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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE RAVENSWOOD INVESTMENT COMPANY, L.P., individually, derivatively and on behalf of a class of similarly situated persons, Plaintiff Below, Appellant v. THE ESTATE OF BASSETT S. WINMILL, THOMAS B. WINMILL, MARK C. WINMILL and WINMILL & CO. INCORPORATED Defendants Below, Appellees.	No. 496, 2018

APPELLANT'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This appeal involves two consolidated actions. The first, CA 3730-VCS, challenges a Board of Directors and controlling shareholders' (whose control was through super-voting stock[1]) (the "Board" or "Individual Defendants") adoption of a stock option plan ("PEP") involving approximately 1/3 of Winmill & Co. Incorporated's ("Winmill") equity, and self-grant of stock options thereunder in a process improperly disclosed and devoid of independent protections, and subsequent forgiveness of the notes ostensibly given to pay for the exercise of those options. The second, CA 7048-VCS, is a claim the Trial Court ("Court") later denied permission to amend into CA 3730-VCS, challenges the Board's operation of Winmill for themselves only and not for all shareholders, through a combination of actions including: delisting the stock, not paying dividends, terminating all shareholder disclosures, improperly resisting demands for books and records and, terminating the preparation of financial statements to avoid having to disclose the financial status of Winmill under 8 *Del.C.* §220.

The Ravenswood Investment Company, L.P. ("Ravenswood"), appeals from a final judgment in both actions entered August 29, 2018 (the "Judgment") (Exhibit

[1] The Individual Defendants owned a small percentage of the equity, but all the Class B shares, the only fully voting stock. The remaining shares, Class A shares, have only the minimal voting rights required by law.

A), after a consolidated trial. Plaintiff seeks review and reversal of the aspects of the Judgment which made final the interlocutory decisions which:

(1) found that although the Board, Bassett Winmill[2] ("Bassett"),[3] Thomas Winmill ("Thomas"), and Mark Winmill ("Mark") breached their fiduciary duties in awarding themselves stock options ("Options") and, further, in then forgiving the notes designated as the consideration for the exercise of the options ("Notes"), the Court would not order rescission of the shares of stock acquired by the Individual Defendants or any other remedy, as reflected in the post-trial Memorandum Opinion *Ravenswood v. Winmill,* 2018 WL 1410860 (Del.Ch. March 21, 2018, revised March 22, 2018) ("*Opinion*") (Exhibit B), and the Letter Decision, denying modification of the *Opinion*, *Ravenswood v. Winmill,* 2018 WL 4154219 (Del.Ch. April 27, 2018) ("*Reargument Decision*") (Exhibit C);

(2) as a matter of law, denied Plaintiff an opportunity to challenge the adoption of the PEP (as distinct from the issuance of options under the PEP), the validity of the adoption of the PEP, a claim that the consent thereto was invalid, and an

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[2] The Estate of Bassett Winmill was substituted as a party when Bassett Winmill passed away during the pendency of this action. (D.I. 132).

[3] Because each Director Defendant bears the same last name as the corporate nominal defendant, throughout this litigation the Court and the Parties have referred to the individual defendants by their first names. This has been done solely to reduce any confusion and, as has been repeatedly stated, is not intended to be in any way disrespectful. See, *Opinion* at *3 fn 7.

opportunity to pursue direct claims relating to the PEP and the Options as reflected in the Memorandum Opinion and Order dated May 31, 2011 ("*PEP Adoption Decision*") (Exhibit D), as reflected in the Transcript Ruling of May 12, 2016 (Exhibit E) and the Letter Decision denying modification of the Adoption Decision dated November 30, 2011 (Exhibit F); and

(3) as a matter of law, largely denied Plaintiff the ability to challenge the Individual Defendants' operation of Winmill for their own benefit and not for the benefit of all stockholders (the "Self-Interested Operation Claim"), as reflected in the Order of the Court dated February 26, 2016 incorporating a bench ruling of February 25, 2016 (Exhibits G and H), and, after trial on a substantially narrowed claim, found for the Individual Defendants, as reflected in the *Opinion*.

SUMMARY OF ARGUMENT

1. The Court erred in not ordering a remedy despite finding that the Directors breached their fiduciary duties by granting self-interested stock option awards and then forgiving the Notes, the purported consideration for the exercise of the options, all without any proper documentation or objective supporting evidence to show either a fair process or fair price. The Court erred: (a) in determining that rescission was unavailable because "the Company lacks funds sufficient to repay Defendants what they have already paid for the options …" (*Opinion* at 3) when the undisputed evidence was that the purportedly required repayment would use only about 10% of the Company's current cash and that the Company, an unregistered investment company, was debt free with substantial additional liquid assets; (b) in determining that rescissory damages would not be beneficial to the Company because the amount owed the Directors exceeded the value of Winmill stock, based solely on its current thinly traded OTC "No Information"[4] bid price, when the undisputed evidence was that price reflects the delisting of the stock, the lack of dividends and the absence of any public disclosures for over a decade and a substantial post-option award value of $6.50 per share exceeding the option's strike price of $2.948; (c) in permitting the Defendants to argue that rescission or rescissory

[4] The OTC Market has three classifications of stocks: Current Information; Limited Information; and No Information. A000399 (¶ 12), A000662 (¶ 15).

damages were not in the best interests of Winmill when that assertion was not made in the Joint Pre-Trial Order ("JPO") or earlier (being first made in post-trial briefing), and that contention was based upon a claimed summary of business records (without the supporting underlying documents), produced only several days before trial and contrary to the pretrial discovery; and (d) in placing the burden on Plaintiff in an entire fairness case to have provided evidence that the stock value exceeded the amounts due Defendants to disprove a theory never asserted and based upon facts never disclosed prior to trial.

2. The Court erred in denying Plaintiff an opportunity to challenge the adoption of the PEP by the Directors on the grounds that the PEP met IRS regulations using a market price for pricing, holding that the claim could not be brought on a direct basis, and holding that Plaintiff's not deposing a witness prior to his death constituted laches. The Court erred because: (a) the allegations that the combination of stock options and stock buybacks provided Defendants (who controlled Winmill through super-voting stock) greater than 50% total equity, diluting the non-controlling shareholders and effectively eliminating their remaining voting rights, stated an individual claim; (b) compliance with IRS regulations is not a safe harbor from a claim for breach of fiduciary duty; (c) reliance upon a stock market price for a thinly traded stock is not, as a matter of law, proof of fair value or even fair market value; and (d) Plaintiff could not be found to have committed laches in not deposing

a single witness as to a claim as to which Defendants bore the burden of proof and without providing Plaintiff the opportunity to develop and explore what evidence, if any, was lost and what prejudice resulted.

