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Case Number 526,2015 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CDX HOLDINGS, INC. (F/K/A CARIS LIFE SCIENCES, INC.)	)	
Defendant Below, Appellant/Cross-Appellee,	)	No. 526, 2015
v.	)	Court Below: Court of Chancery of the State of Delaware Civil Action No. 8031-VCL
KURT FOX, on behalf of himself and all others similarly situated	)	CLASS ACTION
Plaintiff Below, Appellee/Cross-Appellant.	)	

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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Dated: January 21, 2016

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SUMMARY OF CROSS-APPEAL ARGUMENT[1]

The Opinion provides a well-reasoned and detailed analysis of Defendant's breach of contract and the resulting damages to the Option Holders. However, it appears that, when drafting a table of numbers in the Opinion to perform the math calculations for determining damages, the trial court mistakenly inserted an errant data input (a typographical error) in the table which, consequently, altered the damages calculation. The mistake seems obvious because the trial court had already reasoned and concluded that a higher amount was the applicable data input (representing the value of SpinCo that the Board subjectively believed based on the extensive contemporaneous evidence). Defendant does not challenge the substance of Plaintiff's cross-appeal. Nowhere in Defendant's answering brief ("DAB") to Plaintiff's cross-appeal does Defendant ever refute that the typographical error actually exists. Not once. That is because, in fact, it appears to be a typographical error and it actually did substantially alter the damages calculation. Rather, Defendant claims that: (i) Plaintiff somehow waived his cross-appeal, and (ii) the entirety of the damages award was not part of an orderly and logical deductive process. Each claim by Defendant is baseless.

With respect to the waiver claim, Plaintiff fairly presented the issue of proper damages amount to the trial court, seeking more damages than was awarded

[1] Capitalized terms used but not defined herein are as defined in Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal ("POB").

and submitting evidence to the trial court in support thereof. Also, it is undisputed that Plaintiff timely filed his cross-appeal with this Court. Moreover, even if Defendant's waiver claim is accurate, consideration of Plaintiff's cross-appeal is still warranted under Delaware's "plain error/interests of justice" exception, as the harm caused to the Class by Defendant's breach would be unjustly increased.

With respect to the orderly and logical deductive process of the trial court in assessing damages, Defendant's claims are, again, unfounded. While Defendant may disagree with the result, the Opinion clearly states the Vice Chancellor's rationale and explains in detail how the overwhelming contemporaneous evidence of the Board's subjective beliefs on SpinCo's value (and the entirety of the record) supports a damage award. In any event, however, Defendant does not even address whether or not the value input on the table is a typographical error. In essence, Defendant's argument ignores Plaintiff's cross-appeal and Defendant merely disagrees with any damages being awarded at all.

CROSS-APPEAL ARGUMENT

I. A TYPOGRAPHICAL ERROR IN THE OPINION INADVERTENTLY ALTERED THE MATHEMATICALLY CALCULATED DAMAGES, AND DEFENDANT HAS NOT DENIED THE ACCURACY OF SUCH STATEMENT

It is undisputed that the trial court concluded that the Board subjectively believed SpinCo's total value to be either: (i) "around $300 million" (which is the Vice Chancellor's own conclusion of the Board's subjective belief as to FMV based on the entire record), or (ii) $273,729,000 (a "conservative" figure implied by an ordinary course GT FMV valuation, prior to Martino's manipulation of GT). Op. 78-80. Consequently, when crafting a table of numbers in the Opinion to perform the math required to calculate damages, it appears that an errant data input within the table inadvertently (and substantially) altered the trial court's damages calculation, as the table mistakenly uses $240,000,000 (Op. 81) to represent the total value of SpinCo, when the trial court had already concluded that one of such higher amounts represented what the Board subjectively believed. POB 46-50. Logically, such input was a mistake and, based upon the stated reasoning in the Opinion, the trial court meant to *add* $240,000,000 to the Defendant's value of $65,030,000 (which is the adjacent number on the table) and reach a value conclusion of $305,030,000 (*i.e.* "around $300 million"). POB 46-49.

