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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BUTTONWOOD TREE VALUE PARTNERS, LP and FRANKLIN VALUE INVESTORS TRUST—FRANKLIN MICROCAP VALUE FUND, Plaintiffs Below-Appellants, v. MICHAEL J. SULLIVAN, STEPHEN E. FUHRMAN, RONALD V. KAZMAR, MICHAEL X. CRONIN, JOHN F. CALHOUN and CHRISTOPHER M. RODGERS, Defendants Below-Appellees, and CENTRAL STEEL AND WIRE COMPANY, Nominal Defendant Below-Appellee.	No. 178, 2015 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, CONSOL. C.A. NO. 9552-VCL

APPELLANTS' REPLY BRIEF

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I. PLAINTIFFS' COMPLAINT STATES A VALID CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE INDIVIDUAL DEFENDANTS.

The Court of Chancery held below that, but for its interpretation of *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009), "this case might well survive a motion to dismiss." Appellants' Opening Brief ("Op. Br."), Ex. A at 80. The Individual Defendants offer no reason for this Court to reach a contrary conclusion or determine that the facts alleged in Plaintiffs' Complaint fail to rebut the business judgment rule and support application of entire fairness to the Individual Defendants' conduct.[1]

As the trial court recognized, the Complaint alleges detailed facts demonstrating that (1) the Individual Defendants are accountable only to themselves, because their status as trustees derives solely from their concurrent status as CSTW directors, and (2) they have no incentive to advance the economic interests of the Company, its stockholders or even the Trust. Neither the Trust, as controlling stockholder, nor its beneficiaries selects the Trustees or CSTW's Board; instead, the Trust Instrument pre-selects the Company's directors to serve

[1] Except as stated herein, all defined terms shall have the meanings ascribed to them in Appellants' Opening Brief. As stated in their pending Motion to Amend Notice of Appeal, Plaintiffs seek reversal of the Court of Chancery's Order dismissing claims against *all* Individual Defendants – *i.e.*, defendants Sullivan, Fuhrman, Kazmar, Cronin, Calhoun, Rodgers, Powers and Rinn.

as Trustees. In this way, the Trust settlor, Mr. Lowenstine, dictated that the Trust will cede control of its votes to the CSTW Board in perpetuity – in essence, the equivalent of a "dead hand" proxy. *See Carmody v. Toll Bros., Inc.*, 723 A.2d 1180 (Del. 1998). If the Trust Instrument imposed trustee qualifications untied to service on the Board, the Company's directors – even if the trustees elected themselves to those positions – properly would be motivated to maximize the value of the Trust's investment (*i.e.*, the source of their authority) and could be removed according to criteria unrelated to their Board tenure. Here, the Trust's controlling votes have been ceded to the Individual Defendants (all of whom are CSTW insiders), whose only incentive is to maintain their management positions and the attendant perks. The Individual Defendants' response simply ignores this structure.

Neither the Trust Instrument nor Delaware law permits the Individual Defendants – contrary to their arguments to this Court – to ignore their fiduciary duties as CSTW directors in "deference" to the Trust's interests or to subjugate those duties in favor of Illinois trust law. To the contrary, the Trust Instrument resolves conflicts between the Individual Defendants' dual roles as trustees and directors in favor of their fiduciary duties owed to the Company and its stockholders.

Therefore, unless this Court concludes the trial court properly applied *Gantler* in dismissing the Complaint, the Court of Chancery's rulings should be

reversed and the matter remanded. In their Opening Brief, Plaintiffs explained why the facts alleged in their Complaint are consistent with *Gantler* and satisfy any concerns this Court expressed in that opinion about claims of director entrenchment arising from rejected acquisition bids. The Individual Defendants provide no meaningful distinction between the facts alleged here and in *Gantler* and, therefore, no basis for affirming the judgment below.