3. The Court erred: in denying as a matter of law, substantially all of the Self-Interested Operation Claim; and in permitting only a claim that Defendants terminated the preparation of *audited* financial statements in retaliation for a shareholder's exercise of its right to inspect books and records, when the record was undisputed that the disclosures of the PEP, the last disclosures made, were inaccurate and required correction, and the allegations that the stock had been delisted, all disclosures terminated, no dividends had been paid, and the preparation of financial statements terminated as part of Defendants' plans to drive out other stockholders stated a claim for relief. The Court abused its discretion in finding that Defendants terminated preparation of all financial statements to save money, when all competent evidence was that: the decision was made temporally incident to and as a result of a shareholder demand for access; audit fees, the claimed expense, could have been saved without terminating preparation of financial statements entirely; and audit fees were voluntarily incurred after the purported decision to save the expense.

STATEMENT OF FACTS

I. The Parties

Ravenswood is a record owner of 10,000 shares of Winmill. A000810 (¶ 1). Plaintiff also has investment authority with respect to approximately 7%, of the Company's outstanding stock. Amended Verified Class and Derivative Complaint ("Complaint") A000580-581 (¶ 1).

Winmill is a Delaware holding company that manages several investments portfolios. (*Id.* ¶ 2; A000226-245). Winmill conducts an investment management operation of registered investment companies, owns an SEC registered broker/dealer who distributes mutual funds, and owns equity in public and nonpublic companies. A000839-840 at 21:18 – 22:22 (Thomas Winmill). Current revenues are approximately $500,000 per year. *Id.* Winmill's most recent financial statements show that shareholder equity, principally in cash and marketable securities, of $7.8 million in 2014 and $10.5 million in 2013. A000524-525.

The Individual Defendants are: The Estate of Bassett Winmill, formerly Bassett Winmill, who was Chairman, Thomas Winmill, his son and President and Chief Executive Officer, and Mark Winmill, also Bassett's son. A000811 (¶ 3). These Individual Defendants at all relevant times constituted the Board (see *Id.*), and as a result of their exclusive ownership of the Class B shares, were controlling

persons of the Company. *Id.* ¶ 7. The Class B shares have plenary voting rights, while the Class A shares have the minimal votes required by law. *Id.*

II. Winmill is Operated for Defendants' Benefit Only

A. Winmill Goes Dark

In August 2004, the Individual Defendants acted to delist and deregister Winmill and no longer made regular corporate filings. A000137. At that time, the Defendants also eliminated all independent board members. A000877-880, 882 at 166:8 – 169:17; 177:1 – 10 (Thomas Winmill). Winmill does not pay dividends. A000913 at 335:11 - 13 (O'Malley).

Winmill terminated distribution of annual report as of its 2006 annual report. A000281-301. When Ravenswood sought financial information, Defendants resisted and demanded concessions found improper by the Court, including a demand that Ravenswood surrender trading rights to its stock, and Defendants ceased termination of all financial statements. A000526-527. See, Section V below.

As a result, while Winmill stock continues to appear on the OTC bulletin Board, it is listed as a company as to which there is "no information." A000601 (¶ 50). There was nothing in the record at trial which identified any single activity of Defendants in the last 10 years providing any benefit to anyone other than themselves. A000905-914 at 327:14 - 336:16 (O'Malley) (Q: "How was the company operated for the benefit of nonemployee shareholders? … . A: I don't

know if I can answer that." *Id.* at 336:8 - 11 (O'Malley). "But there were other stockholders here, namely the public stockholders. Defendants owed those stockholders fiduciary duties of care and loyalty; they could not make decisions just because those decisions suited their needs or interests. By acting only out of self-interest, Defendants have diminished any confidence ..." in their actions. *Opinion* at 46 – 47.

B. The Evidence of the Terms of and Adoption of the PEP

Consistent with the Directors' self-interested operation of Winmill, in its 2005 annual report, Winmill reported the adoption of a Performance Equity Plan, the PEP. It disclosed plan provisions materially different than those later claimed by Defendants. A000226-245 at 14. According to the Defendants, that plan was adopted on May 23, 2005 and the Defendants were immediately issued 100,000 options each. A000205-225, A000842, A000844-845 at 29:5 - 13; 31:24 - 32:12 (Thomas Winmill). Specifically, the differences between the disclosures and the claimed consent involved the pricing and vesting of the options.

2005 Annual Report	2005 PEP/Written Consent
"The option price per share may not be less than the *fair value* of such shares on the date the option is granted."	"The exercise price per share . . . may not be less than *110% of the Fair Market Value* on the date of the grant." [11]
"The vesting period is three years of service."	Vesting Schedule -- "33,333 immediate; 33,333 on first anniversary and 33,334 on second anniversary"
"The fair value of options granted were estimated at the date of grant using the Black-Scholes option-pricing model."	"The exercise price per share . . . may not be less than *110% of the Fair Market Value* on the date of the grant."

Thomas testified that no plan ever priced options at "fair value". A000847-848, A000851-852 at 40:22 – 41:2, 44:18 – 45:6 (Thomas Winmill). A000226-245. The 2005 annual report at note 9, however, describes a plan which prices options at "fair value" and is not consistent. A000884-885 at 191:10 – 192:24 (Thomas Winmill). No corrective disclosure was ever issued. *Id.*

The PEP supposedly was adopted by a May 23, 2005 written consent of the directors and sole class B shareholder ("Purported Written Consent"). A000205-209. In discovery, Winmill's designee regarding the handling and maintenance of Winmill's corporate minute book denied any knowledge of how the purported consent to the PEP, (A000205-209), came to be in the minute book. A000916-918 at 341:16 – 342:17, 343:1 – 4 (Ramirez). The Purported Written Consent, however, refers to a Plan "in the form annexed hereto" but no plan is attached. Thus, the document which purports to constitute the complete consent to the PEP in the minute book is materially incomplete.

Further, the document in the minute book has signature pages on different paper stock than the rest of the document, showing the signatures were inserted into another document. A000920-922 at 417:2 - 419:11. The earliest known versions of signatures on the consent are single pages with fax tag lines *dated May 24*, A000616-642 at 6:23 - 10:20, 14:13 - 15:13, 16:14 - 17:2, 28:15 - 29:13, 55:12 - 63:14, 86:4-14 (Ramirez), are accompanied by and attached to nothing, not even a description of that to which they purport to consent. A000639 at 62:17 - 19 (Ramirez); A000864 at 64:6 – 10 (Thomas Winmill). There is no evidence of these pages ever being part of an entire consent to an options plan in any form or even existing prior to May 24, the day *after* they are dated and supposedly effective.

