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Case Number 523,2015D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OPTIMISCORP, a Delaware corporation, ALAN MORELLI, and ANALOG VENTURES, LLC,	:	No. 523, 2015
Plaintiffs Below, Appellants,	:	CASE BELOW:
v.	:	Court of Chancery of the State of Delaware, C.A. No. 8773-VCP
JOHN WAITE, WILLIAM ATKINS, GREGORY SMITH and WILLIAM HORNE,	:	
Defendants Below, Appellees.	:	

APPELLANTS' OPENING BRIEF ON APPEAL

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

CASES **PAGE(S)**

AUTHORITIES

NATURE OF THE PROCEEDINGS[1]

This is a case about corporate control, Defendants' wrongful conduct to seize it, and the resulting damages to the corporation and its stockholders.

At a special meeting on October 20, 2012 (the "October 20 Special Meeting"), the board of directors of plaintiff Optimis*Corp* ("Optimis" or the "Company") met and voted to terminate the Chairman and Chief Executive Officer, plaintiff Alan Morelli, and amend its Stockholders Agreement ("Amendment No. 2") to remove a provision that granted the "Initial Stockholders" (controlled by Morelli) the right to appoint a majority of the board. In a subsequent action (the "Section 225 Action") pursuant to section 225 of the Delaware General Corporation Law (the "DGCL"), which was settled in March 2013, Morelli prevailed in nullifying his removal and Amendment No. 2.[2] In May 2013, the Company terminated Defendant William Horne, the architect of the Amendment No. 2 strategy (*see* Op. at 124), as Chief Financial Officer. A few weeks later, on June 25, 2013, the Director Defendants resigned from the Optimis

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[1] The trial court's August 26, 2015 Memorandum Opinion appealed herein (the "Opinion"), cited as "Op.", and Final Order and Judgment ("Final Judgment") are attached as Exhibits A and B, respectively.

[2] Specifically, in the Section 225 Action, Optimis, Morelli and Analog Ventures, LLC ("Analog"), plaintiffs in this action ("Plaintiffs"), entered into a settlement agreement with, among others, John Waite, Gregory Smith and William Atkins, Defendants herein (the "Director Defendants"), pursuant to which (i) they agreed that "any actions of the board purportedly taken at" the October 20 Special Meeting – *i.e.*, approval of Amendment No. 2 and removal of Morelli as Chairman and CEO – "were void" (A1997 ¶ 5), and (ii) the Court of Chancery entered a final judgment designating the slate backed by Morelli as the lawful board of Optimis. (A2005 ¶ 2)

board and, the very next day, sued the Company and Morelli in California to rescind the transaction through which they had sold Rancho Physical Therapy, Inc. ("Rancho"), the Company's largest operating subsidiary, to Optimis six years earlier. The California court denied the Director Defendants' request for a temporary restraining order to enjoin Optimis from exercising control over Rancho, and the Director Defendants dismissed the action in early August 2013.

On August 5, 2013, Plaintiffs commenced this action in the Court of Chancery seeking monetary, injunctive and declaratory relief to remedy Defendants' breaches of their fiduciary duties to the Company and its stockholders, breaches of contract and tortious interference.[3] Plaintiffs' complaint also advanced secondary liability theories of aiding and abetting and conspiracy. Defendants answered and denied Plaintiffs' claims, and extensive discovery followed.

On August 8, 2014, Defendants moved for summary judgment, which Plaintiffs opposed. On January 28, 2015, the trial court denied the summary judgment motions by memorandum opinion.

Trial on the merits was held February 6-13, 2015, with post-trial argument on April 30, 2015. On August 26, 2015, the trial court issued its Opinion and

[3] The same day, Morelli and Analog moved to reopen the Section 225 Action and hold Waite in contempt for violating a *status quo* order by secretly approving nearly $1 million in employment agreements for himself and the other two Director Defendants. (*See* A2839-41; A2856-57 ¶ 12) Following a trial, on September 25, 2013, the Court of Chancery entered an order holding Waite in contempt, voiding the employment agreements, and awarding attorneys' fees to Morelli and Analog. (A2130-31)

entered the Final Judgment (i) dismissing, with prejudice, all of Plaintiffs' claims, except for one claim against the Director Defendants for breach of the fiduciary duty of loyalty, on which the trial court entered judgment for Plaintiffs but declined to award damages or equitable relief, (ii) partially granting and partially denying Horne's request for sanctions, and (iii) denying Plaintiffs' and Defendants' requests for attorneys' fees and expenses. The trial court's determinations against Plaintiffs were premised on two fundamental errors of law.

First, in considering the evidence and assessing credibility, the trial court held that the Company's settlements with certain witnesses (against whom it also had claims related to Defendants' wrongdoing) amounted to witness tampering that undermined the integrity of the proceedings below – although the court never explained how – notwithstanding that those settlements expressly required the witnesses to provide truthful testimony and evidence in this case. As a sanction, the trial court dismissed Plaintiffs' conspiracy claims and drew adverse credibility inferences against Plaintiffs and their witnesses. This was legal error – Delaware law not only permits, but encourages, settlements like these, which were transparently disclosed in discovery and were intended and carefully structured to enhance, not impede, the administration of justice and the integrity of this judicial proceeding.

Second, in rejecting Plaintiffs' claims based on Defendants' unlawful efforts to remove Morelli and seize control of Optimis, the trial court acknowledged a line of "Delaware case law that appears supportive" of the claims, but concluded that the cases "were incorrectly decided and … decline[d] to follow them." (Op. at 164; *see also id*. at 165-75) These cases[4] squarely stand for the proposition that it is a breach of the duty of loyalty for corporate fiduciaries, using guile, trickery or deception, to seize control of the corporation and usurp the right to designate directors from the controlling stockholders. That is precisely what Defendants did here, and it was legal error for the trial court to disregard these precedents and deny Plaintiffs relief on their claims.

Therefore, through this appeal, Plaintiffs challenge those portions of the Opinion and Final Judgment: (i) finding that Plaintiffs engaged in litigation misconduct and imposing sanctions; (ii) dismissing Plaintiffs' breach of fiduciary duty claims against Defendants for their failure to provide fair notice to the board, including Morelli, of their intentions to remove him at the October 20 Special Meeting and to strip him and Analog of their control rights under the Stockholders

[4] *Koch v. Stern*, 1992 WL 181717 (Del. Ch. July 28, 1992), *vacated as moot*, 628 A.2d 44 (Del. 1993); *VGS, Inc. v. Castiel*, 2000 WL 1277372 (Del. Ch. Aug. 31, 2000), *aff'd*, 781 A.2d 696 (Del. 2001) (ORDER); *Adlerstein v. Wertheimer*, 2002 WL 205684 (Del. Ch. Jan. 25, 2002) (collectively, "the *Koch* line of cases"). *Fogel v. U.S. Energy Sys., Inc.*, 2007 WL 4438978 (Del. Ch. Dec. 13, 2007), *overruled on other grounds by Klaassen v. Allegro Dev. Corp*., 106 A.3d 1035 (Del. 2014), which followed *Koch* and *Adlerstein* in reversing a CEO's removal at an invalid special board meeting where advance notice of the purpose was not provided, is less on point here, as the CEO did not have any director designation rights.

Agreement; (iii) dismissing Plaintiffs' claims against the Director Defendants for breach of the Stockholders Agreement by refusing to execute written consents as directed by Morelli at the October 20 Special Meeting to remove and replace certain directors who had been co-opted to support Morelli's removal and approval of Amendment No. 2; (iv) declining to award damages for Defendants' breaches of contract and the duty of loyalty; and (v) holding Plaintiffs' damages too speculative. As discussed below, the Final Judgment should be reversed in relevant part and judgment entered in Plaintiffs' favor or remanded for further proceedings.

SUMMARY OF ARGUMENT

1. The trial court erred by concluding that Plaintiffs' conduct compromised the proceedings below. Specifically, the court erred by holding that settlement agreements that were fully disclosed in discovery and required truthful testimony from the settling parties, along with litigation threats, constitute witness tampering and conduct prejudicial to the administration of justice.

2. Established Delaware case law holds that it is a breach of the duty of loyalty for directors to usurp control through transactions that were not fully and fairly disclosed in advance. The trial court erred when it held that this principle conflicts with section 141(a) of the DGCL and declined to find a breach of duty.

3. The trial court erred in failing to find a breach of the duty of loyalty where Morelli was removed, and Amendment No. 2 was approved, by deceit.

4. The trial court erred in failing to find a breach of the Stockholders Agreement by the Director Defendants in refusing to execute the written consents requested by Morelli to remove and replace directors at the October 20 Special Meeting.

5. The trial court erred in holding that Plaintiffs did not prove damages.

STATEMENT OF FACTS[5]

As stated above, this case is about corporate control. At the time of the most relevant events, culminating with the October 20 Special Meeting, Delaware law – the *Koch* line of cases – consistently, squarely and rightly held, on facts indistinguishable from those here, that it is a breach of the duty of loyalty to seize the right to designate a majority of the directors from one group of stockholders, who are legally entitled to control, and give it to other stockholders. The insurgents' subjective motives and intentions – for example, "we only did what we thought was right for the company" – are not determinative. And when that change of control is further tainted by an opaque and furtive process, as here, settled Delaware case law establishes that conduct as a breach of the duty of loyalty as a matter of law.[6] Until this case.

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[5] Any facts stated herein with only record citations represent factual disputes in the record. As discussed in Section I.C., *infra*, Plaintiffs believe the trial court viewed the evidence through an improperly tainted lens, resulting in numerous erroneous findings of fact. Therefore, where necessary, Plaintiffs provide their version of the facts below, as supported by the record.

[6] The trial court, understatedly, found that "[t]he October 20 [Special] Meeting bears few of the hallmarks of good governance" and that "the Board meeting had many flaws." (Op. at 129, 184; *see also* Op. at 128 (meeting notice "lacked an agenda of the topics to be covered at the meeting and, therefore, was defective")) For example, Waite admittedly kept the other board members in the dark about the purpose of the October 20 Special Meeting – to remove Morelli and approve Amendment No. 2 to eliminate his and Analog's board majority designation rights – and the alleged basis therefor until after the *ad hoc* committee meeting began, from which Morelli was excluded. (A1039; *see also* A200, 416:2-417:6 (Morelli); Op. at 128, 132) Moreover, as with the directors held liable for duty of care breaches in *Smith v. Van Gorkom*, 488 A.2d 858, 874-75, 884, 888 (Del. 1985) (directors who approved merger agreement at single meeting without sufficient inquiry and expert advice not entitled to business judgment protection), *overruled on other grounds by Gantler v. Stephens*, 965 A.2d 695 (Del. 2009), Waite, and the lawyers he and the insurer selected with no input from the board, required the uninformed directors to act

The Opinion turns the law on its head and risks severe adverse consequences for corporations that rely on the stability of Delaware law to order their affairs. Once board control of Optimis, a small but promising enterprise, was thrown into contention by Defendants, the Company's equity value dropped by more than half – tens of millions of dollars – and its legal expenses, to defend against claims brought by Defendants and to seek remedies for their wrongful acts, exploded.[7]

In effect, the trial court overruled the *Koch* line of cases on the basis of a perceived conflict with section 141(a), which provides that "[t]he business and affairs of every [Delaware] corporation … shall be managed by or under the direction of a board of directors[.]" 8 *Del. C.* § 141(a); (*see* Op. at 173-75). There is no such conflict.

