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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE INVESTORS BANCORP, INC. STOCKHOLDER LITIGATION	)	No. 169, 2017
	)	Court below: Court of Chancery of the State of Delaware
	)	Consolidated C.A. No. 12327-VCS

PUBLIC VERSION
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CORRECTED APPELLANTS' REPLY BRIEF

July 11, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other

INTRODUCTION

Defendants' answering brief (Trans. ID 60778551) ("Ans. Br.") confirms that the ruling below can be sustained only if the *Citrix* court's *dicta* rewrote over six decades of Delaware law by adopting a new and inflexible "check-the-box" approach to stockholder ratification. According to this interpretation, advance stockholder ratification of director self-compensation has just one requirement: the existence of a separate "director-specific limit" in a companywide compensation plan approved by stockholders. But Defendants are unable to explain how the EIP's[1] $114 million director-specific limit is any less of a "blank check" than the $55 million limit in *Citrix* that applied to all plan participants, directors included.

This Court should reject Defendants' reductionist interpretation of *Citrix* as unfounded and inconsistent with Delaware law. "[E]ntrustment to the [Board] of the authority to [grant compensation] under [the EIP's] discretionary terms and conditions cannot reasonably be interpreted as a license . . . to do whatever they wished, unconstrained by equity. Rather, it is best understood as a decision by the stockholders to give the directors broad legal authority and to rely upon the policing of equity to ensure that that authority would be utilized properly." *Sample v. Morgan*, 914 A.2d 647, 664 (Del. Ch. 2007). In finding that the mere existence of a "director-specific limit" in a compensation plan is sufficient for achieving

[1] All undefined capitalized terms have the same meaning as defined in Appellants' opening brief (Trans. ID 60647582) ("Op. Br.").

ratification, the Court of Chancery's ruling impermissibly dispenses with the "policing of equity" for self-dealing directors setting their own compensation.

Despite the fact that the burden of demonstrating full and fair disclosure falls squarely on directors who are claiming ratification, Defendants also ask the Court to summarily affirm the ruling below because Plaintiffs "failed" to do what was not required – include a separate disclosure count in their Complaint. Alternatively, Defendants argue that their disclosures were adequate essentially because the disclosures found to be deficient in other cases were, in Defendants' view, more "egregious." But that is not the standard. And Defendants do not explain why their minimalist approach to disclosure is sufficient to achieve ratification in advance of a self-dealing transaction when the same disclosures would plainly not be adequate had Defendants sought stockholder approval of the same transaction after the fact.

With respect to demand futility, Defendants ask the Court to "treat as separate transactions" the awards given to the Board's two executive members even though the Complaint establishes through Defendants' own documents that there was in fact one and only one transaction here: an "allocation" of shares for the entire Board. Because Defendants paid themselves over $50 million in this inherently conflicted transaction, any demand to reclaim that money for the Company would have been futile and is therefore excused as a matter of law.

ARGUMENT

I. Defendants incorrectly describe the EIP and their compensation

Defendants incorrectly describe the EIP in several respects, including by deflating the amount of compensation encompassed within its "director-specific" limit. In their opening brief, Plaintiffs accurately described the EIP as providing a "'limit' of $114 million worth of shares on the amount directors could award themselves." (Op. Br. 4). The plain language of the EIP shows this to be true. A total of 30,881,296 shares of stock are authorized under the EIP. (*See* Section 3.2(a), A088). Section 3.3(c), the limit for non-employee directors, provides in its entirety:

> *Stock Options, Restricted Stock Awards and Restricted Stock Units – Directors*. The maximum number of shares of Stock[2] that may be covered by Awards granted to all non-Employee Directors, in the aggregate, is thirty percent (30%) of the shares authorized under Plan all of which may be granted during any calendar year. The foregoing limitations shall not apply to cash-based Director fees that a non-Employee Director elects to receive in the form of shares of Stock or with respect to enticement awards made to new Directors.

(A090). Thus, the "maximum number of shares of Stock that may be covered by Awards[3]" is "thirty percent (30%) of the shares authorized under the Plan," *i.e.*,

[2] "Stock" is defined as "the common stock of the Company, $0.01 par value per share." (A104).