At trial, Defendants attempted to authenticate the PEP but each witness ultimately admitted having no personal knowledge of how the consents ended up in the minute book or where they came from. A000842, 866-867 at 29:8 – 13, 66:24 – 67:16 (Thomas Winmill).

Defendants only received and signed signature pages, not the entire consent. In a moment of candor, Thomas admitted Winmill's practice of sending only the specific signature pages of consents. "It is not our practice at the firm to encumber the process of the Board of Directors and getting signatures on documents for board meetings and stockholder meetings with the ministerial actions of sending out the agreements and documents in paperwork that they require. That's a separate and

distinct function that I'd only undertake after the first action has been completed and consummated." A000860 at 60:7 – 14 (Thomas Winmill).

Joint Trial Exhibit 11 (A000203-204), the single page signatures with the fax tag lines, is the earliest version of any signed consent purportedly approving the PEP. A000864-865 at 64:13 – 65:24 (Thomas Winmill). No one knows how or why the fax tag lines were removed. A000862 at 62:6 – 12 (Thomas Winmill). No "originally affixed, i.e. wet" signatures from any Defendant to the consent exist. *Id.* at 62:13 – 63:1 (Thomas Winmill).

Thomas admitted receiving various drafts of option plans that were different from each other. A000853-856, 849 at 46:24 – 47:9, 49:3 – 6 (Thomas Winmill). Joint Trial Exhibit 9 ("JX 9") (A000138-180) received from his attorney by email dated May 23, 2005 at 2:39 PM *are not* the documents which Defendants claim are the final documents. A000848-851 at 48:9 –51:3 (Thomas Winmill). However, JX 9 proves that the options prices were not set based on the May 23 closing price of the stock as the proposed price of $2.948 appears on JX 9-WIN 0316, a document sent at 2:39 PM, *before the close of the market.* A000138-180 at A000157.

III. The Surprise Evidence at Trial and Post-Trial Assertion of a New Defense

Prior to trial the information provided by Defendants in their responses to Plaintiff's First Set of Interrogatories on November 30, 2010, identified as the only responsive documents, the options awards, the notes and the $1,532.39 checks.

A000353-355 (Nos. 1-2). They promised to provide all responsive documents "relating to" the creation, adoption, operation, granting and exercise of the options. A000355 (No. 2). Their November 20, 2014 responses to Plaintiff's Fourth Set of Interrogatories, stated that Thomas and Mark had only paid $1,532.39 each and their notes had been forgiven. A000502-505, (Nos. 28, 34). In contrast, Defendants' response to the same interrogatory for Bassett stated he had paid $1,531.39 and that his estate had paid an extended "note, along *with accrued interest*". *Id.* (emphasis added). Plaintiff had requested on October 21, 2014 all documents and records "relating to" the promissory notes. A000488-489 (No. 12). Defendants response was that the only records were the promissory notes to themselves. A000496-497 (No. 12).

Over Plaintiff's objection, the Court permitted the Defendants to submit and provide testimony regarding a summary chart prepared for trial, without any supporting documentation, claiming to show interest payments on the notes through payroll deductions (Joint Trial Exhibit 9 ("JX 9")). A000745-749. Obviously, there would be documentation and information to show such payroll deductions, well preceding the November 30, 2010 and November 20, 2014 discovery responses. None of that information was disclosed in those responses. Therefore, assuming JX 93 is truthful, those discovery responses were false and concealed evidence when made.

The Defendants before trial, in the JPO, and their answer, never raised any claim that rescission was unavailable because the stock was worth less than the required rescissory payment, or would not be in the best interest of Winmill. The exhibits on which their claim was based were not provided to Plaintiff until four (4) days before trial. A000825-836 at 3:16 - 14:24.

IV. The Trial Evidence Regarding Winmill's Financial Status and Available Cash Resources

The sole testimony regarding Winmill's current cash resources came from Thomas himself, who stated Winmill's available *cash* was 10 times the amount of any possible necessary repayment to Defendants. A000869 at 149:23 - 24 (Thomas Winmill). The evidence regarding Winmill's other financial resources were that current net revenues were $500,000 per year (substantially up from the negative revenues in 2014 of $2.95 million), that Winmill had no debt and *net assets* (almost entirely in cash and investments in securities) of between at least $8.5 million and $10.5 million. A000511-514; A000840 at 22:21 (Thomas Winmill).

Winmill's stock price, subsequent to the issuance of the options had been as high as $6.50 per share, and Winmill had repurchased stock at that price. A000246-270.

V. The Termination of Financial Statements as Historically Prepared

Winmill prepared financial statements, including footnotes which described things not appearing in the general ledger, i.e. material contracts, related party

transactions, stock option plans, etc., for years after it stopped making them available to its shareholders. A000905 at 327:14 - 16 (O'Malley). This was information which the Individual Defendants had determined to withhold from Winmill's shareholders for no reason other than they believed they could do it. It ceased preparing such when it became clear that Plaintiff was pursuing its rights to obtain this information, claiming shelter in the general rule that a shareholder cannot force the creation of a document under §220. E.g., *In re Lululemon Athletica Inc. 220 Litigation*, 2015 WL 1957196 (Del. Ch. April 30, 2015).

Thomas admitted that the typical footnotes would contain information not available from a simple printout of financial information. A000875 at 159:10 – 22 (Thomas Winmill). Thomas admitted "most investors like to see audited financial statements…". A000901 at 235:5 – 6 (Thomas Winmill). Winmill's CFO confirmed that without footnotes, the narrative information normally contained in financial statements would not appear. A000905-908 at 327:20 – 330:2 (O'Malley). Winmill's CFO admitted that it would be possible to prepare footnotes, of the type historically prepared by Winmill, without having them audited, and thereby save the expense of the audit. *Id.* In his testimony, Winmill's CFO made clear the mindset of the Company with respect to its public shareholders in his repeatedly referring to Thomas and Mark as "the principals". A000908 at 330:3 – 11 (O'Malley).

