EFiled: Nov 18 2014 04:42PM EST
Filing ID 56355754
Case Number 442,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JULIE FRIEDMAN, derivatively on behalf of EXPEDIA, INC.,	)	
Plaintiff below, Appellant,	)	
vs.	)	
	)	No. 442, 2014
DARA KHOSROWSHAHI, BARRY DILLER, VICTOR A. KAUFMAN, A. GEORGE BATTLE, JONATHAN L. DOLGEN, CRAIG A. JACOBSON, PETER M. KERN, JOHN C. MALONE, JOSE A. TAZON and WILLIAM R. FITZGERALD,	)	Court below: Court of Chancery C. A. No. 9161-CB
Defendants below, Appellees,	)	
-and-	)	
EXPEDIA, INC., a Delaware Corporation,	)	
Nominal Defendant.	)	

APPELLANT'S REPLY BRIEF

November 18, 2014

SMITH, KATZENSTEIN & JENKINS LLP
David A. Jenkins (No. 932)
Neal C. Belgam (No. 2721)
800 Delaware Avenue, Suite 1000
P.O. Box 410
Wilmington, DE 19899
(302) 652-8400
(302) 652-8405 (facsimile)

OF COUNSEL:

LEVI & KORSINSKY LLP
Eduard Korsinsky
Steven J. Purcell
30 Broad Street, 24th Floor
New York, NY 10004
(212) 363-7500
(866) 367-6510 (facsimile)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Regulations

ARGUMENT

In their Answering Brief ("Defs.' Br."), Defendants[1] attempt to dismiss Plaintiff's reading of the Plan as involving "a legal interpretation" requiring "significant effort" to reach. Defs.' Br. 31. It is from this essential (if cryptic) premise that Defendants conclude no intentional violation of the Plan can be inferred. As explained below, not only does this argument sell Plaintiff's allegations short — more was alleged than simply an interpretation of the Plan — it overstates the "complexity" of the Plan and the nature of the violation alleged. B107-08. In any event, complex is not synonymous with ambiguous. Where the terms of the Plan are in fact clear, as they are here, and Plaintiff has alleged facts and circumstances from which it is reasonable to infer an intentional violation, as Plaintiff has here, a motion to dismiss should be denied.

I. The Court of Chancery improperly determined that the OIBA Goal was not a Performance Goal

A. The OIBA Goal was unambiguously a Performance Goal

Defendants are forced to admit that the RSU Award expressly provided that the RSUs would vest only if both the EBITA/Stock Price Goal and the OIBA Goal were achieved. *Id.* at 1. There is nothing ambiguous about this conjunctive vesting requirement: it specifies the exact conditions that needed to occur for the RSU Award to vest, thus comprising the objective "formula" required by Section

[1] Defined terms used herein shall have the same meaning as in Plaintiff's Opening Brief.

162(m). A11-A12; 26 C.F.R. § 1.162-27(e)(2).

Defendants argue that the "EBITA/Stock Price goals were 'objective'" by themselves, which Plaintiff does not dispute. Defs.' Br. at 21. However, the dispositive point is that the RSU Award was written such that the only objective *formula* calls for satisfaction of *both* (i) one of the EBITA/Stock Price Goal *and* (ii) the OIBA Goal; indeed, the RSU Award specifically refers to this formula as the "Combined Goals." A202; B20. Thus, Defendants' argument — *i.e.*, if you cut the existing formula in half, it would still be objective — proves nothing. Defs.' Br. at 21. What matters is not the formula that could have been conceived or whether an alternative formula would be objective — what matters is the formula actually devised. Here, that formula as established in the RSU Award is unambiguous.

