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Case Number 496,2018

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,	)	No. 496, 2018
Plaintiff-Below, Appellant/Cross-Appellee,	)	
v.	)	On Appeal from the Court of Chancery, C.A. Nos. 3730-VCS and 7048-VCS (consolidated)
The Estate of Bassett S. Winmill, Thomas B. Winmill, and Mark C. Winmill, and Winmill & Co. Incorporated,	)	
Defendants-Below, Appellees/Cross-Appellants.	)	

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL

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NATURE OF THE PROCEEDINGS

Plaintiff-Below, Appellant/Cross Appellee, The Ravenswood Investment Company, L.P. ("Ravenswood"), filed a breach of fiduciary duty action on April 30, 2008 (the "2008 Complaint"), containing one direct and one derivative count, against Bassett S. Winmill, Thomas B. Winmill and Mark C. Winmill ("Defendants"), the three directors of defendant Winmill & Co. Incorporated ("Winmill & Co." or the "Company").[1] (A000317-A000331). On November 17, 2011, Ravenswood filed a separate complaint under 8 *Del. C.* § 220, which also alleged a breach of fiduciary duty by the Defendants (the "2011 Complaint"). (A000386-A000392). Ravenswood's claims in both cases were narrowed pursuant to the Court of Chancery's rulings on Defendants' Motions to Dismiss on May 31, 2011 (OB Ex. D[2]) and January 31, 2013 (B00151-B00157) and Defendants' Motion for Summary Judgment on May 4, 2017 (B00518-B00520). The remaining claims from the 2008 Complaint and the 2011 Complaint were tried together in May 2017.

In its March 21, 2018, post-trial memorandum opinion, which was revised March 22, 2018, (OB Ex B) (the "Opinion" or "Op."), the Court of Chancery found that Defendants breached their fiduciary duty of loyalty with respect to their

[1] Bassett S. Winmill died in 2012 and was replaced by his Estate as a defendant.

[2] Exhibits attached to Appellant's Opening Brief (Transaction ID 62662437) ("OB") are cited as "OB Ex. ___".

compensation practices pursuant to the 2005 Performance Equity Plan (the "PEP"), but determined Ravenswood had failed to demonstrate damages. The Court therefore awarded Ravenswood nominal damages of $1.00 from each of the three defendants. (Op. 3, 32, 68). The Court of Chancery also found Ravenswood failed to prove its claims relating to Winmill & Co.'s record keeping and information dissemination practices. (Op. 4). On August 29, 2018, the Court of Chancery entered a final judgment order (the "Final Judgment"), which explained that the Court's prior opinions, orders and rulings had disposed of all claims, and granted Ravenswood $140,000 in legal fees and $25,000 in expenses, to be paid by Winmill & Co. (OB Ex. A).

On September 25, 2018, Ravenswood filed its notice of appeal.[3]

On October 5, 2018, Defendants filed their notice of cross-appeal from the Final Judgment awarding Ravenswood $140,000 in legal fees and $25,000 in expenses.[4]

[3] Plaintiff-Below, Appellant/Cross Appellees' Notice of Appeal (Transaction ID 62488819).

[4] Defendants-Below, Appellees/Cross Appellants' Notice of Cross-Appeal (Transaction ID 62526797).

SUMMARY OF ARGUMENT

Answer to the Ravenswood Investment Company, L.P.'s Summary of Argument on Appeal

1. DENIED. The Court of Chancery correctly determined Ravenswood was not entitled to a remedy because it failed to meet its burden of proving appropriate damages. The Court did not err in considering evidence presented by Defendants regarding the impact of rescission on Winmill & Co. and properly denied rescission and rescissory damages. This decision is supported by the evidence and Delaware law.

2. DENIED. The Court of Chancery correctly dismissed Ravenswood's claims relating to the adoption of the PEP. The Court properly determined that Ravenswood's laches barred its claim concerning adoption of the PEP. The Court properly dismissed Ravenswood's individual breach of fiduciary duty claim because Ravenswood did not adequately plead that its voting rights were eliminated by the stock option grants and stock-buyback. These decisions are supported by the evidence and Delaware law.

3. DENIED. Ravenswood never brought a separate "Self-Interested Operation Claim;" all claims that might fit under this category were properly dismissed by the Court of Chancery. The Court did not abuse its discretion in holding that Defendants had no fiduciary duty to prepare audited financial

statements and disseminate them to stockholders. These decisions are supported by the evidence and Delaware law.

The Estate of Bassett S. Winmill, Thomas B. Winmill, and Mark C. Winmill, and Winmill & Co. Incorporated's Arguments on Cross-Appeal

1. The Court of Chancery erred in awarding $140,000 in legal fees and $25,000 in expenses to Ravenswood, to be paid by Winmill & Co., in connection with the $3 nominal damages award because it incorrectly determined that Ravenswood's litigation created a corporate benefit but not a common fund.

STATEMENT OF FACTS

A. The Parties and Key Persons in the Litigation

Winmill & Co. is a holding company which, through its subsidiaries, conducts an investment management business. (Op. 5). Winmill & Co.'s affiliates manage the assets of several registered investment companies. (*Id.*).

Ravenswood is a record owner of Class A non-voting Winmill & Co. stock. (*Id.* 6).

Defendant Thomas Winmill ("Thomas") is currently the general counsel, president and chief executive officer of Winmill & Co. (*Id.* 7, 10). Thomas also has been a director of Winmill & Co. at all times relevant to this action. (*Id.* 6). Thomas owns Winmill & Co. Class A non-voting stock. (*Id.* 8; B00490-B00491).

Defendant Mark Winmill ("Mark") is the executive vice president of Winmill & Co. (Op. 7). Mark has been a director of Winmill & Co. since 2004, and previously served as a director from 1987-1999. (*Id.*). Mark owns Winmill & Co Class A non-voting common stock. (Op. 8; B00838 (Mark)).

Bassett Winmill ("Bassett") was the founder of Winmill & Co.'s predecessor. (Op. 6). Until his death in 2012, Bassett served as Executive Chairman of the Board of Directors of Winmill & Co. (*Id.* 6). Bassett is the father of Thomas and Mark. (Op. 7).

B. Winmill & Co.'s Stock

The Company has two classes of stock outstanding—Class A and Class B common stock. (A000318 ¶ 3; A000581-82 ¶ 3). The Class A stock is publicly traded on the OTC "pink sheets," and has only those voting rights that are required by Delaware law. (A00581-582 ¶ 3; A00586 ¶ 20). The Class B stock has full voting rights. (A000581 ¶ 3). Until his death, Bassett owned all of the Class B stock; thereafter this stock was held by a Winmill Family trust of which Thomas and Mark are the trustees. (Op. 6-7; A000582-83 ¶ 8).

Ravenswood has been a stockholder of Winmill & Co. since July 2004. (A000317 ¶ 1; A000580-A000581 ¶ 1).

C. The Written Consents Adopting the 2005 PEP

On or about May 23, 2005, Thomas, Mark and Bassett Winmill signed a Joint Unanimous Consent of the Board of Directors and Sole Holder of Class B Common Stock of Winmill & Co. (A000205-A000209) (the "May 23 Consent"). At trial, Thomas Winmill testified extensively about this May 23 Consent, which adopted the 2005 PEP (A00210-A00225), and he identified the three signatures on the document (including the signature of the now-deceased Bassett Winmill). (B000616-B00617).

D. The 2005 PEP

Thus, in May 2005, the Winmill & Co. board adopted the PEP by unanimous written consent. (Op. 11-12). The PEP authorized, but did not require, granting options for 500,000 shares of Winmill & Co.'s Class A stock. (*Id.* 12). The exercise price of the options was to be determined by the board at the time of the grant but was not to be less than 110% of the fair market value of the stock on the date of the grant. (*Id.* 12-13). Under the PEP, options were permitted to be exercised by paying Winmill & Co. cash for not less than the par value of the common stock acquired and giving a promissory note for the remainder. (*Id.* 13).

Winmill & Co.'s 2005 annual report included information regarding the PEP. (A000226-A000245). Page 14 of that annual report incorrectly stated that the terms of the PEP provide that the option exercise price "may not be less than the fair value of such shares on the date the option is granted." (A000240). The PEP provides differently (using "fair market value" as the standard); the Winmill & Co. board never discussed or considered a "fair value" standard. (B00623-B00625, B00775 (Thomas), B00849 (Mark)). This incorrect information in the annual report was a typographical error. (B00827 (Thomas)). Winmill & Co. never issued a correction to this annual report because the error was not discovered immediately and (because Winmill & Co.'s stockholders were not asked to vote on anything with

respect to the PEP) there was no legal need to correct it. (B000775 (Thomas)).[5] All options issued under the PEP were based on fair market value. (B00623-B00624; A000210-A000225).

E. Issuance of Options Pursuant to the PEP

On May 23, 2005, the board issued to each of Bassett, Thomas and Mark Winmill options to purchase 100,000 shares of Winmill & Co. stock with an exercise price of $2.948 per share. (Op. 13-14). At the time of the grant, the Company's stock was trading at $2.68 per share. (*Id*. 14). The vesting schedule for the options comported with IRS rules limiting incentive stock option vesting to an aggregate exercise amount of $100,000 per year. (*Id*.) Accordingly, the total $294,800 aggregate exercise amount of each grant was made with a three-year vesting schedule with one-third of the options vesting each year. (Op. 15).[6]

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[5] These facts were acknowledged by the Court. (OB Ex. H 7). Ravenswood never pled a disclosure claim with respect to this error. Because Ravenswood's complaint was so vague, out of an abundance of caution, on July 9, 2010 Defendants moved to dismiss any purported disclosure claim. (Transaction ID 32065498) (A000005). In response, Ravenswood "clarified that it is not advancing any such claims." (OB Ex. D 7 n.30 and 20).

