.

In addition, under R.C. 1733.12(A) (and under certain circumstances, 1733.18(C)) the members of the credit union may fill vacancies in the board of directors. Accordingly, if a board is completely depleted, the members may regenerate the board themselves. R.C. 1733.14 sets a quorum for membership meetings at 10% of the voting members, who need not vote in person. Therefore, Hughes's "no alternative" argument is without merit.

B. R.C. 1701.13(H) does not prohibit DFI's challenge to Hughes's standing to file a lawsuit in UTCU's name.

Hughes's attempt to silence the state by invoking R.C. 1701.13(H) is without legal foundation because the statute addresses the powers of the corporation, an *ultra vires* issue. It does not govern where the issue is whether, internally, someone had authority to act in the corporation's name, an *intra vires* issue. Here the Court is being asked to decide an exclusively *intra vires* question that is not within the purview of R.C. 1701.13(H).

R.C. 1701.13(H) provides that "[n]o lack of, or limitation upon, the authority of a corporation shall be asserted in any action. . . ." The purpose of subsection (H) is to protect third parties considering doing business with a corporation from having to "inquire into the purpose or powers that may appear in the articles of incorporation." Model Business Corporation Act §3.04, Official Comment. R.C. 1701.13(H) is based on §3.04. And the Official Comment adds that "Section 3.04 also does not address the validity of essentially *intra vires* conduct that is not approved by appropriate corporate action." At issue here is whether the refiling the conservatorship challenge was the act of the credit union or of Hughes acting without *intra vires* authority. Because it is the latter, R.C. 1703.13(H) does not apply.

Murrell v. Elder-Beerman Stores Corp. (Montgomery C.P. 1968), 16 Ohio Misc. 1, 5 states that R.C. 1701.13(H) deals with the actions a corporation may take under the authority of state law or its charter, i.e., an *ultra vires* matter:

> Corporate acts which are not illegal but which are outside the scope of the general express or implied authority of the corporation are said to be "ultra vires." [Citation omitted] . . . It is the term used to express the action of a corporation which is beyond the powers conferred upon it by charter or the statutes under which it was instituted.

R.C. 1701.59(A) answers the question posed by R.C. 1701.13(H)—who may exercise the authority of the corporation as granted by its charter or by state law:

> Except where the law, the articles, or the regulations require action to be authorized or taken by shareholders, *all of the authority of a corporation shall be exercised by or under the direction of its directors.*

(Emphasis added.)

Moreover, Hughes ignores the distinction the Official Comment to §3.04 makes between *ultra vires* and *intra vires* approval:

> Section 3.04 also does not address the validity of essentially intra vires conduct that is not approved by appropriate corporate action. It does not deal, for example, with the enforceability of an executory contract to sell substantially all the assets of a corporation not in the ordinary course of business that was not approved by the shareholders as required by section 12.02 [R.C. 1701.76]. This type of transaction is not beyond the purposes or powers of the corporation; it simply has not been approved by the corporate authorities as required by law. Similarly, *section 3.04 does not deal with whether a corporation is bound by the action of a corporate agent if the action requires, but has not received, approval by the board of directors.*

(Emphasis added.)

Of course it is within the corporate authority of a credit union to contest a conservatorship under R.C. 1733.361(A)(2). But that does not resolve the question of whether Hughes lacked proper corporate authorization under 1733.15(A) to do so *as a board member*. Like a for-profit corporation under R.C. 1701.59(A), a credit union acts through its board under R.C. 1733.15(A), and 1733.17 precludes a single director from doing anything more than filling vacancies in the name of the credit union.

Hughes's reliance on *Mack Construction Development Corp. v. Austin Smith Construction Corp.* (12th Dist. 1989), 65 Ohio App. 3d 402, is misplaced. *Mack*, a contract action, held that R.C. 1701.13(H) did not apply where the plaintiff-appellant Mack's corporate charter had been cancelled before the plaintiff filed suit, and Mack's filing of the lawsuit was completely without authority under R.C. 1701.13: "[A]fter the corporate charter has been cancelled, corporate officers lose the protection of the Corporation Act, with the result that R.C. 1701.13(H) is inapplicable." *Id.* at 406.

C. Hughes had no authority to refile the conservatorship challenge, regardless of whether she was a director or ex-director.