B. All reasonable inferences should have been drawn in Plaintiff's favor from the totality of well-pled allegations

1. Defendants improperly rely on inferences drawn against Plaintiff

In finding that the OIBA Goal was not a Performance Goal, the Court of Chancery improperly disregarded well-pled allegations while drawing a number of inferences against Plaintiff. *See* Plaintiff's Opening Brief ("Pl. Br.") at 20-26; Pl. Br. Exhibit 1 ("Opinion") at 18-21 & n.47. Specifically, the Court of Chancery: (1) dismissed as a "simple mischaracterization" the 2010 Proxy's description of the

OIBA Goal as one of the "RSU Performance Goals," thereby resolving a factual issue against Plaintiff (Opinion at 19-20); (2) concluded that there was an "ambiguity" with respect to whether the Compensation Committee "intended" the OIBA Goal to "satisfy Section 162(m)" notwithstanding Plaintiff's well-pled allegation that the OIBA Goal was part of the only objective formula in the RSU Award itself (*Id*. at 20); and (3) accepted as true for purposes of "resolv[in]g that ambiguity" Defendants' description of the OIBA Goal in the 2013 Proxy, which Plaintiff had alleged through particularized facts was part of an attempted cover-up of the Plan violation perpetrated by the Board (*Id*. at 21).

Citing *Malpiede v. Townson* and *TransDigm Inc. v. Alcoa Global Fasteners, Inc.*, Defendants argue that the Court of Chancery was "not obliged" to accept Plaintiff's "characterizations." Defs.' Br. 23. However, as is apparent from Defendants' own description of those cases, on a motion to dismiss a court's ability to dismiss allegations is limited to situations where the allegations are "effectively negate[d]" by the "unambiguous language" of controlling documents incorporated into the complaint. *Id.* (citing 780 A.2d 1075, 1083 (Del. 2001), 2013 WL 2326881, at *4 (Del. Ch. May 29, 2013). That standard was not met here — indeed the Court of Chancery concluded the opposite — and Defendants make no attempt to reconcile the ruling below with the legal principle they invoke.

With respect to the 2013 Proxy, Defendants claim that Plaintiff "improperly

argues that a court could consider such statements only when they support her interpretation of the RSU Award but not otherwise." Def's. Br. at 24. This entirely misses the essential point, which, simply put, is that it is improper to rely on an alleged cover-up as a basis to conclude that no wrongdoing in fact occurred. Thus, the Court of Chancery's reliance on the 2013 Proxy was improper because the Court relied on that document for the truth of its content despite the fact that Plaintiff specifically alleged that the relevant statements therein were false and misleading. Pl. Br. at 21-23. This was improper on a motion to dismiss. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995) (incorporated documents "are relevant not to prove the truth of their contents but *only* to determine what the documents stated.") (quotation omitted); *In re MONY Group Inc. S'holder Litig.*, 853 A.2d 661, 682 (Del. Ch. 2004) ("[D]isclosures relating to the Board's subjective motivation or opinions" may not be taken as true on motion to dismiss.); *see also Orman v. Cullman*, 794 A.2d 5, 16 n.9 (Del. Ch. 2002) (court may consider statements in incorporated document for truth of matters asserted therein only as to "undisputed facts").

Defendants also incorrectly argue that Plaintiff does not contend that "the trial court failed to consider any facts that it was obligated to have assumed to be true." Defs.' Br. at 5. To the contrary, Plaintiff contends that the Court of Chancery "did not appear to give any consideration to Plaintiff's allegations"

concerning the objective formula in the RSU Award, while disregarding Plaintiff's well-pled allegations concerning the 2010 and 2013 Proxy Statements in favor of Defendants' competing factual assertions. Pl. Br. at 21-24. It is this neglect of Plaintiff's particularized factual allegations that led directly to the Court of Chancery's erroneous conclusion that no Plan violation had been alleged.

2. The Compensation Committee's intent in including the OIBA Goal is not the relevant issue

On appeal Defendants explicitly ask this Court to draw yet another inference in their favor: namely, that the Compensation Committee would not have included an "additional hurdle in order to make it more difficult for Expedia to achieve the tax benefit" conferred by Section 162(m). Defs.' Br. at 17-18. Since the OIBA Goal was part of the objective formula in the RSU Award *required* by Section 162(m), the logical inference is to the contrary. Moreover, Section 162(m) on its face speaks of "one or more performance goals" and its regulations require that the achievement of a performance goal be "substantially uncertain" at the time it is established. *See* 26 C.F.R. § 1.162-27(e)(2). Thus, it is at least equally reasonable to infer that the Compensation Committee was attempting to make the performance goals more rigorous in order to ensure that the goals were sufficiently "uncertain" to comply with Section 162(m). Ultimately, the Compensation Committee may have had any number of reasons for adding the OIBA Goal at the time the Performance Goals were devised, and drawing inferences in Defendants' favor

about the Compensation Committee's intent is wholly improper at the motion to dismiss stage, as discussed above.