The error and logic described above and in Plaintiff's Opening Brief on Cross-Appeal is undisputed, as Defendant's Answering Brief on Cross-Appeal

does not refute: (i) that the typographical error actually exists, or (ii) that such typographical error inadvertently and substantially altered the trial court's intended damages calculation. Basically, the substance of Plaintiff's cross-appeal is never challenged, as nowhere in Defendant's answering brief does Defendant ever say that Plaintiff's claim regarding the mistaken data entry is incorrect. That being said, Defendant merely attempts to refute Plaintiff's cross-appeal by claiming that Plaintiff somehow waived his cross-appeal argument and that the trial court's damages calculation (as a whole) was not based on an orderly and logical deductive process. DAB 32-35. Each of Defendant's claims are meritless.

A. Plaintiff Properly Filed His Cross-Appeal and it is Not Waived.

Plaintiff is entitled to appeal the trial court's calculation of damages. Plaintiff properly and timely filed his notice of cross-appeal in accordance with Delaware Supreme Court Rules 6 and 7, as well as his briefing on cross-appeal in accordance with Rules 13-15. Defendant has not disputed such facts. However, without citation to any case law, Defendant claims Plaintiff waived his cross-appeal argument by not filing a post-judgment Rule 59(e) motion with the trial court to alter or amend the judgment (or by virtue of the parties' cooperation in submitting a post-trial Order to the Vice Chancellor). DAB 32-33. This is illogical. Plaintiff did not waive his cross-appeal or "adopt" the errant calculation. As an initial matter, it should be noted that pursuant to Defendant's flawed

rationale, Defendant has apparently waived all of its appeals in this case as well, as prior to its appeal Defendant similarly did not file a Rule 59(e) motion with the trial court and also cooperated on the post-judgment Order. AR436.

In any event, however, there is no requirement that a successful plaintiff must first request that the trial court alter or amend its judgment prior to appealing the calculation of a damages award to this Court. *See, e.g., Rapid-America Corp. v. Harris*, 603 A.2d 796, 806-07 (Del. 1992) (in a valuation proceeding, the shareholders/plaintiffs, albeit successful in the Chancery Court, successfully cross-appealed for additional damages per share). Plaintiff's issue concerning the proper amount of damages was fairly presented to the trial court, as required by Delaware Supreme Court Rule 8. It is undisputed that Plaintiff submitted the Option Holders' proposed damages and damages model to the trial court. A76; B624-30; B767-68; B898-903; B944-950. Plaintiff argued to the trial court that, as a result of the breach of contract by Defendant, the Option Holders were harmed in an amount significantly higher than the amount that the trial court awarded (with or without correction of the typographical error). Plaintiff argued to the trial court that the Option Holders were damaged by $36,236,347 in the aggregate by Caris' breach of the Plan. B767-68; B903. Plaintiff also introduced evidence into the record in support of such damage calculation, including (but not limited to) the valuation report of Plaintiff's expert, Robert F. Reilly of Willamette Management

Associates, who determined that the fair market value of Target Now and Carisome at the time in question was $231 million and $273 million, respectively. B630. Defendant's contention that Plaintiff did not fairly present the issue of a higher damages amount than what the trial court awarded, is baseless. DAB 32.

Moreover, Caris does not dispute the accuracy of Plaintiff's cross-appeal, (*i.e.* that the Vice Chancellor explained his damage findings but simply made a typographical error when entering a number on a chart). Consequently, Delaware's "plain error/interests of justice" exception to Caris' argument of waiver would also apply in this instance. *See Duphily v. Delaware Elec. Coop.*, 662 A.2d 821, 831-34 (Del. 1995) (applying "plain error/interest of justice" exception to waiver in connection with inconsistent jury findings in a negligence case).