A. The Business Judgment Rule Does Not Apply To The Individual Defendants' Conduct.

As they did before the trial court, the Individual Defendants argue: (1) the Trust, as controlling stockholder of CSTW, has an absolute and unchallengeable right to reject any proposal which might affect its majority control; and (2) the Company's directors (in reliance on their voting veto as trustees) therefore can ignore or reject all value-enhancing alternatives for CSTW, including third party expressions of interest in acquiring the Company. These arguments, however, rely upon misdirection and an incorrect premise. First, the Individual Defendants mischaracterize Plaintiffs' claims as challenging the conduct of the *Trust*, as controlling stockholder, rather than the conduct of the *Individual Defendants*, as CSTW directors. Second, the Individual Defendants assume incorrectly that a director's every decision is protected if that director enjoys majority voting control. Further, while Plaintiffs do not challenge the Individual Defendants' actions *qua* trustees, the terms of the Trust Instrument disprove the Individual Defendants'

reliance upon their "responsibilities" as trustees in an attempt to justify their complete abdication of the separate fiduciary duties that govern their actions as CSTW Directors.[2]

Under the unique governance structure established by the Trust Instrument, the Individual Defendants' positions as trustees derive solely from their status as CSTW directors, not *vice versa*. Mr. Lowenstine imposed a single qualification for trustees following his death – membership on CSTW's Board of Directors. *See* A 63 (Art. VII, ¶ C(1)) (naming as trustees "those individuals who at my death are [CSTW] Directors"). Under the Trust Instrument, this remains the lone qualification for trustees for as long as the Trust owns a controlling share of CSTW; in fact, whenever a person becomes a CSTW director, that person automatically (and solely "by virtue thereof") also becomes a trustee. A 64 (Art. VII, ¶ F). Conversely, if any person ceases acting as a director of CSTW, that person "shall no longer be qualified to act as, and shall cease to be, an Individual Trustee." *Id*. Thus, the Individual Defendants serve as CSTW directors not at the

[2] Contrary to the Individual Defendants' argument (*see* Appellees' Answering Brief ("Ans. Br.") at 16-17), Plaintiffs would be entitled to challenge the Individual Defendants' conduct as trustees because CSTW itself is an intended beneficiary of the Trust. Under Illinois law (which governs the Trust), "the test for determining who is the beneficiary of an express trust is intent of the parties imposing the trust …, and this intention will be ascertained in the first instance, from the express language of the document creating the trust." *Bescor, Inc. v. Chicago Title & Trust Co.*, 446 N.E.2d 1209, 1213 (Ill. App. 1983) (internal citation omitted). As discussed below, the Trust Instrument expressly accounts for the Company's interests by authorizing the trustees to take actions that are in the best interests of CSTW but may be adverse to the Trust's interests. *See* A 73 (Art. VIII, ¶ I).

pleasure of a controlling stockholder but at their own whim, without any accountability to anyone with an economic interest in the Company.

Pursuant to the Trust Instrument, this *status quo* changes dramatically if the Trust ever does not control CSTW. In that event, the directors of CSTW will no longer automatically assume trustee positions solely by virtue of their status of directors; rather, complete authority to name trustees will pass to the Culver Educational Foundation ("Culver"), which then "shall have the power to remove those Individual Trustees who became such by reason of being or becoming [CSTW] Directors and to appoint such number of successor and additional Individual Trustees so that there always will be thereafter nine Individual Trustees." A 65 (Art. VII, ¶ I). The Individual Defendants concede their hostile relationship with Culver, which previously litigated over the directors' "management" of CSTW (the Trust's sole value-producing asset) to the point where its dividends no longer support a full time school. *See* Ans. Br. at 8 n.4; *see also* B 49.

