EFiled: Dec 17 2015 12:08PM EST
Filing ID 58312746
Case Number 526,2015 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KURT FOX, on behalf of himself and all others similarly situated	)	
Plaintiff Below, Appellee/Cross-Appellant,	)	No. 526, 2015
v.	)	Court Below: Court of Chancery of the State of Delaware Civil Action No. 8031-VCL
CDX HOLDINGS, INC. (F/K/A CARIS LIFE SCIENCES, INC.)	)	CLASS ACTION
Defendant Below, Appellant/Cross-Appellee.	)	

APPELLEE'S AMENDED ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

OF COUNSEL:

Daniel S. Cahill, Esquire
Louis Gambino, Esquire
CAHILL GAMBINO LLP
60 Railroad Place, Suite 202
Saratoga Springs, NY 12866
(518) 584-1991
dan.cahill@cahillgambino.com
lou.gambino@cahillgambino.com

Christopher P. Simon (No. 3697)
David G. Holmes (No. 4718)
CROSS & SIMON, LLC
1105 N. Market Street, Suite 901
P.O. Box 1380
Wilmington, DE 19899-1380
(302) 777-4200
(302) 777-4224 Facsimile
csimon@crosslaw.com
dholmes@crosslaw.com

Counsel for the Plaintiff Below, Appellee/Cross-Appellant and the Class

Dated: December 17, 2015

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NATURE OF PROCEEDINGS

This is a simple breach of contract action. Following extensive discovery, the trial was held from December 3-5, 2014. At trial, the parties introduced 217 exhibits, lodged depositions for nine witnesses, and presented live testimony from six witnesses (four of whom were Defendant's directors), all of which was reviewed and assessed by the Chancery Court. The court heard the testimony, reviewed the exhibits, made factual and credibility determinations, and found that there was "[e]xtensive contemporaneous evidence" (Op. 5), "corroborated evidence" (Op. 7), "overwhelming evidence" (Op. 27), "probative evidence" (Op. 58), "powerful evidence" (Op. 59), "Evidence of *Scienter*" (Op. 59), and "persuasive evidence" (Op. 60), which proved, by a preponderance of the evidence, that Defendant breached the contract. Op. 3-4. Caris' appeal asks this Court to reverse all credibility and factual findings of the trial court and ignore the extensive evidence, based on nothing other than unsubstantiated and discredited testimony which was contradicted by the overwhelming evidence at trial.

This breach of contract action was brought in connection with CDx Holdings, Inc.'s (f/k/a Caris Life Sciences, Inc.) ("Defendant" or "Caris") repurchase and cancellation of all stock options ("Option Repurchase") held by its employees ("Plaintiff" or "Option Holders"), in breach of express terms of its 2007 Stock Incentive Plan (the "Plan"), and the implied covenant of good faith and fair

dealing.[1] Caris appeals the Court of Chancery's Opinion, dated July 28, 2015 (the "Opinion" or "Op."), and Final Order and Judgment, which found Caris breached the Plan and awarded damages to the Class of $16,260,332.77, plus interest.

The value of two of Caris' three business divisions were at issue – Carisome and Target Now. On November 22, 2011, via merger (the "Miraca Transaction"), Caris sold its third division, the AP Business, to Miraca Holdings, Inc. ("Miraca"). Such sale excluded Carisome and Target Now (together, "SpinCo"), which (at the same time) were spun-off (the "Spin-Off") from Caris to an entity with the same ownership and Board as pre-merger Caris. For purposes of the Option Repurchase, Caris utilized values of $47.23 MM for Target Now and $17.79 MM for Carisome – $0.61 per share/option. Without disclosing such values, Caris told the Option Holders they would receive "fair market value" ("FMV") based on the "independent" valuations of two firms. B558.

The Chancery Court found Defendant breached the Plan as follows:

1. ***Administrator Did Not Determine The Value Or Adjust the Options*.** The Plan required and directed the Administrator (*i.e.*, the entire Board) to (i) determine FMV and, in doing so, to use good faith and (ii) properly adjust the options to account for the FMV of the Spin-Off. These are contractual obligations, not fiduciary obligations. The court determined, as a matter of fact, that the

[1] As Caris was found in breach of the express contract provisions, the Vice Chancellor did not rule on the implied covenant claim. Op. 46. Plaintiff preserves and does not waive such claim.

Administrator/Board never made any determination of the value the Option Holders would receive under the Plan, and failed to adjust the options for the Spin-Off. Op. 49-52. Indeed, the court concluded that certain directors were not even aware of the Administrator's duties or the Plan itself and, in any event, the directors merely deferred to David Halbert ("Halbert") – Caris' Chairman, CEO and 70.4% stockholder. Op. 50. Rather, the court found that CFO/COO Gerard Martino ("Martino") made the value determination (which was a corrupted tax transfer value to obtain a tax-free Spin-Off and not created to determine FMV for the Plan) which then received perfunctory sign-off by Halbert. Op. 3-4, 25-28, 49.

2. ***Regardless Of Who Determined Value, It Was Not FMV And Not In Good Faith.*** The court found that regardless of who made the value determination, FMV was not determined, and the value received by the Option Holders was not determined in good faith, for the following reasons (among others):

a. It is a stipulated fact that the value used to pay the Option Holders was PwC's intercompany tax transfer valuation of intellectual property ("IP") only. Further, the court found, as a matter of fact, that the transfer tax valuation was not only a mere fraction of a FMV valuation, but that Martino improperly *manipulated* PwC's valuation downward to achieve Caris' goal of a tax-free Spin-Off. Op. 25-28, 67-69.

b. The court found that such transfer tax valuation greatly conflicted (by

over $200 million) with the subjective beliefs of SpinCo's FMV held by the Board and management – all memorialized in extensive contemporaneous evidence in the record. Op. 55-59, 78-80; s*ee infra* Stmt. of Facts at 12-15.

c. When Miraca required a second valuation from Grant Thornton ("GT"), Martino then *interfered* with and *manipulated* the GT valuation as well. Op. 60-63. GT's corrupted valuation, in addition to copying major portions of PwC's valuation, was so materially and obviously flawed that the court called it a "new low" for valuations.[2]

d. The court found there was evidence supporting findings of *scienter*, which evidence also supported a finding of subjective bad faith by Defendant. Op. 59-65.

3. ***Arbitrary and Capricious Determination*.** The Plan states that "arbitrary and capricious" decisions are not final and binding. The court found the evidence used to support the decided value utilized and the decision-making process itself, were "arbitrary and capricious" and, thus, such decision was invalid.

4. ***Withholding Consideration Was a Breach.*** By withholding a portion of the Option Holders' consideration to fund the Merger Agreement's escrow, Caris breached the Plan. Defendant's Brief ("Def. Br.") does not question this finding of breach. Plaintiff also accepts such finding of breach.

[2] Op. 70-71 ("The copy job was so blatant that the output matched PwC's, even when the inputs differed. And when Grant Thornton did its own work, it made fatal errors….").

SUMMARY OF APPEAL ARGUMENT

1. DENIED. Defendant's brief is falsely predicated on a set of non-existent findings, and its entire appeal is premised on those non-existent, constructed "facts." As Administrator, the Board was required to perform obligations under the Plan. The court found that "the Board did not make the determinations it was supposed to make" under the Plan. This was proven by "extensive evidence." Rather, Martino separately determined the Option Holders' value (which was his and PwC's manipulated zero-tax transfer value, and not FMV). Caris' argument that the Board *was found* to have breached the Plan *based on* the wording of the Board's merger resolutions has several embedded fictions. First, Defendant falsely claims the court "found" that the Board "accepted PwC's valuation" with respect to the Plan, but had "a quibble with the wording" of resolutions. Def. Br. 2. This is absolutely false and contrary to the court's express findings concerning the manipulated PwC work, the Board's actions and the Board's beliefs as to SpinCo's FMV. The court rejected Defendant's theory which attempted to transmute a resolution approving the Miraca Transaction into Plan performance. The court found that the Board did not perform the Plan's contractual obligations solely by noting in resolutions that such obligations exist. Second, concerning damages, the court found that the Board subjectively believed Target Now and Carisome had a FMV of "around $300 million" based upon extensive contemporaneous evidence.

While Defense witnesses tried to disavow such evidence (*e.g.*, by claiming they were actually lying at the time and knowingly trying to defraud bidders (Op. 7, 63)), the court assessed their credibility, reviewed the evidence and specifically elected not to credit the unsubstantiated and controverted testimony. Defendant breached the Plan and the court properly awarded contract damages.

2. DENIED. The court did not scrutinize the reasonableness of subjective beliefs concerning FMV to create a "heightened" good faith standard, as Defendant argues. Rather, the court assessed the credibility of live witnesses' *unsubstantiated testimony about their beliefs* back in the Fall of 2011, which the court found was contradicted by "extensive" contemporaneous actions and written evidence. The court found such trial testimony not credible. Defendant offers no evidence to discredit the contemporaneous evidence and other than again asking the Court "to believe them now that they were lying then." The court also did not err by applying the Plan's express "arbitrary and capricious" provision, rather than render the provision mere surplusage. The Plan did not define "arbitrary and capricious," so the court rightly sought interpretive guidance from administrative law's well-developed application of the phrase, and from Delaware courts' application of such term, just as Caris suggested in its pre- and post-trial briefing. Thus, judicial estoppel prevents Defendant from making such argument here on appeal. Finally, Plaintiff expressly pled (and never waived) the arbitrary and capricious breach, but

since Defendant's latest waiver argument was never before raised in its pre- or post-trial briefing to the trial court, such argument itself is waived.