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immediately on Waite's proposals without adequate time to consider and debate the available evidence. (A369-70, 830:24-831:16 (Sussman); A2715, Abdelhamid Dep. 63:13-25; A2724, Atkins Dep. 384:12-14) And without so much as a nod to proper corporate due process on the sexual harassment claim that Waite proffered as the excuse for his proposals, Morelli was given no notice of the specific allegations made against him in the notorious and salacious Solomon Report (*see* A1908-09; A199, 411:19-412:13, A203, 429:15-19 (Morelli); Op. at 128) – for example, he was never even provided a copy of the document (A203, 428:23-429:4 (Morelli)) – or afforded an opportunity to rebut those allegations before or during the October 20 Special Meeting. (A1910-11; A203-04, 429:15-430:1 (Morelli); *see generally* Op. at 129-35 (failing to mention anything suggesting Morelli was given such opportunity))

[7] (*See* A778-79 & nn.9-10, A847 ($44 million drop in equity value); A1076 & n.120; A213, 469:4-11, A278, 589:7-18 (Morelli) (price per share in September 2012 was $2.35 versus $1 at time of trial); A405, 973:10-24 (Bratic)); A391, 916:14-21 (Bratic) ($10 million in litigation expenses incurred); Op. at 68 n.202; A2210; A2503 (showing marked increase in legal fees from 2012 to 2014); A293, 647:1-19 (Morelli) (half million dollars spent to defeat Director Defendants' California rescission action); A2010 (recognizing, at March 25, 2013 board meeting, Company's urgent financing needs on account of mounting legal expenses))

The court's concern – that the rule of *Koch* and its progeny would promote inequitable entrenchment conduct by incompetent or unscrupulous controlling stockholders and their mangers (*see* Op. at 163-75) – already has well-established remedies under Delaware law. Specifically, directors who disagree with the policies of a CEO or board majority designated by the lawful controlling stockholders can try collaboratively to persuade the other directors to change their view – something the Director Defendants assiduously avoided doing here.[8] And failing that, minority stockholders who believe the directors have abrogated their fiduciary duties to the self-interested whim of the controlling stockholders can sue derivatively in the Court of Chancery to enjoin any alleged misconduct.

There simply is no need (because there is no conflict with section 141(a)) to create a new and unwise self-help remedy under Delaware law that would exonerate insurgent directors who extra-judicially overturn a control structure agreed to by the corporation, its board and a majority of the stockholders on a clear day. The disaster inflicted upon Optimis here is an object lesson for why, as a

[8] In fact, when he filed his first paper in the Section 225 Action, Waite claimed that there were no policy differences between the other directors and Morelli. (*See* A1985 ¶ 2 ("This case does not, however, involve competing factions with differences of opinion about the optimal strategic direction for the Company.")) The trial court's 213-page Opinion puts the lie to that contention – obviously, the Director Defendants had major policy differences with Morelli on many issues, but they never raised their concerns with the full board. Plaintiffs repeatedly highlighted Waite's misrepresentation to the court (*see, e.g.*, A435, 1092:23-1095:5 (Waite); A781 & n.15), but the Opinion never even mentions it.

matter of public policy, corporate anarchy like this should not be, and heretofore never has been, tolerated by Delaware courts of equity.

The defense strategy below, from day one, was to inflame the passions of the trial court against Morelli, by painting him as a "bad man" whose business judgments were wrong, and claiming that he had sexually harassed an innocent, defenseless female employee and, therefore, had to be removed.[9] These allegations are untrue, but difficult to defend against in a he-said-she-said context where credibility issues were predetermined against Plaintiffs due to the trial court's error of law in assessing the evidence. The trial court accepted the defense's invitation to wade into the weeds and determine who was "good," who was "bad," and who had the better business judgment about how to run the business of Optimis. Respectfully, that went beyond the more limited role Delaware courts normally – and properly – play in such disputes.[10]

For these reasons and those detailed below, the judgment of the trial court should be reversed.

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[9] This character assassination strategy is why, when Waite filed his first paper in the Section 225 Action, he went out of his way to include a copy of the Solomon Report which, on its face, was an "**Attorney-Client Privilege**" document belonging to the Company that Waite was not authorized to disclose. (*See* A2774-2808 (emphasis in original))

[10] *See VGS*, 2000 WL 1277372, at *5 (in case involving limited liability company control contest, "the issue of who is best suited to run the LLC should not be resolved here [*i.e.*, in the Court of Chancery] but in board meetings where all managers are present and all members appropriately represented.").

A. Optimis Is Formed.

In 2006, Morelli co-founded Optimis, a Delaware corporation headquartered in Pacific Palisades, California, to develop innovative software for the healthcare industry. (Op. at 4, 61) The strategy was to acquire healthcare service providers, initially in the physical therapy field, to help design and beta test the software. (A212, 464:18-465:5 (Morelli); *see* Op. at 62) These acquisitions would create a platform to prove the efficacy of, and help to market, the Company's software solutions to the entire industry. (A165, 274:6-275:13 (Morelli)) Morelli has been the Chairman and CEO since the Company's inception (Op. at 4); together, he and Analog, of which he is the managing member, own nearly 9 million Optimis shares. (*See id.* & n.3)

B. Optimis Purchases Rancho And Enters Into Stockholders Agreement.

The first (and largest) physical therapy provider acquired by Optimis was Rancho. (Op. at 5) On June 14, 2007, Rancho, the Director Defendants (who owned Rancho) and Optimis entered into a stock purchase agreement; Rancho became a wholly owned subsidiary of Optimis and the Director Defendants became directors and stockholders of Optimis (and ceased to be Rancho stockholders). (A743 ¶¶ 1-3; *see* Op. at 59) Rancho and the Director Defendants could rescind the transaction between 18 months and two years after the closing

(A1400-03), but they elected not to do. (A744 ¶ 8) Collectively, the Director Defendants own 8,755,000 Optimis shares. (Op. at 6)

The parties also entered into the Stockholders Agreement with Optimis, dated June 29, 2007, to provide for the orderly governance of the Company.[11] (A1408; A744 ¶ 6; *see* Op. at 59, 61) Under section 3.3, the stockholder parties, including the Director Defendants and Horne, were required "to vote or act with respect to their shares so as to cause and maintain the election to the [Optimis] Board of five (5) individuals [out of nine directors] designated by the holders of a majority of the [Optimis shares] held by the Initial Stockholders," as defined thereunder. (*See* Op. at 190; A1544 ¶ 3.3(a)) Morelli and Analog owned the vast majority of the Initial Stockholders' shares (Op. at 61, 164 n.532) and, as such, had the right to designate a majority of the Optimis board, and Defendants were required to vote for the majority directors, as directed by Morelli and Analog. (A1544 ¶ 3.3(a); *see* Op. at 61, 164 n.532, 190) The Director Defendants breached that provision by refusing to execute a written consent requested by Morelli and Analog at the October 20 Special Meeting. (*See* A369, 827:13-828:4, A374, 848:10-20 (Sussman); Op. at 183-84; *see also* Section III.C., *infra*)

[11] The Stockholders Agreement expired on February 25, 2015. (*See* Op. at 61 n.178)

C. Director Defendants Decide To Seek Control Of Optimis And Enlist The Help Of Others.

In the initial years after selling Rancho, the Director Defendants were content with the Company's direction under Morelli's leadership, as evidenced by their decision to forego their contractual rescission rights. However, by the fall of 2010, that had changed.

As early as November 30, 2010, Smith expressed his "critical" frustrations to Waite and Atkins, his business partners and friends, about "poor financial budgeting and lack of fiduciary responsibility as it relates to expenses Optimis is incurring," and he wanted to "discuss how we plan on broaching this at" an Optimis board meeting scheduled for December 9, 2010. (*See* Op. at 79, 81; A1696-97) The Director Defendants could have openly confronted Morelli before the board with their concerns, as honest fiduciaries are required to do. But in view of Morelli's and Analog's board majority designation rights, Waite advised against it: "If we were to create that confrontation at the board level, then we must be in a position to do what would amount to a hostile take over [*sic*]. I am not sure that is what we want to do right now." (A1696) Waite also correctly anticipated that attempting to seize control would have a significant adverse effect on operations and lead to litigation. (*Id*.) So the Director Defendants adopted a more

surreptitious course and never raised their concerns with Morelli or the full Optimis board.[12]

Instead, the Director Defendants recruited other key employees to support their efforts and undermine Morelli's lawful authority. One logical candidate was Horne, who, unbeknownst to Morelli, was having a years-long affair with Morelli's estranged wife, Therese Doherty. (*See* Op. at 67, 117; A551, 1407:17-1408:5 (Horne)) The affair and Doherty's marital property dispute with Morelli – she was seeking ownership of his Optimis shares – provided Horne's incentive to secretly oppose Morelli. (A551-52, 1408:16-1409:5 (Horne); A177, 323:3-7, A177, 324:5-8 (Morelli))

There also was a strategic disagreement at the highest management levels over allocation of development resources as between Optimis*PT*, the Company's electronic medical records application, and Optimis*Sport*, a complementary application designed to help practices expand beyond traditional rehabilitation services into the huge wellness, maintenance and healthy lifestyle market.[13] Morelli, who ran the software side of the business, believed Optimis*Sport* offered the greatest growth potential for the Company and, therefore, directed the software

[12] (*See generally* A1258-1329 (minutes of all Optimis board meetings between December 2010 and June 2012, none of which indicate or suggest that the Director Defendants raised concerns or disagreed with Morelli's strategic direction); *see also* A614, 1507:17-22 (Atkins); A2162 ¶ 9)

[13] (*See* Op. at 10, 63, 95-96; *see also* A81, 25:24-28:18 (Owens); A165, 275:14-276:6, A212-13, 465:21-466:8 (Morelli); A1706-07, A1731)

developers to work on ***both*** Optimis*Sport* and Optimis*PT*. (A165, 277:10-23 (Morelli)) However, the clinical side of the business, run by Waite and George Rohlinger (a Waite-loyalist) (*see* Op. at 91), wanted to focus ***exclusively*** on finishing Optimis*PT* before allocating any resources to Optimis*Sport*. (A435-36, 1094:11-1095:5 (Waite); A2177 ¶ 10)

On this issue, Jeanine Gunn, the Director of Implementation for Optimis*PT* (Op. at 66), another Waite loyalist, and Helene Fearon and Stephen Levine, key employees in the Company's consulting subsidiary and nationally recognized experts in clinical physical therapy regulatory matters (*see* Op. at 78) – who feared that any material delay in completing Optimis*PT* could harm their reputations in the industry (*see* Op. at 7 & n.8, 41, 78; A319, 750:12-20, A321-22, 761:18-762:2 (Fearon); A630, 1571:23-1572:6 (Levine)) – also were naturally aligned with Defendants.