More fundamentally however, what the directors who served on the Compensation Committee in 2005 intended when they established the RSU Award is not the relevant question presented by the motion to dismiss. Defendants argue that the Court of Chancery properly considered the intent of the Compensation Committee because "[i]ts references to 'intent' were entailed by the *Aronson* test, which focuses on whether directors knowingly and intentionally acted wrongfully." Defs.' Br. at 22. The issue is whether the accelerated vesting of the RSU Award in 2012 was a knowing and intentional violation of the Plan. What the 2005 Compensation Committee actually "intended" when granting the award fits nowhere in this picture. Plaintiff never alleged that the Compensation Committee in 2005 acted wrongfully in devising the RSU Award. Both Defendants and the Court of Chancery focused on the wrong intent and the wrong set of directors.

C. The RSU Award was not an umbrella plan

Defendants also submit that "it is common practice among public companies to establish an 'umbrella plan' or a 'plan within a plan.'" Defs.' Br. at 22 n.9. As an initial matter, what is or is not "common practice" is not a proper consideration on a motion to dismiss. In any event, the RSU Award is not consistent with the

umbrella plans to which Defendants refer. In an umbrella plan, an objective formula is set that establishes the maximum amount of performance-based bonuses to be paid, while a secondary measure(s) is implemented which can be used solely to *reduce* the compensation.[2] Structuring compensation in this manner complies with Section 162(m) because in no circumstances will the final bonus amount exceed that provided for by the preestablished objective formula. Thus, compensation committees may structure bonus arrangements in this way in order to retain some flexibility in determining bonuses without jeopardizing their tax-deductibility. *Id*.

The RSU Award was not such an "umbrella plan" award. Defendants effectively admit as much. Def's Br. at 22 (acknowledging that an umbrella plan allows committee to "retain negative 'discretion [to] reduce[] or eliminate[]'" the compensation due upon attainment of the performance goal). The RSU Award did not identify the EBITA/Stock Price Goal as specifying a maximum payable bonus, nor did the RSU Award provide that the Compensation Committee was retaining "negative discretion" to consider other factors such as OIBA in ultimately determining whether Khosrowshahi would receive less than 400,000 shares. To the contrary, the RSU Award expressly provides for the payment of 400,000 shares

[2] *See, e.g.*, Pamela Baker, A.L.I., "Current Issues Under Internal Revenue Code Section 162(m)" (June 12, 2013), VCU0612 ALI-ABA 79, at *84.

of Expedia stock, to vest upon the achievement of both the EBITA/Stock Price Goal and the OIBA Goal. A202.

D. The eventual tax treatment is not essential to the claim

Defendants argue that Plaintiff's allegations are "entirely conclusory" because "there is no allegation that Expedia did not claim a tax deduction for the RSU Award or that the IRS ever denied or challenged any such deduction." Defs.' Br. at 24 (citing *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000) for the proposition that "plaintiff must provide 'particularized factual statements that are essential to the claim.'"). This argument is misplaced. Whether Expedia took a deduction for the Award and, if taken, whether it was approved by the IRS are not "essential" to Plaintiff's right to enforce a violation of a stockholder-approved plan. Events subsequent to the Plan violation are an appropriate topic for discovery, not a basis to reject the claim at the outset. Defendants point to no authority for the contrary position.

II. The Court of Chancery improperly determined that the OIBA Goal could otherwise be waived

Defendants repeatedly contend that the Plan "specifically authorize[s] the Committee to modify any award so long as the amendment did not affect tax deductibility or materially impair the rights of the recipient." Defs.' Br. at 2; *see also id.* at 16, 17 and 26. That is not true: with respect to Qualified Performance-Based Awards, the Plan sets forth a clear and unambiguous proscription on the

Compensation Committee's authority unrelated to the tax-deductibility issue.