3. DENIED. Once again, Defendant constructs a fictional analysis premised on fictional court findings. The court heard the live testimony, reviewed the evidence and made factual and credibility determinations based upon "extensive" contemporaneous evidence – not on psychology literature as Defendant suggests. The trial court expressly determined that "[e]xtensive contemporaneous evidence established" the witnesses' trial testimony about their subjective beliefs on value in Fall of 2011 was not accurate. Mere dicta discussing hindsight bias did not alter the Vice Chancellor's findings of fact, but rather was mere courtesy by the court.

4. DENIED. The record strongly supports the court's findings as to (1) the Board's subjective belief on the value of SpinCo in Fall of 2011, (2) Caris' goal of a zero-tax Spin-Off, and (3) the substantial difference between a transfer tax valuation of IP and a FMV valuation of SpinCo. The record contains extensive evidence that Caris and its Board believed SpinCo was worth over $200 million more than the value used for the Option Repurchase, and that Caris was focused on a tax-free Spin-Off in determining such amount, not its obligations under the Plan. Ample evidence, including the valuations themselves, proved the difference between the FMV of Carisome and Target Now and their IP transfer tax values was dramatic – over $200 million. Caris offers no evidence to the contrary.

SUMMARY OF CROSS-APPEAL ARGUMENT

1. A typographical error or mistake inadvertently (and substantially) altered the damages calculation in the otherwise well-reasoned Opinion and was, thus, plain error. When calculating damages, the Vice Chancellor specifically identified two possible conclusions of combined value for Target Now and Carisome (*i.e.*, SpinCo): either $273,729,000 (based on the Board's likely reliance on an ordinary course GT valuation, prior to Martino's manipulation of GT) or "around $300 million" (which is the Vice Chancellor's own conclusion of the Board's subjective belief as to FMV based on the entire record). However, in the table of math calculations for damages, rather than use one of those two reasoned value conclusions, the court instead input $240 million– a number which was not otherwise discussed. Logically, such input was an inadvertent mistake and the court either meant to (i) *add* $240,000,000 to the Defendant's value of $65,030,000 (the adjacent number on the table) and reach a value conclusion of $305,030,000 (*i.e.* "around $300 million"), or (ii) use the $273,729,000 value generated by the ordinary course valuation. But for such plain error, the damages calculation would have been $21,611,246.12 (using the $305,030,000 value input) or $19,002,229.10 (using the $273,729,000 value input), not $16,260,332.77.[3]

[3] In each case, prior to pre- and post- judgment interest at the legal rate compounded quarterly from November 22, 2011 until the date of payment.

STATEMENT OF FACTS

I. OVERVIEW - FALL 2011

Caris, a private company, was controlled by Halbert (owned 70.4%), who was also CEO and Chairman. Its next largest stockholder (owned 26.7%) was JH Whitney VI, LP ("JH Whitney"), a private equity fund with a seat on Caris' Board. Op. 1-2. The Option Repurchase was effected when Caris spun-off Carisome and Target Now to SpinCo, of which Halbert and JH Whitney owned 97%, and Miraca merged with Caris (acquiring the AP Business). Op. 2. Caris' entire Board was "Administrator" under the Plan. Op. 49. The Board had six members: Halbert, Castleman (for JH Whitney), Green, Johansen, Knowles, and Poste. Op. 14.

The Plan allowed for the cancellation of options "in consideration for a payment equal in value to the Fair Market Value," with "Fair Market Value" meaning the value of the Common Stock, determined in good faith by the Administrator. A814 at §2.25, A835-36 at §12.3. The Plan also required the Administrator to adjust the Options to account for the FMV of Spin-Off. *Id.* at §12.1; Op. 2-3. Under the Plan, all "arbitrary and capricious" decisions are not final and binding. A818 at §3.4; Op. 3.

The court determined Caris breached each of those Plan provisions. Op. 3-4. The Administrator did not act to set the value Option Holders would receive, never met to determine FMV, and never adjusted the options. Op. 2-4, 35, 47-52.

Director Knowles was not even aware that he was an Administrator, did not know the Plan existed, and could not recall any Board discussions about FMV. Op. 50.

The value the Option Holders received was actually determined by Martino, and Halbert signed off on Martino's determination. Op. 3-4, 37-38, 49-51. Martino and Halbert knew the Board never determined SpinCo's FMV. Op. 7. The value determined by Martino, for the Option Repurchase, was not a good faith determination of FMV for the Plan, but rather a tax number that Martino *"told"* PwC to arrive at and *manipulated* to obtain a tax-free Spin-Off, and was generated by PwC as an intercompany transfer tax value of IP-only. Op. 3-4, 7, 49, 60-62; B354-55; B374; B375; B378-84; B385-93; B394-98.

II. VALUATION USED WAS NOT GOOD FAITH FMV

PwC was never (and has never been) retained by Caris to conduct a FMV valuation or to determine value for the Option Holders. Op. 27-28, 68; B354-55; A184 at ¶40. Martino confirmed this, stating "PwC was engaged to do the valuation for tax purposes, not for valuation on determining what shareholders are going to get….So this is an IP transfer valuation." B740; A288; *see also* B469.

A transfer pricing valuation values less than a whole business and is not a FMV analysis. Op.27. There was a substantial difference in value for Target Now and Carisome (over $200 MM) between the two methodologies. Op. 36-43, 68-69. Martino manipulated the valuation downwards to achieve a tax-free Spin-Off, and

knew that the valuation was far below his and the Board's view of SpinCo's FMV. Op. 3-4, 7, 36-43, 55-59. As PwC emailed to Miraca (and Caris):

> **The valuation under review considers a transfer pricing view of the transaction…that may not equate to the definition of fair market value under Revenue Ruling 59-60, or to the concept of fair value in a financial reporting context.** (B414 at No.10; Op. 27).

The Board knew what an IP tax transfer valuation was (B1) and, as shown by the chart of GT valuations below (p.12), PwC's admission was a vast understatement.

A. ***Martino Arranges For GT to Copy PwC***

Miraca became concerned about successor tax liability. To placate Miraca, Caris agreed to (i) a tax indemnity and (ii) to seek a second valuation from GT. Op. 29-32; A262-63; A393; B745. Martino, once again, intervened to control GT's valuation (the "GT Copied Valuation"). Op. 7, 38, 40-42, 60-62, 70-71.

On October 5, 2011, Martino met with PwC and GT together. The court found that, at this meeting, Martino instructed GT to effectively copy PwC's valuation. Op. 36-42, 62, 70-71; B445; B446; B468. Indeed, a GT manager emailed a GT partner stating **"we are just copying PwC's report and calling it our own."** B468. Previously in 2011, and prior to the GT Copied Valuation, GT provided Caris with four FMV valuations, and an ASC 350 valuation (the "GT Prior Valuations"), using "reliable" and "consistent" methods and arriving at consistent results. Op. 38, 71, Op. Ex. A. This time, however, for purposes of the

Spin-Off, Martino intervened and made sure GT reached the "right result," as GT then abandoned its consistent and historical methodologies in valuing Carisome and Target Now and copied PwC's IP transfer tax valuation and called it FMV. Op. 4, 38-42, 59-62, 70-71; B612.

The effect of Martino's interference was devastating on the valuation. For example, a comparison of the GT Copied Valuation to the GT Prior Valuations (discounted to the same October 31, 2011 valuation date) reveals the actual FMV conclusions were *9 to 12 times higher*:

GT Valuation Date	**Carisome Value as of 10/31/11**
2/11/11	$164,922,000
2/11/11 (No. 2)	$197,631,000
5/24/11	$203,630,000
7/13/11 & 9/21/11	$226,220,000
11/10/11 (GT Copied Valuation)	*$17,634,000*

The court found that, by arranging GT's result, and GT abandoning its prior methodologies and copying PwC, the Defendant obtained "a valuation so much lower as to be itself suggestive of bad faith." Op. 62-63, 71 & Op. Ex. A.

III. EVIDENCE OF HIGHER FMV AND NO GOOD FAITH

The court found extensive contemporaneous evidence (some of which is described below) supported the conclusion that Martino, Halbert and the entire Caris Board all subjectively believed SpinCo had a FMV around $300 million and did not believe Carisome's and Target Now's FMV was $17 million and $47 million, respectively. Op. 17-25, 55-59, 78-79. Given such evidence, nobody

could credibly accept or rely on PwC's or GT's valuation as FMV under the Plan.[4]

A. *Target Now Had $150 - $300 Million FMV.*

1. ***Caris' COO/CFO & Board.*** In April 2011, Martino estimated to PwC that Target Now's fair market value was **$150-$300 million**. Op. 4, 15, 19, 55, 79; B209. PwC presented the same estimate **to the Board**. Op. 15.

2. ***JH Whitney.*** From October 2011-March 2012 (*i.e.* pre- and post-Option Repurchase) JH Whitney documented (and represented to its Board of Advisors and limited partners)[5] that it expected Target Now to be **sold** in 6-9 months for **$154-$187 million**. Op. 58-59, 79; B480-83; B484-89; B591-92. Directors testified that such information was consistent with the beliefs of the entire Board, in and around November 2011. B731; B734-35.