The Trust Instrument also prioritizes the Company's interests over those of the Trust's beneficiaries so as to rectify the obvious conflicts faced by individuals who sit concurrently as trustees and CSTW directors. Mr. Lowenstine "anticipate[d] that it may be desirable for the trustees, both in their capacities as trustees and as directors of [CSTW], to make decisions, or refrain from making

decisions which are arguably adverse in some respects to the best interests of the beneficiaries of a trust hereunder, but which may be in the best interests of [CSTW]." A 73 (Art. VIII, ¶ I). As a result, the Trust Instrument permits the trustees to place the interests of the Company above those of the Trust and insulates them from liability to the Trust for doing so:

> In voting the shares of [CSTW], I authorize the trustees to consider primarily the best interests of [CSTW], since it is my belief that attention to the best interests of [CSTW] ultimately will best serve the interests of the beneficiaries of the trusts hereunder. I further authorize the trustees to take such actions as they deem appropriate with respect to matters involving [CSTW] in which a trustee, or all of the trustees, may be individually interested as a director or officer of [CSTW] notwithstanding that such action may be adverse to the best interests of the beneficiaries of any trust hereunder, provided such action is not in breach of their fiduciary duties in such other capacity or capacities. *Any action taken in those respects shall be binding and conclusive on the beneficiaries of the trusts hereunder as if no such relationship or conflict of interest existed, and the trustees shall be relieved, to the maximum extent permitted by law, of any liability for actions so taken.*

A 73-74 (Art. VIII, ¶ I) (emphasis added). Such actions include "the sale of all securities of [CSTW] in a manner deemed by the trustees to present a fair and reasonable return on the investment and also taking into consideration *the best interests of the other shareholders* and employees of [CSTW]." A 55 (Art. VI, ¶ M(1)) (emphasis added).[3]

[3] The Individual Defendants state incorrectly that the Trust Instrument prohibits selling the Trust's CSTW stock "'as a single block' unless there was no viable alternative." Ans. Br. at 6 (quoting A 55 (Art. VI, ¶ M(1)). The relevant provision reads in full:

As the trial court acknowledged, the foregoing language "subordinate[s] the interests of the directors as trustees to their fiduciary duties as directors of the corporation under the theory that what is in the best interest of the corporation over the long-term would be in the best interest of the trust." Op. Br., Ex. A at 77. Accordingly, the Vice Chancellor stated: "I don't think it's at all clear that the management defendants can simply invoke their trustee's hat and then say that they did whatever the interests of the trust required." *Id.* at 77-78. The Court of Chancery properly recognized the primacy of the Individual Defendants' fiduciary duties as CSTW directors, and the Individual Defendants have offered no basis for this Court to conclude otherwise. It is the Individual Defendants' breach of these duties that establishes their liability under Delaware law and calls for entire fairness review.

B. Delaware Law Does Not Permit The Individual Defendants To Use Voting Control Of The Trust As They Please.

Even if the Court considers the Individual Defendants' "controlling stockholder" argument, it is unavailing. Nothing in the Court's holdings of *Tanzer*

> Although I realize it may be advantageous to sell the trust's interest as a single block to an organization knowledgeable in the steel industry, I nonetheless direct that the trustees not sell the trust's interest as a single block unless the trustees believe, in their sole discretion, that a block sale is the only practicable way to sell the trust's interest at an aggregate price that is within the range of fair market values for such securities, determined by the trustees in good faith.

A 55 (Art. VI, ¶ M(1)). Therefore, the Trust Instrument contemplates and authorizes the very type of transaction the Individual Defendants have refused to consider.

v. Int'l Gen. Indus., Inc., 379 A.2d 1121 (Del. 1977), *overruled in part on other grounds, Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), or *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840 (Del. 1987), insulates the Individual Defendants from liability. Both opinions addressed the right of a controlling stockholder to determine how to vote or dispose of its shares, but recognized that this right is qualified by duties owed to minority stockholders. *See Tanzer*, 379 A.2d at 1124 ("[A] stockholder in a Delaware corporation has a right to vote his shares in his own interest, including the expectation of personal profit, *limited, of course, by any duty he owes to other stockholders*.") (emphasis added); *Bershad*, 535 A.2d at 845 ("Stockholders in Delaware corporations have a right to control and vote their shares in their own interest. *They are limited only by any fiduciary duty owed to other stockholders.*") (emphasis added). Here, as the Trust Instrument expressly states, the Individual Defendants' decision-making as trustees cannot be isolated from their concurrent fiduciary duties as CSTW directors; to the contrary, they *must* comply with those fiduciary duties in exercising their responsibility as directors, regardless of the interests of the Trust or its beneficiaries. *See Weinberger*, 457 A.2d at 710 ("There is no dilution of [a director's duty of loyalty] where one holds dual or multiple directorships, as in a parent-subsidiary context.").