[3] The EIP defines "Award" as "any Stock Option, Restricted Stock, Restricted Stock Unit, Performance Award or any or all of them, or any other right or interest relating to stock or cash, granted to a Participant under the Plan." (A099).

30% of 30,881,296 = 9,264,289 shares. (*Id*.). The basis for Plaintiffs' $114 million calculation is described by Defendants (Ans. Br. 14): 30% of the shares authorized under the EIP (9,264,289) multiplied by the Company's stock price on the date the EIP was approved ($12.27) = $113,672,836.

When they discuss the EIP's "director-specific" limit, Defendants do not actually quote the EIP. Instead, they insist that the EIP's 9,264,289-share limit for directors "has sub-limits – 3,997,452 restricted stock units, and 5,293,938 stock options," and accuse Plaintiffs of attempting to "gloss over the fact that the EIP delineates specific caps on the awards that can be issued to directors." (Ans. Br. 14, 17). Defendants do not say where these claimed director sub-limits are to be found, and they do not in fact exist.

The numbers Defendants rely on as representing the purported director "sublimits" – 3,997,452 and 5,293,938 – equate to 30%, respectively, of the 13,234,841 shares set forth in Section 3.2(a)(2), which concerns restricted stock, restricted stock units and performance shares, and 30% of the 17,646,455 shares set forth in Section 3.2(a)(1), which concerns stock options. (A088). As an initial matter, Defendants' claim that the EIP actually caps the issuance of restricted stock to a total of 13,234,841 shares is not true. (*Compare* Ans. Br. 7 *with* A088

(Section 3.2(a)(2)).[4] In any event, Plaintiffs agree with Defendants that stock options are less costly than "full-value" awards such as restricted stock, and Defendants' description of Section 3.3(c)'s "director-specific" limit would be correct if that section actually provided that directors were limited to 30% of the EIP's 17,646,455 stock options and 30% of the EIP's 13,234,841 shares of restricted stock. Indeed, Sections 3.3(a) and 3.3(b) expressly provide exactly these types of award-specific "sublimits" for "*employees*."[5] But in stark contrast, Section 3.3(c)'s director-specific limit does not make that distinction and instead on its face authorizes the non-employee directors to grant themselves 30% of the EIP's total shares, including in the form of full-value restricted stock awards. (A090).

Lastly, Defendants' description of the EIP's per-person "maximum" amounts for awards to employees is misleading because, as Defendants fail to

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[4] Section 3.2(a)(2) provides: "Notwithstanding the preceding sentence, the Committee may grant Restricted Stock Awards, Restricted Stock Units and Performance Shares in excess of the limit described in the preceding sentence, provided, however, that any Restricted Stock Award, Restricted Stock Unit or Performance Share granted in excess of such limit shall be counted against the share reserve set forth in Section 3.2(a) as three (3) shares for every one (1) share of Restricted Stock, Restricted Stock Unit or Performance Share that is granted in excess of such limit." (A088).

[5] *See* Section 3.3(a), providing a sublimit on the "maximum number of shares of Stock that may be subject to stock options granted to any one Participant who is an employee covered by Code Section 162(m)"; and Section 3.3(b), providing a sublimit on the "maximum number of shares of Stock that may be subject to Restricted Stock Awards or Restricted Stock Units which are granted to any one Participant who is an employee covered by Code Section 162(m)[.]" (A088-A090).

mention, these limits only apply if the Compensation Committee specifically "intends" for a given award to qualify for the federal tax deduction available under Internal Revenue Code Section 162(m). (*Compare* Ans. Br. 7 *with* A088-90).

Claiming that they were merely following industry practice, Defendants suggest that they have not done anything out of the ordinary. This argument is rooted in Defendants' contention that it "has become quite common" for companies that have completed a mutual-to-stock conversion to reserve 14% of the issued shares under an equity compensation plan. (Ans. Br. 6, 9). However, Defendants never explain why this is relevant. Plaintiffs do not challenge the Board's decision to have the EIP reserve 14% of the MSC's issued shares; they challenge the abuse of authority that led Defendants to use that plan to pay themselves over $50 million in equity compensation. The $50 million was on top of Defendants' regular annual compensation, which they do not mention.

