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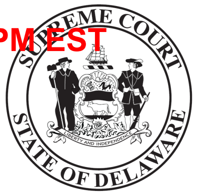


**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| JOSEPH MANHEIM; WEST 36TH, INC.; and REATH & CO., LLC, | ) | |
| Defendants-Below, Appellants, | ) | |
| v. | ) | No. 377, 2023 |
| YOUNG MIN BAN, | ) | |
| Plaintiff-Below, Appellee. | ) | |

<u>**APPELLANTS' OPENING BRIEF**</u>

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Dated: November 21, 2023

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## NATURE OF PROCEEDINGS

In 2019, appellee Young Min Ban launched a lawsuit against appellant Joseph P. Manheim, the founder and C.E.O. of the Delaware Valley Regional Center, LLC ("DVRC"). Ban, who had recently been fired from DVRC, accused Manheim of using over $5 million of DVRC's assets to fund his polo hobby and jet-setting lifestyle. Ban claimed he had been a 30% owner of DVRC, and that in 2016 Manheim fraudulently induced him to assign that interest to a limited partnership Manheim controlled. Ban sought to have Manheim return over $5 million to DVRC, along with an order restoring Ban and his then co-plaintiff's ("Plaintiffs") majority ownership and control of DVRC.

After trial, the Court of Chancery found almost everything Ban alleged was not only legally insupportable, but false. Manheim had not used DVRC's assets to fund his polo hobby. Not only were Plaintiffs not defrauded out of their controlling interest in DVRC; they *never had such an interest*—something defendants proved with the assistance of a forensic ink examiner who determined two documents Ban claimed he had signed one year apart were actually signed contemporaneously. Ban's claims regarding Manheim's conduct were so factually insupportable that the Court of Chancery took the unprecedented step of halting post-trial briefing so it could issue findings of fact in an effort to ensure the parties' legal arguments were applied to actual facts, and not Ban's fictional narrative.

In its 125-page post-trial Memorandum Opinion (the "Opinion," Exhibit A) the Court of Chancery methodically organized, evaluated and adjudicated Plaintiffs' claims which, come trial, challenged years' worth of DVRC's aggregate expenditures, totaling more than $13 million, along with assorted arguments about why they should control DVRC. The Court of Chancery concluded Manheim was liable to repay only $2.5 million to DVRC, most of which stemmed from payments made pursuant to a management agreement Manheim believed was operative, but the court found was no longer in effect. The court left control of DVRC where it had always been—with Manheim.

The Court of Chancery made numerous factual findings and legal holdings in an effort to resolve Ban's false allegations and insupportable claims. In this appeal, Appellants challenge only two of the Court of Chancery's holdings.

First, the Court of Chancery erred in finding Manheim liable for all compensation paid to Paula Mandle, who Manheim had appointed to the board of West 36th Inc. ("WestCo"), DVRC's manager, and who became a DVRC officer. The Court of Chancery found Mandle's appointment bore the hallmarks of a non-conflicted transaction, and was governed by the business judgment rule at the outset. Nonetheless, the Court of Chancery, primarily driven by its belief Mandle "played dumb" during her deposition, concluded Mandle was Manheim's "stooge" and he was "paying her to act as a rubber stamp for the self-interested decisions that he

makes." The court then applied the entire fairness standard of review to her appointment, holding Manheim personally liable for every dollar of compensation paid to Mandle for years.

The court's holding, and its characterization of Mandle, are contrary to Delaware law and the record. The Court of Chancery should have ended its analysis after concluding the business judgment rule applied. By analyzing Mandle's performance as an executive, and as a deponent, the court added the entire-fairness standard's fair-price prong to the business judgment rule's deferential standard of review. Further, the Court of Chancery's conclusions about Mandle's performance are not supported by the record. Mandle performed her duties with integrity, with several DVRC employees testifying about her contributions. Manheim, as WestCo's 70% stockholder who could appoint and remove directors at will, did not need anyone to act as his rubber stamp, and never claimed Mandle's presence—on a four-member board that included Manheim and his brother—made the board independent.[1] By focusing on Mandle's unfamiliarity with the issues in this case, and in particular her lack of knowledge of certain entities involved in the case, the Court of Chancery erred because it never determined that she did not do what she was hired to do: manage DVRC.

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[1] The Court of Chancery found the compensation paid to Manheim's brother, Frank, was entirely fair.

Second, the Court of Chancery erred in dismissing Manheim's counterclaims against Ban for improperly accessing Manheim's DropBox files. While at DVRC, Ban had certain DVRC files linked to his personal DropBox account. After Ban was suspended from DVRC, DVRC terminated his rights to most documents, but Manheim inadvertently failed to terminate his rights to others. Subsequently, Ban accessed and downloaded materials that were still inadvertently linked to his DropBox account, despite knowing he was not authorized to do so, and downloaded numerous files belonging to Reath & Company, LLC ("ReathCo"), Manheim's personal company, and Manheim personally, sending some to his co-plaintiff for use in preparing their case. While the Court of Chancery concluded Ban never "hacked" into the DropBox account, it erred by placing form over substance and in not finding the unauthorized access was both illegal and actionable as a tort.

## SUMMARY OF ARGUMENT

1. The Court of Chancery erred in holding Manheim liable for Mandle's compensation. Manheim's appointment of Mandle to the West 36th board was an unconflicted transaction entitled to deference under the business judgment rule, and the court should not have analyzed the fairness of Mandle's compensation. Even if the Court of Chancery was correct in analyzing the fairness of Mandle's compensation in order to determine the standard of review, the court's conclusions are unsupported by the record.

2. The Court of Chancery erred in holding Ban's admitted unauthorized access and downloading of Manheim's DropBox files was not actionable. Ban violated the Computer Fraud and Abuse Act, the Pennsylvania Uniform Trade Secrets Act, and his unauthorized downloading constituted conversion.