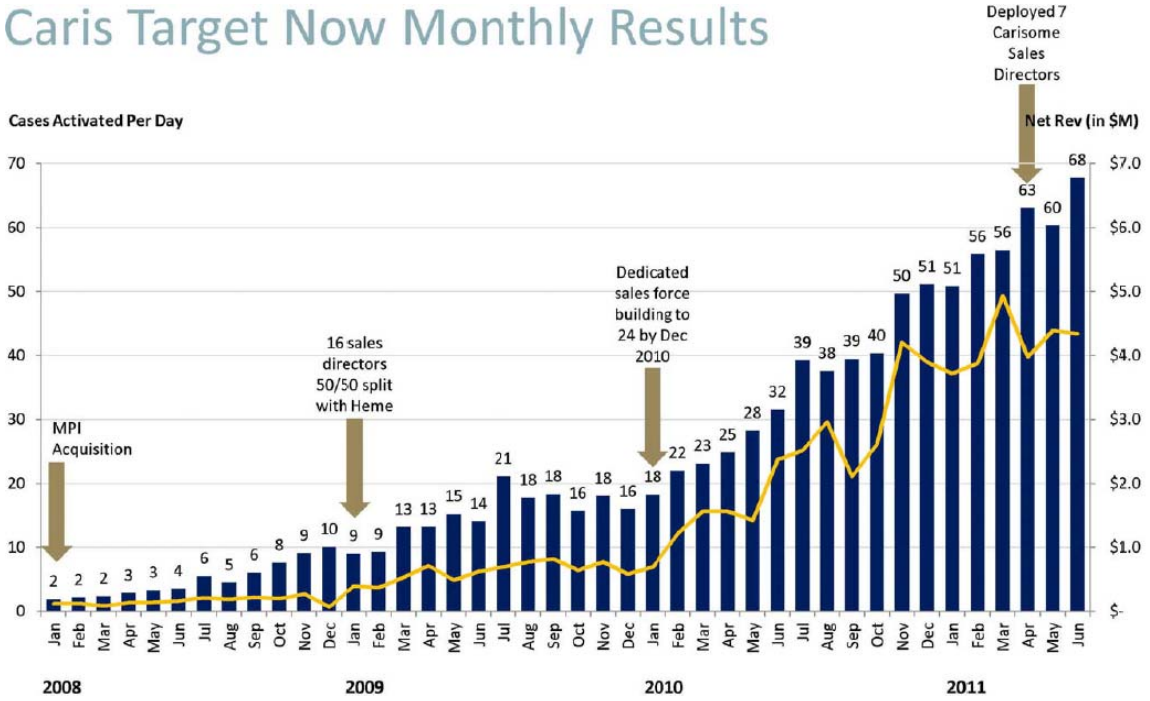
3. ***Citi.*** Citigroup ("Citi"), Caris' exclusive banker, stated in several emails and presentations to Caris' **Board** and management (and internally) that it expected Target Now to sell for approximately **$200 million**. Op. 15-17, 19-20, 55, 79; B319; B467; B419; B288; B721-22. In August 2011, Citi advised bidder Illumina (including directors Halbert and Johansen) that Caris valued Target Now at **$200-$250 million**. Op. 19; B729-30.

4. ***Explosive Growth.*** In 2008, Caris purchased what became Target

[4] Further discrediting themselves, Caris "pivoted" between theories that they **relied** on PwC's and GT's valuations, and that **they did not rely** on such valuations. *See* Op. 8 for discussion.

[5] Caris director Castleman was both a JH Whitney managing member and limited partner.

Now **for $40 million**, commercialized it and grew annual revenues by **5,000%** to about $50 million/year. Op. 18, 56. Caris provided the chart below to bidders:



B344; Op. 18, 56 (noting "it defies belief that…[FMV] increased by only 17%").

5. ***Bidder Projections.*** As part of the bidder presentation, Caris provided bidders with projections (reviewed and approved by the entire Board) indicating a FMV for Target Now **over $200 million**. Such projections were "[t]he only projections that the Board reviewed for Target Now…." Op. 19, 32; B315-18.

6. ***3rd Party Bidder.*** On August, 22, 2011, Danaher Corp. bid to buy Target Now for at least **$100-$175 MM**. Op. 18, 55-56; B323-26; B419. Citi told Danaher **"price alone may not win…[Halbert] needs to be courted."** B352.

B. ***Carisome Had a FMV Over $150 Million***

The court found that Martino, Halbert and the Board subjectively believed

Carisome's FMV was worth "at least as much as Target Now" (over $150 million). Op. 56, 80. The evidence supports such finding including, inter alia, the following:

1. ***Expecting Commercialization.*** At the final Board meeting (October 27, 2011), the Board expected Carisome's prostate test to commercialize in 2012; and such test alone involved a $2B-$8B market. Op. 57, 59; B476-78; *see also* B373; B491; B567; B571; B595. Chairman Halbert was certainly "thinking in billions" for Carisome. B327. Halbert testified that, in 2011, he saw Carisome as possibly "**the largest product launch in the history of mankind.**" A439.

2. ***$100MM New Money.*** The Miraca Transaction itself is evidence of the Board's optimism in Carisome, as its main purpose was to fund Carisome's commercialization. Op. 57. Halbert and JH Whitney invested **$100 million of new money** into Carisome in November 2011. *Id.*; A535-36.

3. ***JH Whitney.*** In its 2011 Year-End Summary to Limited Partners (which included director Castleman), JH Whitney wrote: "The Company is continuing to invest **aggressively in the Carisome platform with the expectation that it will have a blood based test for cancer on the market by the end of the year [2012]**." B595 (emphasis added); Op. 59; *see also* B489; B592.

4. ***TPG.*** On August 24, 2011, directors Halbert, Knowles and Poste (half the Board) gave a presentation to TPG (Texas Pacific Group), representing Carisome's potential commercial opportunity as $130 billion. Op.20; B341; B351.

APPEAL ARGUMENT

I. BASED ON THE FACT FINDINGS, (1) DEFENDANT BREACHED THE PLAN AND (2) THE COURT PROPERLY ASSESSED DAMAGES.

A. Questions Presented

Does the trial record support the trial court's (1) findings of fact that the Administrator/Board failed to determine FMV and adjust the Options pursuant to the Plan; and (2) assessment of damages based upon what the Administrator/Board subjectively believed, in the Fall 2011, was the FMV of SpinCo?

B. Scope of Review

The court's factual findings are subject to clear error review and will be accepted if sufficiently supported by the record and are the product of an orderly and logical deductive process. *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999). This Court affords substantial deference to the trial court's decisions based on live witness testimony, credibility determinations, and expert presentations. *Id.* Determinations based on factors both legal and factual, are reviewed for "abuse of discretion." *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954).

C. Merits of Argument

1. The Administrator Failed To Determine FMV Or Adjust The Options.

The court unequivocally found the Administrator never determined FMV or what Option Holders would receive under the Plan. Op. 3, 7, 35, 37, 43-44, 47-52, 55. The court stated, "[b]ecause the Board did not act as the Administrator to set

the value that holders of options would receive, Caris breached the Plan." Op. 52. The court reviewed hundreds of exhibits and heard and assessed the credibility of all witnesses at trial. For example, Knowles testified that he (i) did not know that the Plan existed; (ii) did not know the Board was the Administrator or that the Plan required the Board to act; and (iii) could not recall any Board discussions about FMV, any vote on the options, or any determination of what the Option Holders ultimately received. Op. 50; A688-90; B748-55.[6] Also, the Board merely deferred to Halbert. Op. 50. The court found "the evidence at trial established that the Board did not make the determinations it was supposed to make. Gerard A. Martino . . . made the determinations, then received perfunctory signoff from Halbert." Op. 3 (emphasis added). There was no Board meeting, no Board analysis and no Board discussion. Op. 49-50. Caris, thus, breached the Plan.

(a) The Chancery Court Evaluated the Only Conduct Available.

Defendant does not credibly challenge the findings of the trial court, but rather repeatedly invents fictional findings with the apparent hope that such fictions, by force of repetition, will become truth – all without any actual evidence. Def. Br. 9-15. This tactic does not satisfy the clear error standard.

The court determined that Caris breached the Plan. Defendant contends that the court's factual finding is somehow a legal error. Def. Br. 10-12. As this Court

[6] The court also found the Board did not determine the FMV adjustment to the options to account for the Spin-Off, and this was also a breach of the Plan. Op. 47-52.

stated: "It does not follow, however, that a trial court commits legal error every time it adopts a view of the evidence contrary to that held by the losing party." *Rapid-America Corp. v. Harris*, 603 A.2d 796, 802 (Del. 1992). The linchpin of Defendant's argument is the embedded fiction – that the Board's resolution approving the Miraca agreement also constituted performance of the Plan's obligations. The court expressly determined that it was not. Op. 51.

Defendant argues that if the court's fact findings are true, the court erred finding breach because it scrutinized the conduct of the wrong people (*i.e.*, Martino and Halbert, and not the Board). Def. Br. 9-12. The court, however, scrutinized everyone's conduct and found that nobody determined FMV for the Option Holders – not the Board (Op. 47-52) and not Martino and Halbert (Op. 55-59).