Instead, Defendants provide a cosmetic description of the "grant date fair value" that the non-employee directors were "scheduled" to receive as their awards vested.[6] (Ans. Br. 11-12). This is misleading for a number of reasons, including the fact that neither the 2016 Proxy nor Defendants' own documents suggest that the $50 million in equity awards was intended to compensate the Defendants for

[6] The awards challenged in *Sample* and *Citrix* included similar vesting schedules, which did not matter. *See Sample*, 914 A.2d at 670 n.74; *Calma on Behalf of Citrix Sys., Inc. v. Templeton*, 114 A.3d 563, 571 (Del. Ch. 2015).

future service or that future grants would either not be made or would be smaller. To the contrary, these awards were entirely retrospective in nature, as Defendants were "rewarding" themselves for the MSC, a transaction completed in early 2014. Moreover, in describing the amount each director is supposedly "scheduled" to receive each year, Defendants avoid mentioning the fact that the EIP expressly provides for the accelerated vesting of awards immediately upon a "change in control" of Investors Bancorp. (*See* A091).[7]

[7] The potential for accelerated vesting is especially relevant because financial institutions that have undergone a mutual to stock conversion are frequently acquired. As one analyst has stated, "[f]or most mutual conversions, an eventual sale is inevitable[.]" *See* http://www.bankingexchange.com/images/Dev_SNL/12517_MutualConversionsArticle.pdf (attached as Exhibit A).

II. Defendants do not and cannot reconcile the Court of Chancery's ruling with well-established principles of Delaware law

As with the Court of Chancery's holding, Defendants' arguments are based on an erroneous reading of *Citrix*. As evidence of this, Defendants are unable to reconcile a number of applicable precedents, most notably *Sample*, *Seinfeld*, and *Larkin*. As discussed in Plaintiffs' opening brief, both *Sample* and *Seinfeld* emphasize a crucial distinction that Defendants trivialize, namely the difference between (a) whether a board of directors' self-dealing is legally authorized, and (b) whether the broad deference of the business judgment rule applies to a judicial examination of that conduct. This distinction turns on whether the scope of the directors' stockholder-approved authority is "sufficiently defined,"[8] or in other words, subject to a "meaningful" limitation, such that it lies on the business judgment (rather than entire fairness) side of the doctrinal "continuum." *Seinfeld v. Slager*, 2012 WL 2501105, *12 (Del. Ch. June 29, 2012).

According to Defendants, the true "problem" with the compensation plan in *Seinfeld* is one that the court itself never mentioned, namely that the directors could "hijack" the plan and "theoretically award the entire pool of shares to themselves" while leaving none for anyone else. (Ans. Br. 20, 24). By attempting to explain the result in *Seinfeld* with an "anti-hijacking" rationale pulled out of thin

[8] *In re 3COM Corp. S'holders Litig.*, 1999 WL 1009210, *3 (Del. Ch. Oct. 25, 1999).

air, Defendants concede their inability to distinguish that case. In any event, because compensation plans are administered by boards of directors, a "director-specific" limit provides no protection against such "hijacking"; indeed the non-employee directors could have "hijacked" the EIP by awarding 9,264,289 shares of restricted stock to themselves while exercising their discretion not to provide awards to anyone else.

Similarly, Defendants ignore the legal significance of *Sample*, a case they seek to explain away as representing a more "egregious" set of facts involving "affirmative misdisclosures" and "25 minutes" of board deliberations. (Ans. Br. 21). However, as noted above, the point of *Sample* that is centrally important here – and that Defendants do not address – concerns "the balance between law…and equity," which is "[a]n essential aspect" of Delaware law. 914 A.2d at 663-64. In that connection, as the *Citrix* court explained, the "key point" of *Sample* is simply that the stockholders there "merely voted in favor of the broad parameters of the plan – and had not voted in favor of any specific awards under the plan." 114 A.3d at 584. Therefore, the challenged awards were not ratified and the defendants remained subject to the same "equitable principles of fiduciary duty" that apply to self-dealing generally. *Sample*, 914 A.2d at 664. The same is true here because, as the *Citrix* court stated immediately after the final excerpt of that opinion Defendants have quoted out of context (Ans. Br. 23), the stockholders "were simply asked to approve, in very broad terms, the [p]lan itself," *i.e.*, the EIP. 114 A.3d at 588.