## STATEMENT OF FACTS

### A. Joseph Manheim Creates DVRC.

In 2012, while he was Chief Investment Officer at the Swarthmore Group, a financial advisory group, Manheim conceived and developed a novel use for the Employment Based Immigration: Fifth Preference, or EB-5, program.[2] The EB-5 program provides a path for foreign nationals to become permanent U.S. residents though investments that create jobs in the U.S. The program is administered by the U.S. Citizenship and Immigration Service ("USCIS").[3]

Foreign nationals who invest through the EB-5 program typically do so through EB-5 regional centers, which pool investors' cash for investments.[4] Most regional centers invest in risky real estate projects. Manheim believed that EB-5 program participants would be drawn to safer investments in government infrastructure projects, but those projects typically were funded through long-term debt that would be repaid long after most EB-5 program investors had completed the program and expected a return of their investment. This made government-project investments unattractive for EB-5 program participants.[5]

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[2] Post-Trial Opinion (the "Opinion," Exhibit A hereto) at 4–5.

[3] *Id.* at 5.

[4] *Id.*

[5] *Id.* at 6.

Manheim conceived of a solution to this timing problem: give the investors the right to have their investment redeemed though a tradable in-kind distribution of an interest in the government loan. This would allow the EB-5 program investors to make short term investments, while the government project is funded through a long-term, low-interest loan. [6]

On the same day in 2012, Manheim formed both DVRC—which would become the EB-5 regional center—and its managing member, WestCo, which also engaged in other business pursuits.[7] Manheim and Swarthmore's CEO, Mandle, were the original co-owners of WestCo, with Manheim owning 70% and serving as President and Treasurer, and Mandle owning 30% and serving as Vice President and Secretary.[8] Shortly thereafter, in late 2012, Ban, a Swarthmore Group employee, acquired half of Mandle's WestCo stock and took over her positions as Secretary and Treasurer, and became a WestCo director with Manheim.[9]

WestCo and DVRC were originally funded through an investment from East 63rd Limited ("EastCo"), a limited company based in the United Kingdom. EastCo was a venture Manheim had pursued with Joseph Bamford.[10]

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[6] *Id.* at 6–7.

[7] *Id.* at 7.

[8] *Id.* at 8.

[9] *Id.* at 11.

[10] *Id.* at 9.

### B. DVRC Becomes a Regional Center.

Throughout 2012 to 2014, Manheim worked to develop a potential investment with the Pennsylvania Turnpike Commission ("PTC") and obtain USCIS approval for DVRC to become a regional center. That approval came in May 2014. Manheim and Ban then began soliciting investments from potential EB-5 program investors, who were primarily based in Asia.[11] With DVRC taking up more of their time, Manheim and Ban resigned from the Swarthmore Group in December 2014.[12]

In February 2016 DVRC received approval to make its first qualified EB-5 investment, which it did through DVRC Pennsylvania Turnpike LP, which loaned $200 million that had been raised from its 400 investors to PTC. DVRC continued raising funds, and in November 2019 loaned $263.45 million to the Southeastern Pennsylvania Transportation Authority ("SEPTA") through DVRC SEPTA II LP, which had 479 investors. Thereafter, DVRC loaned $183.5 million to PTC though DVRC Pennsylvania Turnpike II LP, which had 367 investors.[13]

With DVRC's first investment made in 2016, discussions amongst Manheim, Bamford and Ban about reorganizing DVRC's corporate structure took on importance (the "Reorganization"). At this point, Manheim, Ban and Mandle owned

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[11] *Id.* at 12.

[12] *Id.* at 15.

[13] *Id.* at 23–24.

WestCo, which owned DVRC. Manheim and Bamford held interests in EastCo, which had extended convertible loans to WestCo. The Reorganization was not straightforward; Bamford wanted an interest in DVRC, and to hold that interest though an entity in order to reduce taxes, while looming legislation prohibiting foreign control or ownership of EB-5 regional centers complicated matters, as Bamford was a U.K. citizen.[14]

To accommodate these concerns, Manheim formed Penfold, L.P. on March 18, 2016. Penfold would hold a non-managing interest in DVRC, and Manheim, Bamford and Ban would hold most (and for Bamford, all) of their interest in DVRC though Penfold as limited partners, while Manheim managed Penfold with ReathCo, his personal company, as the general partner.[15] To remove the risk that EastCo, a foreign entity, could be considered to have control of DVRC though its convertible loan to WestCo, DVRC's manager, the loans were extinguished.[16]

The Reorganization was effectuated through two agreements: the Admission Agreement, which made Manheim, Bamford and Ban non-managing members of DVRC (which until that point was 100% owned by WestCo), and the Contribution Agreement, in which Manheim, Bamford and Ban transferred their newly-created

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[14] *Id.* at 24–25.

[15] *Id.* at 25.

[16] *Id.* at 30.

interests in DVRC to Penfold, in which they were limited partners.[17] Manheim, Bamford and Ban signed the agreements in June 2016.[18] For tax purposes, the Admission Agreement was backdated to be effective as of June 1, 2015.[19]

After the Reorganization, Bamford joined the WestCo board.[20] In June 2017, Manheim, Bamford and Ban appointed Albert Mezzaroba (an attorney) and Frank Manheim (Joseph Manheim's brother, who had experience with compliance and other matters relevant to DVRC)[21] as WestCo directors, expanding the board to five members.[22]

### C. Bamford and Ban Leave DVRC.

In late 2017, Bamford experienced health and financial difficulties, stopped participating in the management of DVRC, and moved from the U.S. back to the United Kingdom.[23] In early 2018, Ban was suspended from DVRC after other members of DVRC's management learned Ban had, without their knowledge, been corresponding with investors who were threating lawsuits if their investments were

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[17] *Id.* at 26–29.

