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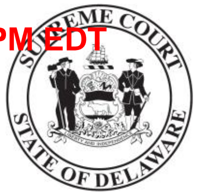

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IRONWORKERS DISTRICT COUNCIL OF PHILADELPHIA & VICINITY RETIREMENT & PENSION PLAN,

Plaintiff Below,
Appellant,

v.

LAMBERTO ANDREOTTI, BART BAUDLER, JOHN BEDBROOK, SAMUEL W. BODMAN, JAMES BOREL, RICHARD H. BROWN, ROBERT A. BROWN, DENNIS BYRON, BERTRAND P. COLLOMB, THOMAS M. CONNELLY, DANIEL J. COSGROVE, CURTIS J. CRAWFORD, ALEXANDER M. CUTLER, JOHN T. DILLON, ELEUTHERE I. DU PONT, ERIK FYRWALD, MARILLYN A. HEWSON, CHARLES O. HOLLIDAY, ROBERT C. IWIG, DANIEL E. JACOBI, LOIS D. JULIBER, JEFFREY L. KEEFER, ELLEN KULLMAN, MICHAEL LASSNER, TRACY LINBO, CARL J. LUKACH, JUDITH MCKAY, WILLIAM NIEBUR, DEAN OESTREICH, WILLIAM K. REILLY, THOMAS L. SAGER, PAUL SCHICKLER, JOHN SOPER, LEE M. THOMAS, PATRICK J. WARD,

Defendants Below,
Appellees,

and E. I. DU PONT DE NEMOURS AND COMPANY,

Nominal Defendant.

No. 286,2015 D

Court Below: Court of Chancery of the State of Delaware

C.A. No. 9714-VCG

PUBLIC VERSION

PLAINTIFF BELOW, APPELLANT'S CORRECTED REPLY BRIEF

PINCKNEY, WEIDINGER, URBAN & JOYCE LLC
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Elizabeth Wilburn Joyce (DE No. 3666)

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Dated: September 14, 2015

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INTRODUCTION

Defendants fail to rebut Plaintiff's central point: the Complaint makes particularized allegations, based on the Company's own documents and statements, that demonstrate that the Report omitted material facts necessary to the Board's good faith review and its consideration of the Demand.[1]

Defendants attempt to sidestep this key issue by touting the Report's drafter and the Report's length to support an inference of its reasonableness. Under Delaware law, neither of these points is relevant, let alone dispositive. The Board is only entitled to the protection of the Business Judgment Rule when it is fully informed, e.g., its investigation addressed all material facts, and the Board acted reasonably and in good faith. As discussed below, the particularized facts alleged here give rise to a reasonable inference that the Board knew the Report was materially deficient and therefore it could not reasonably and in good faith rely on it.

REBUTTAL FACTS

Defendants rely on the Report's unsupported conclusions while ignoring the Complaint's particularized allegations and the Company's own contemporaneous documents and policies, the findings of two federal courts and the verdict of a jury.

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[1] Citations herein to Plaintiff's Opening Brief are cited as "OB"; citations to Defendants' Answering Brief are cited as "AB."

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A. The Failure of GAT and its Abandonment as a Standalone Product

Defendants attempt to downplay GAT's failure, stating: "[b]etween 2006 and 2008, further testing of soybeans with the GAT trait indicated some stunting under extreme stress conditions." AB at 5, 14 (quoting the Report). The Company's own documents show, and the Complaint alleges, not only that GAT was a failure, but also that a number of the Director Defendants nevertheless continued to promote it while concealing this fact. A69-71, A76 (¶¶ 114-18, 128-29) (press releases and presentations promoting GAT).

Defendants contend that when they continued to publicly trumpet GAT after its failure, they were not making misrepresentations, but were using "GAT" as an "umbrella term," and were referring to GAT as both a standalone product and a stack of GAT/RR. AB at 14. Defendants rely on the Committee's unsupported conclusion that "the evidence demonstrates that Pioneer had not abandoned the Optimum GAT standalone product in early 2008." A402 (Report p. 161). But the Complaint's allegations of particularized facts, based upon the Company's documents produced pursuant to 8 *Del. C.* § 220, belie this assertion and instead show that the Company abandoned GAT as a stand-alone product in early 2008 – not 2009, as Defendants claim. AB at 14 (*citing* A402). For example:

- In [redacted] (¶120).