In *Tanzer*, the Court observed that "it would not be fair" to a controlling stockholder "to examine only its director control … which is a consequence of its power and not the source thereof." 379 A.2d at 1123 (cited Ans. Br. at 20). That principle is inapplicable here; to the contrary, the *opposite* is true – as discussed above, the source of the Individual Defendants' control over the Trust is their status as CSTW directors. In this way, Plaintiffs' allegations are consistent with the facts identified by then-Chancellor Strine in *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022 (Del. Ch. 2012), as creating an actionable conflict between a controlling stockholder's individual circumstances and the broader interests of the minority. Whereas the *Synthes* court raised concerns if "the controller forced a sale of the entity at below fair market value in order to meet its own idiosyncratic need for immediate cash, and therefore deprived the minority stockholders of the share of value they should have received," *id*. at 1036, the Individual Defendants here rejected all prospects of potential strategic alternatives based solely upon their personal desire to maintain their lucrative management positions at the Company – what the court below described as "the interesting converse of *Synthes*." Op. Br., Ex. A at 76.

The Individual Defendants concede that Delaware law affords a remedy for self-dealing when "the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives something from the

subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary." *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (cited Ans. Br. at 21). This principle applies fully here, where the Individual Defendants have caused CSTW to act in a manner that perpetuates their control but harms the Company and its minority stockholders. Because the Individual Defendants own virtually no shares of CSTW, and thus have no economic incentive to act for the Company's benefit, they cannot hide behind "the basic tenet that controllers have a right to vote their shares in their own interest." *Synthes*, 50 A.3d at 1041.

Moreover, the Individual Defendants' hands are not tied by the wishes of the Trust as they claim (even if one ignores the fact that they are the persons tying the knots). It takes little imagination to conceive of corporate acts available to faithful fiduciaries that do not require an affirmative stockholder vote or a change in control – for example, terminating dividends and accumulating cash to pursue acquisitions using cash and debt; electing a Board of non-management directors, thereby eliminating the conflict faced by the Individual Defendants; or adopting separate classes of stock to allow the retention of control while issuing additional shares to use in acquisitions. The Individual Defendants have explored no such alternatives.

Given the complete disconnect between the Individual Defendants' control of CSTW and the Company's financial well-being, sustaining Plaintiffs' claims

will not, as the Individual Defendants argue, turn Delaware law on its head. *See* Ans. Br. at 21. This is not simply a situation "where the controlling stockholder controls the boards of both entities, as is commonly the case" (*id.*); instead, the Trust Instrument creates an unusual governance structure pursuant to which the *directors of the "subsidiary,"* solely because they hold such positions, *control the parent*. Under these circumstances, and in view of the obvious conflicts they create, the Individual Defendants' refusal to consider any potential strategic transactions *should* permit Plaintiffs and Delaware's courts to scrutinize their demonstrably self-interested decision-making. This is not the typical case involving the relationship between a corporation and its controlling stockholder and, as such, the business judgment rule has no application.

C. Consistent With *Gantler*, Plaintiffs Allege Specific Conduct By The Individual Defendants In Furtherance Of An Entrenchment Motive.

Plaintiffs and the Individual Defendants appear to agree on the scope of *Gantler's* holding – *i.e.*, that something more than a bare entrenchment motive must be alleged to establish director disloyalty and rebut the business judgment rule when challenging the board's rejection of a merger proposal. *See* Ans. Br. at 25. Like the court below, however, the Individual Defendants apply *Gantler* incorrectly, arguing that Plaintiffs fail to allege "outside conflicts of interest to sustain a loyalty claim." *Id.* The Individual Defendants' simplistic

characterization of the Complaint – arguing that it "alleges only that the directors of [CSTW], who received compensation from the Company because they worked there, rejected an unsolicited takeover proposal that the controlling stockholder had already rejected" (*id.*) – fails to consider the specific facts alleged by Plaintiffs.