[18] *Id.* at 29.

[19] *Id.* at 26.

[20] *See id.* at 33.

[21] References to *Manheim* are to Joseph Manheim.

[22] Opinion at 37.

[23] *Id.* at 45.

not redeemed. Without authorization, Ban had made settlement offers that ran contrary to EB-5 laws and regulations and DVRC's disclosures to the Securities and Exchange Commission.[24]

After his suspension, Ban convinced Bamford that, if he was in charge, Ban could increase distributions. But Bamford and Ban served only as WestCo directors (who could be removed at any time by Manheim, WestCo's 70% owner), in addition to being limited partners in Penfold, DVRC's non-managing member. Nonetheless, they began devising ways to take over DVRC.[25]

In a May 23 2018 text exchange wherein they discussed taking over DVRC in a "bloodless coup[,]" Ban noted that "I first have to gather all the docs."[26] On May 22, 2018, shortly after being suspended, Ban had saved a draft e-mail he kept in his Gmail account entitled WORK STUFF.[27] In it he compiled login credentials for EastCo and DVRC e-mail accounts, login information for various DVRC and WestCo financial accounts, Manheim's social security number and other confidential information.[28]

On June 7, 2018, Ban wrote to Bamford:

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[24] *See id.* at 46–47.

[25] *Id.* at 46–47.

[26] A191; A199.

[27] A180–A189. Ban initially withheld this draft e-mail to himself as privileged.

[28] *Id.*

> I also found some dropbox folder that Joe forgot to unlink me from that contained some interesting files clearly dated after 6/11/2016. I believe Joe created these documents on January 2017. The Elliott LP Agreement 2002 is the basis of what he used to create the Penfold LP agreement. I am sending you the three documents in this folder that you don't already have. You already sent me the 3rd Penfold LP Agreement last week when your accountant received it from Joe.[29]

Ban then provided screenshots of the ReathCo Dropbox account he had accessed.[30] Metadata from documents produced by Ban after Appellants prevailed in their motion to have Ban's laptop reviewed by counsel shows Ban downloaded numerous documents from Manheim's personal Dropbox account. Ban selected and downloaded documents he believed could be helpful to the case, such as the receipt for Manheim's June 2016 trip to London.[31] He also downloaded other things, such as a draft confidentiality agreement unrelated to DVRC marked as privileged attorney work product.[32]

After Ban's suspension, it was discovered that Ban had additional communications with investors in which he made offers that violated USCIS regulations, and entered into a finder's fee arrangement that violated securities

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[29] A208.

[30] A209.

[31] A131–A134.

[32] A169–A177.

laws.[33] On June 28, 2018, Ban was removed from his positions at WestCo and DVRC.[34] Bamford, who had largely ceased participating in DVRC's management, was removed from the WestCo board in August 2018.[35]

Manheim filled these new vacancies with Mandle, who was brought on as a WestCo director and DVRC's Chief Compliance Officer in September 2018. She was given an annual salary of $150,000, with a $18,000 travel stipend.[36]

**D. The Court of Chancery Litigation**

Bamford initiated the Court of Chancery action in 2019. Ban intervened shortly thereafter, the cases were consolidated, and Bamford and Ban filed a consolidated complaint.

Bamford and Ban's consolidated second amended complaint, filed in June 2019, contains sprawling allegations that Manheim misappropriated at least $5.9 million from DVRC while using DVRC's assets to "fund an increasingly lavish lifestyle, including but not limited to frequent vacations and polo tournaments."[37] It accuses Manheim of hiring his brother, Frank Manheim, and friend, Mezzaroba, at excessive salaries—omitting the fact that Bamford and Ban themselves were two of

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[33] Opinion at 48.

[34] *Id.*

[35] *Id.* at 49–50.

[36] *Id.* at 50.

[37] A215–A217.

the three WestCo directors who had approved the appointment of Frank Manheim and Mezzaroba as board members.[38] Critically, for the purposes of this appeal, the complaint does not mention Mandle.

Plaintiffs also accused Manheim of defrauding them out of their DVRC interests—which they had obtained through the Admission Agreement—by convincing them to sign the Contribution Agreement, which transferred those interests to Penfold. This was, according to Plaintiffs, part of Manheim's "scheme to gain unfettered control over DVRC and its substantial cash flows, and to enhance his ability to conceal his direct and indirect misappropriation of DVRC funds."[39] To make this allegation plausible, Plaintiffs claimed the Admission Agreement, which had been drafted and executed in June 2016, actually was drafted and executed in June 2015—the date to which it had been backdated for tax purposes.[40] By contending the contemporaneously signed Admission Agreement and Contribution Agreement had been signed a year apart, Plaintiffs were able to allege that they had been majority owners of DVRC for a full year—the period between the Admission Agreement's effective date and the Contribution Agreement's execution—when in

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[38] A247.

[39] A230.

[40] A227.

fact they never held a direct interest in DVRC, since the agreements were signed together.[41]

As relief for this alleged fraud, Plaintiffs sought an order "[r]estoring the ownership interest in DVRC to Bamford, Manheim, and Ban in equal 30% shares,"[42] despite the fact that they never had held direct DVRC interests that could be "restored." This relief, they believed, would allow them to vote together as members owning 60% of DVRC to merge it into an entity Plaintiffs controlled.[43]

Defendants moved to dismiss part of the consolidated amended complaint, and that motion was granted in part.[44] Plaintiffs then amended their complaint to add a claim against ReathCo. Manheim and ReathCo answered and asserted counterclaims against Ban for violations of the federal Computer Fraud and Abuse Act, the Pennsylvania Uniform Trade Secrets Act, and conversion, all based upon his improper accessing and downloading documents from Manheim's Dropbox account.[45]

A four-day trial was held in June 2021. At the conclusion of trial, the Court of Chancery took the extraordinary step of providing partial rulings from the bench,

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[41] A227–A228.