Of the three Director Defendants, Waite was the most heavily involved in the day-to-day effort to effectuate their strategy to undermine and remove Morelli, but the only fair inference from the evidence – given their close personal and professional relationships and the agreement they reached in November 2010 – is that he did so with Smith's and Atkins' blessings. (*See* A524, 1298:15-1299:24 (Smith)) The plan to remove Morelli as CEO, against his will if necessary, was

discussed regularly among Waite, Rohlinger, Horne, Gunn, Fearon and Levine. (A628, 1565:6-23, A629, 1569:5-15 (Levine))

D. Director Defendants Secretly Remove Morelli From The Rancho Board.

In connection with the sale of Rancho to Optimis, the Director Defendants entered into four-year employment agreements with Rancho, which expired on June 30, 2011.[14] In the spring of 2012, Morelli and the Director Defendants had a dispute over extending these employment agreements (Op. at 97-98), and the Director Defendants' determination to get rid of Morelli intensified.

The Director Defendants also served on the Rancho board with Morelli, who was designated by Optimis. (*See* A746 ¶ 2; Op. at 60) After postponing a scheduled Rancho board meeting to consider the employments agreements, the Director Defendants rescheduled it for April 26, 2012 (*see* A1836-37) but did not tell Morelli (or Optimis) about the meeting or that they had unilaterally dismissed Morelli from the Rancho board. (*See* Op. at 98; *see also* A2746-47, A2748-50, A2751-53,Waite Dep. 84:19-85:1, 161:24-163:7, 166:24-168:9) Their alleged basis for removing Morelli was that he was not a licensed physical therapist, as required for directors under Rancho's bylaws; however, because the Director

[14] (*See* Op. at 59-60; *see also* A488, 1153:3-9 (Waite); A744 ¶ 5; A1472-82 (Smith); A1494-1504 (Atkins); A1515-25 (Waite))

Defendants were not Rancho stockholders, they also were not qualified to be directors under the same bylaws. (Op. at 98)

E. Geller's "Complaint" And Investigation.

Finally, in February 2012, Defendants found the excuse to get rid of Morelli that they had been looking for. Tina Geller, a physical therapist with Optimis (Op. at 6), mentioned Morelli's alleged harassing behavior to Horne, who told Rohlinger. (Op. at 10-11 (noting this is undisputed)) Seven months later, in September 2012, Geller told Waite; at trial, Waite predictably denied having heard about it from Horne and Rohlinger, two of his closest allies in the insurgency. (*See* Op. at 11, 107; *see also* A428-29, 1066:5-1067:7 (Waite)) Geller asked Waite not to report the matter (Op. at 11), and specifically told him, without providing any details, that she did not want to make a sexual harassment complaint against Morelli and that Waite should not treat what she said as such. (A2567, Geller Dep. 188:4-15) Nevertheless, with the pretext Waite had been hoping for in hand, he sprang into action that very same day (*see* Op. at 112) and, after first meeting with his personal lawyer (A2758-60, Waite Dep. 363:23-365:2), Waite called Rancho's human resources director, Nancy Kreile, and told her of a "potentially volatile HR issue in our corporate office in Pacific Pallisades [*sic*]." (*See* Op. at 112; A1907) Kreile immediately reported Geller's "complaint" to the Company's insurers (Op. at 112), without ever speaking to Geller or Morelli (A1906) and despite the fact that

Geller had not filed a claim or made a written complaint. (A1992; A2761, Waite Dep. 430:17-21) An investigation by the Company's insurer into Geller's "complaint" ensued.

Immediately upon receiving the insurer's investigative report (the so-called Solomon Report) on October 18, Waite called a special meeting of the Optimis board for Saturday, October 20, 2012. (*See* A1908; A748 ¶ 1) The whole purpose of the October 20 Special Meeting was to remove Morelli as CEO and Chairman and eliminate his and Analog's rights to appoint the majority of the board under the Stockholders Agreement, but Waite never informed Morelli and the rest of the Optimis board of this purpose before the meeting, as required by Delaware law. *See* (A748 ¶ 3; Op. at 128); *Adlerstein v. Wertheimer*, 2002 WL 205684, at *9 (Del. Ch. Jan. 25, 2002) (invalidating actions at board meeting where voting control – a "set of legal rights" – was affected without advance warning). This was surely intentional, since Waite knew that, if he tipped his hand, Morelli could act to protect the Initial Stockholders' rights by, for example, replacing any of their director designees who might have been co-opted by Defendants. (*See* Op. at 175)

F. The October 20 Special Meeting.

At the start of the special meeting, two directors, Maureen Fahey and Brian Wing, raised objections. (*See* Op. at 130-31) Fahey complained that the board should have been notified earlier and that an independent committee should have

handled the investigation, and Wing objected because he believed that Nancy Solomon, the investigator, was not independent. (Op. at 130-31; *see also* A368, 823:17-824:16 (Sussman); A1910; *accord* A1917-18) Waite stonewalled and replied that further information would be forthcoming only after an *ad hoc* committee was formed. (A368, 825:2-8 (Sussman); A1910) Over the objections of Fahey, Wing and Morelli, the *ad hoc* committee was formed, the board meeting was recessed, and the committee meeting began, but not until after Morelli circulated a written consent seeking to appoint new directors to the OptimisCorp board, which was ignored by the Director Defendants. (A749 ¶¶ 4(b)-(c); A368, 826:8-16, A369, 827:7-828:4, A374, 848:10-20 (Sussman); A1910-11; A1917-21) The *ad hoc* committee included all of the directors except Morelli, who was excluded from the committee meeting. (Op. at 12, 131-32)

At the *ad hoc* committee meeting, the Solomon Report was summarized (A370, 831:17-832:7 (Sussman); A1911-13), but not by Solomon, who prepared the report, conducted the investigation, decided credibility issues, and determined the relevant "facts" – she was not invited and did not attend the meeting. (A2741, Solomon Dep. 76:8-12; A203, 428:23-429:6 (Morelli)) The committee was given very little time to review the report. (A369-70, 830:24-831:16 (Sussman); A2715, Abdelhamid Dep. 63:13-25 (indicating he did not have time to review report); A2724, Atkins Dep. 384:12-14 (only 10-15 minutes)) Fahey related an incident in

which she had walked in on a physical therapy session for her husband at which Geller, the therapist, was dressed in a negligée; despite the obvious relevance, the directors were told to disregard the incident. (A2702-03, Sussman Dep. 52:20-53:21; A2713-14, Abdelhamid Dep. 61:15-62:8; A2707, Wing Dep. 76:9-24) The committee was then pressured to act immediately or risk incurring personal liability without insurance coverage and to quickly settle with Geller. (A386, 895:17-896:13 (Sussman); A520-21, 1284:19-1285:10 (Smith))

Immediately after the *ad hoc* committee meeting ended, the board meeting was reconvened in a different room, but before Morelli could even join it, Waite moved for a vote on Amendment No. 2. (A373, 844:22-845:17 (Sussman)) While doing so, Waite and David Robbins[15] misrepresented to the board that Amendment No. 2 was "just a small thing" and would not affect Morelli's and Analog's rights. (A373, 845:15-17, A373, 846:4-12 (Sussman); A2719, Abdelhamid Dep. 69:7-14; Op. at 182-83) The board approved Amendment No. 2, and when Morelli arrived and again sought to exercise the Initial Stockholders' rights under the Stockholders

[15] Robbins was hired by Waite as outside counsel to the Company because Allen Sussman, the Company's usual outside counsel at whose office the board meeting was held, had informed Waite and Laura Brys (Optimis's in-house counsel) that he was conflicted and could not act as counsel due to his personal relationship with Morelli. (A1979; A376-79, 856:19-868:19 (Sussman); *see also* A2712, Abdelhamid Dep. 49:8-23) At the October 20 Special Meeting, Waite and Robbins disregarded Wing's concerns about Morelli not being present for the vote on Amendment No. 2 and never advised the board about the material effect of the amendment. (A373-74, 846:20-847:5 (Sussman); A526, 1307:9-22 (Smith); A2717, Abdelhamid Dep. 65:17-66:5)

Agreement by presenting a written consent to elect a new majority slate of directors, it was not considered. (A374, 848:10-20 (Sussman)) Instead, the board voted to terminate Morelli, and the meeting ended. (A1915-16)

G. The Section 225 Action.

Shortly after the October 20 Special Meeting, Morelli and Analog filed the Section 225 Action seeking to declare void the actions taken at the October 20 Special Meeting. (A1941; A751 ¶ 1) At a November 13, 2012 hearing, the trial court reaffirmed Morelli's lawful authority to act as Chairman and CEO while that action was pending. (A2809, A2833)

The Section 225 Action settled in March 2013. (Op. at 138; A752 ¶ 5) In that settlement, the parties, including the Director Defendants, agreed that the notice issued for the October 20 Special Meeting was not effective and, therefore, the actions taken at the meeting were "void." (A752-53 ¶ 6; *see supra* note 2) The parties also agreed to the judgment entered by the Court of Chancery (A2004) validating Morelli's majority designated board. (A1994; *see* A753 ¶ 7)

H. The Director Defendants' Rescission Action To Thwart The Company's Financing Efforts And Attempt To Seize Rancho.

After the Section 225 Action concluded, the Optimis board, including the Director Defendants, authorized the finance committee to negotiate with BofI Federal Bank ("BofI"), enter into a term sheet for a $5 million loan and execute loan documents. (*See* A2010-11 (3/25/13 minutes); A2059-60 (4/12/13 minutes))

On June 25, 2013, the day the BofI loan documents were to be executed, the Director Defendants abruptly resigned from the Optimis board (and Waite as Chief Operating Officer) and, the next day, sued Optimis and Morelli in California to rescind the 2007 Rancho sale transaction. (A754 ¶¶ 1-3) The Director Defendants claimed the sale was invalid under California law, which limits stock ownership in physical therapy corporations to licensed physical therapists, an issue the Director Defendants had never disclosed to the Optimis board. The rescission action was a transparent attempt to seize Rancho, and the Optimis*PT* software, from Optimis and interfere with the BofI loan.

The Director Defendants sought a temporary restraining order to enjoin Optimis from exercising control over Rancho and argued that "Morelli is a poor CEO and has badly misplaced his priorities with respect to the company" and that Morelli's leadership had been disastrous. (A2080-81 ¶ 15; A2087 ¶ 14; *accord* A2098 ¶ 31, A2106 ¶ 56) Just like the Rancho ownership structure issue, the Director Defendants had never raised these matters with the Optimis board.