The court of appeals found it unnecessary to determine whether Roberts's order removing Hughes from the UTCU board was valid, and Hughes's collateral attack on her removal is not before this Court either. Even if the Court ultimately reinstates her appeal of the removal order and it is overturned, that would not mean that she had authority to sue in UTCU's name here. Moreover, should the Court wish to examine the merits, it will find that the removal order was validly issued and not void.

1. Hughes's appeal from the DFI's order removing her from the board is not before the court, and she cannot collaterally attack it here.

Hughes's attempt to contest the order removing her from the board is not before the Court in this appeal. In fact, her attempt to appeal that order was dismissed for lack of jurisdiction. That jurisdictional question is pending decision by this Court in *Hughes v. Ohio Deptartment of Commerce, Division of Financial Institutions*, Case No. 2006-0107. There has been no review whatsoever of the issue she tries to raise here: whether Roberts had the authority to issue the removal order. Thus, she is attempting a wholly improper and seriously premature collateral attack on the removal order. The Court should refuse to consider this collateral issue, and decide the propositions of law on the pertinent legal grounds.

2. Roberts's removal order was valid, and even if it were not, a holding that Hughes acted as a director does not confer authority to sue in the name of the credit union.

Whether as a director, ex-director, or member, Hughes had no legal authority to approve refiling the conservatorship challenge by herself. That was the Tenth District's holding below, and it was right. *United Tel. Credit Union*, 2006-Ohio-2198 at ¶ 9. Thus, Hughes would have lost in the court of appeals even if she had been a director when she refiled the conservatorship. And even if Hughes ultimately won reinstatement to the UTCU board of directors, that would not

change the outcome of *this* appeal. That is because her lack of authority to challenge the conservatorship does not turn on whether she was a director. It turns on whether a single person can exercise the exclusive statutory prerogatives of a credit union's board. Were this Court to determine in *Hughes* that she may appeal the removal, and down the line the removal order were to be vacated, she would have challenged the conservatorship as a sole director. But as no single director has any authority to do what she did in the name of the credit union, she would still have acted without authority.

On the other hand, if she were to lose the *Hughes* appeal, she would lose any chance of being declared a director. Such a holding could not benefit her in this case. Should the Court nevertheless conclude that the removal issue is relevant to this decision, it should hold that DFI's removal order was valid. Hughes's argument to the contrary rests on R.C. 1733.181, which says that only the "superintendent of credit unions" may issue valid removal orders. As the order removing her was signed by the Acting Deputy Superintendent of Credit Unions, Kenneth Roberts, she says it must be invalid. Again, her argument fails because she misreads the applicable statutes.

The "superintendent of credit unions" could not have signed the 2003 removal order because that position went out of existence in 1995. That year, the 121st General Assembly reorganized the structure for regulating financial institutions. Am. Sub. S.B. No. 162, 146 Ohio Laws, Part IV, 9163. That reorganization transferred the powers and duties of the "superintendent of credit unions" to the "superintendent of financial institutions." See R.C. 1733.01(P). It then vested all the powers conferred on the superintendent of financial institutions in the "division of financial institutions." See R.C. 121.08(C)(1). The new law paralleled the

former law in making the "superintendent" and the "division" synonymous and able to act seamlessly.

The 1995 transfer of powers in the reorganization had two steps. First, the powers formerly conferred on the superintendent of credit unions, including the power to remove a director, were transferred to the superintendent of financial institutions. Second, the powers conferred on the superintendent of financial institutions were then vested in DFI, as R.C. 121.08(C)(1) expressly provides:

> *Wherever* powers are conferred or duties imposed upon the superintendent of financial institutions, those powers and duties shall be construed as vested in the division of financial institutions [DFI]. The division of financial institutions shall be administered by a superintendent of financial institutions.

(Emphasis added.) Contrary to Hughes's contention, nothing in the present statutory scheme excludes discretionary acts from DFI's powers. The plain language of 121.08(C)(1) vests *all* of the superintendent's powers and duties in DFI.

Although the Superintendent of Financial Institutions administers DFI, he is required to appoint a Deputy Superintendent for Credit Unions. R.C. 1181.01. Under R.C. 1733.32(A)(2) the "deputy superintendent for credit unions shall be the principal supervisor of credit unions." In addition to the rule-making and examination powers of the Superintendent of Financial Institutions, R.C. 1733.32(A)(2) also vests in the Deputy Superintendent "other regulatory functions, powers, or duties" with respect to credit unions, "subject to the control of the superintendent of financial institutions." Thus, the Deputy Superintendent is the principal regulator over credit unions.