[6] Ravenswood never alleged or introduced evidence to establish a value for the options awarded in 2005, instead confusing the value of the options with the aggregate exercise amount. For example, an option to purchase 100 shares of stock at $1 million per share does not have a "value" of $100 million; $100 million is the aggregate exercise amount. The value of the option would depend on the market price of the stock, its volatility, interest rates, the duration of the option, and other factors used in an option valuation model, such as Black-Scholes. In this example,

F. Exercise of the Options

In late 2006, Bassett and Thomas exercised options to purchase 66,666 shares of Winmill & Co. stock; Mark exercised options to purchase 66,666 shares in early 2007. (*Id.* 15). Pursuant to the terms of the PEP, Bassett, Thomas and Mark each paid $1,532.39 in cash to Winmill & Co. and gave the Company a promissory note for $195,000. (*Id*.). The interest rate on the promissory notes was set at the IRS federal rate, and interest amounts were paid primarily through payroll deductions. (*Id.* 15-16).

G. Forgiveness of the Promissory Notes

In February 2008, the Winmill & Co. board forgave the three promissory notes as a bonus for good performance in 2007. (*Id.* 17). In April 2008, the board rescinded the forgiveness when it determined that Winmill & Co. would need to make withholding tax deductions for Bassett, Thomas and Mark. (*Id.* 18). Later the board resolved to forgive the entirety of Thomas's promissory note and to forgive Mark's note in three tranches over three years. (*Id*.). Bassett requested that the board not forgive his note and the board determined his promissory note would not be forgiven. (*Id*.). Bassett's promissory note became due in December 2011. He was not then able to pay off the note and the board accepted a new note from him.

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if the market price of the stock were $10 per share, with little volatility, and the duration of the option were 1 day, the option would have essentially no value, notwithstanding the $100 million aggregate exercise amount.

(*Id*.). Following Bassett's death, his estate paid the $195,000 principle and all remaining interest due on the note (totaling $49,000). (*Id.* 19).

H. Facts Relating to the 2011 Action

1. Winmill Terminates the Registration of its Class A Stock

Prior to August 2004, Winmill & Co. was an SEC-registered company and had its Class A stock listed on the NASDAQ. (Op. 24). In August 2004, Winmill & Co. announced that it had filed a Form 15 with the SEC to terminate the registration of that stock. (B000750 (Thomas); A000137). On March 30, 2005, Winmill & Co. told its stockholders that the Company no longer was required to file reports and forms with the SEC; one of the reasons Winmill & Co. did so was to realize "significant cost savings" by being relieved of these reporting requirements. (A000137).

Even after Winmill & Co. no longer had SEC reporting requirements, Bassett preferred that the Company continue to prepare audited financial statements and provide stockholders with its financial information through press releases and on its website. (B00739 (Thomas); A000137).

2. After Bassett's Death, Winmill & Co. Stops Preparing Audited Financial Statements

Following Bassett's death in May 2012, Thomas Winmill and Winmill & Co. CFO Thomas O'Malley discussed if the audit of the 2011 financials should be halted (B000892 (O'Malley)), but decided that the audit would be completed because it

was nearly finished. (B00740 (Thomas)). After Bassett's death, Thomas and Mark (the remaining two directors) weighed the benefit of continuing to prepare audited financials against the burden and cost of doing so. (Op. 24). The directors decided that, because of the cost of the audits (approximately $20,000 per year for auditor's fees (B00895-B00896 (O'Malley)), management time spent on preparing information for the auditors' review, including drafting footnotes for the financial statements and reviewing accounting standards, and the lack of a commercial purpose for having audited financials,[7] the audits would stop. (Op. 24; B00736-B00738 (Thomas), B00895-B00896 (O'Malley)).

The Winmill & Co. board never again authorized the auditing of the Company's financial statement. (B00819-B00820 (Thomas)). The last audited financial statement, for the year ended December 31, 2011, was completed in October 2012. (Op. 24; A000450-A000472).

3. Winmill & Co. Still Prepares its Financial Information

Although Winmill & Co. no longer prepares audited financial statements, it continues to keep its general ledger. (B00894 (O'Malley)). From this general ledger the Company's unaudited financials are generated. (B00894 (O'Malley); A000511-A000513; A000514; A000515-A000516; B00525-B00526; B00527;

[7] No third parties required audited financials from Winmill & Co.—it is not required to provide its financials to any vendor, landlord, bank, or financer. (B00737-B00738 (Thomas); B00896 (O'Malley)).

B00528; B00529; A000524-A000525; B00530-B00531; A000517-A000523; A000484-A000485). The unaudited financial statements contain information regarding the revenues that Winmill & Co. earns from its investment management practice, realized and unrealized losses on investments in securities, its employment costs, professional fees that were paid or accrued, overhead such as rent and occupancy, and taxes. (B00893 (O'Malley); *see* A000511-A000513; A000514; A000515-A000516; B00525-B00526; B00527; B00528; B00529; A000524-A000525; B00530-B00531; A000517-A000523; A000484-A000485). The unaudited financials are used by Winmill & Co. for various purposes, including evaluating profitability, liquidity, cash on hand, investments, sources of income and expenses, and tax provisions. (B00895 (O'Malley)). As part of the resolution of the books and records portion of the 2011 Complaint, Defendants gave Ravenswood copies of Winmill & Co.'s general ledger and unaudited financial statements.

I. Procedural History of the Litigation[8]

1. The 2008 Complaint

On April 30, 2008, Ravenswood filed the class and derivative 2008 Complaint alleging a jumble of facts that it claimed constituted breaches of fiduciary duty. (A000317-A000331). Count I (brought on behalf of a class) alleged that the action

[8] The complete history of this litigation is far more tortuous than set forth here. Defendants have attempted to limit this description just to those events relevant to this appeal.

of the Defendants in implementing the PEP was a "rolling going private transaction" by a controlling stockholder. (A000329). Count I also alleged that the actions of the Defendants (a) relating to the PEP, (b) approving a stock repurchase plan, and (c) the approval by Bexil, a non-majority owned subsidiary of Winmill & Co., of the sale of York Insurance Services (in which Bexil had a 50% interest) to a third party, were interested transactions. (*Id.*). Count II (brought derivatively) alleged that (a) Defendants' actions with respect to the PEP and the stock repurchase plan improperly increased the Defendants' equity holdings at an unfair price, (b) Defendants' compensation was improperly obtained, and (c) the approval of the York sale by Bexil provided inappropriate compensation to defendants Bassett and Thomas. (A000330).

2. The 2010 Motion to Dismiss

In July 2010, Defendants filed a Motion to Dismiss most of Ravenswood's 2008 Complaint. (B00001-B00033 and B00045-B00064). Rather than amending its complaint, Ravenswood stood on it,[9] filing an Answering Brief in Opposition to Defendants' Motion to Dismiss. (Transaction ID 32898641) (A000006).

In its May 31, 2011 Dismissal Opinion, the Court of Chancery granted Defendants' motion to dismiss Count I, which alleged (on a class basis) that

[9] While standing on its original complaint, Ravenswood nonetheless improperly sought permission to amend if the Court deemed its allegations insufficient. (B00091).

Defendants breached their fiduciary duties by adopting the PEP and the stock buyback plan, by granting stock options with exercise prices that allegedly were below the stock's market value, and by approving Bexil's sale of its interest in York as a result of which Bassett and Thomas received bonuses from Bexil. (OB Ex. D). The Court found that Ravenswood's claim regarding adoption of the PEP failed to state a claim under Court of Chancery Rule 12(b)(6), there was no direct claim regarding the adoption and execution of the stock buyback plan, and there was no direct claim relating to the sale by Bexil. (*Id*. 9-19). The Court also largely granted, under Court of Chancery Rule 23.1, the motion to dismiss Count II (which alleged, on a derivative basis, the same fiduciary breaches as well as receipt of improper compensation), with the exception of (a) those claims involving the actual grant of stock options and (b) the claim that Defendants' vote of Winmill & Co.'s stock in Bexil in favor of the York Sale was self-interested and unfair to Winmill & Co. (*Id.* at 20).

On June 7, 2011, Ravenswood filed a Motion for Reargument on the Court's dismissal of claims relating to the stock buyback. (B00103-B00106) (the "First Reargument Motion"). Ravenswood argued it should be permitted to amend its 2008 Complaint to add certain facts. (*Id*.). The parties briefed the First Reargument Motion and the Court heard argument on August 31, 2011. (B00107-B00114; B00115-B00150).

In the November 30, 2011 Letter Opinion, the Court denied Ravenswood's First Reargument Motion and its request to amend its complaint. (OB Ex. F). With respect to reargument, the Court determined (among other matters) that Ravenswood had pled no particularized allegations regarding the class's voting rights and thus that the grant of the motion to dismiss was proper. (*Id.* 11-12). With respect to Ravenswood's request to amend its 2008 Complaint (the "First Amendment Request"), the Court held that, because Ravenswood had chosen to stand on its 2008 Complaint, rather than amend it in response to Defendants' Motion to Dismiss, Ravenswood was not permitted to amend under Court of Chancery Rule 15(aaa). (*Id.* 7-9).