[42] A275.

[43] A206.

[44] Opinion at 52.

[45] *Id.*

finding that, consistent with Manheim's testimony—and evidence proffered by Defendants' forensic ink chemist expert witness—the Admission Agreement and Contribution Agreement were executed together in 2016. To prevent Plaintiffs' misrepresentations about the timing of the agreements' executions from further infecting the proceedings, the Court of Chancery directed the parties to submit proposed timelines of events, consistent with the court's ruling, so that the court could issue findings of fact before the parties engaged in post-trial briefing.[46]

The Court of Chancery issued its Certain Post-Trial Factual Findings on June 21, 2021, reaffirming its finding that the Admission Agreement and Contribution Agreement were executed together.[47] The court also found Ban had never "hacked" Manheim's Dropbox account, but "only accessed materials to which he had access through his personal DropBox account."[48] Left unresolved were Plaintiffs' claims about Manheim's diversion of money from DVRC, which had ballooned into a claim for over $13 million dollars in damages, a figure derived from subtracting Plaintiffs' proffered *pro forma* model of DVRC's expenses from DVRC's actual expenses.[49]

[46] A548 at 1154–56.

[47] A550–A573.

[48] A573.

[49] Opinion at 114–15.

The Court of Chancery ultimately rejected Plaintiffs' blunderbuss damages claim, which sought to hold Manheim liable even for expenses Plaintiffs themselves incurred on behalf of DVRC while participating in its management.[50] Instead, the court took on the laborious task of wading through Plaintiffs' "wide-ranging arguments and theories, several of which turned out to lack factual support," and organizing the expenditures Plaintiffs challenged into cogent groups, determining the proper standard of review, and determining whether there were legally cognizable damages.[51] As the court noted, its task was made more difficult by "the hot mess of the Company's historical records," which, it found, "Ban played a major role in creating."[52]

In all, the Court of Chancery found DVRC was entitled to $2,515,809.22 in damages from Manheim. The vast majority of the damages stemmed from management payments DVRC had made to ReathCo pursuant to a management agreement the court found had been terminated.[53]

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[50] *Id.* at 115–16.

[51] *Id.* at 2, 113.

[52] *Id.* at 113.

[53] Final Order and Judgment (Exhibit B hereto) at 3. This figure is higher than the damages number in the Opinion, which was increased after Bamford moved for reargument.

Pertinent to this appeal, the Court of Chancery also awarded damages against Manheim based upon Mandle's compensation. The court noted that Mandle was independent from Manheim.[54] Nonetheless, the court found that at her deposition, portions of which were played at trial, Mandle appeared "so devoid of knowledge about DVRC and the EB-5" business that it was reasonable to infer "Manheim must be paying her to act as a rubber stamp for the self-interested decisions that he makes."[55] As the court found, at her deposition, Mandle did not know WestCo's percentage interest in DVRC, the identity of DVRC's other member (Penfold), what Penfold was, who DVRC's manager was, what ReathCo was and did or the amount of management fees it received, whether there were loans between DVRC and WestCo, whether Mandle was considered a DVRC officer, and the bases for her approval of wire transfers to ReathCo. The court noted further than Mandle testified she went to DVRC's offices approximately every other week, which she described as "socially," and did not know the amount of compensation she had received.[56]

The Court of Chancery concluded that Mandle, a successful and well-credentialed business executive, must have been "playing dumb" during her deposition, "because she thought that would be helpful to defendants." This, the

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[54] Opinion at 102.

[55] *Id.* at 105.

[56] *Id.* at 106–07.

court found, "provides powerful evidence of an illicit and symbiotic relationship between Mandle and Manheim. He pays her to serve his interests in the boardroom, and she continued to play that role on the witness stand. In return, she cashes her checks and ignores her duties."[57] The court concluded that the entire fairness standard of review applied to Mandle's compensation, and held Manheim personally liable for the entire $442,205.82 in compensation Mandle received—her salary, bonus and travel stipend for September 2018 through December 2020—for her role as a WestCo director and DVRC officer.[58]

[57] *Id*. at 107–08.

[58] *Id.* at 102, 108.

## ARGUMENT

### I. The Court of Chancery Should Not Have Held Manheim Liable for Mandle's Compensation.

#### A. Question Presented

Can Manheim be held personally liable for the entirety of Mandle's compensation because he failed to prove it was entirely fair, even though the appointment itself is subject to the business judgment standard of review? This question was preserved in Defendants' Post-Trial Answering Brief (A630–A631) and Defendants' Post-Trial Sur-Reply Brief (A726).

#### B. Scope of Review

The determination of the standard of review applied to conduct is subject to *de novo* review. *Nixon v. Blackwell*, 626 A.2d 1366, 1375 (Del. 1993). This Court reviews the "the factual findings of the trial court to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Id.*

#### C. Merits of Argument

##### 1. The Court of Chancery Should Not Have Evaluated Mandle's Compensation, as Manheim's Placement of Mandle on the WestCo Board was a Non-Conflicted Decision Entitled to Business Judgment Deference.

A party that seeks application of the entire fairness standard of review bears the burden of rebutting the business judgment rule. *Solomon v. Armstrong*, 747 A.2d 1098, 1111–13 (Del. Ch. 1999). Controllers "are not automatically subject to entire

fairness review when a controlled corporation effectuates a transaction. Rather, the 'controller also must engage in a conflicted transaction' for entire fairness to apply." *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *6 (Del. Ch. Dec. 11, 2017) (quoting *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014)). A controller's non-conflicted decisions are entitled to the presumptions of the business judgment rule. *Zutrau v. Jansing*, 2014 WL 3772859, at *19 (Del. Ch. July 31, 2014). "It is well-settled Delaware law that a director's independence is not compromised simply by virtue of being nominated to a board by an interested stockholder." *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 996 (Del. Ch. 2014)) (collecting cases), *aff'd sub nom. Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015).