The Superintendent of Financial Institutions, Scott O'Donnell, authorized the Acting Deputy Superintendent of Credit Unions, Kenneth Roberts, to issue appropriate orders in the matters involving UTCU as provided by R.C. 1733.32. Supp. 72. His action was consistent not

only with the statutes bearing on regulation of financial institutions including credit unions, but also with the general provision of R.C. 3.06(A), that "[a] deputy, when duly qualified, may perform any duties of his principal." Moreover, taking a belt-and-suspenders approach, O'Donnell ratified all of Roberts's actions as Acting Deputy Superintendent, including the issuance of the July 23, 2003 order removing Hughes. Supp. 73, 74. Where authority otherwise exists for a state official's action, as it did here, an agent's action may be ratified retroactive to the date the ratified act was completed, even if the agent exceeded his authority. *Monarch Constr. Co. v. Ohio Schs. Facilities Comm'n* (10th Dist.), 150 Ohio App. 3d 134, 2002-Ohio-6281 at ¶59, relying on *State v. Ex'r of Buttles* (1854), 3 Ohio St. 309, 322-23. See also *Sys. Automation Corp. v. Ohio Dep't of Admin Servs.* (10th Dist.), 2004 Ohio App. Lexis 4964, 2004-Ohio-5544, ¶ 24 (state has authority to ratify acts of its agents). DFI does not concede that Roberts acted without authority or exceeded his authority. But even if he did, Ohio law does not permit one person to hold the fortunes, literal and figurative, of a credit union in her hands. The court of appeals ruled accordingly, and its decision should be affirmed.

Defendant-Appellee Kenneth A. Roberts's Proposition of Law No. 2:

Requiring a credit union's board of directors challenging a conservatorship to comply with the Chapter 1733 Board Control provisions does not render R.C. 1733.361 unconstitutional.

Hughes's "unconstitutionality" argument is meritless because it proceeds from false premises. The argument goes like this: She says that if she is not allowed to sue in UTCU's name, UTCU cannot exercise the right to challenge a conservatorship. Falling back on the false choice DFI addressed above, she says that if she cannot refile for UTCU, that leaves only the conservator to do it. But of course the conservator would never do any such thing. So she concludes that refusing to read the statute so as to let her act unilaterally in UTCU's name leaves UTCU without *any* way to challenge the conservatorship. Thus, she says, the right to do so becomes meaningless. Unless she can refile for UTCU, she concludes, the statute is unconstitutional because it violates due process.

She is wrong. In the first place, as DFI explained above, contending that the statute permits only the conservator to challenge itself strains to achieve an absurd result. The perfectly sensible reading is that the board of directors reserves this right during a conservatorship, though only for the 30 days the statute specifies. (And as it happens, the UTCU board did have enough members to have taken such an action within the initial 30 days.) As long as the board of directors complies with the Board Control provisions, R.C. 1733.15(A) and .17, it may challenge the conservatorship on behalf of the credit union. The appeals court's construction does not make the corporate challenge provision unconstitutional on its face because a credit union's board can still authorize a conservatorship challenge when the conservator is otherwise in control.

The board can comply with the Board Control provisions even if it does not have enough members to satisfy R.C. 1733.17's quorum requirements at the time the conservatorship begins. R.C. 1733.17 provides that "a majority of the directors in office constitute a quorum for filling a

vacancy on the board." So the remaining board member fills one board vacancy, then the two pick a third, and so on, until there are enough of them to comply with R.C. 1733.17's quorum requirements. And where all of the directors have left the board, the backup provisions of R.C. 1733.12 allow the members to regenerate the board if they wish. Then the new board members would consider whether the credit union will challenge the conservatorship in court.

The General Assembly provided procedures for regenerating the board, so the *board* may then challenge a conservatorship. Thus, the appeals court's reading does not leave a credit union unable to exercise the right the conservatorship-challenge provision confers. As a result, Hughes's due-process argument collapses. If a credit union board instead believed state regulators were somehow blocking its attempts to regenerate the board according to R.C. 1733.17, it might consider whether it has some legal avenue. But that would have nothing to do with whether the statute itself is unconstitutional. The board-regeneration provisions provide a way to regenerate even a depleted board. Once regenerated, the board may then consider whether to challenge a conservatorship. Thus, as is the case with all of her other arguments, Hughes fails again to justify adopting the dangerous position that one person may challenge a conservatorship on behalf of a credit union. The appeals court's decision should be affirmed.