3. The 2011 Complaint

In November 2011, after having its claims in the 2008 Complaint significantly narrowed, Ravenswood filed the 2011 Complaint, which contained both a books and records claim under Section 220, and another breach of fiduciary duty claim against Defendants. (A000386-392).

4. Ravenswood's Motion for Partial Summary Judgment on the 2008 Complaint

On May 16, 2013, Ravenswood filed a motion for partial summary judgment (B00158-B00168), claiming that the options issued by Defendants pursuant to the PEP were invalid because the written consent that adopted the PEP improperly

contained a preprinted date. (*Id*. 6). The Court called this motion "procedurally awkward" because there was no such claim in the 2008 Complaint, Ravenswood had not filed an application to amend on this issue, and arguably the claim was barred by Rule 15(aaa). (B00169-B00183). On November 27, 2013 the Court denied Ravenswood's motion, finding that the written consent was in compliance with 8 *Del. C.* § 228(c), and that there was no dispute that it had been signed by Bassett (the 100% voting stockholder) on the preprinted date. (*Id.*).

5. The 2016 Motion for Leave to Amend the 2008 Complaint

On February 2, 2016, Ravenswood filed a Motion for Leave to Amend its 2008 Complaint based on alleged date discrepancies in the written consent adopting the PEP (the "Third Amendment Request").[10] (A000528-A000577). On April 11, 2016, Ravenswood filed a related Motion to Compel seeking documents on the timing of the written consent approving the PEP. (Transaction ID 58844201) (A000038).

Oral argument was held on May 12, 2016 on these two motions. (B00291-B00411). The Court of Chancery explained (in response to Ravenswood's argument that its request to amend was based upon "newly discovered evidence" regarding the date on the consent; B00184-B00234) that "the facts that gave rise to

[10] Defendants have omitted discussing Ravenswood's Second Amendment Request, which was filed in 2012 and never went anywhere.

the amendment that's before the Court now were discovered five years ago." (B00297). The Court later stated: "It is not newly discovered evidence. It was produced long ago." (B00399) The Court denied, on the basis of laches, Ravenswood's requested amendments concerning the adoption of the PEP, noting "I have been given no explanation as to why there was not some effort to amend the pleading in some temporal proximity to that [document] production to put the defendants on notice that a claim would be based, even in part, on those facts." (B00397). On the derivative claim for breach of fiduciary duty in connection with the adoption of the stock option plan, the Court stated it had previously determined there were insufficient facts pled to excuse demand and that such facts would have been in hand and should have been pled 5 years earlier. (B00400-B00401). Ravenswood's failure to do so "is precisely the kind of situation that 15(aaa) is meant to address." (B00401).

The Court also denied Ravenswood's request to amend the claim alleging a rolling, going-private scheme because "[t]hat was addressed squarely in Ravenswood I [the opinion on the original motion to dismiss]" and "15(aaa), therefore, bars the claim." (B00402).

On May 16, 2016, Ravenswood filed a Motion to Alter or Amend a Judgment and or for Reargument on its Motion to Compel (the "Second Reargument Motion"). (Trans. ID 59010183) (A000042). The Court denied that motion on June 29, 2016.

(B00412-B00421).

6. The Amended 2008 Complaint

On August 4, 2016, Ravenswood filed its Amended Verified Class and Derivative Complaint (the "Amended 2008 Complaint"). (A000580-A000612). The Amended 2008 Complaint contained three counts: Count I – Breach of Fiduciary Duty in Connection with the Issuance of Stock Options and the Exercise Thereof on Behalf of the Class; Count II – Breach of Fiduciary Duty in Connection with the Issuance of Stock Options and the Exercise Thereof on Behalf of the Company; and Count III – Breach of Fiduciary Duty for Inappropriate Receipt of Funds in Connection with Bexil Transaction Derivatively on Behalf of the Company. (A000607-A000611).

7. Defendants' Motion for Summary Judgment

After depositions were completed (none were taken during the first 8 years of this litigation), on February 3, 2017, Defendants filed a Motion for Summary Judgment on all remaining issues in both cases. (B00422-B00458). The Court granted this motion in part, granting judgment on Count III of the Amended 2008 Complaint (Count I disappeared after trial as Ravenswood realized its claim as to the issuance of the options solely was derivative). The Court also clarified that Count II of the 2011 Complaint (the only remaining count in that complaint) only encompassed a claim related to the motivation behind the decision to stop preparing

financials, (B00476-B00477) because it had dismissed previously Ravenswood's claim that the failure to prepare and provide audited financials was a breach of fiduciary duty.

8. Document Production Following the Court's Summary Judgment Ruling

The Court of Chancery's summary judgment ruling determined that Ravenswood would be permitted to submit evidence regarding Winmill & Co.'s forgiveness of the promissory notes, stating that the "issue really raises two related, but ultimately separate questions: was the price set by the company's board for the options fair? and, if so, was the price the defendants actually paid for the options fair?" (B00471). Defendants had argued Ravenswood should be barred from expanding its claims on the eve of trial by attaching a new meaning to the phrase "price of the options." Since inception of the litigation in 2008, and as used in Ravenswood's 2016 Amended Complaint, "price of the options" had meant the $2.948 per share option exercise price set by the board pursuant to the PEP in 2005. Yet, in April 2017, one month before trial, the Court of Chancery was persuaded to expand the scope of the case to include what effectively was an excess compensation claim arising out of the 2008 forgiveness of the promissory notes.

The Court of Chancery's ruling caused Defendants to review again their documents for additional information regarding this new compensation claim. Prior to trial, Defendants produced six additional documents with respect to the 2008

forgiveness of the promissory notes. (B00532-B00533, B00534-B00537, B00538-B0083, A000483, A000473, A000745-749). Defendants included these document on the joint exhibit list. (B00586-B00587; B00589).[11]

J. The Court of Chancery's Opinion

In its Opinion, the Court of Chancery found Defendants breached their duty of loyalty because they failed to carry "their burden of proving that the amount they paid for their stock options was fair." (Op. 46). However, the Court awarded Ravenswood only $3.00 in nominal damages because Ravenswood failed to provide sufficient evidentiary support for its damage theory (which was rescission) and because the Court "cannot create what does not exist in the evidentiary record, and cannot reach beyond that record when it finds the evidence lacking" to award a remedy. (Op. 3, 63).

With respect to the one remaining claim in the 2011 Complaint, the Court determined Defendants did not breach any duties by forgoing audits of Winmill & Co.'s financials and ceasing to disseminate information to stockholders because these actions were driven by "valid business considerations rather than to punish Plaintiff for its Section 220 Action." (Op. 67).

[11] As explained below, at trial Ravenswood objected to the introduction of these exhibits.

K. Ravenswood's Attorneys' Fees Request

Following Ravenswood's creation of a $3 common fund, Ravenswood sought $300,000 in attorneys' fees and expenses from Winmill & Co. (B01108-B01122; *see also* B01123-B01163). In its Final Judgment, the Court of Chancery awarded Ravenswood $140,000 in legal fees and $25,000 in expenses, to be paid by Winmill & Co. (OB Ex. A).

ANSWERING ARGUMENTS ON APPEAL

I. THE COURT OF CHANCERY CORRECTLY DETERMINED RAVENSWOOD FAILED TO PROVE ANY REMEDY FOR ITS BREACH OF FIDUCIARY DUTY CLAIM

A. Question Presented

Did the Court of Chancery correctly place the burden on Ravenswood to prove damages and to provide the Court with a viable damage theory and evidence upon which the Court could base a damage ruling?

B. Standard of Review

"Appellate courts review a trial court's legal conclusions *de novo.*" *Bank of New York Mellon Tr. Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011). A trial court's evidentiary rulings will be upheld unless they constitute an abuse of discretion. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1, 20-21 (Del. 2005); *Hilco Capital, LP v. Fed. Ins. Co.*, 978 A.2d 174, 180 (Del. 2009).

C. Merits of Argument

1. The Court of Chancery Correctly Placed the Burden on Ravenswood To Prove Its Damages

Ravenswood argues that the Court of Chancery "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." (OB 21). The burden to prove damages properly was placed on Ravenswood.

"Plaintiffs must prove their damages by a preponderance of the evidence." *Beard Research, Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. 2010). While Delaware does not require "certainty" where a wrong has been proven, Ravenswood's burden to demonstrate damages is not eviscerated because an enhanced standard of review is applied. *See Encite LLC v. Soni*, 2011 WL 5920896, at *25 (Del. Ch. Nov. 28, 2011); *In re PLX Tech. Inc. Stockholders Litig.*, 2018 WL 5018535, at *56 (Del. Ch. Oct. 16, 2018) (awarding no damages after finding a breach of fiduciary duty because the application of an enhanced standard of review does not remove a plaintiff's burden "to prove that the breaches resulted in damages."). While "the specificity and amount of evidence required from the Plaintiff on the issue of damages is minimal" the Court "[must have] a basis to make such a responsible estimate" of damages. *Encite LLC,* 2011 WL 5920896, at *25. Thus, as the Court of Chancery explained here, it cannot award damages based on "rank speculation" and "'equity is not a license to make stuff up.'" (Op. 3, 51; *Cline v. Grelock*, 2010 WL 761142, at *2 (Del. Ch. Mar. 2, 2010) (although defendant breached his fiduciary duty, plaintiff failed to prove any damages because the harm was entirely speculative).