As the Court of Chancery recognized, Manheim's placement of Mandle on the WestCo board bore none of the indicia of a self-interested transaction or any other basis for invoking the entire fairness standard of review.

> [T]o invoke entire fairness review, the plaintiffs had the burden to make a prima facie showing that Manheim faced a conflict of interest when determining Mandle's compensation. Mandle is an outside director. She has known Manheim since his days at the Swarthmore Group, she was one of the original directors and officers of WestCo, and she received shares when WestCo was created that she still owns today. Mandle then left the WestCo Board in 2012 after Ban acquired half of her shares. . . . Manheim reappointed her to the WestCo Board in September 2018, after the disputes arose with Bamford and Ban. . . . Those ties are not sufficient to raise

> meaningful questions about Manheim's independence from Mandle or his ability to set her compensation, so the business judgment rule applies as the default standard of review.

Opinion at 102 (citations omitted).

Nonetheless, the Court of Chancery concluded that Mandle "played dumb" at her deposition, which, it found, was "powerful evidence of an illicit and symbiotic relationship between Mandle and Manheim." *Id.* at 106–07. This, combined with the court's perception that Mandle did minimal work for WestCo and DVRC, visiting the office only biweekly, led the court to apply the entire fairness standard of review and hold Manheim personally liable for every dollar of compensation Mandle had received. *Id.*

Appellants respectfully submit that the Court of Chancery's reasoning is circular and contrary to Delaware law. The court found the business judgment rule applied as the default standard of review. The business judgment rule is "a principle of non-review that 'reflects and promotes the role of the board of directors as the proper body to manage the business and affairs of the corporation.'" *Firefighters' Pension Sys. of City of Kansas City, Missouri Tr. v. Presidio, Inc.*, 251 A.3d 212, 249 (Del. Ch. 2021) (quoting *In re Trados Inc. S'holder Litig.*, 2009 WL 2225958, at *6 (Del. Ch. July 24, 2009)). Once the business judgment rule applies, "courts will not second-guess these business judgments." *Cede & Co. v. Technicolor, Inc.*,

634 A.2d 345, 361 (Del. 1993), *decision modified on reargument*, 636 A.2d 956 (Del. 1994).

Nonetheless, the court proceeded to review Mandle's placement on WestCo's board, found that her compensation was not commensurate with her duties, *and then* applied the entire fairness standard of review.[59] In essence, the Court applied the entire-fairness standard's fair-price prong to determine if entire fairness applied. That is not the proper analytical framework, as it eviscerates the business judgment rule entirely. "It is the essence of business judgment for a board to determine if a particular individual warrant[s] large amounts of money, whether in the form of current salary or severance provisions." *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000) (internal quotation marks omitted) (footnote omitted). The Court of Chancery erred in evaluating Mandle's performance after it determined her election to the WestCo board bore none of the hallmarks of a conflicted transaction. *See In re McDonald's Corp. S'holder Deriv. Litig.*, 291 A.3d 652, 689 (Del. Ch. 2023) (analyzing a board's decision to hire an officer under the business judgment rule where the plaintiffs failed to allege the board's decision was not disinterested or independent, because even if the hiring decision was "unwise," it did not mean it was in bad faith).

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[59] Plaintiffs had disavowed any waste claim. Opinion at 103; A680 at n.5.

### 2. The Court of Chancery Erred When Reviewing the Factual Record to Determine the Standard of Review.

In reviewing Mandle's performance as a WestCo director and DVRC officer, and then as a deponent, the Court of Chancery erred by focusing primarily on Mandle's knowledge of the subject matter of the litigation, the Reorganization, rather than the business of WestCo and DVRC. A review of the record with a wider aperture shows Mandle acted, and testified, as a forthright and engaged WestCo and DVRC director and officer who contributed to, and was knowledgeable about, the business of WestCo and DVRC.

The Court of Chancery's primary basis for invoking entire fairness review was Mandle's inability to testify about certain matters at her deposition, which the court found incredible. But a holistic look at Mandle's deposition reveals she was forthright and knowledgeable, expressing ignorance mainly about DVRC and WestCo's corporate structure, which was set in 2016, before Mandle rejoined the WestCo board.

Mandle testified about Manheim's formation of WestCo and DVRC while Manheim, Ban and she were at the Swarthmore Group.[60] She testified about her resignation from the DVRC board in 2012, and that she was not involved with

[60] A374 at 33–A375 at 36.

WestCo and DVRC until she returned to the WestCo board in 2018.[61] She testified about DVRC's agent in South Korea.[62] She testified about amendments to EB-5 regulations that doubled the minimum investment amount.[63]

It is indisputable that Mandle provided valuable services to DVRC.

- Mandle assisted employees with setting up QuickBooks and was the primary management-level reviewer of DVRC's QuickBooks files before they were sent to DVRC's auditor.[64]
- Mandle assisted DVRC employees with budgeting.[65]
- Mandle provided advice to employees about organizing and properly securing investors' documents and communications.[66]
- Mandle assisted in the revision of the procedure to provide distributions to the investors in the funds DVRC manages.[67]

These were not one-off events; Mandle was an integral part of DVRC's management. As one DVRC employee described it:

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[61] A378 at 46–47; A379 at 52.

[62] A392 at 104–05.

[63] A392 at 105–A393 at 106.

[64] A389 at 93; A445 at 65; A446 at 67–68; A363 at 65.

[65] A445 at 65.

[66] A433 at 52–53.

[67] A438 at 54–A439 at 59.