Defendant-Appellee Kenneth A. Roberts's Proposition of Law No. 3:

Ohio's general savings statute, R.C. 2305.19, which allows some cases to be withdrawn and refiled within a year, cannot be used to extend the specific 30-day deadline established in R.C. 1733.361(A)(2) for filing a challenge to a conservatorship.

Although DFI should win on both Propositions 1 and 2 above, the Court can and should avoid both issues and instead affirm the judgment below on an alternate, independent ground—namely, that UTCU's purported challenge to the conservatorship ended when the first filing was withdrawn, and the purported refiling a year later was too late. That is so because Ohio's general savings statute does not apply here and did not extend the initial 30-day deadline for challenging the conservatorship.[5] The text, structure, and purpose of the statute indicate that the General Assembly did not want the savings statute to apply here. Allowing the statute to apply, thus triggering a year of uncertainty before a potential refiling might occur, would undercut the Assembly's purpose in establishing a short-term, 30-day deadline and in requiring a fast-track process to quickly resolve issues regarding control of a credit union.

Ohio's general savings statute, as set forth in R.C. 2305.19, typically allows a plaintiff to gain a de facto "extension" of a statute of limitations. If a plaintiff initially meets a statute of limitations in filing a lawsuit, she may voluntarily dismiss the suit and then refile it within a year of the dismissal. That refiling makes the lawsuit timely, even if the refiling date would otherwise put the case outside of the initial statute of limitations.

Hughes invoked the savings statute to allow her purported refiling, in May 2004, of UTCU's challenge to the conservatorship. DFI initially issued the conservatorship order on

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[5] This issue provides an alternate ground to affirm the appeals court's decision on an issue the appeals court did not reach. If the Court chooses not to address this issue, the Court could either remand to the appeals court to resolve the savings statute issue, or dispose of the entire case by ruling in favor of DFI on the other issues above. The Court cannot, however, resolve this savings statute issue in Hughes's favor, as the Court addresses an appellee's alternate grounds for

February 24, 2003, and a challenge was filed, purportedly on UTCU's behalf, just three days later. That challenge was voluntarily withdrawn on May 20, 2003. When Hughes purported to refile a year later, on May 24, 2004, she invoked the savings statute, R.C. 2305.19.

Hughes does not deny that her case depends wholly on the savings statute, as of course, the May 2004 refiling was long past the initial 30-day deadline from the February 2003 conservatorship order. Thus, if the Court finds, as it should, that the savings statute simply does not apply to extend the 30-day deadline for filing a conservatorship challenge, then it does not matter whether Hughes, as a sole director, or ex-director, or member, could speak for UTCU in re-filing, because without the savings statute, no one could re-file for UTCU. Any such filing, no matter who authorized it, was simply too late.

The Court has explained before that not all lawsuits are subject to the savings statute, and the question of whether a given lawsuit is subject to the savings statute turns on "whether application of the savings statute so adversely affects the [purpose of the statute or cause of action at issue] that the legislature could not have intended to apply the savings statute to [such lawsuits]." *Allen v. McBride,* 105 Ohio St. 3d 21, 2004-Ohio-7112 at ¶ 21. In *Allen,* the Court found that the savings statute did apply to a certain statute regarding will contests, because the will contest statute did not show that the statute would be "so adversely affected" by applying the savings statute.

Here, applying the *Allen* test shows that the General Assembly could not possibly have wanted the savings statute to apply here, as it is hard to imagine a stronger candidate for non-application of the savings statute than the 30-day deadline at issue here. The statute allowing conservatorship challenges, R.C. 1733.361(A)(2), insists on a 30-day deadline for filing: just 30

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affirmance, but should not resolve issues for an appellant that were not part of the jurisidictional

days. Further, the statute then directs the common pleas court to resolve the matter quickly: the court must give those challenges "*calendar priority*" over other civil cases and must "*expeditiously proceed and make a determination on [challenges].*" *Id.* (emphasis added.). This shows that the General Assembly wanted questions involving control of a credit union to be resolved quickly, so that the institution would not operate for long under a cloud of uncertainty.