2. The Court of Chancery's Evidentiary Decisions Here Were Proper

It was Ravenswood's burden to identify an appropriate remedy to right any alleged wrongs. As part of this burden, Ravenswood should have considered the

impact rescission would have on its derivative client—Winmill & Co.—before requesting that remedy. Ravenswood apparently never considered this issue, and now attempts to blame the Court of Chancery (and, in some instances, Defendants) for its failure to do so.

a. Trial Testimony to which Plaintiff did Not Object Was Properly Admitted

At trial, Thomas testified at some length about the impact that Ravenswood's sole requested relief – rescission - would have on Winmill & Co. and on him personally:

> - The positive effects of rescission for him personally including the cancellation or return of the 66,666 shares of stock he owned resulting from the exercise of the disputed options (which were now worth approximately $1, much less than the $2.948 exercise price) and the amount he would financially benefit from such a return;
> - Winmill & Co.'s return to Thomas, Mark and Bassett's estate of the interest that was paid by them on the notes of $10,000 (for Thomas), approximately $30,000 (for Mark), and "considerably more" (for Bassett);
> - The payment by Bassett's estate of the $195,000 principal on the promissory note to Winmill & Co.;
> - Winmill & Co. potentially needing to refile its tax return;
> - Winmill's & Co. having to use approximately 10% of its available cash to repay the amounts to defendants.

(B00729).

Ravenswood did not object to Thomas's testimony at trial. (*Id.*).[12] Therefore, Ravenswood waived the right to challenge on appeal the admission of this testimony unless there is plain error. *See Riggins v. Mauriello*, 603 A.2d 827, 830 (Del. 1992); *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991). To show "plain error," "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Culver*, 588 A.2d at 1096 (quoting *Wainwright v. State,* 504 A.2d 1096, 1100 (Del. 1986), *cert. denied,* 479 U.S. 869 (1986)). Ravenswood has made no effort to meet this standard (not even acknowledging that it failed to object at trial to the testimony). Plain error did not occur because providing the Court of Chancery the practical outcome of Ravenswood's requested relief did not improperly prejudice Ravenswood (Ravenswood should have provided this evidence on its own if it was representing its client properly) nor did it jeopardize the trial process (it helped the Court of Chancery to understand the effect of Ravenswood's requested relief).

[12] Even if the Court of Chancery had sustained Ravenswood's objection to the exhibits that set forth information on the forgiveness of the promissory notes and the amounts paid by Defendants relating to the promissory notes (B00586-B00588), Thomas could have answered questions on this topic without the use of the exhibits. The exhibits made the testimony clearer and helped the Court better understand what occurred.

b. Defendants' Remedy Evidence Was Not Required to be Disclosed on the Pretrial Order

Ravenswood also complains that the Court of Chancery should not have admitted documents (and testimony) relating to rescission because Defendants' "defense" to this remedy was not set forth on the pre-trial order ("PTO") and because the admitted documents were produced late. (OB 22-23). Plaintiffs never objected on the former ground at trial, and thus it has waived the right to now object on appeal. *Riggins v. Mauriello*; *Culver v. Bennett*.

On the merits, Defendants' explanation why rescission made no sense here is not an affirmative defense that needs to be raised in an answer or separately in the PTO. Ravenswood set forth its request for rescission in the PTO section entitled "Statement of Relief Sought." (A000816). In that same section, Defendants sought "[a]n order granting judgment in defendants' favor on all remaining counts in both actions," and that was all that it needed to do. (*Id.*). Defendants routinely submit evidence showing why a requested remedy, or requested damages, is not appropriate without denominating their opposition to that remedy as a separate "defense." Indeed, Ravenswood's only legal support here are cases in which a party attempts to deviate from the pre-trial order at trial. (OB 22-23). Because Defendants had no obligation to set forth these facts in the PTO, there was no deviation at trial.

c. The Court of Chancery Appropriately Determined that Defendants' Document Production Regarding Forgiveness of the Debt Was Permissible

The documents introduced as JX85-88 and 92-93, related to the forgiveness of the promissory notes and the amounts Defendants paid to Winmill & Co. with respect to those promissory notes. (B00532-B00533, B00534-B00537, B00538-B0083, A000483, A000473, A000745-749). The Court of Chancery's determination in its summary judgment ruling that Ravenswood's new claim about the forgiveness of the promissory notes would be heard at trial caused Defendants to review again their documents for additional information regarding this topic; thereafter they produced additional documents that they intended to use at trial. (B00589-590).

Ravenswood objected to their introduction at trial, but the Court determined there was no substantive prejudice in admitting the evidence: "So I am here in search of the truth" and that it would consider documents that reflected what had occurred particularly because "I don't think that this is a surprise. I don't think it's a new theory. I don't think that it is something that is being spawn on the morning of trial or otherwise. It sounds like that's been the position that's been taken all along." (B00597).

While Ravenswood now claims it requested "all documents and records 'relating to' the promissory notes" (OB at 13), its actual request was much narrower:

"To the extent not previously produced by Defendants, records of all promissory notes made by the individual Defendants, including all promissory notes made by the Individual Defendants and forgiven by the Company." (A000496). None of the additional documents fell within this request.[13]

3. The Court of Chancery Properly Determined Rescission and Rescissory Damages Were Not Appropriate Remedies

Ravenswood apparently does not dispute that "[r]escission entails avoiding a transaction . . . and requires that the parties be restored to the status quo before the avoided transaction was consummated." *In re MAXXAM, Inc.*, 659 A.2d 760, 775 (Del. Ch. 1995), or that rescission results in the "unmaking" of the deal. *Norton v. Poplos*, 443 A.2d 1, 4 (Del. 1982). This was the relief Ravenswood requested before, during and after trial.

a. Winmill & Co.'s Lack of Funds Was Not the Basis of the Court of Chancery's Opinion

Ravenswood argues that the Court misapprehended the facts in finding Winmill & Co. lacked the funds to repay to Defendants' the money they paid for the

[13] Thus, Ravenswood's statement that "assuming JX93 is truthful, those discovery responses were false and concealed evidence when made" (OB 13) is just wrong. JX93 (A000745-A000749) was neither a record of the promissory notes, nor the notes themselves, but rather shows only interest due and paid on the promissory notes. This is why JX93 was produced only after Defendants became aware the Court was going to permit Ravenswood to present evidence on the forgiveness of the note (a claim that Defendants believed was not previously in the case). (B00588, B00592).

purchase of their stock and for the interest and principle paid on the promissory notes. (OB 18 (citing Op. 51)). In doing so, Ravenswood ignores the Court's opinion on Ravenswood's post-trial motion for reargument which specifically addressed this point and explained that any "overstatement" by the Court that the repayment could deplete Winmill & Co.'s cash resources did not change the outcome. (B01103-B01104). In its reargument opinion, the Court determined that such a repayment would have eliminated a material amount of Winmill & Co.'s cash "in a manner that could do more harm than good." (B01104). Ravenswood never has explained how the required repayment of these amounts would benefit Winmill & Co.

b. The Court of Chancery Used the Evidence Made Available to It by Ravenswood

Ravenswood also takes issue with the Court's reliance on the Company's stock price to determine the value of that stock. As the Court of Chancery explained "it relied on the *only* valuation evidence" presented at trial. (B01100) (emphasis in original). The Court would have taken Winmill & Co.'s assets into account but Ravenswood "presented no evidence or argument at trial regarding the amount or value of the Company's assets." (B01104).

While the Court noted that $2.68 per share (the trading price when the stock options were granted) "might provide a basis upon which to formulate a principled rescissory damages award" (Op. 59) based upon the highest intervening price of the

stock, the Court found no evidence upon which it could conclude Winmill & Co. "could have disposed of the [the stock] at the higher intervening price." (*Id.* (citing *Reis v. Hazelett Strip-Casting Corp*., 28 A.3d 442, 467-68 (Del. Ch. 2011))).

4. The Court of Chancery Correctly Determined Cancellation of the Stock Was Not An Appropriate Remedy

Cancellation is only available as a remedy when there is total failure of consideration for the purchase of the stock. *See* Op. 55 (citing *Diamond State Brewery v. De La Rigaudiere*, 17 A.2d 313, 318 (Del. Ch. 1941)); *Blair v. F.H. Smith Co.*, 156 A. 207, 213 (Del. Ch. 1931); *see also Sohland v. Baker*, 141 A. 277, 287 (Del. 1927). Cancellation here is not available because all Defendants paid par value for their stock, and made interest payments on the promissory notes. (Op at 55). In addition, Bassett's estate paid all the principal on Bassett's promissory note. (Op at 19 and n.71, n.72).

5. Ravenswood Is Not Entitled to Relief It Never Requested At Trial

On appeals to this Court "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Supr. Ct. R. 8. "Under Supreme Court Rule 8, this Court only considers questions fairly presented to the trial court." *Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017). Accordingly, if an issue is not raised below so the trial Court fairly can consider it,

it is not appropriate grounds for appeal. *Wilmington Mem'l Co. v. Silverbrook Cemetery Co.*, 297 A.2d 378, 380 (Del. 1972) (internal citation omitted).

Nor will this Court consider on appeal arguments first raised on a post-trial motion for reargument. *See States Marine Lines v. Domingo*, 269 A.2d 223, 226-227 (Del. 1970) (claim raised for the first time on motion for reargument came "far too late to merit attention" by the Supreme Court.); *Mr. Pizza, Inc. by Home Ins. Co. v. Schwartz*, 489 A.2d 427, 432 n.3 (Del. 1985) (trial court and Supreme Court ignored argument raised for the first time in response to motion for reargument). (B01077-B01089).