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- A160-61 (¶311).

- The Company's January 2008 "Annual Report for Soybean Product Development and Supporting Products", [2] which stated: *Id*.

- In a January 22-24, 2008 Soybean Strategic Planning session, officer-employee defendants, recommended the Company "discontinue product development for Optimum GAT Rd 7 alone and transition toward a stacking strategy." A82 (¶142).

- This recommendation to discontinue GAT was discussed in a January 26, 2008 email thread by DuPont management, including Lassner, VP of Trait Discovery for the Company, who responded: "***I agree with killing [GAT] as a stand alone product for beans***. A83 (¶144).

- A85-86 (¶150-51).

- A97 (¶177).

- Holliday was a participant on DuPont investor earnings calls in April and July 2008 where he kept silent about GAT's failure and DuPont's intent to pursue stacking. A96 (¶176), A100-101 (¶186).

- A161 (¶311).

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[2] John Soper was the Vice President of Crop Genetics Research & Development for DuPont. A51 (¶70).

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- *See also, e.g.,* A77 (in the Monsanto Litigation that "at the end of 2007 the research team was in a position where it was recommending not moving forward with [GAT] as a commercial product") (¶131), A88-90 (¶¶156-58)

B. DuPont Knew it did Not Have the Right to Stack GAT with RR

Defendants contend that DuPont "reasonably believed" it had the right to stack GAT with RR and "all believed the Company had secured stacking rights." AB at 11 (*citing* A378-79, Report at 137-38). The federal District Court sanctioned DuPont for this very contention. A121-22 (¶¶230-31). Still, Defendants contend: "It was not until August 25, 2008, that Monsanto first indicated its belief that the License Agreement did not permit stacking," pointing to after months of failed negotiations. AB at 5 (*citing* A335 (Report at 94)); A91-94 (¶163-71). The Complaint cites the Company's own contemporaneous documents, however, which demonstrate that the Defendants knew that the Company was not permitted to stack GAT with RR, both at the time it entered into the 2002 License Agreements and in 2007/2008 when it began stacking GAT with RR. For example:

- March 26, 2002: A contemporaneous internal email among drafters of the 2002 license agreement acknowledged that the 2002 draft did not provide Company the same stacking rights under the 1992 Agreement. A60 (¶95) ("section 2.09 may be a problem . . . Our 1992 agreement is not so restrictive and permits us to commercialize stacks. . . .");

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- March 27- 28, 2002 email exchange between [redacted] and [redacted] notes "[s]tacking restrictions with Monsanto RR trait." A61 (¶96);

- August 21, 2007: corporate counsel sent a draft amendment to existing corn licenses with a [redacted] A74 (¶123);

- August 27, 2007: [redacted] A75 (¶125);

- September 20, 2007: [redacted] emailed [redacted] regarding DuPont's soy rights: "Current: [R&D] can stack but no commercial rights." A75-76 (¶127);

- [redacted] A80-81 (¶138);

- January 19, 2008: [redacted] "we don't have commercial rights." A81 (¶139):

- January 26, 2008: Lassner, VP of Trait Discovery for the Company, [redacted] A83 (¶ 144);

- [redacted] A84 (¶146);

- [redacted] A92(¶¶164-68);

- [redacted]

[3] Daniel E. Jacobi was Pioneer's Corporate Legal Counsel and Associate General Counsel for DuPont. A48-49 (¶60).
[4] Daniel J. Cosgrove was Pioneer's Corporate Counsel. A48 (¶57).

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A93 (¶170).

- A104 (¶193).

Defendants' knowledge that they were not permitted to stack GAT with RR was further demonstrated by the fact that they were simultaneously attempting to negotiate with Monsanto for the right to stack GAT with RR. A92-94 (¶163-72). Defendants invested months (if not years) negotiating with Monsanto for the right to stack – including during the time Defendants claim they believe they already had such rights – and ultimately settled the Monsanto Litigation for at least $1.75 billion in order to obtain "a license for RR *which included stacking rights*." AB at 8 (emphasis added).