Defendant argues as if the trial court was confused as to who was obligated to perform under the Plan. The court was not confused. The Opinion states, "Caris has argued that the entire Board, including Knowles, really did determine Fair Market Value and make the necessary adjustments on October 5, 2011, when they approved the Merger Agreement. They did not." Op. 51 (emphasis added). As Knowles' testimony showed, the evidence proved a dearth of any Board action in determining FMV under the Plan. With this fact proven, the court stated:

> **The Plan called upon the Board to determine Fair Market Value in good faith and to adjust the options to reflect the Spinoff. Because the Board did not act, the good faith standard arguably does not even apply.**

> **Assuming it does, it is not immediately clear to whom it should be applied. In this case, Martino actually made the determination, and Halbert signed off, so this decision analyzes whether they acted in subjective good faith.** (Op. 55) (emphasis added).

Defendant's contention that the court should have evaluated the Board's conduct is a non-sequitur. Def. Br. 10-12. The court could not analyze nonexistent Board conduct beyond finding, based on the record, that no such Board determination was attempted or made. Thus, the Plan's "good faith" language arguably did not apply, but if it did, it was applied to the actual decision-makers (Martino and Halbert) whom the court found did not act with subjective good faith. Op. 54-65. The court found that nobody determined FMV for Option Holders, in good faith.[7]

(b) Defendant Concocts Fictional Administrator/Board Action.

As discussed, Defendant's positions argue that the Board somehow performed under the Plan (again, ignoring the contrary fact finding). Def. Br. 12-14. In an attempt to rewrite the Opinion, Caris suggests, however, that it was *the court that relied* on the Board's Miraca merger resolutions to find that the Board *did not perform* its Plan obligations. *Id*. With that fictional premise, Caris states that the Board did not have to adopt a formal resolution and, *ipse dixit*, concludes that "[t]he Board thus determined FMV under the Plan and Delaware law." *Id.* at 13-14. This is sheer artifice. It was Defendant whom argued to the court that such

[7] The court found PwC never determined FMV, and GT's Copied Valuation was a "new low" for valuations, supporting both bad faith and arbitrary and capricious determinations. Op. 27, 70.

Merger resolutions (and only such resolutions) somehow constituted performance by the Administrator of the Plan's obligations. A1580, Op. 51.

The Plan and the merger agreement are two separate contracts. The court rejected Caris' claim that merger resolutions equated to performance of the Plan's valuation obligations. *Id.* The court based its determination of Board non-action on the extensive evidence: such as Knowles' testimony, and the Martino/Halbert November 11 email exchange – not on Board resolutions. Also, the court expressly rejected Caris' theory that the Board accepted PwC's corrupted transfer tax value as FMV in connection with the Plan. Op. 35-36, 47-52. Nor was any Plan related valuation decision made on October 5, as those same October 5 Board minutes authorized hiring GT and, thus, GT had not yet begun to work on its valuation. *Id.* Yet, Caris previously claimed to the court that it had relied upon GT's valuation as "the hallmark" of its good faith process. A115; B447-66; B468. Caris' position on the resolution is fiction. Also, the Board knew the difference between their FMV beliefs (Op. 18-20, 78-80; B338-41; B478-90) and PwC's transfer pricing task (B1; B354-55). The court found that (i) "overwhelming evidence" made clear that PwC never determined FMV for SpinCo (Op. 27), (ii) Halbert knew that and knew the Board never determined FMV (Op. 7), and (iii) at the October 5 meeting, the Board and PwC were solely focused on Miraca tax issues, not the Plan or Option Holders (A287-88; Op. 35-36). As the court found:

> **Consistent with Knowles's testimony, the minutes of the Board meeting reflect only that the Board noted the need for an adjustment. The resolution did not make an adjustment or determine Fair Market Value . . . .The Board just as easily could have passed a resolution saying "the Company shall be in compliance with all of its contractual commitments." Passing such a resolution would not make it so.** (Op. 51)(emphasis added)

Noting that a contract exists is not the same as performing it. The court found Caris' sole purported evidence of performance did not perform Plan obligations.

(i) The *Allen* Decision. Defendant's citation to *Allen v. Encore Energy Ptnrs., L.P.*, 72 A.3d 93 (Del. 2013), is also inapposite. *Allen* involved not only a contractual presumption that a Conflicts Committee acted in good faith, but the only contractual duty of the committee members was to form a subjective belief that a transaction was in the entity's best interest. *Id.* at 104-05. The *Allen* Committee knew of its contractual obligation and engaged in negotiations. This Court affirmed the dismissal of the complaint based on plaintiff's failure to plead a breach of that contract's duty to form a subjective belief, and simply noted that, "[i]t would take an extraordinary set of facts" to plead that breach. *Id.* at 106.

The Plan required the Administrator to actually do its obligation; to make the FMV determination and then Caris had to pay the FMV to the Option Holders. It was not sufficient, under the Plan, just to have a "subjective belief" as to FMV. In the Plan, there was no "presumption" of performance. The court found the Board did not perform its express obligations under the Plan, and found **"action**

'so egregiously unreasonable' as to be 'essentially inexplicable on any ground other than subjective bad faith.'" Op. 47-52, 71 (*citing Allen*, 72 A.3d at 107). Here, also, the Board's subjective belief of FMV was $200 million over the figure used by Martino. Op. 79-80. Hence, comparison to *Allen* is almost meaningless. Caris' claim that under *Allen* the Board should be deemed to have *performed* in good faith *through non-performance and ignorance* misreads *Allen* and the Plan. Defendant also fails to consider that extreme "head in the sand" Board inaction breaches the Plan's "arbitrary and capricious" provision, and the court's position that (since the Board did not act) the good faith language arguably does not apply.

2. <u>The Trial Court's Findings Support the Awarded Damages</u>.

Defendant's argument at Section I.C.(2) is incorrect, and once again implies rulings that do not exist, for purposes of contesting damages. Def. Br. 15-16.

(i) <u>Defendant Mischaracterizes the Breach</u>. Defendant, again, assumes three fictional court findings: (1) that the Board made a Plan determination of FMV (which it did not), (2) through PwC (who was retained just for "tax purposes") (A288), and (3) thus, Caris only breached the Plan by drafting unsatisfactory Board resolutions. Def. Br. 15. Defendant invents these fictitious findings to then make the quantum leap that "[h]ad the Board memorialized PwC's number in its resolutions. . . . Plaintiff would have received the same payment and, thus, suffered no damages." *Id.* The court, however, expressly rejected each of

these fictions (about the Board and PwC). Plaintiff was not owed a Board resolution under the Plan. Rather, Plaintiff was owed performance of express contractual obligations that, as a matter of fact, *did not occur*. Op. 3-4, 47-52.

(ii) Defendant Mischaracterizes Findings on Damages. Caris argues the court "imposed the imagined conduct of a hypothetical board" and did not "'focus on the subjective belief of the specific directors.'" Def. Br. 16. The court, however, measured damages based on what the evidence showed Caris' Board subjectively believed was SpinCo's FMV at such time, stating:

> **The question in this case is what the Board would have determined to be the Fair Market Value …and made its determination in good faith. I have considered the evidence as a whole, including the experts' opinions and the various indications of value….From the evidence presented at trial [$273,729,000] is a reasonable approximation of the Board's subjective belief at the time…. [However,] I think that in fall 2011, the Board valued TargetNow more highly – closer to $150 million….What the evidence instead suggests is that the Board believed Carisome, although riskier, was worth at least as much as TargetNow.** (Op. 78-80)(emphasis added).[8]

The court's damage findings above properly focused on Caris' Board's subjective beliefs, not a hypothetical board. Op. 77-80; Op. Ex. A; s*ee supra* Stmt. of Facts at 12-15; and *infra* §IV.C.1. at 38-41. The court's fact findings are logical and well supported by the extensive record. Defendant has not met its clear error burden.

[8] Defendant accuses the trial court of ignoring Defendant's expert's report. Def. Br. 31, n.7. The Vice Chancellor clearly stated that he considered both "experts' opinions." Op. 78.

II. THE TRIAL COURT APPLIED THE APPROPRIATE GOOD FAITH AND ARBITRARY AND CAPRICIOUS DEFINITIONS.

A. Questions Presented

Did the trial court err by (1) assessing witness credibility in making factual determinations, (2) applying the arbitrary and capricious provision expressly provided in the Plan, and (3) looking to administrative law and Delaware law for guidance in defining "arbitrary and capricious," which is undefined in the Plan?

B. Scope of Review

To the extent the factual findings "turn on determinations of the credibility of live witness testimony and the acceptance or rejection of particular items of testimony, those findings will be upheld." *Brehm v. Eisner*, 906 A.2d 27, 50 (Del. 2006); *Hudak v. Procek*, 806 A.2d 140, 151 n.28 (Del. 2002)(The Chancellor is "the sole judge of the credibility of live witness testimony"). When determinations turns on factors, both legal and factual, the standard of review is "abuse of discretion." *Pitts*, 109 A.2d at 788.