Here, Ravenswood's pre-trial brief failed to address a remedy and damages with the exception of its conclusion, which sought an order "rescinding all options issued to Defendants". (A000695). In the pre-trial order, Ravenswood sought "[r]escission of all of the challenged Stock issued to the Individual Defendants in 2005." (A000816). Ravenswood's opening post-trial brief again ignored all damages analysis, only requesting that "all options issued and all shares acquired pursuant to options issued under the 2005 PEP are cancelled; the Individual Defendants are liable to Winmill & Co. in the amount of all expenses related to the 2005 PEP and options issued thereunder and that as a result of their breaches may not recover any amounts paid to Winmill & Co. as a result of the options and exercise thereof, including payments under any purported notes related thereto . . . ."

(A000989). Defendants' answering post-trial brief highlighted the dearth of information on requested damages. (B01074). Rather than address this deficiency, in its reply post-trial brief Ravenswood essentially gave up, concluding that "the court should fashion appropriate relief as requested." (A001008).

At post-trial argument, Ravenswood could have addressed its damages theory but failed to do so, instead stating "this court has always fashioned remedies based on the evidence presented at trial and the Court's conclusions" (A001110) and suggesting that if the Court "want[ed] more on post remedies" additional proceedings could be held. (A001050).

In its Opinion, the Court analyzed a panoply of potential remedies (including ones that Ravenswood had not requested) but determined that it could not fill the gap that Ravenswood's "failure to plead, prove or argue for appropriate remedies" had created. (Op. 61-62). Thus, the Court awarded nominal damages of $1 from Thomas, Mark, and Bassett's estate. (Op. 63).

Ravenswood moved for reargument. (Transaction ID 6184228) (A000060). In its opinion on this request, the Court explained that Ravenwood never formulated a solidified damages theory, and instead made "rotating requests for relief" all of which it failed to support. (B01097). In denying Ravenswood's motion, the Court of Chancery noted that this motion "represents the first time in this ten-year litigation that Plaintiff has attempted to present any argument or 'evidence' in support of its

requested remedy with regard to the stock option grants." (*Id.*).

Ravenswood was not permitted to raise new arguments on a motion for reargument. *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 975581, at *1 (Del. Ch. Mar. 4, 2010), *aff'd*, 7 A.3d 485 (Del. 2010); *see also, e.g., Filasky v. Von Schnurbein*, 1992 WL 187619, at *1 (Del. Ch. July 29, 1992) ("In effect, the plaintiffs are seeking to raise on reargument an issue that they could have, but did not, raise at trial. Reargument is not permitted for that purpose.") These new arguments are waived and are improper for the trial court's consideration. *Silverberg v. ATC Healthcare, Inc.*, 2017 WL 6021422, at *1 (Del. Ch. Dec. 5, 2017) (denying motion for reargument because plaintiff waived argument due to its untimely presentation).

Despite Ravenswood's failure to present these damage arguments prior to its motion for reargument, the Court of Chancery nonetheless analyzed and rejected Ravenswood's theories in its Opinion. (B01099-B01102).

Ravenswood now, improperly, attempts to raise these same points on appeal. For example, Ravenswood, both on reargument and in this appeal (OB 24) cites to cases (largely appraisal cases) for the proposition that the Court may not defer to an "illiquid, thinly traded over-the-counter stock quotation" for a value determination. (B01099). This argument comes way too late. If Ravenswood believed that the value of Winmill & Co.'s stock was different than its market price, it was free to put

on evidence to the contrary. It chose not to do so, and neither its motion for re-argument nor this appeal are appropriate substitute venues for doing so in a timely fashion.

Ravenswood also argues (with no legal or factual support) that the interest paid on the promissory notes (which was part of the consideration used to exercise the stock options) somehow was *not* consideration for that exercise, and therefore any award of rescission or rescissory damages would not require a repayment of these funds. (OB 27). Because the interest payments obviously *were* paid to Winmill & Co. pursuant to the promissory notes, and because Ravenswood had no legal authority to support this argument, it was rejected by the Court of Chancery. (B01099-B001101 (citing cases for opposite position)). As explained above (*supra* p. 29), to obtain rescission or rescissory damages (the remedy requested by Ravenswood), the entire transaction must be unwound, not just part of it.

Ravenswood's Opening Brief raises for the first time a theory that the "ill-gotten shares [are] worth at least $1,420,000 to $1,150,000" based upon Winmill & Co.'s net asset value, which allegedly is "the usual price at which mutual funds trade," thus creating a share price of "at least $7.10 to $5.75". (OB 25). In addition to being an improper new argument, Ravenswood offered no evidence that the shares were worth any amount, that Winmill & Co.'s "net asset value" was any particular amount, that Winmill & Co. should be priced as a mutual fund, or that mutual funds

trade at their "net asset value."[14]

Ravenswood's claim that the "conclusion that Bassett paid the principal amount due on his note is also without evidentiary support" (OB 28) is strange, because there was ample support for this finding. Thomas and Winmill & Co.'s chief operating officer (Thomas O'Malley) both testified this amount was paid by the Estate. (B00723-B00724, B00725-B00729 (Thomas), B00889-B00890 (O'Malley)), and multiple documents memorialized this payment. (B00538-B0083; A000483 (ordering wire transfer); A000745-A000749).[15]

Finally, Ravenswood argues that Bassett's promissory note "would have been forgiven if Bassett so desired" (OB 28), but he did not so desire, and the entire principle amount (plus interest) was paid.

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[14] Ravenswood also raises for the first time on appeal that it may be entitled to disgorgement. (OB 29-30). Disgorgement is an equitable remedy that requires a fiduciary to relinquish any personal profit made as the result of a breach of fiduciary duty. *See Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 907-908 (Del. Ch. 1999). As Thomas explained, because the stock received as a result of exercising the options was worth far less than the exercise price, the directors (but not Winmill & Co.) would be better off if the awards were rescinded.

[15] Without citing any evidence, Ravenswood also raises for the first time on appeal that the "belated payment by Bassett's estate did not include interest and penalties". (OB 28). This is again wrong. Bassett's note was for $195,000 but his Estate paid $212,473 following his death. (*See* B00723-B00724, B00725-B00729 (Thomas), B00889-B00890 (O'Malley); B00538-B0083; A000483; A000745-A000749).

II. THE COURT OF CHANCERY PROPERLY DISMISSED RAVENSWOOD'S CLAIMS ON (A) THE ADOPTION OF THE PEP AND (B) RAVENSWOOD'S VOTING RIGHTS

A. Question Presented

Did the Court of Chancery err in dismissing Ravenswood's claims on 1) the adoption of the PEP, and 2) Ravenswood's voting rights?

B. Standard of Review

The appeal from a decision granting a motion to dismiss is reviewed *de novo*. *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 252 (Del. 2017); *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002).

C. Merits of the Argument

1. The Court of Chancery's Dismissal of Ravenswood's Derivative Claim Regarding the Adoption of the PEP

In 2011, the Court of Chancery determined that Ravenswood's claim regarding *adoption* of the PEP failed to state a claim under Rule 12(b)(6) (the claim regarding the actual *granting* of the stock options was not dismissed and was tried in 2017). (OB Ex. D 10). The Court considered that the PEP permitted but did not require the grant of options to purchase 500,000 shares of Class A stock to key employees, directors, and officers at a time when approximately 1,509,867 Class A shares were outstanding. (*Id.* 10-11). The Court acknowledged that the directors would have the eventual burden of proving the entire fairness of the transaction but that Ravenswood first "bears the burden of alleging facts that suggest the absence of

fairness." (*Id.* 12) (citing *Monroe County Emp. Ret. Sys. v. Carlson*, 2010 WL 2376890, at *2 (Del Ch. June 7, 2010)). The Court then identified several deficiencies with Ravenswood's PEP adoption claim including 1) that any dilutive effect could "only be measured by examining how options were actually issued" (a claim that was not dismissed); 2) that the board was only authorized to grant options with an exercise price 110% of the then fair market value; 3) that Defendants already controlled all voting rights through their ownership of Class B shares; and 4) even if all options authorized under the PEP were granted to Defendants they would not own a majority of the Class A shares. (*Id*. 12).

As explained above, on June 7, 2011, Ravenswood sought to salvage its dismissed claims with its First Reargument Motion (B00103-B00106). That motion also requested "leave to amend with respect to the dismissed claims." (B00106).

On November 30, 2011, the Court denied this motion, including Ravenswood's request to amend the 2008 Complaint. (OB Ex. F). The Court first addressed Ravenswood's request that it be permitted to amend the 2008 Complaint to assert new allegations regarding the adoption of the PEP. (OB Ex. F 3; *see also* B00104-B00105 ¶ 3).

In denying that request, the Court noted that, when faced with the motion to dismiss, Ravenswood had two options under Rule 15(aaa): to stand on its complaint

or amend it before the response was due. (OB Ex. F 8). Once Ravenswood chose to stand on its 2008 Complaint, then any dismissal would be with prejudice, '"unless the Court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances." (*Id.* 5-6). The Court found that: "[t]here has been no showing that dismissal with prejudice would not be just and, thus, Ravenswood may not now amend the Complaint to make new allegations regarding the adoption of the Performance Equity Plan." (*Id.* 9).