Defendant Cosgrove was a "primary negotiator of the stacking provisions" in the 2002 License Agreement. A60 (¶93). His contemporaneous emails

AB at 9-10. Likewise, the emails of Defendant

similarly contradict Defendants' claims. The Complaint particularized their contemporaneous exchanges, which expressly recognize that Pioneer did not have the right to commercialize a stack. For example:

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- March 14, 2002, circulated a proposed draft 2002 License Agreement modified to remove stacking restrictions. A60 (¶94).
- March 26, 2002 email to from recognizing that DuPont lacked stacking rights. A60 (¶95).
- March 27- 28, 2002 email exchange between and wrote: "biggest issues for us are the stacking restrictions . . .." A61(¶96).
- A75 (¶125).
- September 20, 2007, Jacobi emailed Cosgrove, "[w]hat is our current advice to R&D on stack RR and [GAT] in beans…?" Cosgrove told Jacobi: "they can stack but no commercial rights." A75-76 (¶127).

Rather than address these particularized allegations, Defendants rely on after-the-fact statements derived from witness summaries for Defendants Jacobi and Cosgrove that "explained" to the Committee that a court could read the license to limit Pioneer's right to commercialize, but "they thought they had a reasonable interpretation of the agreement and that the negotiating history would favor Pioneer *if the Court looked beyond the language of the agreement.*" A336 (*citing* Report at 95 n.356, Schickler meeting summary)) (emphasis added).[5] The Company's contemporaneous documents referenced in the Complaint, including

[5] The Report relies on a number of undisclosed witness interview summaries (hereafter, "Summaries") of after-the-fact recollections despite contemporaneous documents and ***trial testimony*** that contradict the Summaries. *See infra* at Section B.4; see also A77 (¶131) (Soper testified in Monsanto Litigation that in at the end of 2007, research team recommended not moving forward with GAT commercially).

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the above referenced emails, refute any such *post hac* explanation, as found by the District Court.[6] A122 (¶231).

C. Additional Inaccuracies

Defendants claim Plaintiff conceded *ex post* independence. AB at 26. The record and Plaintiff's Opening Brief contradict this claim. *See, e.g.*, Tr. 28:17-23; OB at 20-21. Defendants contend that Plaintiff's counsel conceded that bad faith is the only inquiry. AB at 24. There was no such concession. Plaintiff's Counsel stated repeatedly during oral argument that the reasonableness of the Board's actions was also at issue, and Plaintiff's brief below sets forth the applicable standards. *See, e.g.*, Tr. 25:16-26:2. 27:20-24, 33:21-34:1, 36:19-22, 56:23-57:2, 58:16-22; OB at 18-19; *see also* A472-484.[7]

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[6]

[7] Defendants also repeatedly assert that Plaintiff's counsel refused numerous invitations to meet to discuss the investigation. Plaintiff did not understand any communications from Defendants' counsel to include such an invitation and indeed extended an invitation of its own to discuss the case, which Defendants' counsel rejected.

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ARGUMENT

A. Legal Standards

1. Standard of Review

The parties agree that the standard of review is *de novo*. OB at 14, AB at 18.

2. Reasonable Doubt Standard

Defendants ask this Court to affirm the Trial Court's ruling, in part, because the Trial Court cited the "reasonable doubt" standard. AB at 25-26. While the Trial Court recited the correct standard, it erred in not applying it. As addressed in Plaintiff's Opening Brief, the Trial Court wrongly applied a heightened standard, requiring that Plaintiff plead that the Committee's recommendation to refuse the Demand was "clearly erroneous." OB at 18 (quoting Op. at 78-79). This is not the proper standard under Delaware law. [8]

3. Zapata Cases are Relevant Because the Roles and Obligations of the Investigatory Bodies and the Inquiry into the Reasonableness and Good Faith of the Decision Maker are Identical

The Trial Court rejected Plaintiff's reliance on the *Zapata* line of cases, distinguishing special litigation committees in the demand excused context from

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[8] *See Grimes v. Donald*, 673 A.2d 1207, 1219 (Del. 1996) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000), *aff'd*, 784 A.2d 1080 (Del. 2001); *Scattered Corp. v. Chicago Stock Exch., Inc.*, 701 A.2d 70, 73 (Del. 1997), *overruled on other grounds by Brehm*, 746 A.2d 244.