In this case, the trial court found that over 4 years ago the Option Holders (*i.e.* employees) were shortchanged by millions of dollars in the repurchase of their stock options. The Option Holders were forced to bring this lawsuit to attempt to obtain what they were already contractually entitled to receive. The Vice Chancellor spent significant time reviewing and assessing the evidence, and holding a 3-day trial, culminating in a determination of breach of contract and a detailed analysis of the Board's subjective belief of the total value of SpinCo (based on extensive contemporaneous evidence of such subjective belief), which yielded the damages calculation. Based upon the trial court's analysis, however,

the calculation of damages for the Option Holders (but for the unfortunate typographical error) would have been more than $5.35 million higher than the figure stated in the Opinion. POB 49-50. Defendant does not refute that the trial court intended to calculate a higher amount of damages, based on the reasoning explicitly set forth in the Opinion. It would be detrimental to the interests of justice for the Option Holders to be deprived of what they actually bargained for (and were promised) originally, and also what the Vice Chancellor reasoned they should receive as damages for breach of the Plan by Defendant, all because of a typographical error (the existence of which Defendant does not refute). The harm already suffered by the Option Holders as a result of Defendant's breach of contract would, thus, be unjustly exacerbated. Consequently, even if one accepted Defendant's contention that Plaintiff did not properly preserve its cross-appeal, consideration of Plaintiff's cross-appeal is still warranted under Delaware's "plain error/interests of justice" exception. *See Duphily*, 662 A.2d at 831-34.

B. The Damages Award was the Product of an Orderly and Logical Deductive Process.

In a similar effort to challenge Plaintiff's cross-appeal without refuting that the data input described therein is a typographical error, Defendant next contends that the damages award "was not 'the product of an orderly and logical deductive process.'" DAB 33 (*quoting Schaefer v. Butzke*, 692 A.2d 415 (Del. 1996)). While Defendant may disagree with the trial court's conclusion, Defendant's

contention that the trial court's process was not orderly or logical is absurd.

The trial court held a 3-day trial, at which the parties introduced 217 exhibits, lodged depositions for nine witnesses, and presented live testimony from six witnesses (four of whom were Defendant's directors). The trial court heard the testimony, reviewed and assessed all of the exhibits, and made factual and credibility determinations. In the Opinion, for purposes of calculating damages, the Vice Chancellor states he considered the entire record ("the evidence as a whole") and provided a reasoned, thorough and detailed analysis of the Board's subjective belief of SpinCo's value at the relevant time in 2011. Op. 78-80.

Defendant's contention is comprised of at least three incorrect elements: (i) that GT's ordinary course valuation in evidence was "illogical" for the trial court to refer to as an "approximation" (Op. 79) of the Board's subjective belief as to value of Target Now and Carisome (DAB 33), (ii) that the trial court then allegedly rejected its own conclusion and concluded that the Board subjectively believed in a higher value based only on "documents generated by Martino, Citi, and JH Whitney" (DAB 34), and (iii) that the trial court "wholly ignored" the so-called "uncontroverted" expert report of Mr. Gompers. *Id*. Each element is false and mischaracterizes the trial court's analysis.

1. The Ordinary Course Valuation Was Logically Referenced to by the Trial Court. As an initial matter, Defendant mischaracterizes the trial court's use

of the draft ordinary course valuation prepared by GT on July 13, 2011 (prior to Martino's manipulation of GT) and re-sent on September 21, 2011 (the "FMV Valuation"), mere weeks before the Option Repurchase. Op. 78; B289; BR1-14. The FMV Valuation implied a FMV for SpinCo of $273,729,000. Op. 79.

The Board, as Administrator under the Plan, was responsible for granting stock options and setting the exercise prices. A817. In connection therewith, historically Caris retained GT to provide FMV valuations for purposes of setting the exercise price of the options granted by the Board. As the Opinion explains:

> **Grant Thornton regularly prepared valuations for Caris to use for income tax and financial statement reporting related to the issuance of stock options.** Op. 22 (emphasis added).