> Paula, she has a lot of experience in investment industry, and she can guide us through -- in different areas and give us advice and understanding of certain stuff. I think she's -- she's helping or she's helping -- helping the company from the compliance perspective. She's been very helpful.
>
> ***
>
> [S]he will overlook the structure and the way everything's laid out, and she will find the flaws or she will find the places that we can improve. For example, she'll look at our master sheet, if you know what that is. That's basically a sheet containing all the investor information. And she look at it and she share the thought with us saying this is not very efficient and professional and secure and we need something more secure and more efficient than this, saving all the information, fully not saying one sheet is not acceptable. And we -- based on this, we develop something -- we develop a database for the clients, which is secure and easy to use for us, and it helps -- personally, it really helps us with internal compliance, internal control.
>
> ***
>
> For example, we are developing an investor portal which we potentially will want to show it to the client and have -- and use it as a way we can communicate with investor. And she took a look at it and give us her thought on this. If, like, she putting herself in the position of the investor and using her experience telling us how should we do this part, how should we do this part and how should we do this part. And then we think it's very helpful and -- and -- and it improve the security of the system a lot.
>
> ***
>
> So, for example, there is search box on the portal, itself, and she played with it and she found a bug in there and which potentially will expose the information that we do not want to share with clients, and she find a bug and then pointed to us and say we need to fix this.[68]

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[68] A444 at 61–A445 at 65.

Notably, this record was developed during discovery, when the issue of Mandle's compensation was not part of the case.

The Court of Chancery not only focused too closely on Mandle's knowledge about the litigation, giving little consideration to her knowledge about, and contributions to, DVRC's day-to-day operations, it erred in crediting Plaintiffs' hand-picked soundbites. For example, the court found Mandle "did not know if ReathCo provides any services to DVRC" and the "only knowledge she had of ReathCo was of 'its existence.'" Opinion at 106. But Mandle testified that she believed ReathCo was the "general manager of DVRC and is providing that service or Joseph Manheim is doing it specifically," and that she likely had reviewed ReathCo's management agreement and how the management fee was calculated.[69] This is consistent with how DVRC was operated at the time of her deposition, with ReathCo providing Manheim's services to DVRC pursuant to a management agreement.[70] Plaintiffs' sound-bite answers, obtained though repetitive questioning, cannot eviscerate Mandle's straightforward deposition testimony and years of service to WestCo and DVRC.

Plaintiffs and Manheim lived through the Reorganization, and the litigation that challenged it. Mandle, who was not active in WestCo and DVRC at the time of

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[69] A382 at 63; A384 at 72–73.

[70] A103.

the Reorganization, and joined the WestCo board after litigation commenced, was not part of the Reorganization and the litigation. Her lack of knowledge about the corporate structure is unsurprising, as it was not relevant to her role at the company which focused on compliance. And, it provided no basis to apply entire fairness review to her appointment to the WestCo board.

#### 3. There is No Record Support for the Court of Chancery's Finding of a *Quid Pro Quo*.

The Court of Chancery acknowledged that Delaware courts do not second guess decisions subject to the business judgment rule unless they constitute waste, and the plaintiffs had disavowed asserting a claim for waste.[71] Because plaintiffs had not asserted a claim for waste, no legally-recognized exception to application of the business judgment rule existed.

Notwithstanding the lack of a waste claim, the trial court found that Mandle's compensation constituted a *quid pro quo* for rubber stamping Manheim's decisions.[72] That finding has no support in the record. The lower court identified no transactions where Mandle's approval as a director benefitted Manheim, or that not could have been achieved without Mandle. The absence of any such transactions is logical because Manheim held the majority ownership interest in WestCo and,

[71] Opinion at 103; A680 at n.5.

[72] Opinion at 105.

therefore, had absolute voting control over WestCo, including the unilateral ability to appoint and remove directors. Furthermore, the two directors other than Manheim and Mandle were Manheim's brother, Frank, and Mezzaroba, who, the court noted, was a long-time friend of Manheim. Opinion at 98, 101. Thus, the court's finding of a *quid pro quo* relating to Mandle's service as a director is unsupported by the record, as there is no evidence that Manheim ever obtained or needed Mandle's approval to take any action, or that Manheim otherwise received any personal benefit from Mandle serving as a director. Because Plaintiffs did not assert a claim for waste, and because there is no record support for the Court of Chancery's finding of a *quid pro quo*, the award of damages against Manheim for Mandle's compensation must be reversed.

## II. The Court of Chancery's Factual Findings About Ban's Unauthorized DropBox Access Supports Actionable Claims.

### A. Questions Presented

Did Ban's conduct violate the Computer Fraud and Abuse Act, the Pennsylvania Uniform Trade Secrets Act, and constitute conversion? This question was preserved in Defendants' Pre-Trial Brief. A534.

### B. Scope of Review

"This Court reviews questions of law de novo." *Wilm. Tr., Nat'l Ass'n v. Sun Life Assurance Co. of Canada*, 294 A.3d 1062, 1071 (Del. 2023), *as revised* (Mar. 21, 2023).

### C. Merits of Argument

On May 15, 2018, after Ban's communications with investors threatening ligation were discovered, Ban received a letter from Mezzaroba, DVRC's general counsel, stating:

> Please allow this Memo to serve as official notice that you are suspended as an Officer at DVRC and all affiliated companies including but not limited to Reath and Company West 36th Inc [*sic*]. During this suspension you will be paid your salary and all benefits will remain in place during the Company's investigation. However, you are not to contact any employee, vendor, client, investor or agent. Further, you are forbidden from holding yourself out as an Officer, employee, Director or having any role with the DVRC or any of the affiliated Company as referenced above.[73]

[73] A179.

On May 22, 2018, Ban saved a draft e-mail entitled WORK STUFF in his Gmail account.[74] In it he compiled login credentials for EastCo and DVRC e-mail accounts, login information for various DVRC and WestCo financial accounts, Manheim's social security number and other confidential information.[75] Notably, he also included the login information for his DVRC Dropbox account.