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evaluation committees in the demand refused context.[9] Op. at 75-76 and n. 261 (*citing* "[o]ther Zapata-context cases on which the Plaintiff relied"); *see also* A477-483. Defendants limit their response to the Trial Court's distinction of *London v. Tyrell*. AB at 27. But in its Opening Brief on appeal, Plaintiff explained why the Trial Court's analysis of this issue was error, in that both types of committees have parallel roles and obligations, and the inquiry as to the decision-maker's reasonableness and good faith is identical. OB at 21-24. This overlap is particularly true here because the Evaluation Committee addressed both (a) the stockholder demands on the Company, including Plaintiff's, *and* (b) the demand futility allegations made in the *Zomolosky* Action.[10] OB at 10, n. 8 (*citing* A246-47); *id*. at 11 (*citing* A244, A414). Accordingly, the *Zapata* cases should be given their fair weight.[11]

B. Plaintiff Pleads Non-Conclusory, Particularized Facts Contradicting the Report, Entitling Plaintiff to the Benefit of All Reasonable Inferences

This Court has encouraged the use of §220 as part of stockholders' "tools at

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[9] Plaintiff's Answering Brief below (A432-644) cited *London v. Tyrrell,* 2010 WL 877528 at *15 (Del. Ch. Mar. 11, 2010); *Abella v. Universal Leaf,* 546 F. Supp. 795, 799 (E.D. Va. 1982); *Sutherland v. Sutherland,*958 A.2d 235, 242 (Del. Ch. 2008); *St. Clair Shore Gen. Emps. Ret. Sys. v. Eibeler,* 2007 WL 3071837 at *5 (S.D.N.Y. Oct. 17, 2007); *Lewis v. Fuqua,* 502 A.2d 962, 968-969 (Del. Ch. 1985); and *In re Oracle Corp. Derivative Litig.,* 824 A.2d 917, 921, 925-26 (Del. Ch. 2003). *See* A477-79.

[10] *Zomolosky v. Kullman et al*, 70 F. Supp. 3d 595 (D. Del. Sept. 12, 2014).

[11] Having failed to respond to Plaintiff's argument with respect to the *Zapata* cases, Defendants' rebuttal is <u>waived</u>. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (Issues not briefed are deemed waived).

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hand" since *Grimes*, *Rales*, and *Scattered.*[12] Yet the Trial Court abandoned this bedrock principle below. Despite the fact that Plaintiff made such a demand, and pled "non-conclusory facts contradicting the Report," *see In re Synthes, Inc. S'holder Litig*., 50 A.3d 1022, 1026 (Del. Ch. 2012), the Trial Court erroneously characterized Plaintiff's suggested inferences (discerned, in part, from documents produced in response to its §220 demand) as "disagreement" with the Committee's conclusions. Doing so turned the very practice encouraged by this Court on its head, thereby eviscerating the purpose and utility of a §220 demand.

Defendants acknowledge that under *Synthes* and *Levine v. Smith,* 591 A.2d 194 (Del. 1991), inferences are to be construed in Plaintiff's favor if the Complaint "plead[s] non-conclusory facts contradicting" the Report. AB at 19 and n.8. Indeed, in the face of Plaintiff's well-pled allegations, Defendants concede *Synthes* controls: "[h]aving premised their recitation of the facts squarely on [an extrinsic] document and incorporated it, the plaintiffs cannot fairly, even at the pleading stage, try to have the court draw inferences in their favor that contradict that document, unless they *plead* non-conclusory facts contradicting it." AB at 19 (emphasis in the original). Plaintiff has done exactly this.[13]

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[12] *See Grimes v. Donald*, 673 A.2d 1207 (Del. 1996); *Rales v. Blasband*, 634 A.2d 927 (Del. 1993); *Scattered Corp. v. Chicago Stock Exch., Inc.,* 701 A.2d 70 (Del. 1997).