Allowing a *year-long* period of uncertainty would dramatically undercut the goal of quickly resolving who controls a credit union. If the savings statute applies, a credit union's directors could quickly file and dismiss, and then threaten all year to refile. The conservator would have to operate with that threat hanging over its head, knowing that every action or transaction might be unraveled if the conservatorship is successfully challenged next year. That would expose the conservator to potential liability, as demonstrated here. Here, Hughes, purportedly speaking for UTCU, has threatened to sue conservator ASI in conversion. See Appellee UTCU's Brief, filed in 10th District Court of Appeals, at 44-45. Also, third parties will be unsure whether to do business with the credit union, as they will be unsure who has the reins. Members, too, will be unsure of the status of their credit union.

In this case, unlike the *Allen* will contest, four years' worth of decisions made by a credit union—decisions that were accepted and relied on by members, creditors and the general public alike and that cannot possibly be undone now—are at stake. The General Assembly wrote R.C. 1733.361 to bring stability to troubled credit unions and those that deal with them; it fashioned the shortest limitation period into any challenges to conservatorships; and it ordered the courts—in no uncertain terms—to handle those challenges "expeditiously." Those purposes would plainly be frustrated if any credit union could hold a conservator's authority in check *for years*

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memorandum and thus not part of the Court's grant of review.

just by filing and refiling conservatorship challenges. In fact, those purposes would be "so adversely affect[ed] . . . that [the General Assembly] could not have intended" such a result. See *Allen*, 2004-Ohio-7112, at ¶ 21. R.C. 2305.19 applies to "save" many otherwise expired statutes, but to apply it here would bring chaos to conservatorships whose very purpose is to offer stability. DFI accordingly urges the Court to recognize that R.C. 2305.19 does not trump the short limitations period set forth in R.C. 1733.361 or, in the alternative, to remand the issue to the court of appeals.

Denying application of the savings statute here would further cement a pattern that appears in the caselaw regarding the savings statute. The savings statute makes the most sense in a typical civil suit, in which case a plaintiff seeks money damages from a defendant, whether for tort, breach of contract, or whatever such cause of action. In *Allen,* the Court rejected an artificial distinction between statutory and common-law actions, thus allowing the savings statute to apply to such cases as statutorily-created age discrimination cases. That makes sense, as such cases are standard civil suits for damages.

Conversely, it makes little sense to apply the savings statute to actions that involve not a demand for money, but a challenge to a time-sensitive government regulatory action such as the one here. In such cases, the validity of a government act needs to be resolved more quickly, so that the government, the regulated entity, and third parties can all know soon whether an action stands. For example, courts have rejected application of the savings statute to an administrative appeal under R.C. 119.12, because in such a case, the appellant is challenging government action by way of appeal; such an appellant is not filing a civil action for damages. See *Woodward v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 160 Ohio App. 3d 246, 2005-Ohio-1514, at ¶¶ 12-13; *Schmeig v. Ohio State Dep't of Human Servs.* (10th Dist. Dec. 19,

2000), No. 00AP-561, 2000 Ohio App. Lexis 5949, at *4. The conservatorship statute here is similar. To be sure, this statute calls for filing a new civil action with a complaint against the regulator, as opposed to a true administrative appeal, but it *functions substantively* as an appeal. The State agency—here, DFI—acts first, and then the regulated party seeks to undo that action, just as in an administrative appeal. It makes little sense for such an action to be kept in limbo for a year.

Given this argument's applicability to future challenges under the statute, the Court can and should address it first. First, the issue was fully briefed below. The trial court agreed with Hughes that the savings statute applied, and the issue was fully briefed and argued in the court of appeals. But the court of appeals never reached it, as it chose to first address the issues concerning Hughes's ability to speak for UTCU. Not only was the issue fully preserved, but the issue is a purely legal one, requiring no factfinding unique to this case. Finally, this issue is, it seems, more likely to recur than the rare circumstance of having a board dwindle to less than a quorum of directors. Thus, the Court should resolve this issue in DFI's favor, and affirm the judgment below on this alternate ground.

CONCLUSION

For the above reasons, this Court should affirm the judgment below. If in the alternative the Court reverses the court of appeals on the first proposition of law, the case should be remanded to the court of appeals to address the remaining assignments of error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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