A. Section 11(b) prohibits waiver of other conditions

As explained in Plaintiff's Opening Brief, the plain language of Section 11(b) expressly and unambiguously requires that "any other condition"[3] placed on a Qualified Performance-Based Award be satisfied before the Award can vest. Pl. Br. at 28; A64, A69-70. In arguing that the prohibition on waiver was inapplicable because it was waived, Defendants simply seek to rewrite the Plan. Defs.' Br. at 25-26. Section 11(b) explicitly provides that a Qualified Performance-Based Award may not "vest" or be made "payable" unless the Performance Goals and "any other conditions" have been achieved. *See* Pl. Br. at 27-29.

Along similar lines, Defendants repeatedly claim that Friedman conceded that the Plan afforded the Compensation Committee discretion to waive the OIBA Goal if it was not a "Performance Goal" for purposes of Section 162(m) compliance. Defs.' Br. at 9, 20, 21 and 26. A review of the portion of the transcript to which Defendants refer, however, unmistakably shows that no such concession was made:

> THE COURT: Well, let me follow up at that point, because that seems to be a fairly accurate recitation of what's not in dispute. But what I need you to point me to is, as I understand it, this committee can pick

[3] The regulations implementing Section 162(m) also require that "material terms" of qualified awards be satisfied but, as Defendants do not meaningfully engage this argument in their Answering Brief, further discussion of the point is not warranted. Supreme Court Rule 14(c)(1).

> from among the various metrics in Section 1(dd) and establish certain performance goals. Would you agree with me on that?
>
> MR. PURCELL: Yes.
>
> THE COURT: Okay. So now my question to you is, what if they'd done that, and they say, okay, now we want to put some other conditions or other terms on a grant. Is there anything in the plan that prohibits them from using some of the same metrics, or even derivations of the same metrics that are 1(dd), to independently set up other conditions or terms but not make them Performance Goals, capital P, capital G?
>
> MR. PURCELL: Your Honor, I don't think there's anything in the plan that prohibits that per se. I think they could do that. And the key to plaintiff's argument on this point is the, I think, very straight-forward regulation of 162(m) that essentially states that the factors that dictate when compensation will be paid need to be governed by an objective standard or formula that a third party having knowledge of the results could look at to determine how much compensation was to be paid under the award. And the only -- the only objective standard or formula that we have here is the standard that is set forth expressly in Mr. K's RSU agreement . . . .

B127-28. Noticeably absent from this discussion is any mention of whether anything in the Plan prohibits waiver of those "other conditions." The context makes clear that the colloquy concerned only whether "other conditions" that were not part of the objective formula required by Section 162(m) could be based on the Section 1(dd) factors. Indeed, the question of waiver of "other conditions" came up just two pages later:

> THE COURT: Okay. So let's assume the committee's intention was the only thing that determines whether or not this award is going to be tax-deductible and, therefore, the only things we're going to pick as our menu to be performance goals, to be these two things, this EBITA or stock price goal; right? They make that decision. But we also want

> to impose this OIBA condition, and perhaps this OIBA condition could be, if we wanted it to be, a performance goal, but we don't want to make deductibility of this award depend on that. Can they do that?
>
> MR. PURCELL: Yes, Your Honor. Theoretically they can do that. They could have done that, ***but that's not what they did***.
>
> THE COURT: Okay. And we can fight about whether they did or didn't. And if they had done that, in the case of the second goal, the OIBA goal, let's assume that it was clear the committee's intention was not to make that the predicate for tax deductibility, but to make it an independent goal. Is there anything in the plan that says they can't waive it?
>
> MR. PURCELL: I think that there is something in the plan that says they can't waive it. I think --
>
> THE COURT: Tell me what that is.
>
> MR. PURCELL: That is ***the "other conditions" language in 11(b)***.

B130-31 (emphasis added). As this exchange shows, far from conceding that the Plan permits waiver of other conditions placed on Qualified Performance-Based Awards, Plaintiff has consistently argued to the contrary.