[13] Defendants argue that Plaintiff's particularized allegations are mere

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1. Internal Control Failures

Defendants ignore Plaintiff's particularized allegations that the Director Defendants had personal knowledge relating to DuPont's internal controls and the breakdown of those controls. AB at 30-31. The Director Defendants served on Board committees charged with oversight of such controls. Plaintiff pleads particularized facts about these Defendants' roles and responsibilities on those committees. A53-54, A57-58, A90, A125-26, A139-40, A144-45, A177-78 (¶¶ 77-78, 87, 161, 239, 269, 272, 280, 365). For example, Kullman served on the Strategic Direction Committee, along with Brown, Dillon, Holiday, and Juliber, that received regular updates from all business lines, including Pioneer, with respect to strategy, key transactions, and key decisions. A54-55, A79-80 (¶¶ 80-

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disagreements with the Report's conclusion by cherry-picking sentences – from the end of the Complaint – that simply contain the word "conclusion(s)." AB at 21-23, n. 9. But the Complaint alleges the investigation lacked material information and the Committee made factual findings that contradict Plaintiff's well-pled particularized facts, and are inconsistent with other aspects of the Report itself. Defendants' cited excerpts omit pertinent portions of the allegations. *E.g.,* AB at 22 (*citing* A143 (¶ 277 n.54)) but excluding language in the same paragraph of the Complaint alleging that the Report's conclusion was "*irreconcilable with the facts* contained in the Report" and, "even accepting the Committee's conclusion . . . the facts . . . warrant action by the Board.") (emphasis added); *see also id.* (citing A146 (¶ 282) but deleting the portion of the allegation stating: "The Report omit[]s management's failure to alert the Board to the brewing storm with Monsanto, including with respect to the Sanctions Order [in which] the court determined that DuPont's internal documents directly contradicted the position it had espoused as to its right to stack GAT with RR.") (emphasis added).

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81, 137). Kullman informed the Director Defendants on May 15, 2009, when the Monsanto Litigation was filed. A109-10 (¶ 204).

When these Defendants were not: (1) informed of the longstanding dispute with Monsanto over stacking until Monsanto sued DuPont or (2) informed of the Sanctions Order (which made factual findings directly contrary to their litigation position) until after critical litigation positions were taken and a $1 Billion Judgment was rendered, they became aware that the internal controls had failed. A35, A94-95, A105, A109-10, A142, A144-46, A155-58 (¶¶ 12, 173, 195, 204, 277, 280-82, 299-307).

Defendants ignore the focus of Plaintiff's internal controls allegations and instead point to the Trial Court's conclusion (which is itself taken straight from the Report) that "the Company's internal control systems . . . [were] not sufficiently deficient so as to satisfy the first prong of *Caremark,* and there were no 'red flags.'" AB at 23. But the Trial Court improperly accepted the Report's conclusions as fact, notwithstanding that these supposed "facts" contradict Plaintiff's particularized allegations. Plaintiff alleges there were red flags based upon (1) the terms of the internal controls themselves; (2) the Directors and Board Committee members' high-level roles and responsibilities related to such internal controls; (3) the long-tenured status of a majority of the Director Defendants; (4) the number of times the Board Committees met during the operative time period;

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and (5) the Director Defendants' knowledge that material information, as learned from the Report, was not fully investigated or shared with the Board at the appropriate time. A53-55, A90-91, A94-95, A109-10, A125-26, A134-44 (¶¶ 77-80, n. 7-10, 161, 173, 204, 239 n. 33, 261, 263, 265-70, 272-77, 280).

At the motion to dismiss stage, "facts" cited by the Committee cannot trump a plaintiff's particularized allegations contradicting those facts. *See In re Gardner Denver, Inc., S'holder Litig.*, 2014 WL 715705, at *7 (Del. Ch. Feb. 21, 2014) (a trial court must disregard "facts" outside the complaint, "absent endorsement of their truthfulness by the [p]laintiff"). By accepting the content of the Report, rather than Plaintiff's well-supported allegations as true, the Trial Court improperly gave the benefit of competing inferences to the Defendants. Delaware law is well settled on this point: inferences must be drawn in Plaintiff's favor. *La Point v. Amerisource Bergen Corp.*, 970 A.2d 185, 191 (Del. 2009); *see also* OB at 15-16.