For example, previously in 2011 alone (prior to Martino's manipulation of GT and the GT Copied Valuation), GT provided Caris with four FMV valuations. Op. 38, 71, Op. Ex. A. The trial court's comparison of the prior GT FMV valuations (all regularly used to price the stock options) to the latest FMV Valuation displayed compelling consistency (contrary to the GT Copied Valuation):

GT Valuation Date	**Total SpinCo Value as of 10/31/11**
2/11/11	$281,714,000
2/11/11 (No. 2)	$276,334,000
5/24/11	$272,136,000
7/13/11 (FMV Valuation)	*$273,729,000*
11/10/11 (GT Copied Valuation)	*$54,756,000*

Op. 38, Op. Ex. A. Thus, the concept that the Board would have reviewed GT's

latest valuation in connection with pricing stock options is not illogical. It is also not, as Defendant suggests, "highlight[ing] the trial court's application of an objective standard" rather than a subjective standard. DAB 33. Rather, it is an example of the trial court analyzing and considering the Defendant's regular and ordinary course practice. Op. 22, 78-80.

However, in determining what the Board subjectively believed as to the value of Target Now and Carisome, the trial court "considered the evidence as a whole, including the experts' opinions and the various indications of value." Op. 78 (emphasis added). To contend otherwise mischaracterizes the Opinion and the evidence. Defendant's assertion that the trial court concluded "that the Board *should have* relied" on the FMV Valuation (DAB 33) is also simply false and misleading (and inconsistent with Defendant's next argument discussed in subpart 2, *infra*, at 11-18). Rather, as part of its logical process, the trial court merely noted that the FMV Valuation for SpinCo (of $273,729,000) in evidence was:

> **From the evidence presented at trial, this is a reasonable approximation of the Board's subjective belief at the time. My assessment of what the Board believed differs only in the relative weighting. I think that in fall 2011, the Board valued TargetNow more highly – closer to $150 million…..My belief from the record is that the Board did not value Carisome as highly as the Grant Thornton figures imply.** Op. 79-80 (emphasis added).

The Opinion then discusses the Board's subjective beliefs and the weighting of the values of Carisome and Target Now based on the "balance of the record."

Op. 79-80. If the trial court actually engaged in an objective (rather than subjective) analysis, as Defendant contends, then the trial court would not have used evidence of the Board's subjective beliefs to adjust the values expressed in the FMV Valuation (downward for Carisome and upward for Target Now). This was part of a logical explanation of the evidence, and part of an orderly analysis, to assess the Board's subjective beliefs on SpinCo's value (described further below).

2. ***The Trial Court Used the Entire Record to Assess Damages.*** Defendant further mischaracterizes the Opinion, stating that the trial court "immediately rejected" its own conclusion about the FMV Valuation and concluded that the Board subjectively believed in higher SpinCo values based only on "documents generated by Martino, Citi, and JH Whitney." DAB 34 (emphasis added). This is demonstrably false. Defendant attempts to distort the trial court's statements and findings, as if the trial court limited its consideration to a mere few pieces of evidence that have no relation to the Board's subjective beliefs on value. *Id.* The trial court clearly stated that it considered all of the evidence, as follows:

> **The question in this case is what the Board would have determined to be the Fair Market Value …and made its determination in good faith. I have considered the evidence as a whole, including the experts' opinions and the various indications of value….From the evidence presented at trial [$273,729,000] is a reasonable approximation of the Board's subjective belief at the time…. [However,] I think that in fall 2011, the Board valued TargetNow more highly – closer to $150 million….What the evidence instead suggests is that the**

> **Board believed Carisome, although riskier, was worth at least as much as TargetNow.** Op. 78-80 (emphasis added).