The California court denied the Director Defendants' injunction request for failure to demonstrate any basis for relief. (A754 ¶ 4; A864) Thereafter, the Director Defendants agreed to dismiss the action "with prejudice" and offered to help Optimis obtain financing. (A2116) But when the Director Defendants finally did file the dismissal, it was without prejudice (Op. at 141), and when asked to

assist with the BofI financing, they refused. (A2117; A2125) Not surprisingly, BofI declined to proceed with the loan. (A2110; A2111)

I. Optimis And Morelli Seek To Remedy The Damage To The Company Caused By Defendants And Settle With Complicit Individuals.

In April 2013, Geller, through one of her California counsel, Jack Schaedel, filed a $2 million sexual harassment complaint against Optimis and Morelli.[16] (Op. at 24, 139; A2019; A2027) On May 30, 2013, the parties engaged in a lengthy mediation and, early the next morning, reached a tentative settlement of those claims for $550,000, conditioned on the Company's insurer funding the settlement (the "Mediation Settlement"). (Op. at 24; A2067) The insurer later refused to do so, and the settlement was not consummated. (Op. at 26) But from June to December, settlement discussions continued, and on December 2, 2013, the parties ultimately settled Geller's harassment claims (the "Final Settlement"). (Op. at 26; A2132) The economic terms of the Final Settlement, $550,000, were the same as in the Mediation Settlement six months earlier. (*Compare* A2074 ¶ 14, *with*

[16] In addition to Schaedel, Geller's other principal lawyer was Don Hernandez; both are partners at Gonzalez Saggio Harlan in Pasadena, California. (A267, 544:16-23 (Morelli)) Hernandez defended Geller's deposition in this case (*see* A2521-22, A2614-15, Geller Dep. 3:20-24, 8:3-5, 231:3-7, 233:24-234:1), in which she disavowed the sworn declaration that he and his partner had advised her to sign in the Final Settlement nine months earlier. That is why, as the trial court noted, before Geller's deposition, Plaintiffs submitted her declaration in opposing Defendants' summary judgment motions, but then "disowned" her as a witness after she was deposed "and explicitly called her a 'perjurer.'" (Op. at 27 n.58) Because Geller perjured herself, Plaintiffs' counsel were constrained by Delaware Professional Conduct Rule 3.3(a)(3) in presenting any of her evidence at trial. Thus, it was ***Defendants***, not Plaintiffs, who proffered Geller's perjured testimony at trial which, incredibly, the trial court accepted by applying its erroneous "improper conduct" inferences against Plaintiffs. (*See* A614-27, 1509:1-1558:2 (Geller); Op. at 51)

A2137 ¶ 17) Both the Mediation Settlement and Final Settlement required that Geller provide truthful information, as well as a sworn statement regarding the events leading up to her sexual harassment claim.[17]

The trial court suggested that, during the June-December 2013 discussions, the Company offered to "increas[e] the payments if Geller agreed to the language" that it proposed for her sworn statement. (Op. at 34-35) There was no evidence at trial to support this – the $550,000 settlement amount was agreed to on May 30-June 1, 2013, it remained the same in the Final Settlement on December 2, 2013, and there were no interim proposals to change that amount, either based on what Geller would say in her sworn statement or anything else. The only sworn declaration that Geller ever provided – in which she acknowledged that (i) "Mr. Morelli never assaulted [her] or forced [her] to engage in any sexual activity whatsoever," (ii) her "actions could have been reasonably interpreted as initiating" the sexual activity with Morelli, (iii) "on several occasions [she] initiated the activity" with Morelli, and (iv) "Mr. Waite encouraged [her] to make a complaint

[17] (*See* A2072-73 ¶ 11 (Geller agrees that "she will meet all of her legal obligations and that any testimony given will be truthful"); A2073 ¶ 12 (Geller agrees to provide "a declaration under penalty of perjury … which Geller represents, warrants and agrees is truthful"); A2134 ¶ 9 (Geller agrees that "she will meet all of her legal obligations and that any testimony given will be truthful"); A2135-36 ¶ 11 (Geller will cooperate with Optimis by "providing responses that are given in good faith and represent Geller's best knowledge and understanding"); A2136 ¶ 12 (Geller agrees to provide "a declaration under penalty of perjury … which Geller represents, warrants and agrees is truthful …, together with the brief summary statement attached hereto …, which she also agrees is truthful"), A2136 ¶ 13 ("Geller agrees that the information and/or testimony to be provided by her shall be truthful and represent Geller's best refreshed recollection of events"))

against Mr. Morelli" – was carefully and thoroughly vetted ***by her own lawyers*** (Hernandez and Schaedel) and made part of the Final Settlement. (A2147-51 ¶¶ 1, 13, 15)

Similarly, in May 2014, Plaintiffs sought to resolve their claims against Fearon and Levine for their part in Defendants' takeover scheme. (Op. at 52, 142) These settlements likewise required Fearon and Levine to provide truthful information and sworn statements.[18]

[18] (*See* A2155 and A2158 (last WHEREAS clause: each of Fearon and Levine "wishes to provide truthful information to assist and support Optimis"); A2156 ¶ 4.a and A2159 ¶ 4.a (each of Fearon and Levine agrees to provide "a written declaration under penalty of perjury … which" each "represents, warrants and agrees is truthful"), A2156 ¶ 4.b and A2159 ¶ 4.b (each of Fearon and Levine agrees to "[p]rovide truthful information and/or testimony when requested …, which information … and testimony may include future declarations or affidavits that" each "hereby covenants to review, revise as necessary and execute from time to time based on truthful information")) Pursuant to these obligations, Fearon and Levine did provide affidavits (A2167; A2175) in opposition to Defendants' summary judgment motions that were timely filed when and as required under the trial court's scheduling orders. (*See* A719; A725-26; A728-29) Contrary to the trial court's statement (Op. at 44), these affidavits were not "concealed for months."

ARGUMENT

I. PLAINTIFFS DID NOT COMPROMISE THE INTEGRITY OF THE PROCEEDINGS BELOW.

A. Question Presented

Did the trial court err in concluding that Plaintiffs' settlements with certain witnesses constituted witness tampering, which compromised the integrity of the proceedings below? This issue has been preserved for appeal. (*See* A848-61; A1077-85; Op. at 13)

B. Scope Of Review

Legal conclusions are reviewed *de novo* to determine whether the trial court "'erred in formulating or applying legal precepts.'" *Rapid-Am. Corp. v. Harris*, 603 A.2d 796, 804 (Del. 1992) (citation omitted). Fact determinations are reviewed for abuse of discretion. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits Of Argument

The trial court held that Plaintiffs engaged in witness tampering and other misconduct by (i) entering into settlements that required truthful declarations and testimony from the settling parties and (ii) threatening litigation. (*See* Op. at 3, 40, 53) As a result, the trial court sanctioned Plaintiffs by dismissing their conspiracy claim and making adverse credibility determinations in fact findings throughout the entire Opinion. (*See, e.g.*, Op. at 52-53; 211-13)

This appeal raises issues of great importance to members of the Delaware Bar and the clients they advise, who commonly enter into settlements requiring cooperation and truthful testimony from the settling parties. Plaintiffs are mindful of the concerns raised by the trial court – that settlements in which valuable consideration is exchanged may, or may not, influence a witness's testimony. But such concerns are properly handled through normal credibility determinations, not sanctions. Moreover, such concerns are unfounded where, as here, opposing counsel are given complete and voluntary access to the settling parties and related documentary evidence through the adversarial process (*see* Op. at 21) and are then able to present such evidence to the trier of fact. Further, holding that such settlements amount to witness tampering and conduct prejudicial to the administration of justice will have a chilling effect on settlements (favored under Delaware law) by injecting ethical dilemmas for counsel where none previously were thought to exist. Accordingly, as explained below, the trial court resolved this issue incorrectly as a matter of law and against public policy and should be reversed.

1. The Settlement Agreements Do Not Constitute Witness Tampering.

In reviewing the settlements, the trial court determined that Plaintiffs had tampered with certain witnesses – principally Geller, who did not appear at trial, and Fearon and Levine, who were trial witnesses – by requiring sworn statements

as part of their agreements.[19] (Op. at 50-53) In so concluding, the Court relied heavily on *Weber v. State*, 457 A.2d 674 (Del. 1983) (Op. at 17-19, 37-38), a criminal case which is inapposite here.[20] In *Weber*, a murder victim's family provided $85 to three State witnesses for new suits and haircuts. 457 A.2d at 678. Initially, the family lied by denying that they paid the witnesses, but later admitted doing so. *Id.* The trial court excluded the evidence regarding the payments and the Supreme Court reversed, holding that such evidence should have been allowed for the trier of fact to weigh the witnesses' potential bias against the defendant. *Id*. at 682-83. In *dicta*, the Supreme Court suggested that the payment of money coupled with the family's lack of candor, while perhaps not falling within the criminal

[19] The trial court properly recognized that criminal and professional misconduct determinations were beyond its jurisdiction (Op. at 14, 39), but nevertheless found that Plaintiffs engaged in witness tampering. (Op. at 53) That finding, based on an erroneous view of the law, was an abuse of discretion. *See Giuricich v. Emtrol Corp.*, 449 A.2d 232, 240 (Del. 1982) ("[I]t does not follow that the Trial Court may … apply an incorrect legal standard. To do so is to abuse discretion."); *Gist v. State*, 529 A.2d 772, 1987 WL 38069, at *2 (Del. 1987) (TABLE) (same); *Storey v. Camper*, 401 A.2d 458, 466 (Del. 1979) (same).

[20] The trial court's other cases also are inapposite. (Op. at 16-17, 38 n.94) As the trial court noted (Op. at 17), Plaintiffs did not lie to the court, unlike the plaintiffs sanctioned in the cited Delaware cases. *See Bessenyei v. Vermillion, Inc.*, 2012 WL 5830214, at *8-9 (Del. Ch. Nov. 16, 2012) (repeated falsely verified pleadings); *Parfi Holding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 914-15, 925-27, 929-33 (Del. Ch. 2008) (multiple false representations). As for the cited federal bribery cases, *see Holmes v. U.S. Bank*, 2009 WL 1542786, at *5 (S.D. Ohio May 28, 2009) (penalizing plaintiff who offered to pay for witness testimony), and *HomeDirect, Inc. v. H.E.P. Direct, Inc.*, 2013 WL 1815979, at *5-6 (N.D. Ill. Apr. 29, 2013) (sanctioning attorney who presented witness declaration to opposing counsel when he had reason to believe witness was lying), Plaintiffs did not present any false declarations or offer to pay for testimony. (*See* A2731, Morelli Dep. 418:1-6; A642-43, 1619:5-1620:6, 1622:10-1623:1 (Levine)) Rather, Plaintiffs resolved disputed claims, which were critical to their efforts to prevent further harm to Optimis, and required the settlement counter-parties to tell the truth.

statute against bribing a witness, violated the spirit of the law and cast doubt on the integrity of the trial proceedings. *Id*. at 679 n.6.