2. Failure to Interview Key Witnesses

Regarding allegations that Defendants failed to interview key witnesses, Defendants offer one case for the proposition that Plaintiff does not get to determine who is interviewed in the course of the Company's investigation. *See* AB at 32. But here, the Board failed to even inquire about the knowledge of the two highest-ranking officers and Board members, who had institutional knowledge of the facts from 2002 forward. Plaintiff alleges that Kullman and Holliday

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possessed crucial, relevant, unique information that a reasonable committee and board would have investigated, particularly considering the breadth of the allegations set forth in the Demand. A54-55, A79-80, A109-10 (¶¶ 80-81, 137, 204). Defendants' failure to acknowledge this, and their resort to "quantity over quality" arguments, is unavailing. *See* AB at 31-32. A reasonable inference – and Plaintiff posits the most reasonable inference – to be made from the Committee's (and later the Board's) failure to interview Kullman and Holliday is that it chose not to interview them to save the Committee from having to explain the contradiction between facts alleged in the Complaint, and the Summaries.

Defendants argue that Plaintiff has not shown that the 23 individuals who were interviewed were incapable of providing a complete overview of the facts. AB at 32-33. However, given Kullman's role as CEO and Chair, her specific responsibilities with respect to the Company's internal controls, and her unique role as the provider of information regarding the litigation to the Board, she was a necessary person – with unique authority, responsibility, and knowledge - to interview. OB at 31, n.64. A44, A79-80, A94-95, A109-12, A115, A118-20, A136-37, A158 (¶¶42, 137, 173, 204, 208-09, 216, 220-21, 225, 265, 306). Where witnesses who should have been interviewed were not, a reasonable doubt arises as to the reasonableness of the investigation. *City of Orlando Police Pension Fund v. Page*, 970 F. Supp. 2d 1022, 1032 (N.D. Cal. 2013) (despite defendants' arguments

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that the investigation was extensive and included interviews of 17 people, no reasonable investigation could have occurred without an interview of the lead investigator of the underlying wrongful conduct).

3. The Delayed Disclosure of the Sanctions Order to the Full Board

The Complaint alleges that the Sanctions Order – which made factual findings directly contrary to DuPont's position in the Monsanto litigation (a position reiterated here) – was withheld from the Board until after crucial litigation decisions were made, litigation costs were incurred, and the Company suffered a $1 Billion Judgment. A123-24 (¶ 236); A355. The Committee and the Report do nothing to address this failure. Instead, the Committee determined that the District Court (the decision of which was later affirmed on appeal) was simply wrong and misguided with respect to the issuance of the Sanctions Order. Even a cursory review of the Sanctions Order, however, demonstrates that the District Court's findings are highly detailed and well founded, and based on the Company's own contemporaneous documents. *See In re Massey Energy Co.*, 2011 WL 2176479, at *21 (Del. Ch. May 31, 2011) ("when a company already has been proven to have engaged in illegal conduct, it is a high risk strategy for it to embrace the idea that its regulators are wrongheaded and to view itself simply as a victim of a governmental conspiracy").

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Defendants rely on the Monsanto Litigation's protective order to excuse the failure to disclose the Sanctions Order to the full Board, contending that the protective order required court approval to share the Sanctions Order within the Company, despite the fact that the Sanctions Order referenced only the Company's documents and did not contain any confidential information regarding Monsanto. *E.g.,* AB at 34. But, even assuming such court approval was required, Defendants do not explain why approval was sought only to share the Sanctions Order with certain individuals within the Company and not the entire Board, given the enormity of the sanctions and the District's Court's findings directly contrary to the Company's litigation position.

The Sanctions Order must be considered in full context – not only as to the findings made and affirmed – but also taking into account that the record presents not one, but ***three*** instances in which the Company was sanctioned in conjunction with litigation against Monsanto.[14] Plaintiff has pled reasonable doubt as to the Board's good faith and reasonable reliance on a Report that dismisses such sanctions out of hand. At a minimum, the fact that the Sanctions Order was withheld from the Board during the Monsanto Litigation triggered a duty to inquire

[14] *Compare* AB at 6-8 (noting Company also sanctioned for attorneys' fees with respect to reformation defense against Monsanto), *with* A121-22 (¶ 230 at n.31) (Pioneer sanctioned in 2001 re stacking of corn), *and* A156 (¶ 301 (re Sanctions Order)).

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into how that litigation was conducted and how informed decisions could have been made by the Board without the benefit of the District Court's findings.