C. Merits of Argument

1. Defendant Attempts to Rewrite and Falsely Characterize the Opinion Regarding the Good Faith Language.

Defendant claims that "[b]y scrutinizing the reasonableness of subjective beliefs concerning FMV," the court "rewrote" the good faith language to a "heightened standard." Def. Br. 17. Defendant mischaracterizes the Opinion. The

court did not scrutinize the reasonableness of subjective beliefs, but rather the credibility of the trial witnesses' testimony about their beliefs, given the "extensive" evidence that contradicted such testimony. The court stated:

> **When witnesses have testified that they believed subjectively in what the contract required, the trial judge must "make credibility determinations about [each] defendant's subjective beliefs by weighing witness testimony against objective facts."** (Op. at 54) (*quoting Allen*, 72 A.3d at 106) (emphasis added).

The court heard the testimony, reviewed the evidence, assessed witness credibility, and found that the witnesses' true subjective beliefs were memorialized in the "extensive" contemporaneous evidence. Op. 6-7, 78-80; *supra* at 12-15. Citing to no evidence other than discredited testimony, Caris claims err. Def. Br. 19.

As an initial matter, "because the Board did not act, the good faith standard arguably does not even apply," and such non-action itself breached the Plan. Op. 52, 55. Regardless, the trial court then examined good faith, as follows:

> **When a contract governed by Delaware law calls upon a party to act or make a determination in good faith, without any qualifier, it means that the party must act in subjective good faith.** (Op. at 54) (*citing ev3, Inc. v. Lesh*, 114 A.3d 527, 539 (Del. 2014) (Strine, C.J.); *DV Realty Advisors LLC v. Policeman's Annuity & Benefit Fund of Chi.*, 75 A.3d 101, 110 (Del. 2013); *Allen*, 72 A.3d at 104 (Del. 2013)).

For purposes of "good faith" determinations, the court examined Martino and Halbert because they alone (and not the Board) made the decision (Op. 55-65). For purposes of assessing damages, the court examined the subjective beliefs of the

Board. Op. 77-80. While desperately trying to mischaracterize the Opinion and the standard of review by the court, Defendant accuses the court of the following:

> **Under the guise of assessing Martino's and Halbert's credibility, the trial court ignored rational grounds for the FMV valuation, cherry-picked record cites, and concluded that Martino and Halbert could not possibly have believed that SpinCo was worth $0.61/share in November 2011.**
> (Def. Br. at 19) (emphasis added).

The accusation is unfounded and (again) cites to no evidence. The court must assess live witness credibility. Defense witnesses testified at trial attempting to disavow all contemporaneous, documented evidence of their subjective belief of SpinCo value, by either admitting to attempted fraud or simply giving self-serving testimony that directly contradicted their own actions, testimony, stipulated facts, and thousands of pages of their own emails, Board and management presentations, bidder presentations, prior valuations, and financial projections. The court credited Defendant's own contemporaneous acts and documents. Op. 3, 5-8, 47-52, 55-60, 63, 77-80. When fact findings "turn on determinations of the credibility of live witness testimony…those findings will be upheld." *Brehm*, 906 A.2d at 50.

2. The Court Correctly Enforced the Arbitrary & Capricious Provision.

With respect to the Plan's "arbitrary and capricious" provision, Defendant has three arguments. Each of those arguments distorts reality.

(a) Arbitrary & Capricious Provision Applies to All Decisions.

The court found that Defendant breached the Plan, including its "arbitrary

and capricious" language. Op. 65-70. As Defendant's primary argument is to presume a fictional Board action relying (sometimes) on an incorrect PwC value for the Plan, it must then (by any means necessary) eliminate its express obligation to not make "arbitrary and capricious" decisions, or its appeal still fails. Caris argues that the court should not have viewed the §2.25 good faith FMV decision obligation and the §3.4 arbitrary and capricious provision, as jointly enforceable. Def. Br. 20-21. As the Opinion notes, Defendant treats both Plan provisions "as if they established standards of review," rather than contractual obligations. Op. 52.

As an initial matter, Defendant previously asserted that both provisions *did* apply, stating "Plaintiff's claim fails unless he is able to establish that the Board acted either in bad faith or arbitrarily and capriciously in determining Fair Market Value of the underlying common stock." A115 (emphasis added).

Defendant's argument violates three basic tenets of Delaware contract law. First, the court correctly determined both provisions of the Plan "work together without conflict" and should be read together as it "gives 'each provision and term effect, so as not to render any part of the contract mere surplusage.'" Op. 53 (quoting *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010). Defendant argues that the arbitrary and capricious provision should only apply "if it applies to all conduct except where the parties specifically agreed to a different standard." Def. Br. 20. The Plan does not say §3.4 applies to certain

decisions and not others. Rather, it says §3.4 applies to "all decisions made . . . . pursuant to the provisions of the Plan," which includes the required good faith determination pursuant to Plan §2.25. What Defendant seeks is a new contract.

Another tenet of Delaware law is that, in interpreting a written contract, the court will not use an unreasonable construction that produces an absurd result. *Estate of Osborn v. Keys*, 991 A.2d 1153, 1160 (Del. 2010). The purpose of the Plan's terms was not to exculpate the Board, but to ensure that rational decisions were made, particularly for this most critical decision. Op. 53. Caris' construction yields an absurd result, as it allows the Board to not act and to, instead, ostensibly (in ignorance) rely on a corrupted and inapplicable valuation for making the most important decision under the Plan. Since such action would not survive "arbitrary and capricious" analysis, Defendant seeks to eliminate it by rewriting the Plan.

If §3.4 of the Plan was intended to apply to certain Administrator decisions and not others, Defendant could have written the Plan that way and, indeed, did so for other Administrator decisions. *See* A814 at §2.21. Moreover, as Defendant drafted the Plan, the doctrine of contra proferentem applies, and if the application of §3.4 is deemed ambiguous, any ambiguities should be resolved against the drafting party (*i.e.*, Caris). *Kuhn*, 990 A.2d at 397. However, there is no conflict between the provisions, as "[u]nder the terms of the Plan, the Board's good faith determinations were conclusive unless arbitrary and capricious." Op. 3.

(b) Plaintiff Expressly Pled (And Never Waived) The Arbitrary & Capricious Breach, But Defendant Waived Its Latest Argument.

The trial court found that Plaintiff expressly pled the arbitrary and capricious breach **in the Complaint** and Defendant devoted "large portions of its **pre-trial brief** to addressing it." Op. 53, n.12. Moreover, Plaintiff addressed the "arbitrary and capricious" standard in each of Plaintiff's post-trial briefs. B888-98; B923-32. Defendant cannot plausibly argue prejudice, so it instead takes snippets from cases deciding waiver *due to prejudice* and claims Plaintiff waived the breach of the arbitrary and capricious language in the Plan because it "appears nowhere in Plaintiff's pre-trial brief or the pre-trial order." Def. Br. 21. This, again, is false. Op. 53, n.12. Defendant has never been prejudiced and has been aware of the claim from the start. Moreover, as Defendant never raised this argument to the trial court in its pre- or post-trial briefing, it is waived. This Court will not review contentions which have not been raised or fairly presented to the trial court for decision. *See* Supr. Ct. R. 8; *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991).

In its briefing to the trial court, Defendant made a different (yet equally baseless) waiver argument – that Plaintiff never pled "arbitrary and capricious." A1593. The court found this prior (different) argument to be wrong. Op. 53, n.12.

Defendant is also incorrect in its new assertion that issues not briefed pre-trial, despite being pled and answered (and included in Defendant's pre-trial brief and Plaintiff's post-trial briefing), are waived. Def. Br. 21. Defendant's alleged

support for such incorrect statement of law is *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003). *Emerald Partners* (a case on remand) does not propose that pre-trial briefs render other previous pleadings moot. From *Emerald Partners*:

> **This case has been pending for fifteen years. It has been the subject of many appeals and a lengthy trial with many hundreds of pages of pre-trial and post-trial briefing, including 150 pages of post-trial briefing on this remand. One would think that if Emerald thought its most recent argument had merit, it would have raised that argument…sometime before the completion of this latest (and hopefully last) round of briefing fifteen years later. Emerald never did….** (*Id.*) (emphasis added)

From the outset, Caris had full notice of (and defended) the claim that it breached the Plan's "arbitrary and capricious" language. This Court should not countenance Caris' new argument (Supr. Ct. Rule 8), which, in any event, lacks merit.

(c) Looking to Administrative Law for Guidance was Appropriate.

Since the Plan did not define "arbitrary and capricious," the court sought guidance. Op. 65. Defendant claims the court erred by "importing its definition of [arbitrary and capricious] into the contract" from administrative law with no evidence that was the parties' intent. Def. Br. 22. Defendant, meanwhile, tries to import the business judgment rule into this breach of contract case, and accuses the court of "purport[ing] to rely on the [arbitrary and capricious] standard" while "actually craft[ing] and appl[ying] a more onerous standard." Def. Br. 22-23.

Defendant mischaracterizes the Opinion and this breach of contract case.