B. Because the Plan is unambiguous, Defendants' collateral arguments are misguided

Defendants also protest without explanation that it would be "illogical" to read the plain terms of Section 11(b) as proscribing waiver of "any other conditions" placed on a Qualified Performance-Based Award. Defs.' Br. 26. But that is precisely what the Plan says. Defendants offer no alternative reading nor would any other reading be appropriate: "compensation plans when approved by shareholders are administered in strict accordance with the terms of the Plan and as

the shareholders had the right to anticipate." *Sanders v. Wang*, 1999 WL 1044880, at *12 (Del. Ch. Nov. 8, 1999) (holding that countervailing policy considerations cannot justify deviation from strict construction of a plan's unambiguous terms). Thus, Defendants' contention that the strict interpretation of Section 11(b) would "unduly constrain compensation committees' broad flexibility to regulate executive compensation," even if it were true, cannot justify the blessing of a Plan violation under Delaware law. Defs.' Br. at 26-27.

Similarly unavailing is Defendants' contention that "[t]he meaning of 'condition' in the context of Section 11(b) of the Plan and 'material term' in the context of 26 C.F.R. § 1.162-27 are far from 'clear and unambiguous,' and Friedman's claim that the Delaware Court of Chancery also misconstrued the provisions only proves the point." Defs.' Br. at 27. The phrase "any other conditions" is hardly subject to interpretation. That the Court of Chancery reached a contrary conclusion is the reason for this appeal, not a basis for resolving it. Indeed, the position advanced by Defendants cannot be reconciled with the *de novo* standard of review that Defendants otherwise concede is applicable here. Pl. Br. at 14; Defs.' Br. at 14.

Finally, Defendants do not meaningfully distinguish Plaintiff's cases holding that it is legal error for a court to dismiss a claim alleging a clear plan violation. Defendants state that in *Lynch v. Rawls*, 329 F. App'x 641 (9th Cir. 2011), "unlike

here, there was no dispute that the plan was clear – only whether backdating had actually occurred." Defs' Br. at 27. This is a distinction without a difference: the issue in both cases is the same — whether a knowing and intentional violation of a shareholder-approved plan has been sufficiently alleged.[4]

III. Plaintiff properly alleged demand futility under the second prong of *Aronson*.

When a plaintiff alleges that a board has violated an express and unambiguous term of a stockholder-approved incentive plan,[5] the allegations are sufficient to raise a reasonable doubt that the acts complained of were a good faith exercise of business judgment. *Sanders*, 1999 WL 1044880, at *4-5 (an award of shares in excess of a plan's numerical limitation raised "doubt that the board's actions resulted from a valid exercise of business judgment"); *California Public Employees' Retirement System v. Coulter*, 2002 WL 31888343, at *11 (Del. Ch.

---

[4] Defendants also miss the salient points of *Udoff v. Zipf*, 375 N.E.2d 392 (1978) and *Green v. Weiner*, 766 A.2d 492 (Del. 2001). Defs.' Br. at 27-28. In the former case the court explicitly recognized that it is improper to dismiss a case alleging a violation of a stockholder-approved plan without affording plaintiff an opportunity to take discovery. 375 N.E.2d at 394-95. And although the legal principle for which the latter case stands may be "unremarkable," the case reinforces the proposition that it is improper for a court to resolve questions of fact on a motion to dismiss.

[5] "[D]irectors have no discretion to exceed the intra-entity limitations on their authority," such as those imposed by a stockholder-approved plan, and "[w]ithout authority to take the action in question, a board has no business judgment to exercise." *Allen v. El Paso Pipeline GP Co., L.L.C.*, 90 A.3d 1097, 1108 (Del. Ch. 2014); *Quadrant Structured Prods. Co. v. Vertin*, 2014 WL 5465535, at *3 (Del. Ch. Oct. 28, 2014) ("When evaluating corporate action for legal compliance, a court examines," among other things, "entity-specific contractual agreements, such as a stock option plan [or] other equity compensation plan . . . ."); *see also Desimone v. Barrows*, 924 A.2d 908, 932 (Del. Ch. 2007) ("[T]he common law of corporations cannot and should not fail to consider the fiduciary consequences of director behavior that involves a breach of contract or violation of law.").

Dec. 18, 2002) (repricing of stock options in violation of plain terms of governing stock plan not a valid business judgment); *Pfeiffer v. Leedle*, 2013 WL 5988416, at *6 (Del. Ch. Nov. 8, 2013) (particularized factual allegations that board clearly violated a plan raise a reasonable doubt that act was a valid exercise of business judgment).