Plaintiffs' actions in settling with Geller and the others are nothing like the facts in *Weber*. Critically, the settlements here were completely transparent – Plaintiffs voluntarily produced the relevant documents in discovery (*see* Op. at 21), and Defendants were able to cross-examine the witnesses about their settlements and present whatever information they wanted the trial court to consider in assessing credibility. *See State v. Devonshire*, 2004 WL 1588324, at *2 (Del. Super. Ct. June 15, 2004) (finding *Weber* irrelevant where court had not limited defendant's ability to cross-examine witness regarding any potential bias).

Moreover, Plaintiffs required the parties they settled with to provide truthful testimony in order to ***aid***, not impede, the truth-seeking function of the litigation process. For example, with respect to Geller, Plaintiffs believed her declaration memorialized true facts. (*See* A2736, O'Shea Dep. 186:11-24; A297, 663:23-665:4 (Morelli)) This belief was reasonable for several reasons. *First*, Plaintiffs insisted on multiple contractual requirements that any testimony Geller provided be truthful, including in her declaration. (*See* note 17, *supra*) *Second*, throughout the settlement process, Geller was represented by well-regarded California employment counsel who advised her to provide the sworn declaration. (*See* A2138 ¶ 24; *cf.* A2697, Schaedel Dep. 79:6-12) *Third*, it was Geller's counsel –

not Plaintiffs – who refreshed her recollection of events that provided the basis for her declaration statements, and the lawyers heavily negotiated the declaration language that Geller herself agreed to sign under penalty of perjury and contractually represented was truthful. (A2729, Morelli Dep. 411:17-412:15; *see, e.g.*, A2118) *Fourth*, at the time she executed it, Geller's declaration was the only time she had ever sworn under penalty of perjury to any of the facts. And *fifth*, only Geller and Morelli knew the truth of what had occurred between them, and what Geller acknowledged under oath in her declaration – that she initiated the sexual activity with Morelli, who never coerced or forced her to engage in any sexual activity (*see* A2147 ¶ 1, A2151 ¶ 15) – was consistent with what he knew to be true.

Based on these facts, Plaintiffs reasonably and in good faith believed that Geller's declaration, signed under penalty of perjury and on advice of her own counsel, constituted the truth. Thus, the trial court erred in finding that the Geller settlement was witness tampering.[21]

Similarly, there was nothing improper about the settlements with Fearon and Levine. *First*, their settlements required them to provide truthful testimony (*see* A2156-57 ¶¶ 4-5 (Fearon); A2159-60 ¶¶ 4-5 (Levine)), which aided, and did not

[21] The trial court's contrary "abiding conviction" appears to be premised on the mistaken belief that, between the Mediation Settlement in June and the Final Settlement in December, Geller was offered additional money for the declaration she ultimately provided. (Op. at 26) As explained above, the economic terms – a payment of $550,000 – never changed. *See* pp. 23-24, *supra*.

impede, the truth-seeking function of the litigation process. (A852-53) *Second*, the payments to Fearon and Levine in 2014 constituted back-pay, which simply honored the commitments ***made by Horne and Waite*** to Fearon and Levine in 2012, right after the October 20 Special Meeting. (A1079-80 & n.133; *see* Op. at 41) Thus, the Company's commitment in 2012 by Waite and Horne – not Plaintiffs – to make those payments was unrelated to Fearon's and Levine's settlements in 2014 and subsequent testimony.[22] In fact, the settlements disposed of Fearon's and Levine's claims against Optimis for failure to fulfill its compensation commitments, as authorized by Horne and Waite. Thus, if the increased compensation promise from Optimis to Fearon and Levine is to be viewed as a "bribe," the bribe came from Waite and Horne in 2012 – Plaintiffs had nothing to do with it.

Moreover, contrary to the trial court's view (*see* Op. at 52), Fearon's and Levine's testimony was fully consistent with their affidavits.[23] For example, while Fearon and Levine did not use the word "conspiracy" – common sense says conspirators rarely do – their affidavits attested to a confederation of individuals

[22] Once again, viewing testimony through a tainted lens, the trial court disregarded Levine's testimony that he and Fearon had reached agreement with Morelli and the Company for reinstated compensation in July 2013 (A642, 1619:19-1620:6 (Levine)), some ten months before the Company settled its claims against them.

[23] Their trial testimony is at A299-364, 673:10-808:17 (Fearon) and A627-52, 1561:5-1661:3 (Levine). Their affidavits are A2167 (Levine) and A2175 (Fearon).

within the Company, including Fearon, Levine, Waite, Horne and others – with a common purpose to take control of Optimis away from Morelli.[24] Those statements were entirely consistent with Fearon's and Levine's testimony that there were ongoing discussions about removing Morelli as CEO[25] and that the core group – Waite, Horne, Rohlinger, Gunn, Fearon and Levine – regularly discussed Morelli's ouster as CEO.[26] While Fearon's and Levine's testimony provided additional context and details, it did not negate or contradict the substance of their affidavits. Thus, the trial court erred in finding that the Fearon and Levine affidavits were "materially misleading" and in "stark contrast" with their testimony

[24] (*See, e.g.*, A2167 ¶ 3 and A2175 ¶ 3 (several individuals at Optimis, including Waite and Horne, "had an interest in taking control of Optimis away from Morelli"), A2168 ¶ 6 and A2176 ¶ 6 (conversation in February 2012 with Waite, Horne and Rohlinger discussing plan to "give Alan a nudge" to step down as CEO, and noting that plan to remove Morelli was "discussed regularly" by, among others, Waite, Horne, Fearon and Levine); A2168 ¶ 6 (Waite said Morelli "might have to be removed against his will" if he didn't step down voluntarily))

[25] (*See, e.g.*, A628-29, 1565:6-21, 1568:17-1569:15 (Levine) (removing Morelli as CEO "was a regular topic of conversation" and an "ongoing theme" for the group); A628-29, 1564:21-1569:15 (Levine) (recounting February 2012 conference where Waite said "we may just need to give [Morelli] a nudge" to push him out); A631-32, 1577:16-23, 1579:11-15 (Levine) (reference to "drastic measures" in Levine June 2012 email (A1848) to Waite and others meant "[g]etting Morelli out of the way" and Morelli was the "effected [*sic*] limb" that needed to be "amputate[d]"); A309-10, 713:23-715:6 (Fearon) (explaining that in context of Levine's June 2012 email, Morelli was the "effected [*sic*] limb" needing to be "amputate[d]"))

[26] (*See* A628-29, 1565:6-21, 1569:5-15 (Levine) (plan was regularly discussed and an "ongoing theme" for group)) Fearon was not asked at trial about the regularity of such conversations, but her deposition testimony on this point was consistent with her affidavit. (*See* A2517-19, Fearon Dep. 105:25-107:21 (recalling that plan to take control of Optimis was discussed regularly))

and abused its discretion by sanctioning Plaintiffs based on this misperception.[27] Those sanctions improperly permeated the entire Opinion and should be reversed.

2. Threatening Litigation Does Not Violate Delaware Law.

The trial court was critical of threats by Plaintiffs in the settlement negotiations with Geller, Fearon, Levine and others of litigation claims that the Company had against them. (*See* Op. at 34, 40, 42-43) However, threats of litigation are "typically permissible so long as the threat was done with a good faith belief that a viable cause of action existed." *Edge of the Woods v. Wilmington Sav. Fund Soc'y, FSB*, 2001 WL 946521, at *5 (Del. Super. Ct. Aug. 16, 2001) ("threats" procuring releases amounted to "nothing more than hard-bargaining business tactics"). Plaintiffs reasonably believed they had viable claims against Geller, Fearon and Levine, and the trial court so assumed.[28] Accordingly, because there was no bad faith, the trial court erred by finding that Plaintiffs' litigation threats constituted witness tampering.

The same is true of the trial court's criticism of raising possible criminal violations with some witnesses, which it cited as a further basis for imposing sanctions. (*See* Op. at 3, 17, 39, 47-50, 52 n.146) However, as the court noted

[27] (*See* Op. at 52 (sanctioning Plaintiffs by "resolv[ing] any doubts in favor of Defendants in those instances where the reliability of the testimony of Fearon or Levine is questionable"))

[28] (*See* Op. at 51 ("I also assume that … Morelli and his counsel believe their rhetoric regarding a vast conspiracy to take control of Optimis away from Morelli for the alleged insurgents' own self-interested motives."); *id*. at 52 ("I conclude that Plaintiffs essentially struck a hard bargain with" Fearon and Levine))

(Op. at 47 n.130), threats of criminal charges are permissible under Delaware law. *See* Del. State Bar Ass'n Comm. on Prof'l Ethics Op. 1995-2 (criminal charges may be threatened against opposing party if attorney believes they are warranted and would proceed with them if civil claim is not satisfied). The court correctly assumed that Plaintiffs in good faith believed in the merits of their claims against the settlement counter-parties, criminal as well as civil, and not only would, but did, proceed with the charges by asking the criminal authorities to investigate and prosecute them. (Op. at 49-51) Since the conduct the trial court disapproved of is permitted by law, it was legal error and an abuse of discretion to sanction Plaintiffs for it.

3. The Court's Fact-Finding Function Was Not Impaired.

The trial court also held that integrity of the proceedings was undermined because Plaintiffs' conduct impaired its "truth-finding function." (Op. at 19) However, the 213-page Opinion ***fails to provide any explanation at all*** as to how the trier of fact was impeded by the settlement agreements or alleged threats of litigation, and the record does not support any such finding. Indeed, the trial court was able to review all of the settlement agreements (*see, e.g.*, Op. at 26-27, 33 & n.71),[29] the settling witnesses' declarations (*see, e.g.*, Op. at 23-29),[30]

[29] The settlement agreements with each of Geller (A2132), Fearon (A2155) and Levine (A2158), all of whom testified extensively in deposition and/or at trial, as well as other witnesses – *e.g.*, Jim Lynch (A1332), who was deposed, and Joseph Godges (A1246), who never testified – were all voluntarily produced in discovery.

contemporaneous settlement negotiation documents (*see, e.g.*, Op. at 21, 23-33), deposition transcripts and, in some instances, trial testimony of the settling witnesses.[31] Plaintiffs did not obstruct Defendants', or the trial court's, access to settlement evidence, or alter, destroy or conceal any of the evidence.

Thus, Plaintiffs proceeded transparently, and the trial court had all the available evidence before it. In such circumstances, the court was not prejudiced, and sanctions are inappropriate. *See Crumplar v. Superior Ct.*, 56 A.3d 1000, 1009 (Del. 2012) (reversing sanctions where attorney's actions did not prejudice court proceedings). Rather, its proper function is to weigh the evidence before it and make appropriate credibility determinations. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Stauffer Chem. Co.*, 1990 WL 140438, at *1 (Del. Super. Ct. Sept. 13, 1990) (holding no prejudice to court where information from witnesses could be obtained through the subpoena process). The only impediment to the trial court's fact-finding role was the legally improper "witness tampering" lens through which it erroneously chose to view the extensive evidence offered by the parties.