As an initial matter, Defendant judicially admitted such "imported" definition *was* Caris' intent since, in its pre-trial and post-trial briefing to the trial court, Defendant argued for application of the same standard as the court used in the Opinion – also from administrative law. A142; A1593-96. Defendant even quoted from several of the same Delaware cases that the trial court cited to for the same proposition (and even from the same pages). Op. 66; A1593-96 (*citing* to *Willdel Realty, Inc. v. New Castle Cnty.*, 270 A.2d 174, 178 (Del. Ch. 1970) and *Harmony Constr., Inc. v. State Dep't of Transp.*, 668 A.2d 746, 751 (Del. Ch. 1995). Caris' new position on appeal violates the principle of judicial estoppel. "Judicial estoppel prevents a litigant from advancing an argument that contradicts a position previously taken by that same litigant, and that [a court] was persuaded to accept as the basis for its ruling." *In re Silver Leaf LLC*, 2004 Del. Ch. LEXIS 93, *8 (Del. Ch. June 29, 2004). Thus, Defendant cannot argue that the court so erred.

As it was undefined in the Plan, the court appropriately sought guidance on meaning of the term "arbitrary and capricious." Op. 65. First, the court observed that "a well-developed body of law exists applying it in the context of decisions by administrative agencies" and then explained such law, as well as how the Chancery Court has previously interpreted "arbitrary and capricious." Op. 65-67. The court then applied the facts to such standard and found Defendant in breach. Op. 67-70.

Caris, however, seeks business judgment rule analysis, stating "the trial court ignored the deference afforded to corporate boards that rely in good faith on experts and officers as part of a decision-making process." Def. Br. 23 (*citing* 8 *Del. C.* §141(e); *Brehm*, 746 A.2d at 261-262. This is a breach of contract action, however, and the Administrator breached a contractual duty, not a fiduciary duty.

Caris also ignores the factual findings that led to the court's conclusion. The court found Caris did not employ a decision making process rationally designed for the issue to be decided. The issue to be decided was FMV of the entire business, yet the process employed was one that used a corrupted IP transfer tax value. Op. 67. The evidence supporting the supposed "decision" also failed, as (i) PwC's corrupted IP transfer tax valuation was improperly used, and (ii) the GT valuation was "'so egregiously unreasonable' as to be 'essentially inexplicable on any ground other than subjective bad faith.'" Op. 67-71 (*citing Allen*, 72 A.3d at 107).

Defendant also asserts (in an absurd argument never raised to the trial court) that under administrative law, "the proper remedy would be to remand to the Board for a new determination [of FMV], *not* to award damages." Def. Br. 22. This case is a breach of contract case, not an administrative law case. Borrowing a definition did not transform Defendant from a breaching contract party into a government agency, just as the remedy would not be jail time if the definition came from penal law. The court did not err. Contract damages were the appropriate remedy.

III. THE BASIS FOR ALL OF THE TRIAL COURT'S FACT DETERMINATIONS WAS THE EXTENSIVE EVIDENCE, NOT REFERENCES IN DICTA TO PSYCHOLOGY

A. Questions Presented

Did the trial court err by: (1) making fact findings based on the credibility of live witness testimony, and (2) in *dicta*, citing to literature without relying on such literature for purposes of making fact determinations?

B. Scope of Review

To the extent the factual findings "turn on determinations of the credibility of live witness testimony and the acceptance or rejection of particular items of testimony, those findings will be upheld." *Brehm*, 906 A.2d at 50.

C. Merits of Argument

1. The Vast Contemporaneous Evidence Bears on Witness Credibility.

It is a fundamental role of the trial court to assess witness credibility. In this case, the court heard and evaluated the trial testimony, reviewed all of the "extensive" contemporaneous evidence, and reasonably determined that portions of Defendant's witnesses' testimony regarding their beliefs of value in 2011 were not credible, based upon the "extensive" evidence that contradicted such testimony. Op. 5-6, 59-60; *supra* Stmt. of Facts 12-15; *infra* §IV.C.1. at 38-41.

As an initial matter, (presumably to confuse this Court) Defendant wrongly states that the court "found" the credibility of three directors to be "very, very strong." Def. Br. 24. Such snippets of informal comments to counsel at the trial's

conclusion were not findings and are misleading, especially without context. At the end of trial, in the context of fostering settlement discussions, the court noted that each party had strengths and weaknesses. A793-95. While also stating that it was "absolutely not the case" that he had already made any findings (A804 (emphasis added)), the Vice Chancellor noted the general credibility of the people on the Board (though not referencing specific testimony), but simultaneously said:

> **What's very, very strong for the plaintiffs is . . . a lot of objective indications, contemporaneous indications, that at least at the time, there were people who thought there was more value here than PwC put on it and Grant Thornton.** (A794) (emphasis added).

The Vice Chancellor further noted "I also think that there's at this point hindsight involved." A802 (emphasis added). This is also consistent with the Opinion, where the court's actual fact finding took place.

Defendant presents such informal commentary as though the court "found" in the Opinion that its witnesses' testimony about their beliefs of value in 2011 to be credible and then argues the court erred by not crediting such testimony. Defendant does so only by citing to the discredited testimony itself. Def. Br. 25. In essence, without evidence, Defendant argues that the court really should have believed its witnesses. Yet, Caris' two primary witnesses – Halbert and Martino, who the court found were the *only* persons who made the determination of what Option Holders would be paid – "testified in substance that they sought to defraud

bidders for TargetNow by knowingly providing the bidders with projections that Martino and Halbert did not believe." Op. 7 (emphasis added); *see also Id.* at 63. The court noted that "[a]lso relevant to their credibility is Martino and Halbert's testimony that they had no problem giving false projections to bidders" (Op. 60), and that they asked the court "to believe them now that they were lying then." Op. 64 (*citing Atr-Kim Eng Fin. Corp. v. Araneta*, 2006 WL 4782272, at *7, *17 (Del. Ch. Dec. 21, 2006) (Strine, V.C.) (rejecting a "believe-me-now-I-was-lying-then" explanation). Defendant ignores the fact that the court was presented with so much powerful evidence of subjective bad faith in arriving at what they would pay the Option Holders for SpinCo, that the Opinion includes a section entitled "Evidence Of *Scienter*." Op. 59-65. The court determined, as a matter of fact, that Defense witnesses' testimony of their beliefs on SpinCo value in 2011 lacked credibility.

Further, for all Board members that testified at trial (Halbert, Johansen, Knowles and Castleman), the court found (in assessing damages (Op. 78-80)) that their testimony of their beliefs of value in 2011 was completely contradicted by the extensive contemporaneous evidence of their subjective beliefs, stating, "[t]he defense witnesses testified with conviction that they believed these things in fall 2011, but the contemporaneous evidence showed they did not." Op. 6 (emphasis added). For example, the court stated that "[a]t trial, Castleman disavowed the contemporaneous documents and testified directly contrary to them. . . . I credit the

contemporaneous documents." Op. 59 n.15. With no objective evidence and citing only to discredited testimony, Defendant simply wants this Court to overturn such findings of fact and credibility. That does not meet the clear error standard.

Defendant also claims (without authority or basis) that the court ignored the "collapsing events of mid- to late- 2011." Def. Br. 26. Again, such claim is made without citation to any actual evidence whatsoever (other than the discredited testimony itself), because there was no collapsing event. *See infra* §IV.C.1 at 38-41; B479. Rather, the court heard the testimony, reviewed the evidence, and made reasonable determinations. Further, Defendant's argument is moot because the court found the Board itself was not the actual decision-maker for the determination of what the Option Holders would receive, in breach of the Plan.

2. The Evidence And The Witnesses Themselves Discredited Their Testimony (Not Dicta Reference to Psychology)

The court made factual findings based on extensive contemporaneous evidence, not psychology literature. Defendant completely mischaracterizes the court's references to literature on hindsight bias as a "psychological approach" and the "basis for the trial court's rejection of honest testimony." Def. Br. 26. That was not the court's basis for its conclusion. The court found that "[e]xtensive contemporaneous evidence established" the witnesses subjectively believed the FMV was higher and "[t]he defense witnesses testified with conviction that they believed [differently] in fall 2011, but the contemporaneous evidence showed they

did not." Op. 5-6.

Rather than call such testimony perjury, the court (in dicta) said "[i]n my view this was a product of [sic] hindsight bias" and explained such term's meaning through brief reference to applicable literature. Op. 5-6. Whether perjury or hindsight bias, however, the proven facts (based on the extensive evidence) would not change. Defendant mischaracterizes the court's courtesy as "invoking a new hindsight bias approach," which ignores reality. Def. Br. 27. In reality, there was "[e]xtensive contemporaneous evidence" (Op. 5), "corroborated evidence" (Op. 7), "overwhelming evidence" (Op. 27), "probative evidence" (Op. 58), "powerful evidence" (Op. 59), "Evidence of *Scienter*" (Op. 59), and "persuasive evidence" (Op. 60), all of which collectively supported the court determining that, by a preponderance of the evidence, Plaintiff proved that Defendant breached the Plan.

3. Defendant Wants Its Witnesses Declared Honest As A Matter of Law.

Without citation to any evidence, authority or precedent, Caris suggests that once the discredited testimony is somehow given credence via its mere assertion that it should be believed (with the embedded assumption that all contemporaneous evidence should be ignored), then there is no support for the awarded damages. Def. Br. 29. However, the trial court (not the parties) assesses witness credibility and makes factual determinations, and unless such assessments and determinations are clearly wrong, then they are to be affirmed. *Brehm*, 906 A.2d at 50.