Defendants contend that Plaintiff failed to allege that the Plan violation was knowing and intentional. Defs.' Br. at 15, 19, 24-25 and 28. That argument cannot be reconciled with the Complaint, which repeatedly alleges that the violation was in fact "[knowing] and [intentional]". A7-8, A16-A20 and A25. Plaintiff alleged that every Defendant except for Coe was on the Board when the decision was made to accelerate the vesting of the RSU Award in express violation of the terms of the Plan and that just months later the entire Board approved specific amendments to the Plan *and* a description of those amendments in the 2013 Proxy designed to conceal the violation. A20-21. Specifically, less than seven months after accelerating the vesting of the RSU Award and making the payment to Khosrowshahi, the Board amended the Plan, including Sections 7(b)(i), 11(b) and 12(d). A17-19. The effect was significant: as a result of these amendments, the Compensation Committee would have (i) unfettered discretion to accelerate the vesting of a Qualified Performance-Based Award when it previously did not, and (ii) unfettered discretion to modify the terms of a Qualified

Performance-Based Award even if such modifications would cause the award to lose its tax-deductibility status under Section 162(m). Notwithstanding the substantial additional powers these new amendments conferred on the Compensation Committee, the Board did not discuss these amendments at all when seeking stockholder approval. A19. To the contrary, the Board perfunctorily referred to these amendments as "administrative changes." *Id*. The 2013 Proxy provided no explanation whatsoever as to why the Board suddenly decided to remove language that had been in the Plan since inception, nor why these amendments were described as merely "administrative" in nature. Surely these changes were made with a specific purpose in mind. What precipitated these changes? What effect was intended? The Board was silent.

Indeed, at oral argument Defendants' counsel addressed the question of why this language was changed and that explanation is telling.

> MR. STERN: "[I]t would make sense that tax advisors to public company boards would want to frame the plan in a way that permitted the compensation committee to have the discretion to waive a performance goal and give up the 162(m) deduction if it thought it would be wise to do so. In other words, there's a coherent – if, in fact, the terms of this plan did impose – did give the committee greater freedom than it had before, there would be a logical explanation[.]"

B164-65. Although the change was not even discussed in the 2013 Proxy, much less was its purpose explained, Defendants echo this explanation in their Answering Brief. Defs.' Br. at 8 ("[T]he amended Plan no longer prohibited the

Compensation Committee from amending a Qualified Performance-Based Award if such amendment would result in the loss of a Section 162(m) deduction.") Of course, an amendment designed to remove a prohibition on the Board's authority and give it "greater freedom" to modify awards granted under the Company's stockholder-approved Plan is anything but an "administrative change" unworthy of mention when the Board seeks its approval.

Thus, not only did Plaintiff plainly allege intentional wrongdoing, her allegations are precisely of a type that the Court of Chancery has relied upon in similar cases to draw an inference of conscious wrongdoing at the motion to dismiss stage. For instance, in *In re Tyson Foods, Inc. S'holder Litig.*, the plaintiff alleged that board members breached their fiduciary duties by timing stock option grants to themselves and other insiders just prior to the release of positive information that, once released to the public, would likely lead to an increase in the value of the stock options. 2007 WL 2351071, at *2 (Del. Ch. Aug. 15, 2007). The plaintiff further alleged that defendants failed to disclose this practice to stockholders. *Id.* at *9. Despite concluding that the applicable stock plan *permitted* defendants to time the issuance of stock options in this manner, the Court found demand was excused under the second prong of *Aronson* due to defendants' later deception in failing to transparently disclose what they were doing. *Id.* at *4. As the Court explained, "where a board of directors intentionally