Larkin[9] is another important case that Defendants are unable to persuasively distinguish. In particular, Defendants cannot explain how ratification failed in *Larkin* when the plan at issue included a "director-specific," indeed (unlike here) a director-specific annual limit. Nor can they explain how the mere fact that stockholders were provided much more information about what the directors sought to have ratified led the court to apply entire fairness rather than business judgment. Contrary to Defendants' argument, there was nothing "convoluted" about the proposal in *Larkin*, which simply presented an omnibus compensation plan for stockholder approval, just as the Board did with the EIP here.[10] Defendants provide no reason why the fact that in *Larkin* the board of directors "had already exercised its discretion," and indeed specifically disclosed the awards that were made "contingent" on stockholder approval of the proposed plan, would have caused the ratification defense to fail. (Ans. Br. 25). According to Defendants' reading of *Larkin*, if the Board made its "allocation" of awards *before* seeking stockholder approval of the EIP and specifically disclosed the awards when seeking such approval, Defendants' ratification defense would necessarily

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[9] *Larkin v. O'Connor*, C.A. No. 11338-CB (Del. Ch. Mar. 22, 2016) (TRANSCRIPT) (Op. Br. Ex. B).
[10] (*See* Op. Br. Ex. B at 6-11).

have failed, because the fact that they disclosed the specific awards they wanted stockholders to ratify would have been "confusing" and led to "ambiguity" with respect to the stockholder vote on the EIP. (Ans. Br. 25-26). This makes very little sense.

On the other hand, Defendants cannot show how a $114 million or even $66 million "director-specific" limit bears any resemblance to the "sufficiently defined" characteristics of the plan in *3COM*, 1999 WL 1009210, at *3, or the plans in *Lewis* and *Steiner*.[11] As for *Bosnjak*, Defendants claim that the court's finding of ratification was based on stockholder approval of a plan that "included director-specific parameters." (Ans. Br. 19). This is incorrect. What the stockholders approved in *Bosnjak* was not a compensation plan or the "parameters" of such a plan, but the specific awards for each director – and they expressed that approval by voting separately on discrete proposals that set forth the specific compensation for each director. *Cambridge Ret. Sys. v. Bosnjak*, 2014 WL 2930869, **2, 7-8 (Del. Ch. June 26, 2014).

Defendants misstate these cases in order to show that the Court of Chancery purportedly "[a]dher[ed] to established Delaware law," and that Plaintiffs are attempting to "establish an untenable new rule" for judicial review of director self-dealing. (Ans. Br. 1, 33). In describing this supposed "new rule," Defendants

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[11] *Lewis v. Vogelstein*, 699 A.2d 327 (Del. Ch. 1997); *Steiner v. Meyerson*, 1995 WL 441999 (Del. Ch. July 19, 1995).

argue that "the only compensation structure that would pass muster is one where specific awards to directors made under a stockholder-approved plan in compliance with limits on director compensation are nonetheless set forth for separate approval by stockholders *and* the potential dollar amounts of those awards set forth 'meaningful limits' as determined by the Court." (Ans. Br. 33). This is not accurate.

In the first place, Plaintiffs are not proposing a "new" rule. To the contrary, there is nothing new about the application of the entire fairness standard to director self-dealing in setting compensation. Nor is there anything new about directors having the ability to avoid entire fairness by showing that stockholders have ratified the directors' self-dealing transaction. Obtaining "separate approval" of "specific awards to directors" is one available method for directors to achieve ratification. If directors pursue that course, the awards have been ratified and can only be challenged under a waste standard even if, as the *Bosnjak* case makes clear, those awards appear to be "excessive," because in this situation the "stockholders cannot legitimately claim they were not made aware of the material terms of what they were being asked to approve." 2014 WL 2930869, at *9.