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[30] (*See, e.g.*, A2147-51 (Geller Decl.); A1330 (Godges Decl.); A2161 (Jim Lynch Decl.))

[31] (*See generally* A2520-2680, Geller Dep. (Day 1 & 2); A2685, Levine Dep.; A2514, Fearon Dep.; A2688, Lynch Dep.; A299-364, 673:6-808:24 (Fearon); A627-52, 1560:16-1661:10 (Levine))

4. The Trial Court's Holding Is Against Public Policy Favoring Settlements Of Disputes.

Delaware law "favors the voluntary settlement of contested issues." *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964); (A854 n.105) Delaware courts also recognize the validity of releases, which are routine in settlement agreements. *See Seven Inv., LLC v. AD Capital, LLC*, 32 A.3d 391, 397 (Del. Ch. 2011); (A1080 & n.133) Similarly, cooperation clauses are frequently included in settlement agreements. (*See* A853 & n.103) As discussed above, there was nothing improper about the settlement negotiations or agreements reached by Plaintiffs with Geller, Fearon, Levine or anyone else.

This Court should reverse the trial court's decision and imposition of sanctions as a matter of public policy. The trial court's novel holding is a dangerous precedent contrary to the policy favoring settlements. Parties would now risk being subject to witness tampering and bribery claims for including what have been routine, bargained-for releases and cooperation provisions in settlement agreements with potential defendants. Such a rule would dis-incentivize settlements in multi-party liability disputes where less than all of the potentially liable parties agree. That is not in the public interest. Because the trial court's erroneous holding would have a chilling effect on settlements, it should be reversed as a matter of public policy.

II. DEFENDANTS BREACHED THEIR DUTY OF LOYALTY BY ATTEMPTING TO GAIN CONTROL OF OPTIMIS.

A. Question Presented

Did the trial court err in ruling that Defendants did not breach their duty of loyalty by failing to provide Morelli with proper notice of the October 20 Special Meeting and improperly stripping him and Analog of their board majority designation rights under the Stockholders Agreement? (A827-29; A1033-34; A1050-51; A1103-09) Plaintiffs have not previously responded to the trial court's section 141(a) argument since it was raised for the first time *sua sponte* in the post-trial Opinion (at 163-75).[32]

B. Scope Of Review

See Section I.B., *supra*.

C. Merits Of Argument

The trial court erred in holding that Defendants did not breach their duty of loyalty when they failed to give notice to Morelli of their intent to remove him and usurp the Initial Stockholders' rights under the Stockholders Agreement. Indeed, established Delaware law – the *Koch* line of cases – requires the conclusion that Defendants did breach their fiduciary duties.

[32] Defendants below did not raise section 141(a) or *Klaassen v. Allegro Development Corp.*, 2013 WL 5967028 (Del. Ch. Nov. 7, 2013), *aff'd on other grounds*, 106 A.3d 1035 (Del. 2014), relied on by the trial court, and they provided no substantive discussion of the *Koch* line of cases. (A1033-34 & n.3)

1. Delaware Precedent Is Not In Conflict With Section 141(a).

The trial court declined to follow established Delaware law in rejecting Plaintiffs' claims that Defendants, including Horne,[33] had breached their duty of loyalty when they failed to provide Morelli (and the rest of the board) with fair notice of their intentions at the October 20 Special Meeting to remove him and strip him and Analog of their board majority designation rights under the Stockholders Agreement. (Op. at 164-72) The trial court held that the *Koch* line of cases, dating back more than two decades, was decided incorrectly because, in the court's view, they conflict with the basic premise of Delaware law that a corporation is managed by the board of directors, as codified in section 141(a). (Op. at 164, 172-73) There is no such conflict.

Section 141(a) mandates that a Delaware corporation be managed by or under the direction of its board of directors. Section 141(a) thus deals with the authority of the board of directors, but not who they are or how they are to be selected; that is controlled by other provisions of the DGCL. For example, specific to the circumstances regarding the October 20 Special Meeting and Morelli's efforts to remove and replace certain of the Optimis directors by written consent

[33] For example, Amendment No. 2 was Horne's idea. (Op. at 124-25 ("Horne attended a meeting at some point before October 20 in which Waite or Brys said that, based on the outcome of the investigation, Morelli may need to be fired. Horne then pointed out that the Stockholders Agreement probably would need to be amended. He reasoned that: 'If the board decided that Mr. Morelli needed to be removed as CEO, then if he had the ability to just turn around, appoint new board members and reappoint himself as CEO, I think that would go against the spirit of what needed to be done.'"))

under the Stockholders Agreement, section 141(k) specifically provides that "[a]ny director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors[.]" 8 *Del. C.* § 141(k). Further, section 211(b) provides that "[s]tockholders may … act by written consent to elect directors," *id.* § 211(b), just as Morelli tried to do. And section 218(c) validates the Stockholders Agreement pursuant to which Morelli sought to remove and replace the directors at the October 20 Special Meeting: "An agreement between 2 or more stockholders … may provide that in exercising any voting rights, the shares held by them shall be voted as provided by the agreement[.]" 8 *Del. C.* § 218(c).

There is no question that the Stockholders Agreement covered the vast majority of the outstanding Optimis shares and granted to the Initial Stockholders, controlled by Morelli and Analog, the right to elect, remove and replace a majority of the Optimis board. Thus, the rights granted to Morelli and Analog under the Stockholders Agreement, which they tried to exercise at the October 20 Special Meeting but were unlawfully thwarted from doing so by the Director Defendants, did not conflict with section 141(a) and were expressly authorized by the legislature through other provisions of the DGCL. The trial court's refusal to enforce those rights and hold Defendants liable in damages for violating them was legal error and an abuse of discretion.

In finding a conflict between section 141(a) and the rights granted to the Initial Stockholders under the Stockholders Agreement – which it therefore refused to enforce – the trial court speculated that "serious entrenchment problems" would have resulted if Morelli had been given proper notice of Waite's intentions to remove him from power and to strip him and Analog of their board designation rights under the Stockholders Agreement.[34] To reach this conclusion, the trial court not only had to assume that Morelli would have exercised his rights under the Stockholders Agreement if given the opportunity, but also that the yet-unnamed, newly appointed directors immediately would breach their fiduciary duties to the stockholders and interfere with the board's management of the corporation. Neither of these things happened (nor could they have because of the Director Defendants' actions), and the trial court's unsupported speculation that they might occur amounts to an unpermitted advisory opinion.[35]

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[34] (Op. at 174-75 ("I have no doubt that [Morelli] would have terminated those directors in advance of the meeting if he had been given the opportunity. Thus, I hold that none of the Director Defendants breached their duty of loyalty by not advising Morelli in advance of his potential termination."))

[35] *See Stroud v. Grace*, 606 A.2d 75, 96 (Del. 1992) (reversing trial court's invalidation of bylaw where "[t]here was no basis to invoke some hypothetical risk of harm rather than an examination of the board's proven, and entirely proper, conduct"); *AB Value Partners, LP v. Kreisler Mfg. Corp.*, 2014 WL 7150465, at *7 (Del. Ch. Dec. 16, 2014) ("What may happen after Kreisler's annual meeting and the election of the Board is merely speculation at this point. This Court cannot grant the extraordinary relief of enjoining a Company's facially valid advance notice bylaw on the basis of hypothetical future events. If this issue of compensation for past contributions does resurface and AB Value feels aggrieved, it can pursue its available remedies at that time.").

Here, as in the *Koch* line of cases that the trial court refused to follow, no "entrenchment problems" arose for the court to deal with because of Defendants' secretive self-help strategy, in which they denied Morelli and Analog clear notice, as required under Delaware law, and refused to honor Morelli and Analog's efforts to exercise their rights under the Stockholders Agreement at the October 20 Special Meeting. *See Adlerstein*, 2002 WL 205684, at *9 (CEO and controlling stockholder entitled to opportunity to exercise – or not to exercise – power to prevent change of control in advance of meeting). Moreover, there was no evidence that, if Morelli had been allowed to replace board members at that time, those new directors would have failed to faithfully exercise the authority conferred on them under section 141(a). And even if that had happened, Defendants would not have been powerless to address any alleged entrenchment or self-interested breaches of fiduciary duty by Morelli and his new designees – Defendants could have sued derivatively to enjoin any such threatened or ongoing misconduct and for damages. But those were not the facts before the trial court, and speculation about them provides no excuse for disregarding the *Koch* line of cases and condemning Optimis and its stockholders to the chaos and disruption caused by Defendants' self-help scheme from which, three years later, the Company still has yet to recover.

2. Defendants Breached Their Duty Of Loyalty By Failing To Provide Proper Notice Before October 20 Special Meeting.

If the trial court had applied the holdings of *Koch* and its progeny, it would have had to find that Defendants breached their duty of loyalty when they failed to provide proper notice before the October 20 Special Meeting and interfered with the contractual rights of the Initial Stockholders at that meeting. (Op. at 174-75) The *Koch* line of cases is directly on point.

"This right to advance notice derives from a basic requirement of our corporation law that boards of directors conduct their affairs in a manner that satisfies minimum standards of fairness." *Adlerstein*, 2002 WL 205684, at *9; (A827-28). In *Koch*, the CEO – a director and the majority common stockholder with the right to designate two of the company's four directors – was removed at a special board meeting without notice. The Court of Chancery held that the removal was invalid because, without notice, the CEO was deprived of the opportunity to protect himself by changing the composition of the board before the meeting.[36] *See Koch*, 1992 WL 181717, at *5 n.2.

[36] The trial court correctly noted that *Koch* was vacated by this Court; presumably, the implication was intended to be that the Court of Chancery decision no longer is good precedent. (*See* Op. at 165 n.533, 167) However, the result of the vacatur was that the trial court's decision in *Koch* would not have any precedential or preclusive *res judicata* effect ***against the parties***. *See Stearn v. Koch*, 628 A.2d 44, 47 (Del. 1993). For non-parties, the Court of Chancery decision in *Koch* has the same precedential force as a trial court opinion that was never appealed. *See In re IBP, Inc., S'holders Litig.*, 793 A.2d 396, 408 n.34 (Del. Ch. 2002).

A similar result was reached in *VGS* in the limited liability company context. There, the CEO controlled the majority equity interest, sat on the board of managers, and had the right to designate two out of three board members. The other two board members, without notice to the CEO, merged the LLC into a corporation and thereby diluted the CEO into a minority equity position. The Court of Chancery found a breach of the duty of loyalty and ordered the merger to be rescinded. *See VGS*, 2000 WL 1277372, at *1-3 ("Because the two managers acted without notice to the third manager under circumstances where they knew that with notice that he could have acted to protect his majority interest, they breached their duty of loyalty to the original member and their fellow manager by failing to act in good faith.").[37]

As for *Adlerstein*, the facts there are closely aligned with Defendants' allegations here. Adlerstein, a director, Chairman and CEO, had majority voting control and the power to elect the full board. As the company's prospects worsened, disagreements with the other directors arose over the CEO's performance. At the same time, an independent consultant investigating a complaint by a female employee found Adlerstein guilty of sexual harassment.