The Individual Defendants do not and cannot contest that they alone control their perpetual receipt of lucrative salaries and other benefits as CSTW officers. *See* Op. Br. at 13-16, 31; A 26-30. Nor can the Individual Defendants dispute that they owe their positions as trustees solely to their status as CSTW directors. *See* A 63-64. As a result, the Individual Defendants enjoy their power even though they possess essentially no personal interest in the value of CSTW stock and no personal interest in the Company's economic performance beyond its ability to pay their compensation and benefits. *See* Op. Br. at 6-9; A 15-19.[4] Under the terms of the Trust Instrument, the Individual Defendants' dual positions as trustees and directors are unassailable for so long as they maintain the Trust's ownership of more than 50% of CSTW's shares. *See* Op. Br. at 12; A 38. Thus, the Individual Defendants face not just a threat to their positions as officers or directors, but to their control of CSTW; control that, as discussed below, the Individual Defendants

[4] By contrast, "[a] director who is also a shareholder of his corporation is more likely to have interests that are aligned with the other shareholders of that corporation as it is in his best interest, as a shareholder, to negotiate a transaction that will result in the largest return for all shareholders." *Orman v. Cullman*, 794 A.2d 5, 28 n.56 (Del. Ch. 2002). Here, nobody with any economic interest in CSTW or its stock can evaluate the Individual Defendants' decision-making and hold them accountable for their performance as managers.

admittedly sought to preserve through their rejection of the strategic alternatives. As required by *Gantler*, these particularized allegations establish far more than a general, conclusory "entrenchment motive." 965 A.2d at 707.

The Individual Defendants attempt to challenge Plaintiffs' allegation that their "consistent refusal to consider any strategic alternatives for CSTW … admittedly was driven by a personal desire to retain their roles as trustees of the Trust, rather than the interests of CSTW or its minority shareholders." Op. Br. at 32. The minutes of the July 18, 2011 trustees meeting, however, make clear that the Individual Defendants considered their potential removal by Culver as a basis to reject the Samuel offer:

> The Trustees noted that the fundamental purpose of the Trust is to support the School. Should there be a sale of the [CSTW] stock, Culver would then be able to appoint the Trustees, and Culver has previously argued that operating the School is impractical. Should Culver-appointed Trustees reach that conclusion, the Trust would allow them to cease operating the School.

B 48. The terms of the Trust Instrument demonstrate that the Individual Trustees' purported reliance upon "the fundamental purpose of the Trust" was pretextual – the Trust Instrument itself contemplates a sale of the Trust's CSTW stock in the event it becomes "impractical to operate the Conserve School." A 55 (Art. VI, ¶ M(1)). The Trust Instrument also acknowledges that the trustees may determine that the Trust's CSTW shares "should be sold" without consideration of the Conserve School or its operation. A 71 (Art. VIII, ¶ C). Regardless, the Court of

Chancery's task was not to determine whether the Individual Defendants could articulate a countervailing argument in support of their actions, but to determine whether Plaintiffs, accepting all well-pleaded facts as true and drawing all reasonable inferences in their favor, "would be entitled to recover under any reasonably conceivable set of circumstances." *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