The Court then turned to Ravenswood's arguments that it should alter or amend its May 31 Order. Here, Ravenswood first argued that the Court made a mathematical error in that Order because it stated that the defendants would hold 47% of Winmill's total shares if the PEP and stock buyback plan were to be fully implemented, and the correct percentage should have been 53%. (OB Ex. F 10). Ravenswood asserted that this was "important because the greater percentage suggests more strongly that '[t]he combination of the stock buybacks and options grants constitutes a rolling 'going private' scheme by a controlling stockholder devoid of any of the required substantive or procedural protections.'" (OB Ex. F 3). The Court rejected that argument, reasoning that the mathematical error was not material; as the Court explained, it dismissed Ravenswood's claim regarding adoption of the PEP "because the only allegation the Complaint made with regard to that plan was that it had a dilutive effect on public shareholders' equity," and

"[t]hat effect alone does not render the plan unfair." (OB Ex. F 10-11).[8]

Ravenswood also argued that (1) its 2008 Complaint contained "particularized allegations regarding the class's voting rights, and, thus, that demand should have been excused as to the claim that the stock buyback harmed Winmill," and (2) "because the combined effect of the [2005 PEP] and the [Stock Buyback] 'is to provide Defendants absolute voting control in those circumstances where the Class A shares would have a vote,'" Ravenswood had established that demand was excused. (*Id.* 4-5). The Court rejected these arguments, again stating that the 2008 Complaint's only claim regarding the adopting of the PEP was that it had a dilutive effect, and that it did not include any allegations that the Class's voting rights were harmed by the adoption of the PEP or the stock buyback. (*Id.* 12).

Thus, Ravenswood's "motion to alter or amend the May 31 Order, its motion for reargument, and its motion to amend the Complaint [were] denied." (*Id.* 13). Ravenswood appeals from these rulings.

2. The Dismissal of the PEP Adoption Claim Was Not "Based on IRS regulations"

Ravenswood appears to assert that, with respect to the adoption of the PEP, it pled that the exercise price of the options was improper and the Court of Chancery

[8]The Court also noted that, pursuant to Rule 15(aaa), plaintiff was not permitted to amend its 2008 Complaint to present new allegations regarding the adoption of the PEP. (*See* OB 10, n. 18).

improperly relied on IRS regulations in determining that the adoption of the exercise price was not a breach of fiduciary duties. (OB 32-33). In making this argument, Ravenswood conflates two distinct issues. At the motion to dismiss stage in 2011, the Court found Ravenswood's pleading was inadequate to state a claim on the adoption of the PEP. (OB Ex. D 9-13). The Court's opinion does not reference IRS regulations and thus those regulations were not the basis for the dismissal of the claim. (*Id.*).

Later, in the Court of Chancery's April 27, 2017, summary judgment opinion, the Court ruled that because the Defendants had set the option strike price at 110% of fair market value (the amount required by IRS regulations set forth at 26 *U.S.C.* § 422) (B00468), this exercise price did not constitute the basis for a finding that the Defendants had paid an unfair price for their stock. Nonetheless, the Court permitted the unfair price claim to go to trial (B00471) and later determined that Defendants had not met their burden of proving entire fairness on this claim. (Op. 3, 32). Thus, the Court's holding that Defendants did not establish they paid an entirely fair price moots any additional theory (such as the IRS-set exercise price being inadequate) Ravenswood had with respect to the price being unfair.[16]

[16] Ravenswood also argues it pled that the option price was not adequately disclosed to the stockholders (OB 10). Ravenswood pled no disclosure claim. (OB Ex. D 7 n.30).

3. The Court of Chancery Properly Dismissed Ravenswood's Individual Claim on Adoption of the PEP

Count I of Ravenswood's original 2008 Complaint asserted an individual claim for breach of fiduciary duty in connection with the board's adoption of the Stock Option Plan. (B00026). The Court of Chancery held that, because: (a) the original 2008 Complaint alleged the PEP only authorized but did not require the board to grant stock options with an exercise price not lower than market value; (b) Defendants already controlled all of Winmill & Co.'s voting stock; and, (c) even if all options authorized under the plan were granted the Defendants would not obtain a majority interest in the Class A shares, Ravenswood had failed to state a claim. (OB Ex. D 12-13). On appeal, Ravenswood argues that the adoption of the PEP (in conjunction with the 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." (OB 33-34). This individual claim has no merit.

First, the adoption of a stock option plan later determined to be invalid would cause direct harm to the corporation and would affect the stockholders only derivatively. *See Feldman v. Cutaia*, 951 A.2d 727, 730 (Del. 2008) (harm suffered from issuance of invalid stock options is derivative); *Byrne v. Lord*, 1995 WL 684868 (Del. Ch. Nov. 9, 1995) (derivative action challenging validity of stock

option plan).

Second, Ravenswood's assertion that a change in voting rights occurred as a result of the combination of the stock repurchase plan and the grant of options was properly dismissed because it lacked sufficient factual support. (OB 5, 33-34). In the 2008 Complaint. Ravenswood pled only that, on July 10, 2006, Winmill & Co. instituted a plan to repurchase up to 500,000 shares of its Class A stock on the open market, that in 2006, the Company repurchased 10,147 shares at a total cost of $43,564 ($4.29 per share), and that in 2007, the Company repurchased 178,235 shares at an average price of $5.90 per share. (A000325 ¶ 32). The 2008 Complaint does not allege that these repurchases were made at an unfair price.

The 2008 Complaint also failed to state a valid individual claim for relief on the effect of the combination of the PEP with the stock repurchases. In *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), this Court clarified the distinction between individual and derivative claims, stating that the determination of whether a stockholder's claim is individual or derivative

> must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?

Tooley, 845 A.2d at 1033. The Court further explained that to state a direct claim, "[t]he stockholder's claimed direct injury *must be independent of any alleged injury*

to the corporation." *Id.* at 1039 (emphasis added). The stockholder must demonstrate that he "can prevail *without showing an injury to the corporation*." *Id.* (emphasis added). The decision in *Tooley* approved the analytical approach in such earlier decisions as *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348 (Del. 1988) and *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008).

The 2008 Complaint fails to allege *any* harm to the other Class A stockholders from the repurchases. It alleges that the effect of the alleged wrongful conduct was "to erode the equity of the Class' shares" (A000329 ¶ 48), and that the stock repurchases "increased the equity ownership of Defendants." (A000325 ¶ 34). The effect of the repurchases, however, was not to "erode" anyone's interest or to increase the Defendants' interest disproportionately to the other stockholders' interests. Rather, all stockholders' equity interests were increased proportionally as a result of the repurchases. Nor, as the Court of Chancery held, could this issuance have decreased Ravenswood's voting rights, because the voting stock was held solely by Bassett Winmill. (OB Ex. D 1). Additionally, there was no allegation that the repurchases were made at too high a price, and thus no facts were pled that the value of the outstanding stock was impaired. (*Id.* 14).

4. The Court of Chancery Properly Found that Ravenswood's PEP Adoption Claim Was Barred by Laches

On August 26, 2010, (two years and four months after it commenced this lawsuit), and while Defendants' motion to dismiss was pending, Ravenswood served

its first set of discovery requests (*see* B00034-B00039, B00040-B00044**)**. Defendants served written responses on November 30, 2010 (A000353-A000357) and produced their first installment of responsive documents on June 17, 2011. (B00254).

Included within this June 17, 2011, production was a copy of the 2005 Written Consent that contains a page with Bassett and Thomas Winmill's signatures which includes a telecopy tag line. (*Id.* 14). This tag line states: "May 24 05 10:08 a Bassett S. Winmill 732 741 8861." (A000183). That copy of the 2005 Written Consent also contains a page with Mark Winmill's signature which includes a telecopy tag line stating: "May 24 10:23 a Tuxis Corporation 845-677-2800." (A000184). It is apparently the absence of these telecopy tag lines on the 2005 Written Consent that was produced in 2008 in a prior Section 220 Action that has caused Ravenswood to argue that this 2008-produced document was "altered." (*See* A000967, A000972). Ravenswood has never explained why, if the absence of this tag line is so important, it did not raise this matter until years after it received the relevant documents.

On February 2, 2016, nearly five years after receiving the written consent with the telecopy tag lines, Ravenswood argued that it should be permitted to amend the Complaint due to the allegedly "newly discovered evidence" that the written consent form is dated as of May 23, 2005 but bears a fax tag line of May 24, 2005.

(B00393). Ravenswood sought to amend its Complaint to: 1) challenge the option issuances for lack of consent, 2) challenge the adoption of the PEP, and 3) challenge the so-called "rolling going-private transaction." (*Id.*).

As explained above, the Court of Chancery found that the claims regarding adoption of the PEP were barred by laches. (B00397). Despite Ravenswood's assertions that it "subsequently discovered facts indicating that the shareholder consents used to adopt the PEP were backdated" (OB 34) because the consents "*had been altered to remove the facsimile tag lines,*"[17] the Court found that Ravenswood gave "no reasonable explanation for the delay in asserting any claims" based on the fax tag line or "as of" dating. (B00397). The consent with the fax tag lines was produced on June 17, 2011 and the Court was "given no explanation as to why there was not some effort to amend…in some temporal proximity to that production" and that "[i]n the absence of that explanation" it was unreasonable to assert the claim 6 years later. (B00397-B00398).[18] The Court found this delay was prejudicial to Defendants because in the intervening time Bassett died and Defendants therefore

[17] Ravenswood had presented no evidence that the written consent was altered. (*See generally* OB).