4. The Report Relies On Unsupported, Undisclosed Meeting Summaries Rather than Contemporaneous Documents or Sworn Testimony

The Report heavily relies on Summaries drafted by the Committee's lawyers in conducting the investigation years after the events of the underlying Monsanto stacking dispute. The Committee cites to the unsworn and undisclosed Summaries, conducted in 2013, as authority for key witnesses to contradict their trial testimony in the Monsanto Litigation, or other contemporaneous Company documents.[15] *See, e.g.*, A297 (Report at 56, n. 203) [REDACTED] explaining in 2013 an email from 2002); *compare* A61 (¶96) (citing the same 2002 email). Some of these witnesses were individuals who wrote the contemporaneous documents particularized in the Complaint, and who worked with the Monsanto Litigation legal team that was sanctioned for its untruthfulness. A121 (¶229).

This Court has long held that the trial court may consider documents integral to the plaintiff's complaint; however, such documents "are relevant not to prove the truth of their contents, but only to determine what the documents stated." *In re*

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[15] Defendants cannot simultaneously withhold supporting documents *and* use them against Plaintiff. *See Grunstein v. Silva*, 2012 WL 5868896, at *1 (Del. Ch. Nov. 20, 2012) ("[T]he 'sword and shield' concept ha[s] precluded a party from shielding evidence from an opposing party and then relying on the evidence at trial to meet its burden . . . .").

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Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 69-70 (Del. 1995). Thus, a trial court must disregard additional "facts" that are not considered in the complaint, "absent endorsement of their truthfulness by the [p]laintiff." *Gardner Denver*, 2014 WL 715705, at *5-10 (granting in part and denying in part plaintiff's motion to strike material from defendants' brief in support of dismissal).

Here, Defendants present the contents of the Report, and references to the undisclosed Summaries on which it relies, as "facts" for the truth of the matter asserted; but the Company's own contemporaneous documents – cited with particularity in the Complaint – contradict the Report's and Summaries' "facts."[16] Accordingly, the Court should not rely on such materials. To the contrary, the Court must ignore them and give Plaintiff the benefit of all reasonable inferences.[17] So too, the Trial Court cannot resolve disputed facts on a Rule 23.1 motion, nor find the Board's reliance on such disputed facts reasonable or in good faith.

C. Defendants Have Conceded a Number of Plaintiff's Arguments

Defendants fail to respond to several of Plaintiff's substantive arguments and conceded others. *See, e.g.,* OB at I.C.1.b; (erroneous heightened pleading standard) (*see* A, 2, supra); I.C.1.c; (erroneously presuming concession of the

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[16] Over a third of the footnotes in the Report's "fact" section cite to Summaries.

[17] Delaware courts recognize that allegations in the Complaint and supporting documents integral to the Complaint are to be read as a whole. *I/Mx Info. Mgmt. Solutions, Inc. v. Multiplan, Inc.*, 2013 WL 3322293, at *6 n.30 (Del. Ch. June 28, 2013); *In re China Agritech, Inc., S'holder Deriv. Litig.*, 2013 WL 2181514, at *21 (Del. Ch. May 21, 2013).

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independence of the board *ex post*); I.C.1.d; (disregarding plaintiff's citation to *Zapata* cases); and I.C.2.e, (no reasoned cost-benefit analysis).[18] Thus, Defendants have waived any substantive rebuttal. Supreme Court Rule 14 (b)(vi)(A)(3); *Emerald Partners*, 726 A.2d at 1224 ("Issues not briefed are deemed waived") (citation omitted); *Accord*, *Emerald Partners v. Berlin,* 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd,* 840 A.2d 641 (Del. 2003)); *VTB Bank v. Navitron Projects Corp*., 2014 WL 1691250, at *4 (Del. Ch. Apr. 28, 2014).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court reverse and vacate the Trial Court's May 8, 2015 Order.

[18] At oral argument, Defendants' counsel conceded this point, and it is not addressed here. *See* Tr. 61:8-24; 62:1-4.

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CERTIFICATE OF SERVICE

I, Alessandra C. Phillips, Esq., hereby certify that on September 28, 2015, I caused a true and correct copy of the foregoing *Public Version Plaintiff Below, Appellant's Corrected Reply Brief* to be served via File & ServeXpress upon:

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