Defendants claim that they terminated this preparation of financial information upon the death of Bassett to save audit fees. A000872 at 156:6 – 15 (Thomas Winmill). Bassett, however passed away in May 2012. *Id.* at 156:22 – 24 (Thomas Winmill). While the Defendants could have immediately terminated the audit process, which was not completed until four months later, *Id.* at 156:18 – 21 (Thomas Winmill), they chose not to do so and incurred the very expense they claim they wished to avoid, paying $18,500 for an audit opinion. A000875 at 159:3 (Thomas Winmill). Thomas admitted that Plaintiff's ongoing litigation was a factor in terminating the preparation of these financial reports. A000648 at 63:12-22 (Thomas Winmill). Of course, it is possible to save the expense of an audit and still prepare the financial reports, (A000907 329:12 – 16 (O'Malley)): Defendants sole offered explanation for ceasing preparation of all financial statements. A000874-875 at 158:23 – 159:9 (Thomas Winmill).

Thomas admitted that the only way a prospective investor could obtain the necessary information to evaluate the current financial condition of the Company would be to contact the Company and ask for information. A889-890 at 216:18 – 217:8 (Thomas Winmill). Of course, Defendants' conduct with respect to Plaintiff's efforts to obtain information from the Company, an existing shareholder with the right to this information, belies the availability of that option. A000892-911 at 226:1 – 233:14 (Thomas Winmill). Further, Winmill's CFO admitted that the Company

would not provide such information absent a nondisclosure agreement. A000910-911 332:18 – 333:24 (O'Malley).

Winmill's CFO was unable to identify in any fashion how Winmill has been operated to benefit all of its shareholders. A000913-914 335:6 – 336:11 (O'Malley). Winmill's CFO never heard anyone express any concern for nonemployee shareholders. *Id.*

VI. The Decision After Trial

As to the question of breach of fiduciary duty relating to the grant of the Options and the forgiveness of the Notes, the Court ruled entirely in Plaintiff's favor. *Opinion* at 3. Defendants did not appeal that decision. The Court held that Defendants were obliged to prove that the "grant was the product of a fair process that yielded a fair result. They failed to carry that burden." *Id.* Further, the Court stated that it "must assess the fairness of what Defendants actually paid for their stock options. That is where Defendants' case falls short." *Id.* at 43. "[T]he Board forgave those Notes long before the principal was even touched." *Id.* at 43 – 44. "While Bassett ultimately chose not to have his Note forgiven, *the Board had already forgiven the Note* and would have done so again had Bassett so desired." *Id.* at 44 fn 158 (emphasis added). "I cannot find that Defendants carried their burden of proving that the amount they paid for their stock options was fair." *Id.* at 45. "In addition to the process infirmities already discussed, it cannot be ignored that the

Board remained focused on the personal interests of the individual beneficiaries of the option grants (themselves) throughout its decision making with respect to the PEP. Recall, for example, that the Board initially forgave the Notes in February 2008 but then rescinded that decision when the debtors determined they were not prepared to deal with the tax consequences of loan forgiveness. … When Bassett could not pay … the Board extended the maturity of his payment obligation without consideration." *Id.* at 46.

The Court denied any remedy for these breaches because: "the Company lacks sufficient funds to repay Defendants what they have already paid for the options--a necessary step if rescission is to perform its function…," *Id.* at 3; "the Company cannot afford to repay Defendants the amounts they paid for their options," *Id.* at 51, "the Company's return of the funds Defendants paid for their options would significantly reduce (if not completely eliminate) the Company's available cash resources," *Id.* at 56–57, "the Company would be receiving stock worth substantially less now than it was in 2006 or 2007… [creating] a windfall for Defendants…," *Id.* at 57 fn 196, that rescissory damages are unavailable because the current value of Winmill stock was $1.00 per share, would need to be offset by repayment to Defendants and there was no evidence of a higher intervening achievable share value, *Id.* at 59. The Court determined that the amount to be repaid was "the par value [$1,532.39], interest, and, as to Bassett, the note principal. *Id.* at 57 fn. 196.

As to the Self-Interested Operation Claim, the Court ruled for the Defendants stating: "As for Plaintiff's claims relating to the Company's record keeping and dissemination practices, those claims fail for lack of proof and because, as presented, they reflected improper attempts to repackage claims already dismissed by the Court." *Id.* at 4.

ARGUMENT

I. The Court Erred in Not Awarding Rescission Based Upon Its Conclusion That "the Company lacks sufficient funds..." and That Relief is Not in Winmill's Best Interests and in Not Awarding Rescissory Damages or Other Relief

A. Question Presented

Whether the Court of Chancery erred in in failing to order a remedy after finding that the Individual Defendants breached their fiduciary duties in granting themselves stock options and further breached them by forgiving the notes ostensibly used to pay to the exercise of the options? This issue was preserved for appeal. A000580-612, A000687-744, A000807-822.

B. Scope of Review

The standard and scope of review as to a Court's legal rulings is *de novo*. E.g., *Hudak v. Procek*, 806 A.2d 140, 150 (Del. 2002) ("*Haudek*"); *Bank of New York Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011) ("*Mellon*"). The standard and scope of review as to a Court's finding of fact is a deferential "clearly erroneous" standard; whether the factual findings and inferences drawn are supported by competent evidence. *Id.*; *Hall v. State*, 14 A.3d 512, 516-17 (Del. 2011) ("*Hall*"). The Court's decision as to damages is reviewed for abuse of discretion; whether it is based upon conscience and reason, as opposed to capriciousness or arbitrariness. *Gatz Properties, LLC v. Auriga Capital Corp.*, 59

A.3d 1206, 1212 (Del. 2012) ("*Gatz*"). Where there are two permissible views of the evidence, the factfinder's choice will not be clearly erroneous. *Id.*

Conclusions by a Court about whether a market price for a stock is a reliable indicator of value are reviewed for whether it has a reasonable basis in the record and is in accord with accepted financial principles. *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*, 177 A.3d 1, 5-6 (Del. 2017) ("*Dell*").

C. Merits of Argument

The Court concluded it could not order rescission because Winmill had "[in]sufficient funds to repay Defendants …" the amounts they had already paid for the exercise of the options and that rescission "would not be in the Company's best interests…" because it would provide no net benefit to Winmill. *Opinion* at 3, 52. This decision is based on an error of law and is unsupported by competent evidence.

1. Placing the Burden of Proof on Plaintiff Was an Error of Law

The Court appears to have improperly placed the burden of proof on Plaintiff in a case governed by entire fairness, when it came to the issue of remedy. "Plaintiff has failed to develop any evidence supporting cancellation, rescission, rescissory damages or some other form of damages as possible remedies…" *Opinion* at 3. This was an error of law. E.g., *Kahn v. Lynch Comm. Systems, Inc.*, 683 A.2d 1110, 1115 (Del. 1994).