Similarly, the Individual Defendants attempt to refute Plaintiffs' allegation that they rejected the Samuel offer "without any analysis" at the CSTW Board level by citing minutes of their July 18, 2011 meeting as *trustees*. *See* Ans. Br. at 29-30. This argument, however, requires that the Individual Defendants concede that they impermissibly subordinated their fiduciary responsibilities as CSTW Board members to their (self-interested) decisions as trustees. Of course, any decision-making process undertaken by trustees cannot demonstrate fulfillment of the Individual Defendants' fiduciary duties as CSTW directors. To be sure, the minutes of the perfunctory special meeting held by the *CSTW Board* on July 18, 2011 reveal that the Individual Defendants, while purporting to act as the Company's directors, declined Samuel's proposal simply because the Trust declined to sell. *See* B 52 ("The Directors noted that each of the methods of accomplishing the [Samuel] proposal would require the support of the majority

stockholder of the [Company], the Conserve School Trust.").[5] The minutes themselves support Plaintiffs' allegation that the Individual Defendants "peremptorily rejected the Samuel offer without any substantive deliberation." Op. Br. at 33. For the purpose of this Court's review of the trial court's dismissal ruling, the Complaint alleges a "reasonably conceivable set of circumstances" to support Plaintiffs' claims. *Central Mortgage*, 27 A.3d at 535.

The Individual Defendants also attempt to re-cast their consistent refusal to engage with potential transaction partners by characterizing expressions of interest as "cold calls." Ans. Br. at 33. Viewed in isolation, and outside of the broader context of the Individual Defendants' dual roles as directors and trustees, a board declining to consider a single unsolicited inquiry could very well merit application of the business judgment rule. The Complaint here, however, alleges a policy of rebuffing (or ignoring outright) potentially value-maximizing transaction partners without any exploration of possible terms, solely for self-interested purposes. The Individual Defendants never address the fact, as alleged in the Complaint, that they responded to "previous attempts to discuss acquisition interest" with "clear and immediate disinterest in pursuing or discussing the topic." A 36 (SAC ¶ 51). This, perhaps most starkly, demonstrates that the Individual Defendants did not act "in

[5] While the July 18, 2011 Board minutes state that the Individual Defendants, "[i]n their capacity as Directors," agreed with their decision as trustees that "pursuing the proposal was not in the best interests of [CSTW]" (B 52), neither the Trust nor the Board minutes reflect any meaningful consideration of the Company's "best interests." *See* B 49, B 52.

the good faith pursuit of a legitimate corporate interest." *Gantler*, 965 A.2d at 706.[6]

Finally, the Individual Defendants do not meaningfully rebut Plaintiffs' allegation that, in an industry undergoing consolidation, their self-interest has caused CSTW to "sit on the sidelines" by refusing to consider strategic acquisitions. A 25 (SAC ¶ 34). While the Individual Defendants contend that Plaintiffs should have identified specific targets or opportunities that were disregarded (*see* Ans. Br. at 34), this argument simultaneously proves too much and too little. The Individual Defendants ignore the specific opportunities alleged in the Complaint, but argue at the same time that Plaintiffs should be required to plead predictively the results of a process the Individual Defendants concededly have never undertaken. On this score, the Complaint more than adequately meets Delaware's notice pleading standard as recognized by this Court. *See Central Mortgage*, 27 A.3d at 536.

In their application of *Gantler*, the Individual Defendants seem to claim that allegations of willful malfeasance, such as "sabotage," "deceit or concealment," are needed to prove director disloyalty in rejecting an acquisition bid. Ans. Br. at

[6] The Individual Defendants' reliance upon *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009), is misplaced because the Court there considered only whether enhanced scrutiny under *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), was appropriate "simply because a company is 'in play.'" 970 A.2d at 242. The allegations of Plaintiffs' Complaint do not implicate *Revlon*, but support application of entire fairness review to the Individual Defendants' conduct.

28, 32. *Gantler* imposes no such requirement; rather, this Court held only that "plaintiffs must plead, in addition to a motive to retain corporate control, other facts sufficient to state a cognizable claim that the Director Defendants acted disloyally." 965 A.2d at 707. Plaintiffs have met that test, and accordingly the Court of Chancery erred by dismissing the Complaint.

CONCLUSION

For the foregoing reasons, as well as those set forth in their Opening Brief, Plaintiffs respectfully request that the Court reverse the Court of Chancery's Order granting the Individual Defendants' Motion to Dismiss and remand this action for further proceedings.

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