On June 7, 2018, Ban wrote to Bamford:

> I also found some dropbox folder that Joe forgot to unlink me from that contained some interesting files clearly dated after 6/11/2016. . . .
>
> I have been looking through what I have, but it is very limited due to Joe having cut me off of DVRC Dropbox and my DVRC email.[76]

The Dropbox folders Ban referenced were in a Dropbox account belonging to Manheim in which he maintained personal files and files relating to ReathCo and Penfold.

Ban provided screenshots of the ReathCo Dropbox account he had accessed, creating an electronic record of his own misconduct.[77] Metadata from documents produced by Ban after Appellants prevailed in their motion to have Ban's laptop

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[74] A180–A189.

[75] *Id.*

[76] A208; A210.

[77] A209.

searched show Ban downloaded numerous documents from Manheim's personal Dropbox account. Ban selected and downloaded documents he believed could be helpful to the case, such as the receipt for Manheim's June 2016 trip to London.[78] He also downloaded other things, such as a draft confidentiality agreement unrelated to DVRC marked as privileged attorney work product, and a copy of Manheim's passport.[79] Metadata from one of the Excel files he downloaded showed it was last modified by Manheim on May 28, 2018—two weeks after Ban was suspended from DVRC.[80]

These documents were manually downloaded by Ban after he was suspended. When Ban was suspended, his DVRC Dropbox access was removed and all of the DVRC-related files on his computer were deleted as a result of that access being cancelled.[81]

When questioned at his deposition, Ban was defiant about his invasion of Manheim's Dropbox account.

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[78] A131–A134.

[79] A169–A177; A104.

[80] A205.

[81] A539 at 250–51 (testifying at trial that in May 2018 "I noticed that all of my DVRC-related documents, financials, anything associated with DVRC, disappeared or were deleted from my computer and I no longer had access to them on DropBox"); A542 at 269–70; A544 at 426.

> Q. So at this point in June of 2018, you had received a letter from Albert Mezzaroba telling you that you were not to have anything to do with DVRC or related entities while you're suspended; correct?
>
> MR. KESSLER: Objection.
>
> THE WITNESS: Well, your summarizing of that letter is very broad. . . . I mean, *if you're stealing and you say please don't look into my stealing because I have the power to steal, I don't know if someone who is sitting outside who is being robbed should sit still. So that's my position.*[82]

He was similarly defiant at trial.

> A. At the time, I found in my personal Dropbox folder, I believe the folder was called "Reath." And I was surprised that it was still there. I don't know when it had been placed, when it had been linked to my personal Dropbox. But it was still there. I wasn't -- at the time, because Joe Manheim had deleted or unlinked me from all of my files associated with DVRC and, et cetera, I thought that perhaps he forgot. . . . .
>
> Q. And you believe that because Joe Manheim forgot to unlink you, it was proper for you to continue to access that folder?
>
> A. I mean, yes.[83]

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[82] A451 at 423–24 (emphasis added).

[83] A545 at 429.

In its factual findings issued after trial, and before pre-trial briefing, the Court of Chancery found that Ban had "only accessed materials to which he had access through his personal DropBox account."[84]

**1. Ban Violated the Computer Fraud and Abuse Act.**

Under the U.S. Computer Fraud and Abuse Act, it is unlawful if anyone "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer." 18 U.S.C. § 1030(a)(2)(C). The Computer Fraud and Abuse Act provides a civil cause of action against anyone who accesses a protected computer and causes damage or loss of loss of at least $5,000. 18 U.S.C. § 1030(g) (referencing 18 U.S.C. § 1030(c)(4)(A)(i)(I)).

Appellants proved each element of the Computer Fraud and Abuse Act. Ban intentionally accessed Manheim's DropBox account without authorization. A DropBox account constitutes a protected computer. *Frisco Med. Ctr. L.L.P. v. Bledsoe*, 147 F.Supp.3d 646 (E.D. Tex. 2015). Ban saved all his passwords along with log-in credentials for DVRC's accounts when he left DVRC. He told Bamford the files he was accessing were available only due to Manheim's inadvertence. At his deposition and at trial, he justified his intrusion by contending he had been wronged first and had to protect himself. While the Court of Chancery made no

[84] A573.

finding regarding whether Ban's conduct was intentional, such actions demonstrate that Ban was intentionally acting and intending to access Manheim's records despite his suspension, and later termination. The "intentional" standard under Section 1030 focuses on "those whose conduct evinces a clear intent to enter, without proper authorization, computer files or data belonging to another." *Thayer Corp. v. Reed*, 2011 WL 2682723, at *5 (D. Me. July 11, 2011) (quoting S.Rep. No. 99–432 at 5–6 (1986) (Senate committee report regarding change in standard from "knowing" to "intentional" in Sections 1030 (a)(2) and (a)(5))). That standard was met here, even if it does not rise to the level of "hacking."

Ban caused damage greater than $5,000. Damage occurs when confidential files are downloaded and disseminated, because even though "no data was physically changed or erased, . . . an impairment of its integrity occurred." *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F.Supp.2d 1121, 1126–27 (W.D. Wash. 2000). Attorneys' fees paid as a result of the incursion—like those Appellants incurred defending claims Ban supported with documents procured through unauthorized access—constitute a loss. *See, e.g.*, *C.D.S., Inc. v. Zetler*, 298 F. Supp. 3d 727, 763 (S.D.N.Y. 2018) ("In certain circumstances courts have found that attorneys' fees constitute losses [under 18 U.S.C. § 1030(e)(11)]."); *SuccessFactors, Inc. v. Softscape, Inc.*, 544 F.Supp.2d 975, 980–81 (N.D. Cal. 2008) (holding that the cost of investigating and identifying the CFAA offense, including "many hours

of valuable time away from day-to-day responsibilities, causing losses well in excess of $5000," qualified as costs of responding to an offense under § 1030(e)(11) (internal quotations omitted)).[85]