IV. THE VICE CHANCELLOR PROPERLY DETERMINED THE FMV OF SPINCO

A. Questions Presented

Was there sufficient evidence in the record to conclude: (1) the Fair Market Value of Carisome and Target Now (SpinCo) in late 2011; (2) Martino and Caris utilized PwC to arrive at a zero tax for the Spin-Off; and (3) there was a material difference between an IP only tax transfer valuation and FMV?

B. Scope of Review

The court's factual findings are subject to clear error review, and will be accepted if sufficiently supported by the record and are the product of an orderly and logical deductive process. *Schock*, 732 A.2d at 224.

C. Merits of Argument

1. The Record Contains Powerful Evidence that Caris and Its Board Believed SpinCo Was Worth Hundreds of Millions of Dollars.

"Extensive contemporaneous evidence" strongly supports the court's conclusions that, in the Fall of 2011, the Board believed the FMV of SpinCo far exceeded the $65 million assigned by Martino. Op. 55-59, 78-80. Defendant, again, ignores the actual evidence, and asserts it was error for the Vice Chancellor to weigh the evidence and assess witnesses' credibility. Def. Br. 30-31. Claiming the court "turn[ed] a blind eye" to the "operative reality in fall 2011," Defendant includes a timeline of SpinCo's value based solely upon the reassertion of

discredited testimony. To assist the Court, below is an accurate timeline of written, contemporaneous evidence in the record concerning the Board's information and beliefs regarding SpinCo's value:

- **2/11/11:** GT ordinary course valuation (for pricing options) estimated future SpinCo value at $539 million. Op. 39; B2.

- **4/5/11:** GT assesses Target Now FMV of $104 million. Op. 40; B143.

- **4/19/11:** Martino believes Target Now FMV is $150-$300 million. B209. PwC presents to Board using that valuation. Op. 15.

- **5/24/11:** GT FMV of future Target Now value is $119.7 million; Carisome is $411.7 million; total is $531.5 million. Op. 39; B213.

- **5/25/11:** Citi presentation to entire Caris Board reflecting IPO valuation for Target Now of $195 - $300 million. B288; Op. 55.

- **7/13/11:** GT ordinary course (draft) valuation estimates future "SpinCo" value of $665.9 million. Op. 38-39; B289.

- **8/9/11:** Full Caris Board approves Target Now projections to bidders showing "Modest Growth" projected Target Now revenue of $267 million, with EBITDA of $68 million and an upside case for Target Now of $476 million in revenue with EBITDA of $104.35 million. Op. 19; B315-18.

- **8/22/11:** Danaher bids $825 - $900 million for Target Now and AP Business, implying (at least) $100-$175 million value for Target Now. Board is aware of bid. Op. 55; B323-26; B352.

- **8/24/11:** Board members Halbert, Poste and Knowles (*i.e.*, half the Board) make presentation to TPG that global market for Carisome could exceed $130 Billion. Op. 20; B341; B351.

- **8/25/11:** Halbert and Johansen are advised by Citi that it informed bidder Illumina of Caris wanting $200-$250 million for Target Now. Op. 19.

- **9/12/11:** Miraca and PerkinElmer Bid letters for AP Business both indicate strong interest in acquiring Target Now. B362-63; B369-71.

- **9/15/11:** Knowles on video at conference in Switzerland says Carisome's prostate test would be "ready for primetime" by end of 2011. B864-65.

- **9/16/11:** Caris creates internal 5-year financial projections for Carisome prostate test sales (U.S. only) with 2012 "Base Case" revenue of $11 million and projected revenue rising to over $130 million and $62 million of EBITDA by the end of 2015. B373.

- **10/7/11:** Citi email expects Target Now sale at $150-$200 million. B467; *see also* B319; B434; B435; B436; B599.

- **10/27/11:** Caris Board Packet contains: (1) Carisome Launch strategy showing an $8.8B market; and (2) financials through Q3 2011 with Target Now Revenue **growing** each quarter of 2011. These are the last financials the Board reviewed before the Option Repurchase. B470-71; B476-79.

- **11/3/11:** JH Whitney presentation states: (i) Target Now value is $153.4 million, (ii) Caris expects to sell Target Now in 6-9 months for $187 million, and (iii) at this time there is "continued momentum towards Carisome Platform Commercialization." These statements were consistent with the Caris Board's information at that time. Op. 58-59; B480-83; B484-90; B731; B734-35; A714-15; A725-28; A787-88.

- **11/3/11:** Director Johansen sends email to Halbert stating "as we think about SpinCo as a juggernaut developing and rolling out Carisome diagnostic tests over the next few years." B491 (emphasis added).

- **11/16/11:** Halbert emails to Caris CFO, General Counsel and Johansen that: "Now its on to Carisomes!! And transforming the world!!!!" B567.

- **11/22/11:** Miraca Transaction closing. Halbert and JH Whitney invest $100 million into SpinCo for Carisome commercialization. Op. 57.

- **11/29/11:** Carisome Commercial Launch memo detailing Caris' expectation and strategy for commercialization in 2012. B571.

- **Q1/2012:** JH Whitney indicates Target Now value of $179.2 million and states: "[Caris] is continuing to invest aggressively in the Carisome platform with the expectation that it will have a blood based test for cancer on the market by the end of the year." Op. 58-59; B595; B597.

The Vice Chancellor found this to be "extensive" evidence of the Board's, Halbert's and Martino's subjective beliefs on the value of SpinCo throughout the Fall of 2011, until after the closing of the Miraca Transaction. Op. 55-59, 77-80. Defendant's claim that the court "ignored that by the Fall of 2011, SpinCo's value had dropped drastically" (Def. Br. 30-31) is wholly contradicted by the contemporaneous evidence.

2. Caris utilized PwC to obtain a Zero-Tax Valuation.

Incredibly, Defendant asserts that: (1) it is an "illogical theory" that Martino wanted to eliminate Spin-Off taxes, and (2) "zero-tax valuation was never" a motivation and there is "no support" in "the structure of the Transaction or in the record" for the court's finding. Def. Br. 32-34. Defendant contends the court's "theory" is based solely on "one email from Martino to PwC" which, Defendant says, the court "misinterpreted." Def. Br. 33-34. Defendant's goal was a zero-tax Spin-Off and the Vice Chancellor was presented with significant, uncontradicted evidence (well beyond one e-mail) supporting his conclusion.

As an initial matter, the evidence unequivocally demonstrated that, as early as the Spring of 2011, it was the intent of Caris and its primary stockholders to engage PwC and Citi to structure and effect the "tax free" Spin-Off. B210. A May

8, 2011, email from Martino to JH Whitney reveals the intent of these meetings:

> **We started some discussions with PwC last week. I had them meet with David [Halbert] and Laurie [Johansen] as well. <u>We have some hurdles to get a tax free spin off</u> of Carisome, etc. But possible.** (*Id.*) (emphasis added).

When asked about the email, Martino testified:

> **I don't recall what the hurdles were <u>to get a tax-free spinoff</u> for Carisome. But -- refresh my recollection that we would like a tax-free spinoff of Carisome, but <u>that kind of would go without saying</u>. Regardless of what asset we were spinning off…we would like it to be as tax advantageous as possible.** B737 (emphasis added).

Thus, Martino's own testimony and documents refute Defendant's argument.

Halbert's testimony as well supports to the Vice Chancellor's findings:

> **Q. It says, we have some hurdles to get a tax-free spinoff of Carisome, etc., but possible. Do you remember discussing trying to get a tax-free spinoff of Carisome --**
>
> **A. Vaguely….**
>
> **Q. Okay. So it was -- one of the goals was to minimize, if not get down to zero, the spinoff of Carisome and Target Now?**
>
> **A. Well, I don't know anybody that wants to pay more taxes than they have to.** (B724.)

Later in such deposition of Chairman Halbert found the zero-tax "theory" logical:

> **Q. Okay. And if we flip back to the first page, it says, Jerry, please see the attached model. We are at zero tax. Do you see that?**
>
> **A. Yes, I do.**

> **Q. And that was one of the goals that Jerry [Martino] was trying to work on with PWC for the spinoff, correct?**
>
> **A. It appears that way.** (B732.)

Moreover, Martino's trial testimony was that, at the time, Caris and Miraca were "focused" on the tax aspect of the Spinoff. A287-88.

In addition to Defendant's own witnesses' testimony, there is much further support in the record (well beyond one email, as Defendant claims), including:

- On September 20, 2011 at 9:26 a.m. Martino emails PwC asking them to prepare something "based on a $40 million or so valuation of RetainCo [SpinCo]." Martino has provided PwC with the "bogey to hit." B374; Op. 25, 60.
- 21 minutes later, PwC responds "Jerry – got it. We're on it." B375; Op. 26.
- On September 21, 2011 at 8:38 a.m. (less than 24 hours later) PwC sends Martino a valuation of SpinCo. Stating: "Jerry – please see attached model below. **We are at zero tax**." B378, B384 (emphasis added).
- To keep Carisome's cost valuation near $15 million (the zero-tax value), Martino improperly instructed PwC to "exclude" more than $26 million of costs from its cost-method valuation. Op. 7, 25-28; B384; B394-98; B399.
- To defend the "zero-tax" valuation of SpinCo, Martino spent the following week writing "strained" memoranda justifying his assumptions. Op. 7; B401-05; B406-08; B409-14; A1030; A1039.

- The Spin-Off resulted in zero U.S. federal tax liability for Caris, its subsidiaries and shareholders (primarily Halbert and JH Whitney). A186.