2. The Court's Decisions to Permit an Untimely Defense and Use of Previously Undisclosed Evidence Was an Abuse of Discretion

The Court abused its discretion in allowing Defendants to raise a defense not identified in the JPO and to submit evidence not disclosed in discovery. At no time did the Defendants ever assert Winmill could not afford to repay any amount they paid. At no time prior to their post-trial briefing did Defendants ever raise the claim that rescission would not be in the best interests of Winmill. As a result, Plaintiff was not given fair notice of the evidence and arguments Defendants intended to present at trial.

Unless a possible defense is raised in a pretrial order, permitting evidence to suggest that defense at trial is an abuse of discretion, because the failure to raise a defense in a pretrial order is prejudicial and makes "it difficult, if not impossible, to fairly face the issue for the first time during trial." *Alexander v. Cahill*, 829 A.2d 117, 128-29 (Del. 2003) ("*Alexander*"). Permitting deviation from a pretrial order requires a showing of manifest injustice and not preventing prejudice to the opposing party is an abuse of discretion. *Counzo v. Shore*, 958 A.2d 840, 845-46 (Del. 2008); *Green v. Alfred A.I. duPont Institute etc.*, 759 A.2d 1060, 1063-64 (Del. 2000).

Where an issue could have been but was not raised pretrial in some form and where the failure to do so results in prejudice, it is an abuse of discretion to permit the defense and supporting facts at trial. *Alexander* at 128 – 29 (Del. 2003). *Alexander's*, supra, admonition as to the importance of avoiding trial by surprise is

particularly pertinent where, as here, entire fairness places the burden of proof on the Defendants. The Court's conclusion that this theory was not a new theory, *Reargument Decision* fn 42, is without factual support. The cited trial transcript is to argument on the admissibility of documents not previously produced regarding the forgiveness of the notes.[5] There is no mention of an argument that rescission would not be in the best interests of Winmill.

Allowing the documents and testimony was an abuse of discretion as it was material, had been requested in discovery and was not timely provided by Defendants. *Sammons v. Doctors for Emergency Services, P.A.*, 913 A.2d 519, 529 (Del. 2006); *Hoey v. Hawkins*, 332 A.2d 403, 406 (Del. 1975).

3. No Competent Evidence Supports a Conclusion That Winmill is Unable to Pay any Required Amount for Rescission

Even were these arguments properly considered, the uncontradicted evidence is that repaying Defendants was well within Winmill's financial abilities. Even Thomas's testimony was that repayment would only take about 10% of the *cash on hand*. A000869-870 at 149:18 - 150:1 (Thomas Winmill) (emphasis added). The most recent financial information for Winmill shows that, even before the recent rise in the stock markets, it had a total net equity of between $12.5 and $9.6 million.

[5] Inexplicably, this is not the Court's only transcript citation error. In the Opinion the Court stated that it had made an inquiry of Plaintiff regarding the nature of the remedy. *Opinion* at 48-49. The cited reference, A001049-1050 at 41:17 - 42:5, and the pages that precede it contain no inquiry from the Court on that subject.

A000511-514. Indeed, even Defendants do not argue Winmill could not afford to repay Defendants.

4. No Law or Competent Evidence Supports a Conclusion That Paying any Amount Required for Rescission Was Not in Winmill's Best Interests

The Court's "not in Winmill's best interests" conclusion is unsupported by law or any by competent evidence. Relying on what it erroneously stated was the "only evidence" of the value of Winmill stock, the Court relied on incompetent evidence, specifically the stock price of a thinly traded, illiquid stock as to which there had been no financial disclosures and no dividends for over 10 years.

As a matter of law, the Court may never factually defer to an illiquid, thinly traded, over-the-counter stock quotation (particular for stock as to which there has been no public information for a decade) as constituting the value of the stock. *Appelbaum v. Avaya, Inc.*, 812 A.2d 880, 890 (Del. 2002) ("The Court cannot defer to a market price as a measure of fair value if the stock has not been traded actively in liquid market."). Accord, *DFC Global Corporation v. Muirfield Value Partners, LP,* 172 A.3d 346, 373 (Del. 2017); *Merlin Partners LP v. AutoInfo, Inc.*, 2015 WL 2069417 at*12 (Del. Ch. April 30, 2015); *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 459 – 60 (Del. Ch. 2011) ("it is reasonable for a board to use market value ... when there is no a controlling stockholder and the stock is widely traded." (Emphasis added)).

The illiquid OTC price, particularly for Winmill is not competent evidence of the value of Winmill stock. *Id.*; *Dell* at 23-24. Indeed, in a different case where a publicly reporting company's stock was much more heavily traded and even covered by analysts, the Court concluded that the market was not sufficiently developed that the trading price of the Company's stock was neither a reliable "stand-alone indicator of fair value" nor even an appropriate "data point" to use in reaching "fair value." *Blueblade Capital Opportunities LLC v. CI LLC*, 2018 WL 3602940 at *1 (Del. Ch. July 27, 2018).

The lack of competence of the data point used is highlighted by the fact that the Court's valuation of Winmill as a whole was $1,473,750, for an unleveraged investment Company with about $12 million in known net liquid assets; $3 million of which are cash.[6] Not only was the sole data point of value on which the Court relied not competent evidence, the Court was factually in error in concluding there was no other evidence of value. See also, Argument 3 above. Winmill's net asset value, the usual price at which mutual funds trade, is at least $7.10 to $5.75, making the ill-gotten shares worth at least $1,420,000 to $1,150,000 on a trading basis alone. Given that the Court allowed this argument to be raised post-trial, for the first time,

[6] A000511-512 lists almost $8.5 million in net assets and 1,477,500 shares outstanding. A000514-515 lists $10.5 million in net assets lists the total claimed payments by Defendants at $295,773. Thomas testified that paying this amount would used 10% of the Company's cash on hand, or approximately $3,000,000 cash on hand. A000869-870 at 149:18 – 150:1 (Thomas Winmill).

based on evidence not disclosed before trial, it was an abuse of discretion. If the Court desired to consider the untimely argument, it should have required current financial and valuation information on which to base its decision.

Instead, the Court assumed, Winmill could not pay. If there were concerns about the ability to pay, the Court could have ordered rescission conditioned upon payment of a specific amount and ordered Winmill to pay that amount or to show cause as to why it could not. See, Court of Chancery Rule 70.