"Extensive contemporaneous evidence" in the record strongly supports the court's conclusions that, in the Fall of 2011, the Board believed the FMV of SpinCo far exceeded the $65 million assigned by Martino. Op. 55-59, 78-80. The evidence "as a whole," which was considered and weighed by the trial court and supported the conclusion that the entire Board subjectively believed SpinCo had a FMV "around $300 million," includes, but is not limited to, the following:

(a) ***The GT Prior Valuations Indicate SpinCo's FMV is $272-$281 million.*** Prior to the manipulation of the valuation process found by the trial court, all of the GT Prior Valuations used by Defendant in 2011 to price the stock options under the Plan, consistently valued SpinCo between **$272 - $281 million**. *See* chart of GT valuations, *supra* at 9; Op. Ex. A. The regular use of such valuations to price the stock options is powerful evidence that the Board subjectively believed in the values set forth therein.

(b) ***PwC Indicates to the Board that Target Now's FMV is $150-300 million.*** In April 2011, Martino estimated to PwC that Target Now's FMV was **$150-$300 million**. Op. 4, 15, 19, 55, 79; B209. PwC then presented the **$150-$300 million** estimate of Target Now's value to the Board. Op. 15. The record contains no contemporaneous evidence that the Board (or any individual director) disagreed or questioned the $150-$300 million estimate in 2011. To the contrary,

such price range is consistent with the other contemporaneous evidence of the Board's subjective belief as to Target Now's value. *See* discussion at 12-16.

(c) ***Citi Indicates to the Board that Target Now's FMV is $195-300 million.*** Citigroup ("Citi"), Caris' exclusive banker, stated in several emails and presentations to Caris' Board and management (and internally) that Target Now had a market value of **$195 - $300 million** and it expected Target Now to sell for approximately **$200 million**. Op. 15-17, 19-20, 55, 79; B319; B467; B419; B288; B721-22. The record contains no contemporaneous evidence that any Board director disagreed with Citi's value assessment made to the Board in 2011. Also, in August 2011, Citi advised third-party bidder Illumina (as well as directors Halbert and Johansen) that Caris valued Target Now at **$200 - $250 million**. Op. 19; B729-30. As the trial court noted, such directors "did not disagree" with this price range. Op. 19. Further, as Chairman Halbert's testimony quoted below (*infra* at 14) indicates, the entire Board was kept aware of these developments.

(d) ***The Board's Beliefs Were Consistent With JH Whitney's Documents.*** As discussed below, Chairman Halbert's and Vice-Chairman Johansen's testimony confirms that the beliefs expressed in the JH Whitney documents are consistent with the information provided to the entire Board. B731; B734-35. From October 2011-March 2012 (*i.e.* pre- and post-Option Repurchase) JH Whitney, which had a seat on Caris' Board, documented and represented to its

Board of Advisors and limited partners (which included Caris director Castleman) that it **expected** Target Now to be **sold** in 6-9 months for **$154 - $187 million**. Op. 58-59, 79; B480-83; B484-90; B591-92. Further, in its 2011 Year-End Summary to Limited Partners, JH Whitney wrote: "The Company is continuing to invest **aggressively in the Carisome platform with the expectation that it will have a blood based test for cancer on the market by the end of the year [2012]**." B595 (emphasis added); Op. 59; *see also* B489; B592. Directors Halbert and Johansen testified that such information, as described by JH Whitney, was consistent with the beliefs of the entire Board, in and around November 2011. B731; B734-35. For example, when questioned regarding JH Whitney and the statements within the JH Whitney documents, Chairman Halbert testified that:

> **A. Well, as board members they were kept up to speed on the entire AP process, as well as any other interests that was expressed by Danaher or Miraca or anyone else about the Target Now business.**
>
> **Q. Okay. And then it says, continued momentum towards Carisome platform commercialization. Do you see that?**
>
> **A. Yes.**
>
> **Q. And is that consistent with their status as board member, that they were kept up to date on what was going on?**
>
> **A. Yes.** B731 (emphasis added).