It was long Caris' goal to obtain a zero tax Spin-Off. Defendant's argument and inexplicable "Holmesian bad man" tangent, are simply unsupported, conclusory arguments, contradicted by the evidence.

3. The Record Fully Supports That There Was a Substantial Difference Between an IP Transfer TaxValuation and a FMV Valuation.

The court had ample evidence to find that "[f]or TargetNow and Carisome, the difference between a tax transfer valuation and a fair market valuation was substantial." Op. 69. Indeed, the difference was hundreds of millions of dollars.

(a) Target Now. The extensive evidence proved Caris and its Board believed Target Now's FMV, at that time, was about "$150 million." Op. 55-59, 78-80. The evidence included the objective and subjective FMV beliefs of professional firms Citi, Danaher, PwC, GT and JH Whitney, all of which expressed in writing that Target Now's FMV was somewhere between $150-$300 million. *See supra* §IV.C.1 at 38-41. By definition, an IP transfer tax valuation values less than the entire business. Here, in addition to being corrupted by Martino, the PwC IP Transfer Tax valuation (on its face) revealed that it was materially lower than a FMV valuation. In using a form of discounted cash flow, PwC deducted over $40.9 million from Target Now's EBIT "to insure that the calculated values" did not include the value of the entire business. B528 at §1.2.1(3); B557. That $40.9

million was removed from a DCF model that yielded a $47.2 million valuation of Target Now's IP. B389; B557. Also, Plaintiff's expert's DCF analysis of the entire business valued Target Now at $151-$269.8 million (B619), with an overall FMV of $231 million. B626.

(b) Carisome. The court also found that Carisome's manipulated transfer tax value and FMV were materially different. There were 2010 ordinary course "competing valuations that PwC and [GT] prepared," with PwC preparing an IP Transfer Tax valuation (concluding $10.25 million) and GT preparing a FMV valuation (concluding, after discounting, $115,981,000) – *over 11 times higher than the IP transfer tax valuation*. Op. 69. Such massive differential between valuation methods and results continued through the October 31, 2011 valuation date. As shown above (p.12), the July GT Prior Valuation of Carisome, as of October 31, 2011, was $226.2 million, but the IP Transfer Tax value, was $17.7 million (with FMV over *12 times higher* than IP Transfer Tax value). Op. Ex. A; s*ee also* B629 (Carisome FMV of $273 million). The court had ample evidence to conclude PwC's corrupted value was substantially lower than the actual FMV of Carisome and Target Now, both as subjectively believed by the Board and supported by objective, written evidence.

CROSS-APPEAL ARGUMENT

I. A TYPOGRAPHICAL ERROR IN THE OPINION INADVERTENTLY ALTERED THE MATHEMATICALLY CALCULATED DAMAGES

A. Question Presented

Did the court err by inserting, in its mathematical (tabular) calculation of damages, an errant data input that substantially altered the calculated amount? Op. 77-82; B209; B288; B480-90; B633; B944-45.

B. Scope of Review

When reviewing factual findings, the Court will make contradictory findings only if the findings below are clearly wrong or not the product of a logical and deductive reasoning process, and if justice so requires. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)

C. Merits of Argument

The court concluded that the Board subjectively believed the total value of SpinCo to be either (i) around $300 million or (ii) $273 million. Op. 78-80. Consequently, when calculating damages, it appears that a typographical error inadvertently altered the court's conclusion of damages amount, as a table in the Opinion mistakenly uses $240 million (Op. 81) to represent the total value of SpinCo (Target Now and Carisome), when the court had already concluded that one of such higher amounts represented what the Board subjectively believed.

In Section II.D. "Damages" of the Opinion, the court found that, based on

the Board's prior ordinary course behavior, the Board would have determined FMV had it made such determination in good faith, as follows:

> **In my view, had the Board proceeded in good faith, it would have retained Grant Thornton to determine the fair market value of TargetNow and Carisome. Absent Martino's intervention, Grant Thornton would have prepared its report using methods and techniques that were consistent with its prior work. The Board then would have used the values of TargetNow and Carisome, in conjunction with the sale price for the AP business, to determine what option holders would have received.** (Op. 78.)

As the court further explained, the record contains a draft July 2011 stock option FMV valuation that GT prepared in the ordinary course (prior to Martino's intervention) and sent to Caris on September 21, 2011 (the "FMV Valuation"). *Id.*; B289. The court used the FMV valuation, discounted the values determined therein to the appropriate valuation date of October 31, 2011, and determined that the FMV Valuation implied a FMV for SpinCo of $273,729,000. Op. 79. With respect to such $273,729,000 value, the Vice Chancellor states:

> **From the evidence presented at trial, this is a reasonable approximation of the Board's subjective belief at the time. My assessment of what the Board believed differs only in the relative weighting. I think that in fall 2011, the Board valued TargetNow more highly—closer to $150 million. That figure is at the low end of the $150 to $300 million that Martino estimated…and below the $195 to 300 million that Citi estimated….It is towards the low end of the values in JH Whitney's internal documents…of $153.5 million (JX 161) and $187.2 million (JX 162).** (Op. 79; B480-83; B484-90) (emphasis added).

The court also found that, based on the evidence in the record, the Board valued Carisome "at least as much as Target Now." Op. 80. Thus, based on this analysis alone, the court seemingly determined that, together, Target Now (FMV "closer to $150 million") and Carisome (FMV "at least as much as Target Now") have a FMV of approximately $300,000,000. Indeed, the court concluded:

> **Based on this reasoning, were I to set aside the [FMV Valuation], I would conclude from the balance of the record that the Board believed TargetNow and Carisome together were worth around $300 million. Grant Thornton's figure of $273 million is conservative relative to that assessment.** (Op. 80 (emphasis added).)

Thus, the court identified two possible conclusions as to the Board's subjective belief on the total FMV of Target Now and Carisome: either (1) around $300 million (based on the entire record other than the FMV Valuation) or (2) $273,729,000 (the amount implied by the "conservative" FMV Valuation). *Id.*

The court then constructed a table, based on Plaintiff's expert's table, to calculate the value per share that Defendant should have paid the Option Holders based on such beliefs. Op. 80-81. However, in the tabular mathematical calculation, rather than inputting one of the only two possible values of SpinCo that the court reasoned should apply (*i.e.* around $300 million or $273,729,000), the court instead inserted (adjacent on the chart to Defendant's $65.03 million figure) **$240 million** – a number never otherwise mentioned anywhere in the

Opinion. *Id.* Plaintiff submits that this figure was an inadvertent mistake in data entry and that, rather than write $240 million ***adjacent to*** Defendant's value of $65,030,000, the court meant to ***add*** $240 million to such adjacent value and reach a value of $305,030,000 (which is "around $300 million," as the court reasoned). Such logical conclusion is further supported by the fact that $240 million is the approximate difference between the $65.03 million value used by Caris in breach of the Plan, and the court's "around $300 million" value finding. Further, through function of the chart, the $65 million was actually ***subtracted*** from $240 million.

Logically, the court would not have spent the vast bulk of the Damages section of the Opinion using the entire record to support either a $300 million or $273 million valuation of Spinco, to then just use a $240 million amount that was not otherwise mentioned or advocated for in any way. The court would not "conclude" from the "balance of the record" (*i.e.* all of the record other than the $273 million FMV Valuation) that "the Board believed TargetNow and Carisome together were worth around $300 million," and that the $273 million figure was, thus, "conservative relative to that assessment," if the court was then going to find that the actual value was $33 million less than such "conservative" amount and $60 million less than the amount determined by the court based on the "balance of the record." That would not be logical.

Thus, had the court added $240 million to the adjacent $65.03 million value

on the table (reaching a value of $305,030,000), with all else remaining unchanged, the damages calculation would have been **$21,611,246.12**, not $16,260,332.77. Therefore, but for the typographical error, the court would have awarded **$21,611,246.12** (plus pre-and post-judgment interest) in the Opinion and the Order. Alternatively, and at a minimum, the court meant to use the "more conservative value of $273,729,000" generated by the FMV Valuation prior to Martino's interference and manipulation. Had the court used $273,729,000 rather than $240 million, with all else remaining unchanged, the damage calculation would have been **$19,002,229.10** (plus pre-and post-judgment interest).

CONCLUSION

The Court of Chancery correctly found that Defendant breached the Plan. However, the court appears to have mistakenly used an incorrect data input in its damage calculation. As this Court has the correct input, this Court should Affirm Judgment for Plaintiff and Damages, and further calculate the additional damages.

Dated: December 17, 2015
Wilmington, DE

CROSS & SIMON, LLC

/s/ Christopher P. Simon
Christopher P. Simon (No. 3697)
1105 N. Market Street, Suite 901
P.O. Box 1380
Wilmington, DE 19899-1380
(302) 777-4200
(302) 777-4224 Facsimile
csimon@crosslaw.com
Counsel for the Plaintiff Below, Appellee/Cross-Appellant

OF COUNSEL:
Daniel S. Cahill, Esquire
Louis Gambino, Esquire
CAHILL GAMBINO LLP
60 Railroad Place, Suite 202
Saratoga Springs, NY 12866
(518) 584-1991
dan.cahill@cahillgambino.com
lou.gambino@cahillgambino.com