conceals the nature of its earlier actions, it is reasonable for a court to infer that the act concealed was itself one of disloyalty that could not have arisen from a good faith business judgment." *Id.* at *4; *see also In re Ebix, Inc. S'holder Litig.*, 2014 WL 3696655, at *21 (Del. Ch. July 24, 2014) (recognizing that a reasonable inference of conscious wrongdoing may arise from allegations concerning "the circumstances surrounding the disputed award or other relevant facts."); *In re InfoUSA, Inc. S'holder Litig.*, 953 A.2d 963, 990 (Del. Ch. 2007) (finding actions taken by board to conceal nature of payments made to CEO and others warranted inference that board had acted in bad faith). While Defendants prefer to focus on the Plan alone and contend that there is no provision that was "so clear" that it is appropriate to conclude that Defendants "*must*" have known they were violating the Plan (Defs.' Br. at 19; *id.* at 31), this improperly ignores the significance of the 2013 amendments to the Plan and their description in the 2013 Proxy — which Defendants now all but outright admit was entirely insufficient if not completely false and misleading. At the same time, Defendants exaggerate Plaintiff's burden, which was only to allege particularized facts sufficient to raise a *reasonable doubt* that the Plan violation was intentional.

In light of the above, the cases on which Defendants rely are easily distinguishable. In *Abrams v. Wainscott*, 2012 WL 3614638, at *2 (D. Del. Aug. 21, 2012), the plaintiff failed to plead "what the directors knew and when" or that

the defendants' positions on the compensation committee gave them specific knowledge of the plan provision that was violated. In *Freedman v. Redstone*, 2013 WL 3753426, at *9 (D. Del. July 16, 2013), *aff'd*, 753 F.3d 416 (3d Cir. 2014) the defendants acted with "express authority" and "there [was] no clear and undisputed violation," making the case "distinguishable from *Sanders*." In *Freedman v. Mulva*, 2014 WL 975308, at *4 (D. Del. Mar. 12, 2014) the complained of activity was, in fact, a purportedly material misstatement in a disclosure. Finally, in *Ebix*, plaintiffs did not allege with particularity that the plan in fact governed the compensation in the challenged bonus agreement. 2014 WL 3696655, at *21. In contrast, the allegations at issue in this case easily fit the *Sanders* paradigm, which "teaches that when a plaintiff presents particularized factual allegations that indicate that the board clearly violated an unambiguous provision of a stock plan, it is proper to infer that such violation was committed knowingly or intentionally and, therefore, that demand should be excused." *Pfeiffer*, 2013 WL 5988416, at *6.

Defendants' final argument is that even if the Compensation Committee intentionally violated the Plan, the full Board "remains capable" of considering a demand. Defs.' Br. at 29. Defendants base this argument on the fact that Plaintiff only appealed the ruling below with respect to prong two of the *Aronson* test. From this, Defendants incorrectly conclude that "Friedman has dropped her challenge to the disinterestedness and independence of the Board." Defs.' Br. at

29.[6] Contrary to Defendants' argument, Plaintiff alleged that the entire Board adopted the amendments to the Plan removing the terms violated by the accelerated vesting of the RSU Award, and further attempted to conceal the Plan violation in the 2013 Proxy. As with any cover-up, these acts are a breach of fiduciary duty inextricably linked to the initial wrongdoing (the Plan violation), with respect to which all Defendants face a substantial risk of liability sufficient to excuse demand as a matter of law. A16, A20; *see also In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 289 (Del. Ch. 2003) (applying *Aronson* to Board's decision to refrain from acting after it was informed of the terms of improper employment agreement).

[6] As an initial matter, where the factual allegations are sufficient to excuse demand under *Aronson*'s second prong, as they are here, no inquiry need be made into director interest and independence. *See*, *e.g.*, *Sanders*, 1999 WL 1044880 at *5; *Coulter*, 2002 WL 31888343, at *10.

CONCLUSION

For the reasons set forth above and in Plaintiff's Opening Brief, the ruling of the Court of Chancery should be reversed.

November 18, 2014

SMITH, KATZENSTEIN & JENKINS LLP

/s/ David A. Jenkins
David A. Jenkins (No. 932)
Neal C. Belgam (No. 2721)
800 Delaware Avenue
Suite 1000
P.O. Box 410
Wilmington, DE 19899
(302) 652-8400
(302) 652-8405 (facsimile)

Attorneys for Plaintiff-Appellant

OF COUNSEL:

LEVI & KORSINSKY LLP
Eduard Korsinsky
Steven J. Purcell
30 Broad Street, 24th Floor
New York, NY 10004
(212) 363-7500
(866) 367-6510 (facsimile)