Defendants warn that requiring them to meet the traditional burden of entire fairness for their self-allocation of over $50 million in stock would encourage frivolous challenges to director compensation where in "every case…[the plaintiff] will always argue that the limit of the plan, whatever the dollar amount, is too high to be 'meaningful.'" (Ans. Br. 27). Invoking the ultimate legal bogeyman of the frivolous yet non-dismissible case, Defendants argue that "*every case* will be subject to judicial review" and that "no challenge" to director compensation "could be dismissed at the pleadings stage." (Ans. Br. 27, 33). This argument is overwrought and a distraction from what is at issue in this case.[12]

By insisting that their ratification defense must succeed lest courts become overwhelmed by an eruption of nettlesome director compensation litigation, Defendants are proposing a solution in search of a problem. Because the reality is that, in drawing up the sort of "director-specific limit" embedded in the EIP, Defendants embarked on a very different path than other directors have taken in their efforts to accomplish ratification for director self-compensation. In the "executive summary" of its 2016 Director Compensation Report available online,

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[12] Contrary to Defendants' suggestion, weak cases are, as they should be, appropriately dismissed under Rule 12(b)(6) even when the entire fairness standard applies. *See Monroe Cty. Emps' Ret. Sys. v. Carlson*, 2010 WL 2376890, at *2 (Del. Ch. Jun. 7, 2010) (dismissing complaint because there were "*no* factual allegations geared towards proving that the [challenged transactions] were executed at an unfair price") (emphasis in original). Director compensation cases are no exception. *See Oldfather v. Ells et al. (Chipotle Mexican Grill, Inc.),* C.A. No. 12118-VCL, at 2 (Del. Ch. Dec. 8, 2016) (ORDER) (dismissing claims challenging director compensation despite application of entire fairness standard because alleged facts did not suggest compensation was unfair) (attached as Exhibit B).

the prominent consulting firm Frederic W. Cook identifies the following as an "emerging trend":

> In response to recent shareholder lawsuits regarding the reasonableness of director pay, an increasing number of companies have been adding annual limits on director compensation to shareholder-approved equity plans to mitigate the risk of litigation. Roughly one-third of companies in this study have such limits, and we expect this percentage to grow, as many companies are waiting to implement this feature until they bring the applicable plan to shareholders for normal-course re-approval. To enhance protection, these limits are increasingly covering *total* pay rather than just equity; among the sample, 30% of the limits proposed in 2016 cover total pay, versus just 4% of limits proposed prior to 2016. Among the companies in this study, limits on total pay typically reflect a multiple of two to three times annual total pay.[13]

According to the same report, "most" of the companies that have responded by including "'*meaningful*' limits on annual compensation per director in shareholder-approved equity plans" have included limits "on total pay [that] are between $400K and $600K and typically equate to a multiple of two to three times total pay." (*Id.* at 19-20 (emphasis added)).[14]

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[13] *See* http://www.fwcook.com/content/documents/publications/11-30-16_ FWC_2016_Director_Comp_Report.pdf at 1 (attached as Exhibit C).

[14] In *Bosnjak*, because stockholders had only approved the directors' equity compensation, the challenge to the directors' cash compensation survived the motion to dismiss and it remained "the defendants' burden to demonstrate the fairness of the cash compensation paid to the outside directors." 2014 WL 2930869, at *7. In light of this, companies increasingly began to incorporate into their stockholder-approved compensation plans limits on *total* annual pay for directors.

In stark contrast, even according to Defendants' incorrect calculation, the EIP's "director-specific" limit is extraordinarily capacious: encompassing $66 million worth of Investors Bancorp stock, without addressing cash compensation much less limiting *total* pay (indeed the Company's non-employee directors also awarded themselves approximately $150,000 each in regular compensation during 2015). Thus, Defendants ask this Court to find that a consequence of stockholders having approved the EIP is that the vote extinguished *ex ante* any fiduciary duty claim, including with respect to a hypothetical transaction in which the non-employee directors, "assuming equal treatment," awarded themselves $6 million each. (Ans. Br. 14). Defendants do not explain how it is that a reasonable stockholder would have understood a vote to approve the EIP as being a vote to waive the right to rely on "the policing of equity" for such an extraordinary and yet to occur self-dealing transaction, *Sample*, 914 A.2d at 664, much less how this outcome reflects "the wishes of [Investors Bancorp's] stockholders…."[15] (Ans. Br. 2). More importantly, they do not explain how this result is consistent with basic principles of Delaware law concerning self-dealing transactions. Indeed,

[15] Defendants' suggestion that Plaintiffs should have instead "encourage[d] other stockholders to vote against the EIP" is misplaced. (Ans. Br. 35). Plaintiffs and other reasonable stockholders could recognize the benefits of Investors Bancorp having an equity compensation plan and thus approve it while taking comfort in the fact that traditional fiduciary principles would apply to any director self-dealing under the plan.