5. The Court's Conclusion That There Was No Basis to Award Rescissory Damages is Not Supported by Competent Evidence

The Court acknowledged that an appropriate award of rescissory damages could be made at the "highest intervening per-share value..." *Opinion* at 59, citing *Reis, supra.,* but rejected that approach because there was no evidence to support Winmill could have disposed of the shares. *Opinion* at 59 – 60. The evidence showed the market price, when Winmill was far more actively traded reached $6.50 per share. A000246-270. The Court's conclusions that the market price for Winmill stock was adequate proof of current value but not adequate proof of intervening value are irreconcilably inconsistent. If the market price is competent evidence of value as of trial, it is competent evidence of value for the period prior to trial.

The Court never considered the illogic of its conclusion. If rescission was really beneficial to the Individual Defendants, why did they resist it for so long?

They resisted for the obvious reason that the stock is far more valuable that the Court assumed.

6. No Law or Competent Evidence Supports the Conclusion That Repayment of Interest or the Principle on Bassett's Note was Required

The Court's conclusion that in a rescission the Defendants would be entitled not simply to the payments they made for the shares they obtained, but also for the interest payments they made was without legal credible evidentiary support. The Court correctly found that rescission requires an unwinding of the transaction to achieve the *status quo ante*. *Opinion* at 53 and authorities cited therein. However, the transaction in question is the exercise of the options. Indisputably, the interest payments were for the deferral of the Individual Defendants' debt to Winmill, something they unquestionably received, and which cannot be and will not be rescinded. As a result, the proper focus is only on the principle amounts paid.

The interest payments were not to pay for the exercise of the options. Defendants' Interrogatory responses acknowledge that neither Thomas nor Mark paid anything for the exercise of the options beyond the $1,532.39 initial payment and the forgiven note. A000502-505 (Nos. 28, 34). Even using the Court's valuation of $1.00 per share it would clearly be in Winmill's interest to receive as to each Defendant $66,666 worth of stock for $1,532.39. Rescission as to these shares should have been ordered.

The Court's conclusion that Bassett paid the principal amount due on his note is also without evidentiary support. Bassett passed away having paid neither principal nor any interest on his note.[7] The evidence showed and the Court concluded that Bassett's note was forgiven. *Opinion* at 43- 44, fn 158. The "debt" was subsequently reinstated at Bassett's request to avoid taxes and would have been forgiven if Bassett so desired. *Id.*

One who pays a "debt" that he is not obliged to pay is "a volunteer without any standing in equity …". *Eastern States Petroleum Co. v. Universal Oil Products Co.*, 44 A.2d 11, 15 (Del Ch. 1945). Accord, *Eastern Savings Bank, FSB v. Cach, LLC*, 124 A.3d 585, 590 (Del. 2015); *Olivere v. Taylor*, 65 A.2d 723 (Del Ch. 1949). As a result, the payment was a gift and need not be repaid as part of any rescission. *Schoon v. Troy Corp.*, 948 A.2d 1157, 1174 (Del. Ch. 2008) (superseded as to another issue by statute *Marino v Patriot Rail Co.*, 131 A.3d 325, 340 (Del. Ch. 2016)). This "debt" was voluntary and for Bassett's own benefit, not to pay for the exercise of any options. Further, the belated payment by Bassett's estate did not include interest and penalties which accrued on the note and, there is no evidence that there would have been any net amount due to the estate when those were considered. Rescission as to these shares should have been ordered.

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[7] His estate made all payments. *Id.*

7. The Failure to Award a Remedy is Unjust, Penalizes Innocent Shareholders and Rewards Wrongdoers

The decision of the Court ignores the principle enunciated in *Agustino v. Hicks*, 845 A.2d 1110, 1124 (Del. Ch. 2004) that equity will not suffer a wrong without a remedy. The effect of the decision to deny a remedy is giving the Defendants 200,000 shares, approximately 14% of Winmill's equity, (*Opinion* at 12), *for nothing*. See, *Opinion* at 46 (decisions must be suited to the interests of all shareholders). Even where all parties are innocent, the party responsible for the situation must bear the loss. "Where the choice as to which of two innocent parties must bear the loss, that burden must fall on the party who but for whose conduct the problem would never have arisen." *Crumlish v. Price*, 266 A.2d 182, 184 (Del. 1970). *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 457 (Del. 1982).

All of this negative circumstance, even that the stock price is $1.00 per share in a booming stock market, properly is laid at the doorstep of the Individual Defendants. Permitting them to act inappropriately without consequence is unjust. Even were it ultimately to prove true that Winmill could not repay amounts which must be returned, which is not true, the Court's decision to make such a finding on this record also creates a manifest injustice in allowing a faithless fiduciary to escape without providing a remedy. This Court has authority to order disgorgement of

shares obtained in breach of fiduciary duty. *Sample v. Morgan*, 914 A.2d 647, 674 (Del Ch. 2007).

II. The Court Erred Denying, as a Matter of Law, Plaintiff's Challenges to the Adoption of the PEP

A. Question Presented

Whether, with respect to the adoption of the PEP, the Court of Chancery erred in granting Defendants' Motion to Dismiss and denying Plaintiff's an opportunity to assert a claim of invalid shareholder consents on the grounds of laches? This issue was preserved for appeal. A000611.

B. Scope of Review

The standard and scope of review of a grant of a motion to dismiss under Chancery Rule 12 is *de novo*. *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC*, 27 A.3d 531, 535 (Del. 2011) ("*Central Mortgage*"). Because the Court on undisputed facts refused Plaintiff leave to amend to pursue a claim that the shareholder consents used to adopt the PEP were invalid on the grounds of laches, the decision of the Court is subject to *de novo*, plenary review. *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009) ("Reid"); *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 262 (Del. 1993).

C. Merits of the Argument

1. The Court Erred in Dismissing Plaintiff's Claim as to the Adoption of the PEP

A motion to dismiss should not be granted unless, accepting all well pleaded factual allegations as true, accepting even vague allegations as well pled if they give the opposing party notice of the claim, and drawing all reasonable inferences in favor of the non-moving party, the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances. *Central Mortgage* at 535.

Here, Plaintiff's initial complaint alleged that the Individual Defendants, in a self-interested compensation decision devoid of any procedural or other protections adopted a plan intended almost exclusively to benefit themselves. A000586-589, 598-604 (¶¶ 20-24, 46-54). Self-interested compensation decisions made without independent protections are subject to entire fairness review and are inappropriate for dismissal under Chancery Rule 12. *In re Investors Bancorp, Inc. Stockholder Litigation*, 177 A.3d 1208, 1217 (Del. 2017); *Calma on Behalf of Citrix Systems, Inc. v. Templeton*, 114 A.3d 563, 570 (Del.Ch. 2015).