[18] Ravenswood, incorrectly, states that the Court found its "laches" was due to its failure to depose Bassett Winmill before his death (OB 5, 35). The Court actually found that Ravenswood had committed laches because of its failure to properly raise this claim until after Bassett Winmill died.

were unable properly to prepare their defense.[19]

Based upon laches, the Court properly rejected Ravenswood's claim that there was new evidence. The Court found "It is not newly discovered evidence. It was produced long ago." (B00399).

5. The PEP Was Authenticated at Trial

Although not directly related to its appeal from the Court's dismissal of the claim involving adoption of the PEP, Ravenswood continues to assert that the PEP entered into evidence at trial was not properly consented to or is not the correct document.[20] (OB 10-12). At trial, the Court of Chancery determined that the PEP had been properly authenticated and could be entered into evidence. (B00654-

[19] Ravenswood improperly blames Defendants for its own failure to analyze the documents that Defendants produced, stating "Defendants never informed Plaintiff that the document without the fax tag line had been altered." (OB 34-35). This was a request for production, in response to which defendants produced relevant requested documents. Defendants had no duty, absent an interrogatory requesting the information (which was not done), to "explain" anything about the produced documents to defendants. It was Ravenswood's job to review the documents and ask questions (either of witnesses or counsel) if it had them. It did not do so. While Ravenswood may not properly have examined the documents until years later, that is not defendants' fault.

[20] Ravenswood also argues that the price set forth in the PEP could not have been accurate because it was sent in an e-mail from Ravenswood's counsel at 2:39 on May 23, 2005 when the market had not closed for the day. (OB 12). As the Court of Chancery concluded, it was not unusual for the price of Ravenswood's stock not to change during the course of the day because it was a thinly traded stock. (Op. 14 n.51). *See* B00524 reflecting Winmill & Co.'s stock price for May 23, 2005-June 30, 2005.

B00667 (Thomas)). Given the extensive evidence presented at trial on this issue, the Court did not abuse its discretion in making this determination. (B00614-B00628 (Thomas); A000205-A000209; A000210-A000225).

III. RAVENSWOOD NEVER PLED A "SELF-INTERESTED OPERATION" CLAIM; THE COURT OF CHANCERY PROPERLY DISMISSED ANY COMPONENTS OF THAT CLAIM THAT RAVENSWOOD ACTUALLY BROUGHT, AND FOUND AGAINST RAVENSWOOD ON ITS FINANCIAL REPORTING CLAIM

A. Question Presented

Although Ravenswood never pled a "Self-Interested Operation Claim," did the Court of Chancery act properly in dismissing the components of that claim and finding Ravenswood failed to prove its financial reporting claim.

B. Standard of Review

The appeal from a decision granting a motion to dismiss is reviewed *de novo*. *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 252 (Del. 2017); *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 894 (Del. 2002). In reviewing the Court of Chancery's factual conclusion that the Defendants did not violate their fiduciary duties by ceasing to create audited financial statements, the Court should apply a "clearly erroneous" standard of review. *Bank of New York Mellon Tr. Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011) (citation omitted).

C. Merits of the Argument

1. The Components of any "Self-Interested Operation Claim" Were Properly Dismissed By The Court of Chancery

Ravenswood's Opening Brief describes a challenge to the Defendants' "operation of Winmill for themselves only and not for all shareholders" (OB 1) and labels this purported cause of action the "Self Interested Operation Claim."

Ravenswood argues that the evidence of this so-called cause of action is as follows: 1) delisting Winmill & Co.'s stock; 2) not paying dividends; 3) terminating disclosures to the stockholders;[21] 4) terminating the preparation of financial statements; 5) operating "in secrecy and without oversite" [sic]; 6) paying themselves whatever they chose; 7) awarding themselves free stock; and 8) seeking to acquire shares of the stockholders. (OB 6, 38). Ravenswood never brought such a cause of action; only on appeal is it attempting to bring together (a) claims it never brought below ((1), (2), (5), (6) above), (b) claims that were dismissed below ((3) and (8) above), and (c) claims on which it went to trial ((4) and (7) above).

In dismissing Ravenswood's claims related to the adoption of the PEP and the Stock Buyback and trying other parts of the claim, the Court of Chancery implicitly rejected Ravenswood's argument that "together, these actions amounted to a scheme by the Defendants 'to erode the equity of the Class's shares, to permit the Defendants to pursue a going private transaction, [and to] enhance the equity of these individual Defendants . . . ,' both 'at the expense of the Class . . . and at the expense of the Company.'" (OB Ex. D (citing A000329 ¶ 48 and A000330 ¶ 51)). In its 2011

[21] Ravenswood also argues that Winmill & Co. had a duty to correct the incorrect disclosures regarding the PEP (OB 10), and that the Court of Chancery "erred as a matter of law in refusing to permit Plaintiff to proceed on discovery and trial of this claim on a derivative basis." (OB 33). However, Ravenswood never pled a disclosure claim, (OB Ex. D 7, n.30) no doubt because Winmill & Co.'s stockholders were not required or entitled to take any action with respect to the disclosure at issue. (OB Ex. H 7).

decision denying reargument on the motion to dismiss, the Court explained that it did not consider the PEP and the Stock Buybacks

> as part of a single scheme because the Complaint does not contain any allegations that would tie the two efforts together. The Complaint merely states, as a conclusion: "[t]he combination of the stock buybacks and options grants constitutes a rolling 'going private' scheme by a controlling stockholder devoid of any of the required substantive or procedural protections." Compl. ¶35. The Complaint does not explain why the Performance Equity Plan and the stock buyback should be viewed as a single scheme nor does it delineate the missing "required substantive or procedural protections" attendant to the "going private" scheme.

(OB Ex. F 7 n.11).

In its May 31, 2011 Opinion, the Court of Chancery dismissed Ravenwood's stock buyback claim, both direct and derivatively. (OB Ex. D 15). The Court looked at the buyback claim both as one for diminishing the Winmill & Co.'s value and for reducing the public shareholders' proportional ownership of Class A shares. Ravenswood, however, failed to plead that the transactions were completed at other than market value or that the repurchases harmed the stockholders' voting rights. With respect to the derivative claim, the Court found that Ravenswood failed to plead that Defendants were interested parties to the stock buyback or that the buyback program was not a product of valid business judgment.

2. The Court of Chancery Properly Found Against Ravenswood On Its Claim Relating to Preparation of Audited Financials

Ravenswood's 2011 Complaint set forth two counts. Count I was a normal request to produce certain books and records of the Company, while Count II awkwardly attached a breach of fiduciary duty claim against Defendants for their "refusal to have [Winmill & Co.] provide [its] shareholders reasonable and regular financial information" and requested that the Court of Chancery order Defendants to provide financial statements for the prior two years and continue to provide "prompt regular disclosures." (Op. 27). The only aspect of this fiduciary duty claim that withstood Defendants' Motion to Dismiss was "the timing or potential motivation for stopping the preparation of [the] audited financial reports and perhaps other financial information." (*Id*. 28-29). The Court thereafter repeatedly rejected Ravenswood's effort to expand this claim to include Winmill & Co.'s decision not to generally send financial information to its stockholders. (B00476-B00477; Op. 64).

The evidence at trial demonstrated that, prior to 2004, Winmill & Co. was listed on NASDAQ and thus obligated to prepare audited financial statements and send regular financial information. (Op. 24). In February 2010, due to costs and litigation risks, Winmill & Co. stopped distributing financial information to its stockholders. (*Id.*).

On November 17, 2011, Ravenswood filed its second 220 demand, which included a demand for books and records. (A000386-A000392).

After that filing, Winmill & Co. had its financial statements audited for calendar year 2011; the audit was completed and dated October 10, 2012. (A000450-A472). In the fall of 2012, Winmill & Co. stopped preparing audited financial statements. (Op. 24).

Bassett was the one director at Winmill & Co. who favored the preparation of audited financials, even though they were not required. (Op. 24). Thomas and Mark deferred to Bassett's wishes. (B00739 (Thomas), B00892 (O'Malley)). Bassett died in May 2012. (Op 24). After Bassett's death, to save time and money, no new financial audits were authorized by Defendants. (Op. 24). The uncontroverted trial testimony was that preparing the audited financial statements were time consuming for management, audited financials were not needed for any business purpose and they cost a significant amount of money to prepare (approximately $20,000 for 2011) for Winmill & Co. (*Id.* 24, n.100). Moreover, Winmill & Co. continued preparing financial information and has all financial transactions recorded on its computer system. (Op. 24). Therefore, if a stockholder requested Winmill & Co.'s books and records, that information was available. (*Id.*).

Ravenswood, nonetheless, notes that Winmill & Co.'s last financial audit was completed in October 2012, around the same time the parties were involved in motion practice on the 2011 Complaint, and speculates that the latter must have driven the decision not to continue to prepare audited financial statements.[22] (OB 39-42). After trial, the Court of Chancery found the circumstantial evidence of temporal proximity (between the filing of the 2011 Complaint and the discontinuance of producing audited financial statements) was insufficient to reveal an improper motive. (Op. 64-67).