Based on such corroborating testimony from the Board's Chairman and Vice-

Chairman, as well as the consistent contemporaneous evidence, the trial court logically determined that this evidence is consistent with the subjective beliefs of the Board. Op. 58-59, 78-79.

(e) ***Third-Party Danaher Bids on Target Now.*** On August, 22, 2011, Danaher Corp. bid to buy Target Now for at least **$100 - $175 million**. Op. 18, 55-56; B323-26; B419. The entire Board was aware of this bid by an arm's-length bidder. B416, B419; B731. It is logical that a Board would think its assets are worth what the market is offering to purchase it for, especially if such value coincides with all other contemporaneous indications of value.

(f) ***Bidder Projections.*** As part of the bidder presentation, Caris provided bidders with projections indicating a FMV for Target Now **over $200 million**. These projections were **reviewed and approved by the entire Board**. Further, such projections were "[t]he only projections that the Board reviewed for Target Now…." Op. 19, 32; B315-18 (projecting positive EBITDA of $65-$595 million). It is logical that a Board would believe that its asset is reasonably worth what Board-approved financial information indicates it is worth. Moreover, such Board-approved projections indicate a value for Target Now in excess of what the trial court determined was the Board's subjective belief.

(g) ***Board was Expecting Commercialization of Carisome.*** On October 27, 2011 (just three weeks before the Option Repurchase), Caris' Board had its

final meeting. The entire Caris Board was informed that:

- Carisome's prostate test had an immediate potential market of $2 Billion; with an eventual potential market of $8.8 Billion. B478.
- The Carisome Prostate V2 test validation/verification study was expected to be completed in approximately 12 weeks (January 2012) and the Board was discussing Carisome's "commercial launch strategy." B470-78. Carisome commercialization planning documentation shows that, at that time, Caris was anticipating the commercial launch of Carisome's prostate test in early 2012 and was beginning to hire sales staff and structure sales incentives. B571, 577-78. Thus, at the relevant time in 2011, the Board and management were anticipating that the realization of Carisomes "potential" would begin in a matter of months. As the Vice Chancellor found:

  > **Post-closing presentations to the Board contemplated expanding Carisome with particular emphasis on its sales function. JX 182. Management and the Board actually believed at the time that Carisome could have a product to launch in early 2012. *Id*.** Op. 57 (*citing* to B571, 577-78).

- Target Now's Case Volume and Net Revenue had both continued to increase through Q3 2011 and for every quarter over the prior 12 months. B479.

Presumably the Board was not lying to itself within its own Board materials.

(h) ***TPG – Billions for Carisome.*** On August 24, 2011, directors Halbert, Knowles and Poste (which is half of the entire Board) gave a presentation to TPG

(Texas Pacific Group), and represented that Carisome's potential commercial opportunity as $130 billion. Op. 20; B341; B351. As the October 27, 2011 Board materials discussed above show, the entire Board thought this potential commercial opportunity would soon be a reality. Op. 57; B571, B577-78. This is consistent with other evidence as well. For example, Chairman Halbert was certainly "**thinking in billions**" for Carisome. B327. Halbert testified at trial that, in 2011, he saw Carisome as possibly "**the largest product launch in the history of mankind.**" A439. Within a week of the closing, Halbert also emailed to Caris' COO/CFO, General Counsel and Vice-Chairman Johansen that: "Now its on to Carisomes!! And transforming the world!!!!" B567. Vice-Chairman Johansen expressed similar feelings about Carisome, calling SpinCo "a juggernaut developing and rolling out Carisome diagnostic tests over the next few years." B491 (emphasis added).