Accordingly, the court erred in declining to consider Ban's unauthorized accessing and downloading of Manheim's files under the Computer Fraud and Abuse Act. Even if Ban's conduct constituted only obtaining evidence through unauthorized access, but without monetary damages (thereby not rising to a civil claim under the statute), it would still be strong evidence in support of Appellant's

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[85] *But see Above & Beyond - Bus. Tools & Servs. for Entrepreneurs, Inc. v. Wilson*, 2022 WL 17742726, at *7 (D.N.J. Sept. 1, 2022) (citing cases holding attorneys' fees incurred in "respond[ing] to a litigation or even to prosecute a CFAA claim" do not constitute a loss under the Computer Fraud and Abuse Act). Other courts around the country have considered attorneys' fees and enforcement costs to be statutory losses which are "compensable as long as those costs were reasonably incurred responding to the offense," because "[n]othing in [Section 1030(e)(11)'s] definition limits compensable damages to the precise time that the unauthorized access is occurring." *Facebook, Inc. v. Power Ventures, Inc.*, 252 F. Supp. 3d 765, 777–78 (N.D. Cal. 2017), *aff'd*, 749 F. App'x 557 (9th Cir. 2019); 18 U.S.C. § 1030(e)(11) (defining "loss" to include "the cost of responding to an offense"); *cf. NCMIC Fin. Corp. v. Artino*, 638 F. Supp. 2d 1042, 1065–66 (S.D. Iowa 2009) ("Although attorneys' fees in prosecuting a CFAA action do not count toward the $5000 statutory threshold, attorneys' fees incurred responding to the actual CFAA violation to place the plaintiff in their *ex ante* position are permissible as costs 'incurred as part of the response to a CFAA violation, including the investigation of an offense.'") (internal citations omitted) (citing *Wilson v. Moreau,* 440 F.Supp.2d 81, 110 (D. R.I. 2006), and then quoting *A.V. ex rel. Vanderhye v. iParadigms, LLC,* 562 F.3d 630, 646 (4th Cir. 2009)).

claim that Ban's self-help evidence gathering constituted unclean hands that should foreclose any relief he sought.[86]

#### 2. Ban Violated the Pennsylvania Uniform Trade Secrets Act.

Some of the documents Ban downloaded constitute trade secrets: analyses on business and investing opportunities, and confidential information about potential investments, investors and customers.[87] This is a violation of the Pennsylvania Uniform Trade Secrets Act. 12 Pa. Con. Stat. § 5301, *et seq*.

The Pennsylvania Uniform Trade Secrets Act defines a trade secret as:

> Information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

12 Pa. Con. Stat. § 5302. Misappropriation of trade secrets includes "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." *Id.* "Improper means[] [i]ncludes, but is not limited to, theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy or espionage through electronic or other means." *Id.*

[86] *See* A500–A512.

[87] *See, e.g.*, A105–A130; A135–A168.

Ban misappropriated Defendants' trade secrets when he improperly downloaded them from the DropBox. The court erred in declining to consider Ban's unauthorized download of these trade secrets under the Pennsylvania Uniform Trade Secrets Act.

**3. Ban Committed Conversion.**

Ban's unauthorized download of the DropBox files also constitutes common law conversion.[88] *AlixPartners, LLP v. Benichou*, 250 A.3d 775, 784 (Del. Ch. 2019); *Sentient Jet, LLC v. Apollo Jets, LLC*, 2014 WL 1004112, at *11 (D. Mass Mar. 17, 2014).

To succeed on a claim for conversion, Appellants had to prove that, "at the time of the alleged conversion, (1) [Appellants] had a property interest in the allegedly converted property, (2) [Appellants] had a right to possession of such property, and (3) [Ban] wrongfully possessed or disposed of such property as if it

[88] *Dow Chem. Co. v. Organik Kimya Hldg. A.S.*, 2018 WL 2382802, at *7 (Del. Ch. May 25, 2018) ("Pennsylvania courts appear to take a narrow view of UTSA preemption, holding that the Act does not displace common law claims premised on theft of information that fails to rise to the level of a trade secret." (footnote omitted)); *EXL Labs., LLC v. Egolf*, 2011 WL 880453, at *8 (E.D. Pa. Mar. 11, 2011) ("If Plaintiff's conversion argument was solely based on misappropriation of trade secrets, PUTSA would preempt this claim. However, Plaintiff premises its conversion claim on misappropriation of both trade secrets and other confidential information. If we dismiss Plaintiff's conversion claim, and later determine that Plaintiff's confidential information does not constitute trade secrets, we risk leaving Plaintiff without a remedy.").

were [his] own." *Israel Disc. Bank of New York v. First State Depository Co., LLC*, 2012 WL 4459802, at *13 (Del. Ch. Sept. 27, 2012), *aff'd*, 86 A.3d 1118 (Del. 2014).

The converted documents were created and controlled by Appellants, and resided in a folder titled "Reath." Ban accessed and downloaded the documents during his suspension. In other words, he indisputably did not have a right to access, let alone possess the files. In spite of this, Ban's testimony reflects that he treated Appellant's files as if they were his own.

The court erred in declining to consider whether Ban's unauthorized download of DVRC's confidential information constituted common law conversion.

## CONCLUSION

For the foregoing reasons, the Court of Chancery erred in holding Manheim liable for Mandle's compensation and in holding Ban's unauthorized accessing and downloading of Manheim's DropBox files was not actionable. This Court should reverse the trial court's errors.


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## CERTIFICATE OF SERVICE

I, Bruce E. Jameson, do hereby certify on this 21st day of November, 2023, that I caused a copy of the foregoing ***Appellant's Opening Brief*** to be served upon the following counsel of record via File and ServeXpress:

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