[37] While the holding of *VGS* has been limited to its facts, *see Klaassen v. Allegro Development Corp.*, 106 A.3d 1035, 1045 (Del. 2014), its equitable reasoning still applies to the current facts. *See VGS*, 2000 WL 1277372, at *4 ("[Defendants] owed Castiel a duty to give him prior notice even if he would have interfered with a plan that they conscientiously believed to be in the best interest of the LLC.").

Concerned about the company's dire financial situation, the other directors negotiated a capital infusion by a new investor, who required the issuance of preferred shares that would give him voting control. At a special meeting without advance notice to Adlerstein of what they intended to do, the other directors voted to approve the investor transaction and remove Adlerstein as Chairman and CEO.[38] The Court of Chancery held that the board's action "must be undone" because adequate notice was not given to the controlling stockholder, which prevented him from exercising his right to remove the other directors before they took action. *See Adlerstein*, 2002 WL 205684, at *9 (invalidating actions at board meeting where voting control – a "set of legal rights" – was affected without advance warning).[39]

In each of these cases, the insurgents sought to usurp a controller's bargained-for control and director designation rights, through tactics that were not

[38] Similar to the excuses offered by Defendants here for removing Morelli as CEO and Chairman for cause and eliminating his and Analog's board majority designation rights, "[t]he elements of 'cause' assigned [by the insurgent directors in *Adlerstein*] were mismanagement of the Company, misrepresentations to his fellow board members as to its financial situation, and sexual harassment in contravention of his employment contract." *Adlerstein*, 2002 WL 205684, at *7. Nevertheless, the *Adlerstein* court unwound the insurgents' actions, holding that "an action taken primarily to divest a stockholder of control and transfer that control to another would also seem afoul of 'the norm of loyalty.'" *Id*. at *11 n.35 (quoting *Mendel v. Carroll*, 651 A.2d 297, 304 (Del. Ch. 1994)).

[39] In *Fogel*, the removal of the CEO at a purported special board meeting was invalidated. The court, citing *Koch* and *Adlerstein*, alternatively held that by not giving notice to the CEO of their plan to terminate him, the remaining directors tricked him into attending the meeting and prevented him from exercising his right to preemptively call a special meeting of stockholders to replace the directors adverse to the CEO. *Fogel*, 2007 WL 4438978, at *3 (holding that board's deception by omission, even if it was undertaken in good faith, was not appropriate even if CEO had reason to suspect he would be terminated).

fully and fairly disclosed in advance to the adversely affected director and controlling stockholder – in each because, as here, with advance notice, the controlling stockholder could have acted to protect his interests by removing hostile directors and designating new replacements. And in each case, the court invalidated the effort because the insurgents "breached their duty of loyalty" to the holders of the controlling equity "by failing to act in good faith." *VGS*, 2000 WL 1277372, at *1; *see also id.* at *4-5; *Adlerstein*, 2002 WL 205684, at *11 n.35 ("[A]n action taken primarily to divest a stockholder of control and transfer that control to another would also seem afoul of 'the norm of loyalty.'").

Here, Waite's notice for the October 20 Special Meeting was defective because it failed to inform the other directors, including Morelli, of the proposal to oust him as CEO and strip him and Analog of their rights to designate a majority of the board, as required by Delaware law. (*See* Op. at 128; A748 ¶ 3); *Adlerstein*, 2002 WL 205684, at *9. This was surely intentional, since Waite knew that, if he disclosed his removal plan, Morelli could defend himself by responding to false harassment claims and act to protect the Initial Stockholders' rights by, for example, replacing their director designees who were believed to have been co-opted by Defendants. *See* Section III.C.3, *infra*. But whatever concerns Defendants may have had about Morelli's strategy, leadership or behavior, they were not permitted, as fiduciaries, to disregard the normal rules of corporate

governance. *See Adlerstein*, 2002 WL 205684, at *11 ("[I]t is in such times of dire consequence that the well-established rules of good board conduct are most important.").[40]

Defendants breached the duty of loyalty and, in equity and good conscience, Plaintiffs should have received a remedy.

3. Defendants Breached Their Duty Of Loyalty By Securing Amendment No. 2 Under False Pretenses.

In addition to failing to provide proper notice for the October 20 Special Meeting, the Director Defendants also breached their duty of loyalty by securing Amendment No. 2 through deceit. For the amendment to be effective, it had to be approved by majorities of both the board and the stockholder parties to the Stockholders Agreement. (A1548 § 6) The trial court erred in finding no breach of fiduciary duty for the amendment approval, because (i) it acknowledged, but never analyzed, the breach committed by Waite in obtaining consents from Optimis stockholders by misrepresentations (*see* Op. at 125), and (ii) Waite misled the board about the significance of the amendment before it was approved. (*See* Op. at 182-83); *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1046 (Del. 2014)

[40] Defendants also violated their duty of loyalty by substituting their own judgment for those who held the right to elect a majority of the board. *See Johnston v. Pedersen*, 28 A.3d 1079, 1091 (Del. Ch. 2011) ("The incumbent directors could not act loyally and deprive the stockholders of their right to elect new directors, even though they believed in good faith that they knew what was best for the corporation."). Indeed, the right to choose who should be the majority members of the Optimis board belonged to the Initial Stockholders, not Defendants. (A828-29 n.90) The trial court never addressed this issue.

("Our courts do not approve the use of deception as a means by which to conduct a Delaware corporation's affairs….").

First, before the October 20 Special Meeting, Waite lied to stockholders, several of whom also were board members, about the purpose of Amendment No. 2, which the trial court found did "not appear to satisfy Delaware law." (Op. at 125; A433, 1084:12-1085:4 (Waite); A2762-64, Waite Dep. 481:8-483:19) However, the court said Waite's breach of fiduciary duty was "moot" because Amendment No. 2 was "vacated" months later in the Section 225 Action settlement. (Op. at 125) But what the parties, including the Director Defendants, contractually agreed to in that settlement is that Amendment No. 2 was "void" – *i.e.*, a nullity, never happened.[41] Yet, by giving the Director Defendants a pass on their breaches of fiduciary duty and contract through their refusal to agree to Morelli's written consents to replace board members at the October 20 Special Meeting, the trial court did give effect to Amendment No. 2. (*See* Op. at 183-84) That was legal error and an abuse of discretion. These breaches catapulted Optimis into years of operational dysfunction, directional limbo and unnecessary litigation, and should have been evaluated by the trial court.[42]

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[41] *See Waggoner v. Laster*, 581 A.2d 1127, 1137 (Del. 1990) (a "'stock issue [that] was void, [was] a nullity'") (citation omitted).

[42] The damages Defendants inflicted on Plaintiffs are discussed further in Section IV.C, *infra*, and note 7, *supra*. (*See also* A1071-77)

Second, Waite misled the board when presenting Amendment No. 2 for vote, stating that it was "just a small thing" (A373, 846:4-12 (Sussman)), and was "not going to affect Alan at all." (A2719, Abdelhamid Dep. 69:7-14) The trial court agreed with Plaintiffs – "Assuming Waite made that statement, I agree with Plaintiffs that it was inaccurate and potentially misleading" – yet, nevertheless, determined that the "Board understood" the purpose of the amendment. (Op. at 183) But Defendants offered no testimony or evidence at trial from four members of the nine-director board – Godges, O'Keefe, Wing and Fahey, at least one of whom would have had to support the amendment for it to pass – as to their understanding, or lack thereof, of Amendment No. 2. Thus, there was no evidence to support the trial court's determination as to the board's state of knowledge, and it erred in finding that Waite's misleading statements did not taint the approval process for Amendment No. 2.

III. DEFENDANTS BREACHED THE STOCKHOLDERS AGREEMENT.

A. Question Presented

Did the trial court err in ruling that the Director Defendants did not breach the Stockholders Agreement when they failed to execute written consents to elect the new directors designated by Morelli? This issue has been preserved for appeal. (A787, A814 & n.83, A828, A834-35; A1040, A1056-57 & n.64)

B. Scope Of Review

See Section I.B., *supra*.

C. Merits Of Argument

The trial court erred in holding that the Director Defendants did not breach the Stockholders Agreement when they refused to execute the written consents to elect the new directors designated by Morelli, the representative of the Initial Stockholders, at the October 20 Special Meeting.[43] (*See* Op. at 189-92) In so ruling, the trial court effectively rewrote the Stockholders Agreement, as well as the Section 225 Action settlement agreement, contrary to the well-established principle that courts will not rewrite a contract. *See Gertrude L.Q. v. Stephen P.Q.*, 466 A.2d 1213, 1217 (Del. 1983) ("Delaware follows the well-established principle that in construing a contract a court cannot in effect rewrite it[.]") (citation

[43] The trial court also erred in finding "no evidence that Defendant Horne ever signed Amendment No. 2." (Op. at 189) It is undisputed that Horne executed and emailed the document to Waite shortly after the October 20 Special Meeting. (*See* A1933, A1939)

omitted).

Section 11 of the Stockholders Agreement required the parties to "make, do, execute, or cause or procure to be made, done and executed such further acts, deeds, conveyances, consents and assurances without further consideration, which may reasonably be required to effect the transactions contemplated by this Agreement." (A1550 § 11; A834-35) As the trial court recognized, section 3.3(a) of the Stockholders Agreement entitled Morelli and Analog to appoint five of the nine members to the Optimis board, and required that "'whenever members of the Board are to be elected by written consent,' the Initial Stockholders and the Director Defendants 'agree to vote or act with respect to their shares so as to: (a) cause and maintain the election to the Board of five (5) individuals designated by the holders of a majority of the Shares held by the Initial Stockholders.'" (Op. at 190 (quoting Stockholders Agreement))

But contrary to the plain terms of the Stockholders Agreement, the trial court held that the Director Defendants did not breach it when they refused to sign the written consents requested by Morelli at the October 20 Special Meeting, finding that Plaintiffs had not shown "how Morelli still had the contractual right to require the Director Defendants to sign written consents when he did make his demand."[44]

[44] The court also erroneously found that Plaintiffs had "not shown that Morelli demanded that the Director Defendants provide such written consents before Amendment No. 2 was adopted." (Op. at 191) As discussed above, however, the record clearly established that Morelli proffered

(Op. at 191) This disregards the parties' settlement agreement in the Section 225 Action in which the Director Defendants agreed that the actions taken at the October 20 Special Meeting, including Amendment No. 2, were "void."[45] (A1997; A752-53) Since Amendment No. 2 was a nullity, when Morelli demanded that the Director Defendants sign his proposed written consents at the October 20 Special Meeting, the amendment was not in effect, Morelli and Analog retained their full contractual rights under the Stockholders Agreement, and the Director Defendants were obligated to sign Morelli's written consents.