(i) ***$100MM of New Money.*** The Miraca Transaction itself is evidence of the Board's optimism in Carisome, as its main purpose was to fund Carisome's commercialization (to seize on the multi-billion dollar opportunity). Op. 57; B373. Halbert and JH Whitney invested $100 million of new money into Carisome in November 2011, and the entire Board was aware of this further investment. Op. 57; A535-36. The entire Board was also aware that JH Whitney is a sophisticated private equity firm that is strictly "about making money," and not engaged in

philanthropic endeavors. BR16. To that end, JH Whitney not only had a seat on the Caris Board, but also "always had" other JH Whitney attendees come to Caris' Board meetings and "scrub the financials." BR18.

Contrary to Defendant's assertion that the trial court's damages award was an unsupported conclusion (DAB 34), the trial court used multiple sources from the evidence to assess what the Board subjectively believed were the fair market values of Carisome and Target Now in the Fall of 2011. The trial court's process and analysis of the evidence were orderly and logical.

3. The Trial Court Considered Both Parties' Expert Reports. Defendant contends that "in calculating damages, the trial court wholly ignored" the so-called "uncontroverted expert report" of Mr. Gompers. DAB 34. As an initial matter, the Gompers report is not "uncontroverted." The conclusions of value for Target Now and Carisome in the Gompers report are contradicted by nearly all of the extensive contemporaneous evidence, and by Plaintiff's expert report. For example, the Gompers report concluded that "Carisome had little to no value." A1480. Such conclusion contradicts the beliefs of Caris' entire Board, management, and each of its financial advisors, in 2011. *See* discussion, *supra*, at 12-17. Halbert was certainly "thinking in billions" for Carisome and even testified that, in 2011, he saw Carisome as possibly "the largest product launch in the history of mankind." B327; A439. In any event, in the "Damages" section of the

Opinion, the Vice Chancellor clearly stated that "I have considered the evidence as a whole, including the experts' opinions…." Op. 78 (emphasis added). Caris' claim that the trial court "wholly ignored" its expert's report is, thus, erroneous.

Finally, without challenging the substance of Plaintiff's cross-appeal, and in a sentence layered with fictions wholly contradicted by the trial court's findings, Defendant claims that Mr. Gompers' report supports Defendant's "good faith" alleged "reliance" on PwC's valuation as "reasonable." DAB 35. First, the trial court expressly found that the Board never made a determination of what the Option Holders would receive under the Plan (as the Merger Agreement (with Miraca) and the Plan are two separate and distinct contracts). They did not use PwC's report, FMV, or make any determination (reasonable or otherwise) that they were required to make under the Plan. Op. 3-4, 47-52, 55. Indeed, Halbert testified "that the Board was incapable of valuing those businesses." Op. 8.

Next, there was no "good faith." The trial court found that the PwC and GT valuations were manipulated downward and corrupted by Martino. Op. 3-4, 7, 36-43, 60-62, 70-71. PwC was retained for tax purposes only and to achieve zero tax in connection with the Spin-Off, "Martino told PwC where to come out" on the IP tax valuation (Op. 4) (emphasis added) and provided PwC with lowered projections and "strained memos" to justify the result. Op. 7. With respect to GT, the trial court found "Martino intervened again." Op. 62. The trial court found

that the interference with GT's prior methodologies and resulting report "is an example of action so egregiously unreasonable as to be essentially inexplicable on any ground other than subjective bad faith." Op. 71 (quotations omitted) (emphasis added). Consequently, the trial court found that "Martino suppressed the valuation of SpinCo to achieve zero tax. Halbert approved it. The value of SpinCo was not determined in good faith." Op. 65 (emphasis added). Not only does Caris fail to challenge the substance of the cross-appeal, but through fiction and *ipse dixit*, Caris attempts to ignore and erase the trial court's factual determinations.

CONCLUSION

The Court of Chancery appears to have mistakenly used an incorrect data input in the damage calculation of its otherwise well-reasoned Opinion. As this Court has the correct input, this Court should Affirm Judgment for Plaintiff and Damages, and further calculate the additional damages.

Dated: January 21, 2016
Wilmington, DE

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