Defendants' various "policy" arguments are at best an indirect attack on the existence of the entire fairness standard for director self-compensation.

Defendants conclude by claiming that reversal of the Court of Chancery's ruling would mean "boards could never rely on judicial pronouncements" because "any compensation decision would be subject to the whims of the court[,]" while protesting that subjecting them to the default standard of entire fairness would be "extremely unfair" because they "complied with *Citrix* by having a separate limit for directors" inserted into the EIP, and thus expected immunity for any subsequent self-dealing. (Ans. Br. 34 & n.7). Ironically, Defendants claim to have relied exclusively on their reading of purported "guidance" in a case in which the court rejected a ratification defense (Ans. Br. 1), while suggesting that the *Citrix* court announced, in *dicta*, a new bright-line and inflexible rule for accomplishing stockholder ratification. But *Citrix* was just the latest in a series of decisions to *reject* the argument that compliance with a stockholder-approved plan necessarily results in business judgment protection for self-dealing. Indeed, the *Citrix* court applied "sixty years of Delaware law" (Ans. Br. 24) and ultimately found the case to be no different than *Seinfeld* – a case Defendants cannot legitimately distinguish and that the Court of Chancery never mentioned. *Citrix*, 114 A.3d 563.

Of course, before *Citrix* was decided, in *Bosnjak* a board of directors had successfully moved to dismiss claims challenging the directors' equity compensation, thus providing directors with a foolproof blueprint for obtaining stockholder ratification. Defendants opted not to take that course, choosing instead to follow a purported "rule" Defendants contend they deduced from reviewing the *Citrix* opinion, which was issued on the same afternoon Defendants filed the 2015 Proxy and proposed the EIP to stockholders.[16]

[16] Because the relevant reliance-induced act would actually have been the Board's creation of the EIP's director-specific limits, which in fact occurred well before *Citrix*, Defendants' reliance argument is fundamentally anachronistic and illogical.

III. Defendants cannot meet their burden of showing full and fair disclosure

According to Defendants, the Court should not consider the disclosure question because Plaintiffs did not include a separate disclosure count in their Complaint. (*See*, *e.g.*, Ans. Br. 2, 28.) This bid to avoid the merits fails for the simple reason that it was Defendants' burden to establish full and fair disclosure, because otherwise they cannot establish their "affirmative defense of stockholder ratification." (Op. 15).[17] In any event, Plaintiffs did not include a separate disclosure count in their Complaint because, as explained in *Sample*, such a claim would have been "redundant": the wrongdoing Plaintiffs alleged is "in essence one claim for breach of fiduciary duty." 914 A.2d at 660-61. Disclosure came into play only because Defendants responded by claiming ratification.

Other than attempting to avoid the merits, Defendants' principal response seems to be that the underlying facts in *Sample* were more "egregious" and "extreme" than they are here, an assertion that does nothing to show that Defendants made full and fair disclosure. (Ans. Br. 21, 31). Defendants also assert (i) "there is no evidence that the Board delayed acting for any reason;" (ii) Plaintiffs failed "to demonstrate why the Board's consideration of federal

[17] Notably, Defendants claim that "[t]he Court of Chancery properly held that Plaintiffs failed to allege particularized facts showing that stockholder approval of the [EIP] was obtained through materially misleading disclosures," wrongly suggesting not only that Plaintiffs bear the burden on this issue but that the burden extends beyond the requirements of Court of Chancery Rules 8 and 12(b)(6). (Ans. Br. 3).

regulations would be improper or why" that fact would be material; and (iii) that the Board had no "undisclosed plan" because when stockholders were asked to approve the EIP "the Board had *not* determined to issue any specific equity awards." (Ans. Br. 29-30) (emphasis in original).