Further, Plaintiff's initial complaint alleged two additional factors: (1) that the decision was improperly disclosed to shareholders, and (2) that the actual standard used by the Defendants, basing the strike price of the options on the thinly traded, illiquid market price of the stock was improper as understating value. A000586-589, 593-594, 601-602 (¶¶ 20-24, 35, 50).

The disclosure stating "fair value" would be used to price the options when, in fact, "fair market value" was used, was a material misstatement. Delaware law and the Court itself held, there is a significant difference between "fair value" and "fair market value." *Ravenswood Inv. Co., L.P. v. Winmill*, 2011WL 6224534, at *3 (Del. Ch. Nov. 30, 2011) ("Given the lack of a liquid market for Winmill's shares, it would seem more likely that fair value would be greater than market value."); see *Finkelstein v. Liberty Digital, Inc.*, 2005 WL 1074364, at *12 (Del. Ch. April 25, 2005) noting "[t]he concept of fair value under Delaware law is not equivalent to the economic concept of fair market value"). The Court erred as a matter of law in refusing to permit Plaintiff to proceed on discovery and trial of this claim on a derivative basis.

The Court's conclusion that compliance with IRS regulations precluded a breach of duty claim was error as a matter of law. E.g., *Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000) (compliance with statutory law *and* fiduciary duties is required).

2. The Court Erred in Dismissing Plaintiff's Direct Claim as to the Adoption of the PEP

The initial complaint also alleged that the PEP, in conjunction with a stock buyback program, had the intended purpose of providing the Individual Defendants, who were controlling shareholders only through super voting stock which constituted a minority of the total equity, the ability to obtain control over all

shareholder votes by providing them an absolute majority of the equity. A000580-612. The Court erred as a matter of law in refusing to permit Plaintiff to proceed on discovery and trial of this claim on a direct basis.

The initial complaint alleged self-dealing transactions by controlling shareholders which had the effect of diluting minority shareholders, and indeed, essentially emasculating even the minimal rights held by those minority shareholders. These facts alleged a dual status claim, constituting both a derivative and a direct claim.

Gentile v. Rossette, 906 A.2d 91, 100 (Del. 2006). The Court erred as a matter of law in dismissing Plaintiff's direct claim.

3. The Court Erred in Refusing Leave to Amend Based on Laches

Plaintiff subsequently discovered facts indicating that the shareholder consents used to adopt the PEP were backdated, and thus, invalid. *Crown EMAK Partners, LLC v. Kutz*, 992 A.2d 377 (Del. 2010); *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129 (Del. Ch. 2003). These facts included discovering that the documents originally produced to Plaintiff as the operative shareholder consents *had been altered to remove the facsimile tag lines*, which showed the actual dates of the consents were the day after the claimed dates of the consents. Although over a lengthy period the Defendants had produced both documents at different times, Defendants never informed Plaintiff that the document without the fax tag line had

been altered and that it did not, as one would naturally expect, predate the document with the fax tag line. Plaintiff did not discover these facts until after Bassett had passed away. A000412-444, 528-577. The Court, without permitting factual discovery to determine the extent to which there had been any prejudice as a result of Bassett's passing, and ignoring that Plaintiff did not have the burden of proof with respect to this claim subject to Entire Fairness, found Plaintiff guilty of laches for not having deposed Bassett before his death and barred an amendment to the complaint and all discovery into this issue. (Exhibit E).

The defense of laches is fact specific and ordinarily granting summary judgment or a motion to dismiss is inappropriate pending the development of all the facts, so that the court can fully assess whether prejudice exist, the extent to which it exists and whether alternatives to the absolute bar of latches are appropriate. *Reid, supra*. "[A]ffirmative defenses such as latches are not ordinarily well-suited for treatment on such a motion. Unless it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it, dismissal of the complaint based upon an affirmative defense is inappropriate." *Id.* at 183 – 184. This admonition applies equally to a refusal to allow an amendment on the grounds of futility. See also, *Church of Religious Science v. Fox*, 266 A.2d 188 (Del. 1970).

III. The Court Erred in Dismissing, as a Matter of Law, Substantially All of Plaintiff's Claim that the Individual Defendants Operate Winmill Solely for Their Own Benefit and in Denying the Remainder After Trial

A. Question Presented

Whether the Court of Chancery erred in dismissing as a matter of law substantially all of Plaintiff's claim that the Individual Defendants operate Winmill for their sole benefit and in denying the remainder after trial? This issue was preserved for appeal. A000589 (¶¶ 24), A000611, A000735-743.

B. Scope of Review

The standard and scope of review of a grant of a motion to dismiss under Chancery Rule 12 is *de novo*. *Central Mortgage*, 27 A.3d at 535. The standard and scope of review as to a Court's finding of fact is a deferential "clearly erroneous" standard; whether the factual findings and inferences drawn are supported by competent evidence. *Hall*, 14 A.3d at 516-17.

C. Merits of the Argument

1. The Court Erred in Failing to Recognize a Cause of Action for Failure to Run Winmill for the Benefit of All Stockholders

"One of the pillars of our law with regard to public companies is that they must be run for the benefit of their stockholders." *Opinion* at 1. Although this principle can be found in many decisions of the Delaware Courts, the proposition was so obvious that the Court felt no need to provide a citation to authority. See, e.g., *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del.1985); *In re*

Trados Shareholder Litigation, 73 A.3d 17, 36 (Del.Ch. 2013); *Freedman v. Restaurant Associates Industries, Inc.*, 1987 WL 14323 at *6 (Del. Ch. October 16, 1987); *Frederick Hsu Living Trust v. ODN Holding Corporation*, 2017 WL 1437308 at *20 fn 23 (Del. Ch. April 14, 2017); *OptimisCorp v. Waite*, 2015 WL 5147038 at *59 (Del. Ch. August 26, 2015); *Gilbert v. El Paso*, 1988 WL 124325 at *6 (Del. Ch. November 21, 1988).

For this principle to have full meaning, there must be some outer edge, some limit, to how long directors can operate a corporation without at least attempting to take some effort benefiting all shareholders. There are, of course, numerous decisions in Delaware law where a particular action or inaction, standing alone, was found to have not constituted a breach of fiduciary duty. For example, not paying dividends, *Solomon v. Armstrong*, 747 A.2d 1098 (Del. Ch. 1999); delisting stock *Seagraves v. Urstadt Property Co., Inc.*, 1989 WL 137918 at *4 (Del. Ch. December 4, 1989) ("*Seagraves*"), *Hamilton v. Nozko*, 1994 WL 413299 (Del. Ch. July 27, 1994); or a general failure to make a disclosure, *Malone v. Brincat*, 722 A.2d 5 (Del. 1988).