The Court of Chancery found that the entire fairness standard of review did not apply to this claim, because the Defendants did not appear on both sides of the transaction or derive a personal benefit from the decision to stop preparing audited financial statements. (Op. 65). Additionally, the Court determined that there was no evidence of "any desire to punish" Ravenswood for its 2011 Complaint. (Op. 67). The Court based its finding on Thomas's and Mark's testimony that "the decision to discontinue the Company's preparation of audited financial statements was made to save the Company time and money and reduce the risk of disclosure-related

[22] Ravenswood also complains that Winmill & Co requested Ravenswood to sign a confidentiality agreement that Ravenswood refused to sign, describing it as being forced to "surrender trading rights to its stock." (OB 8). Winmill & Co. was attempting to ensure that it would not be charged with aiding and abetting Ravenswood's potential insider trading as a result of Ravenswood buying stock from or selling stock to others who did not have Ravenswood's non-public information.

litigation"[23] without commensurate benefit to Winmill & Co. (Op. 67). Thomas and Mark "also credibly explained that the timing corresponded with the passing of their father." (*Id.* 67). Moreover, the Court rejected Ravenswood's "attempt[] to revive claims based on a general obligation to disclose information to stockholders." (*Id.* 64).

There was no evidence to the contrary. Thus, the Court of Chancery's determination here was entirely proper.

[23] Ravenswood's citation to Thomas Winmill's deposition testimony (OB 16) is misleading. His testimony only reflects a concern that if Winmill & Co. were to begin again the practice of sending financial information to its stockholders, it could be faced with a claim by Ravenswood for attorneys' fees. (B00522-B00523).

ARGUMENT ON CROSS APPEAL

I. THE COURT OF CHANCERY INCORRECTLY RULED THAT RAVENSWOOD WAS ENTITLED TO $140,000 IN LEGAL FEES AND $25,000 IN EXPENSES

A. Question Presented

Whether, given the Court of Chancery's correct holding that Ravenswood was entitled to only $3.00 in nominal damages as a remedy, did the Court of Chancery err in awarding $140,000 in legal fees and $25,000 in expenses to Ravenswood, to be paid by Winmill & Co. This question was raised below. (B01180-B01122; B01123-B1163; Exhibit 1 at 39-40)[24].

B. Standard of Review

The Court of Chancery's determination that Ravenswood is entitled to $140,000 in legal fees and $25,000 in expenses, will be overturned upon a clear showing that it abused its discretion. *See Tandycraft, Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989). Any legal principles applicable to the attorneys' fees decision are subject to *de novo* review. *See Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011 (Del. 2007).

[24] The Oral Argument and Rulings of the Court on Plaintiff's Motion for An Award of Attorneys' Fees and Expenses Transcript (Transaction ID 62455059) is attached as Exhibit 1 to this brief.

C. Merits of Argument

1. The Standard for Evaluating Ravenswood's Request for an Award of Attorneys' Fees

"Delaware follows the American Rule, under which litigants ordinarily are responsible to pay their own attorneys' fees, regardless of the outcome of the lawsuit." *Alaska Elec. Pension Fund*, 941 A.2d at 1015. There are two commonly recognized exceptions to the American Rule potentially applicable here. *See In re First Interstate Bancorp Consol. S'holder Litigation*, 756 A.2d 353, 357 (Del. Ch. 1999). "In the realm of corporate litigation, the Court may order the payment of counsel fees and related expenses to a plaintiff whose efforts result in the creation of a common fund . . . , or the conferring of a corporate benefit." *Tandycraft*, 562 A.2d at 1164 (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).

Common monetary funds are created in derivative or class actions which result in the recovery of money or result in the imposition of corporate changes that are designed to produce monetary savings in the future. *Tandycrafts*, 562 A.2d at 1164-1165. In the event a common monetary fund is created, "the stockholder class is entitled to an award of counsel fees and expenses for its efforts in creating the benefit." *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997). It has been "explicitly recognized that where a fund is created, fees will normally be paid from that fund since that is the most appropriate method of

spreading the costs of the litigation." *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *4 (Del. Ch. Nov. 27, 1990).

"The corporate benefit doctrine comes into play when a tangible monetary benefit has not been conferred." *In re Dunkin' Donuts*, 1990 WL 189120, at *3; *id.* at *4 (in a corporate benefit case "there is no creation of a fund"); *see In re First Interstate Bancorp Consol. S'holder Litigation*, 756 A.2d 353, 357 (Del. Ch. 1999) ("'Alternatively, the corporate benefit doctrine comes into play when a tangible monetary benefit has not been conferred,' but some other valuable benefit is realized by the corporate enterprise or the stockholders as a group.") (citation omitted). While a corporate benefit is not pecuniary, there must be a finding that the litigation "specifically and substantially" advanced the claim. *See Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966).

2. The Determination of the Court of Chancery

The Court of Chancery determined that the common fund exception to the American Rule does not apply here. This determination was incorrect and ignored that Ravenswood sought only damages or damages-related relief (such as rescission), and was awarded only nominal damages. At no time did Ravenswood request relief on a theory that it was creating a corporate benefit distinct from damages or rescission, nor did it introduce evidence relating to such a corporate benefit.

Nevertheless, the Court decided that the litigation "admonished defendants for their past practices and for their conduct" and "serves to prevent or at least dissuade this board from repeating its past practices . . ." (Exhibit 1 34). The Court never explained how its ruling "prevent[ed]" anything in the future, merely speculated that the ruling "dissuaded" anyone, and then used this finding to conclude that the corporate benefit doctrine applied and to undertake a quantum meruit analysis to determine the appropriate fee. To make such a finding without evidence was an abuse of its discretion.

In its quantum meruit analysis, the Court accurately acknowledged that "there was a good bit of wheel-spinning in this litigation, including a good bit of unnecessary and redundant motion practice" (Exhibit 1 37) by Ravenswood's counsel. Notwithstanding these problems with Ravenswood's ten years of litigation, which produced only a $3 common fund recovery, the Court awarded a fee of "10 percent of the lodestar, or $140,000." (Exhibit 1 39). The Court of Chancery also found a cost adjustment was warranted and awarded 75% of Ravenswood's costs, or $25,000. (Exhibit 1 39-40).

3. Ravenswood Created a $3.00 Common Fund

The $3.00 nominal damages award is the only discernable benefit conferred upon the Winmill & Co. as a result of this litigation. (Op. 27). To determine the amount that constitutes a reasonable fee award, the size of the common fund created

traditionally is the most important factor. "This court has traditionally placed greatest weight upon the benefits achieved by the litigation." *See In re Emerson Radio S'holder Derivative Litig.*, 2011 WL 1135006, at *2 (Del. Ch. Mar. 28, 2011) (internal quotation omitted; citation omitted); *In re Anderson Clayton S'holders Litig.*, 1988 WL 97480, at *1 (Del. Ch. Sept. 19, 1988) ("We have, for good reasons having to do with efficiency and incentives, resisted the tendency to make hours expended in the effort a central inquiry, at least where a monetary benefit is achieved by the litigation.").

4. Ravenswood Created No Corporate Benefit

The Court of Chancery erred when it decided that Ravenswood had created a corporate benefit when it caused the Court to issue an opinion that:

> admonished defendants for their past practices and for their conduct in connection with the awards at issue in this case. The decision also serves to prevent or at least dissuade this board from repeating its past practices with respect to stock option plans by having declared that the board's past practices in this regard implicate and, if repeated, violate the fiduciary duty of loyalty.

(Exhibit 1 34).

This determination was nothing new under Delaware law—corporate directors have a duty of loyalty to their company. *See Schoon v. Smith*, 953 A.2d 196 (Del. 2008). The Court of Chancery only found that the Defendants failed to meet their burden of establishing the entire fairness of its 2008 compensation

practice in connection with the 2005 option grants. No governance changes were urged by Ravenswood, agreed to by the Defendants, or required by the Court.

Nonetheless, Ravenswood argued that it should be awarded material attorneys' fees and costs for causing the Court to admonish defendants and possibly dissuading this board from repeating its past, unspecified "practices" (Exhibit 1 34; B01120-B01121), when the actual common fund benefit found was only $3.00. The Court of Chancery accepted Ravenswood's claim (Exhibit 1 34), although there was no evidence as to what specific practices had been prevented or dissuaded, or what the value was to the Company of such reminders or admonishments. Ravenswood's statement that a "reminder" or "admonishment" of a basic legal principle was a legally recognized corporate benefit was likewise unsupported. The reason why there was no evidence on this issue was that Ravenswood never sought a corporate benefit. That theory was only seized upon after trial, after the post-trial briefing, after all the evidence was submitted, and all the arguments were made, when Ravenswood's case for damages essentially failed (due to its own decisions).

The Court of Chancery stated that to be cognizable the "corporate benefit"

> conferred must [] be substantial in the sense that its value to the [corporation] is immediately discernible rather than speculative in character. Nevertheless, in order for a benefit to be substantial, it need not involve the recovery of property or prevention of a dissipation of assets.

(Exhibit 1 33). Under this standard the Court of Chancery's determination that a

corporate benefit was created was in error. An "admonishment" and "at least dissuad[ing]" some unknowable, undefined, potential future action is not providing an "immediately discernable" value but rather is purely "speculative in character." As the Court explained in connection with finding only nominal damages, it should not proceed based on "rank speculation" and "'equity is not a license to make stuff up.'" (Op. 3, 51; B01107).

The $3.00 common fund Ravenswood created should be the sole source of recovery for an award of attorneys' fees.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Chancery with respect to Ravenswood's appeal and reverse the decision of the Court of Chancery only with respect to the award of $140,000 in attorneys' fees and $25,000 in expenses and directing that no attorneys' fees and costs should be awarded to Ravenswood beyond its share of the nominal damages common fund.

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