These assertions deliberately evade the critical point, one that Defendants are careful not to deny: As their own internal documents revealed, the Board asked stockholders to approve the EIP by disclosing the general and abstract benefits of having such a compensation plan while concealing the fact that Defendants had already decided to reward themselves for the 2014 MSC by making a mass "allocation" of shares (in precise amounts to be determined) immediately after the EIP was approved. As explained in Plaintiffs' opening brief, Defendants' disclosures thus fell well short of the "full and fair" mark, particularly in the context of advance stockholder ratification. Indeed, if the information Defendants disclosed when seeking approval of the EIP was sufficient to ratify $50 million of equity awards before they were granted, these same disclosures would also be sufficient to ratify the awards after the fact. That proposition is untenable.

Defendants appear to acknowledge the inadequacy of their disclosures when attempting to "boil[] down" Plaintiffs' argument. (*See* Ans. Br. 32). However, Defendants still have it wrong because Plaintiffs' argument is not that the Board should have "put forth [the EIP] to stockholders without any planning or thought as to what awards they might make under [the EIP]" following its approval, but that the Board should have been candid about its plans when asking stockholders to approve the EIP. (Ans. Br. 32).

Despite insisting that Plaintiffs "willfully misconstrue the import of the 2014 Prospectus," Defendants do not explain how Plaintiffs committed that infraction. (Ans. Br. 31). In any event, Plaintiffs have misconstrued nothing. Though Defendants are vague in describing the purported significance of the Prospectus on appeal, in moving to dismiss they asserted that because of the Prospectus "'every stockholder who [purchased shares in the MHC Conversion, or who held or purchased shares thereafter], was expressly told of the planned restricted stock and stock option awards that are the subject of the complaint.'" (A160-A061 quoting Def's Motion to Dismiss at 4). As Plaintiffs already demonstrated, the Prospectus did no such thing, and even if it had, it would serve only to establish that the 2015 Proxy itself was fatally deficient.

Defendants' reliance on the Prospectus is unavailing. The Prospectus is a dense 237-page document, which Defendants claim without accompanying citations "disclosed in detail. . . the potential number and percentage of shares reserved for issuance and an estimate of the total dollar value of such securities," *i.e.*, \$102.3 million to \$158.8 million. But Defendants never explain how such a disclosure would support their ratification argument. (Ans. Br. 5-6). The 2015

Proxy made no reference to the Prospectus at all, much less told stockholders it contained information relevant to their consideration of the EIP.

IV. Defendants' demand futility arguments fail

In defending the Court of Chancery's conclusion that demand was not excused, Defendants pointedly avoid mentioning what their own documents establish: the awards to Cummings and Cama were literally "components" of a single transaction in which the entire Board made for itself a mass "allocation" of shares under the EIP. (A076-A077 ¶ 131, quoting minutes of June 23, 2015 Compensation Committee meeting). Defendants illogically argue that "far from being 'a single conflicted transaction…,' the Board approved the awards to executives after a series of Compensation Committee meetings to consider proper compensation in consultation with outside advisors and experts," as if a conflicted transaction could never occur following such "consultation." (Ans. Br. 37). Indeed, in making the argument that "the awards to non-employee directors and to executives can appropriately be *treated* as two separate transactions," Defendants concede the essential point, which is that they were not in fact separate transactions in this case. (Ans. Br. 39) (emphasis added).

Consistent with this acknowledgement, Defendants never explain how the non-employee directors could have disinterestedly and independently decided whether to have the Company seek disgorgement of Cummings' and Cama's share of the "allocation" without being influenced by the fact that the non-employee directors also gave themselves millions of dollars in the very same transaction.

Delaware law provides no basis for assuming that any director is capable of such an extreme feat of mental compartmentalization. To the contrary, demand is excused in this situation simply because "[i]t strains reason to argue that a defendant-director could act independently to evaluate the merits of bringing a legal action against any of the other defendants if the director participated in the identical challenged misconduct," as is the case here. *Needham v. Cruver*, 1993 WL 179336, *3 (Del. Ch. May 12, 1993).

CONCLUSION

As Defendants more or less admit, they can only prevail if *Citrix* means what they say it means. But it does not. The "director-specific" limit in the EIP is in substance no different than the overly broad "limits" that prevented directors from obtaining business judgment protection for self-dealing in *Seinfeld* and *Citrix*. All of these "limits" amount to "a blank check," and Delaware law simply does not afford directors business judgment discretion when writing such a check to themselves. Plaintiffs respectfully submit that the Court of Chancery's erroneous ruling to the contrary should be reversed.

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