However, corporate action, even where legally permissible, will be proscribed if taken for an inequitable purpose. *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437, 439 (Del. 1971); *Rabkin v. Philip A. Hunt Chemical Corp.*, 498 A.2d 1099, 1107 (Del. 1985). Allegations of fiduciary manipulation of the corporate machinery

for personal advantage are actionable. See *In Re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319, 331-33 (Del. 1993); *Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc.*, 532 A.2d 1324, 1336 (Del. Ch. 1987); *Seagraves*, *supra*. Here, the Complaints in both CA 3730 and CA 7048 allege systematic manipulations of the corporate machinery which benefitted the Individual Defendants and harmed all other shareholders. A000580-612, 651-686. Specifically, that the Individual Defendants shut off access to any benefits of ownership to anyone but themselves through delisting the stock, not paying dividends, terminating disclosures, and further, terminating the preparation of financial statements when it became clear they would be forced to release them under 8 *Del.C.* § 220. *Id.*

The Individual Defendants benefitted because for over 10 years they have operated in secrecy and without oversite, paid themselves whatever they chose, awarded themselves free stock, and sought to acquire the shares of stockholders who became unwilling to tolerate further abuse. *Id.* The Court erred in limiting this claim to one that Defendants terminated preparing *audited* statements in retaliation to Plaintiff's § 220 demand. The proper question should have been how do any of these benefit all shareholders. The testimony at trial was clear, there was no benefit to all shareholders. Further, even as a standalone disclosure claim under *Malone*, *supra.*, Defendants were obliged to correct the improper disclosure of the PEP. They never have. The Court erred in not permitting this claim to go forward.

2. The Court Abused Its Discretion in Finding the Defendants Did Not Terminate Preparation of Financial Statements for an Improper Reason

After trial, the Court found against Plaintiff on this claim. The Court's conclusion that the Individual Defendants terminated preparation of financial statements to save money is not supported by competent evidence. The only testimony was that Winmill could save money by foregoing audits. Not only did the Court find the Defendants' testimony not credible as to other matters, e.g. *Opinion* at 38, the story Defendants tell is entirely illogical.

First, the preparation of unaudited financial statements was still possible and there was no testimony at trial explaining why unaudited statements were terminated. Second, the termination of the preparation of audited financial statements, did not coincide with the event which purportedly triggered that termination, the passing of Bassett. After Bassett passed away, Defendants authorized completion of the work and obtained the audit opinion for the year in question and incurred the very costs they claimed they were seeking to avoid. The Court erred in not finding for the Plaintiff even on this narrowed claim.

The facts show the termination of the preparation of statements as had been done for years was connected to Plaintiff's pursuit of information. The court hearing on proceeding with the deposition in the books and records action occurred one day after the completion of the 2011 audit. A000903-904 at 238:6 – 239:20 (Thomas

Winmill). On September 19, 2011, Plaintiff delivered its demand to inspect certain of Winmill's books and records pursuant to 8 *Del.C.* § 220 (the "Demand"). Plaintiff's Demand sought to inspect records regarding Winmill's financial information, including compensation to the Individual Defendants, a list of other Winmill stockholders, and a list of all trading activity by Winmill and the Individual Defendants in the Company's stock. On September 27, 2011, Winmill's counsel responded to Plaintiff's Demand ("Winmill's Response"). With respect to the financial information request, Winmill agreed to produce such if Plaintiff signed Winmill's proposed confidentiality agreement.

Despite Ravenswood offering to enter into an appropriate confidentiality agreement in its Demand, the Individual Defendants caused Winmill to insist on an inappropriate condition: specifically, that in order to obtain access to any of the Company's non-public financial information regarding the Company, Plaintiff agree not to trade in Winmill's stock until the Individual Defendants chose to publicly disclose such information. A000379-385. The language of Winmill's proposed confidentiality agreement further precluded Plaintiff from communicating with anyone regarding this information, even for example by sending the stockholder list to a mailing agent to send a communication to Company stockholders. Defendants' insistence on these unreasonable restrictions resulted in nearly two-years of hard-

fought, burdensome Section 220 litigation, which included extensive motion practice and depositions.

On May 30, 2014, the Court rejected Winmill's proposed trading restrictions as improper and ordered Winmill to produce to Ravenswood the financial information of Winmill requested by Ravenswood, including "all quarterly and annual financial statements, whether audited or unaudited, for Winmill for all periods from September 19, 2009 through the date of completion of compliance with the Demand." *The Ravenswood Inv. Co., L.P. v. Winmill Co., Inc.*, 2014 WL 2445776 at *2, *4 (Del. Ch. May 30, 2014) (the "*May 30 Opinion*").

Following the *May 30 Opinion*, Winmill presented Ravenswood with another confidentiality agreement that contained an additional, legally indefensible and unreasonable indemnification provision (which required payment of Winmill's attorneys fees even for a suit where Winmill was the Plaintiff), not included in its first proposed confidentiality agreement. The Court rejected this condition. *The Ravenswood Inv. Co., L.P. v. Winmill & Co., Inc.*, 2014 WL 7451505 at *1 (Del. Ch. Dec. 31, 2014). Only after this Court's May 30 and December 31 Opinions, did Defendants announce that "Winmill [stopped creating] audited financial information for the years after 2011." In other words, Winmill secretly stopped "producing" these reports as soon as Ravenswood sought to enforce its legal rights to have them and concealed that decision from the Court and Plaintiff for more than two years.

Plaintiff's efforts to obtain discovery regarding the Company's decision to stop preparing financial statements was blocked, with Defendants' claiming that Winmill & Co. did not make any 'decisions to cease the preparation of financial statements. While counsel for Defendants later admitting that was an incorrect statement, the Company never produced a single document relating to the Company's decision to suddenly stop the preparation of financial statements, i.e. no board minutes, no board resolution and no emails. The decision for Defendants on this limited claim is not supported by competent evidence and should be reversed.

CONCLUSION

Respectfully, the challenged decisions of the Court of Chancery should be reversed. This Court should remand with instructions to enter an order of rescission as to the stock options and the shares obtained thereunder, with instructions to permit a direct claim for damages both as to the adoption of the PEP and grant of the stock options to proceed, to permit the Self-Interested Operation Claim in its entirety to proceed, and should grant all other relief deemed appropriate.

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