For these reasons, the trial court erred in finding that the Director Defendants did not breach sections 3.3(a) and 11 of the Stockholders Agreement, and this Court should reverse.

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his written consents both before and after Amendment No. 2 passed. *See* pp. 18-21, *supra* (Subsection F of Statement of Facts).

[45] The parties' contractual agreement that Amendment No. 2 was void obviates any question about whether a court would have held that the amendment was "void" or "voidable." *See Klaassen*, 106 A.3d at 1046-47.

IV. PLAINTIFFS ARE ENTITLED TO MONETARY DAMAGES FOR DEFENDANTS' BREACHES OF DUTY.

A. Question Presented

Did the trial court err in refusing to award monetary damages for Defendants' breaches of contract and the duty of loyalty? This issue has been preserved for appeal. (A778-79, A789, A819, A846-48, A862; A1038, A1071-77, A1097)

B. Scope Of Review

Legal conclusions are reviewed *de novo* to determine whether the trial court "erred 'in formulating or applying legal principles.'" *Berger v. Pubco Corp.*, 976 A.2d 132, 139 (Del. 2009) (citation omitted). The propriety of a court-ordered remedy is reviewed for abuse of discretion. *Id.*

C. Merits Of Argument

Although the trial court found that the Director Defendants breached their duty of loyalty and, as explained above, should have found further such breaches by them and Horne, and that all Defendants breached the Stockholders Agreement, it did not award any damages. (*See* Op. at 185-87) This was an error of law, which this Court should reverse.

1. Delaware Law Supports Awarding Monetary Damages.

The trial court found that the Director Defendants breached their fiduciary duty by concealing the alleged ownership structure defect between Optimis and

Rancho and "acted intentionally and for their own benefit" in plotting to seize Rancho from Optimis. The court, however, held that Plaintiffs were not entitled to relief because the Company "promptly cured the technical defect regarding the ownership of Rancho" and damages were speculative. (Op. at 187) However, Delaware law "require[s] that a fiduciary not profit personally from his conduct, and that the beneficiary not be harmed by such conduct." *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 437, 445 (Del. 1996). The scope of recovery for a breach of the duty of loyalty is not narrow. *Id.*

Here, the trial court failed to find Defendants liable for various breaches of fiduciary and contractual duties as it should have, as explained above. But focusing on just the one breach of loyalty that the court did find, where Optimis ultimately was able to cure the technical defect that the Director Defendants concealed from the board, even if they did not profit from their breach, Plaintiffs still are entitled to damages. *See Thorpe*, 676 A.2d at 445 (remanding to trial court to determine damages where company had not been harmed and defendants "had not profited substantially"). At a minimum, Plaintiffs are entitled to at least $10 million in incidental damages caused by Defendants' actions, including legal fees.[46]

[46] The litigation costs and legal fees alone that Defendants caused the Company to incur on account of their breaches of contract and the duty of loyalty, including those associated with the October 20 Special Meeting, are at least $10 million. *See* note 7, *supra*, and accompanying text. *Cf. William Penn P'ship v. Saliba*, 13 A.3d 749, 759 (Del. 2011) (affirming award of attorneys' fees and costs "supported by Delaware law in order to discourage outright acts of disloyalty by

See id. (reversing trial court and remanding with instructions to determine award based on legal and due diligence expenses for breach of loyalty).

2. The Court Erred In Finding That Plaintiffs' Damages Calculations Were Speculative.

The trial court also declined to award damages by labeling Plaintiffs' calculations as "speculative and unreliable." (Op. at 206-11) This was error for two reasons: (i) Defendants should have been estopped from claiming that the management projections that they helped create and approved were unreliable; and (ii) the court abused its discretion in finding that management's projections were speculative.

First, Defendants are estopped from arguing that the management projections underlying Plaintiffs' expert's damages calculations were unreliable. Where, as here, Defendants Waite and Horne participated in preparing the 2012 projections used by Bratic and the other Director Defendants accepted and approved them,[47] the trial court should have "regarded with rightful suspicion attempts by [those] parties who produced such projections to later disclaim their reliability, when that denial serves their litigation objective," but did not (again, likely because of the tainted credibility lens through which the court viewed the

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fiduciaries," noting that "[a]bsent this award, [plaintiffs] would have been penalized for bringing a successful claim against [defendants] for breach of their fiduciary duty of loyalty").

[47] (A530, 1323:23-1324:9, A550, 1402:8-16 (Horne); A211-13, 459:8-469:11 (Morelli); A2684, Horne Dep. 496:4-21; A1320, A1326; A1861)

evidence). *See Del. Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 332 (Del. Ch. 2006); (A1075 & n.118). Indeed, Defendants' own reliance upon and use of the projections demonstrates their reliability. As the trial court acknowledged, "senior management of Optimis, including Horne, were willing to give these Projections to investors" (Op. at 208 n.630), including the Director Defendants' friends and family. (*Id.* at 76) The record also establishes that in June 2012, the entire Optimis board, including the Director Defendants, unanimously voted to value Optimis stock at $2.35 per share and pursue a private placement of equity from both inside and outside investors. (A1326; A778 ¶ 3)

Moreover, notwithstanding Defendants' self-serving insistence at trial that the 2012 projections were unreliable, there is no record evidence that they or any other Optimis directors disagreed with the projections. Therefore, Defendants' own reliance on the June 2012 projections underscores their reliability. *See Kessler*, 898 A.2d at 332 ("Traditionally, this court has given great weight to projections of this kind because they usually reflect the best judgment of management…. That is especially so when management provides estimates to a financing source and is expected by that source (and sometimes by positive law) to provide a reasonable best estimate of future results.").

The trial court also improperly excluded consideration of the Company's management projections as a valid valuation tool for calculating damages. (*See*

Op. at 206, 208 & n.630, 211) Under Delaware law, management-prepared projections are generally favored because "'management ordinarily has the best first-hand knowledge of a company's operations.'" *See Merion Capital, L.P. v. 3M Cogent, Inc.*, 2013 WL 3793896, at *11 (Del. Ch. July 8, 2013) (citation omitted). Such contemporaneous projections may be discounted where there are (i) "deliberate attempt[s]" by management to "falsify [the] projected revenues and expenses," *see id.* at *11 n.103 (citation omitted), (ii) "unprecedented" use of projections, or (iii) projections created "for the purpose of obtaining benefits outside the company's ordinary course of business," such as in anticipation of litigation. *Owen v. Cannon*, 2015 WL 3819204, at *18 (Del. Ch. June 17, 2015). Delaware courts "rightly … give heavy weight" to management projections even where the trial court finds there is "a basis to conclude that the projections were too rosy[.]" *Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *11 (Del. Ch. Aug. 19, 2005).

Here, the trial court did not find that management falsified its projections and declined to reach the question of whether the projections were created outside the ordinary course of business. (*See* Op. at 206 n.624 (noting that it "need not reach this argument")) Moreover, the Company's use of its management projections cannot be said to have been "unprecedented" because it previously used similar projections in the normal course of business, including in earlier private

placements. (*See, e.g.*, A1556) Therefore, the trial court erred when it disregarded contemporaneous management projections in favor of its own backward-looking analysis. (*See* Op. at 207-08 (questioning the "rosy picture" painted by projections in view of lower actual results)) Moreover, any uncertainties in the amount or proof of damages should have been resolved against the breaching Defendants and in favor of Plaintiffs.[48]

The trial court also erred by holding that Plaintiffs failed to prove damages, as a matter of law, because harm was not apportioned between Plaintiffs or between claims. (Op. at 210) This finding was not supported with any authority and is contrary to Delaware law. *See, e.g.*, *Beard Research, Inc. v. Kates*, 8 A.3d 573, 614 (Del. Ch. 2010) (rejecting argument that failure to allocate damages among plaintiffs' different claims defeated damages analysis and recognizing that "it is the Court's responsibility to allocate damages among various" claims), *aff'd sub nom. ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010). In addition, the court was provided with an adequate calculation to apportion the harms

[48] *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) ("It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain."). Delaware courts routinely adjust their "remedy calculation" when faced with such uncertainty. *See, e.g.*, *In re S. Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 816, n.190 (Del. Ch. 2011), *aff'd sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1178-84 (Del. Ch. 1999) (construing uncertainty in record against defendant, who breached fiduciary duty, and awarding damages even though award might overcompensate plaintiffs), *aff'd*, 766 A.2d 437 (Del. 2000).

suffered by Plaintiffs. (A398, 943:16-944:2 (Bratic)) As Plaintiffs' expert, Bratic, explained at trial, "[i]f you take the lost profits and apportion it based on a number of share holdings, you could then determine what the specific damages are to Mr. Morelli individually and Analog." (A398, 943:19-23 (Bratic)) Even if the court were to assess damages using some measure other than lost profits, a similar calculation easily could be performed to apportion the damages to which each Plaintiff would be entitled.

3. The Diminution In The Company's Equity Value Remains A Viable Alternative Measure Of Damages.

Finally, the trial court erred in wholly ignoring Plaintiffs' alternative measure of damages in the amount of the diminution in the Company's equity value between June 2012 and trial.[49] (*See* A778-79 & n.10, A847; A1076 & n.120) Such damages serve as an adequate measure, as they would restore Optimis stockholders to their financial positions before Defendants' wrongful acts set in motion the flood of litigation that has tied up the Company's resources for the past three years and caused its equity value to plummet. *See Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 440 (Del. 2000) (affirming award of rescissory

[49] This damages amount was $44 million. It was calculated by comparing (i) the Company's equity value in June 2012 (based on 25 million shares outstanding and the $2.35 price per share at that time) and (ii) the Company's equity value at trial (based on the $1.00 per share value of Optimis stock around that time), and (iii) applying a 30% control premium that Bratic testified was appropriate in calculating the diminution in equity value. (A405, 973:10-24, A412, 1001:8-19 (Bratic))

damages for breach of fiduciary duty).

The trial court's failure to address Plaintiffs' alternative damages argument prevents this Court from "meaningfully [] review[ing]" whether the damages ruling was correct. *See Wit Capital Grp., Inc. v. Benning*, 897 A.2d 172, 177 & n.13 (Del. 2006) (reversing and remanding since original ruling implicitly rejected but failed to address merits of argument raised by party).

The trial court erred in ruling that Plaintiffs were not entitled to monetary damages to remedy Defendants' breaches of fiduciary duty and contract. Accordingly, this Court should reverse the damages rulings and remand to the trial court to reassess the proper measure of damages in accordance with Delaware law.[50]

[50] *See, e.g.*, *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 164, 177 (Del. 2002) (reversing and remanding to determine proper damages award); *Thorpe*, 676 A.2d at 445 (remanding for determination of damages incidental to defendant's breach of fiduciary duty).

CONCLUSION

For all of the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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