EFiled: Jan 11 2016 11:43PM EST
Filing ID 58412262
Case Number 523,2015D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OPTIMISCORP, a Delaware corporation, ALAN MORELLI, and ANALOG VENTURES, LLC,	:	No. 523, 2015
Plaintiffs Below, Appellants/Cross-Appellees,	:	CASE BELOW:
v.	:	Court of Chancery of the State of Delaware, C.A. No. 8773-VCP
JOHN WAITE, WILLIAM ATKINS, GREGORY SMITH and WILLIAM HORNE,	:	
Defendants Below, Appellees/Cross-Appellants.	:	

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

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DATED: January 11, 2016

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INTRODUCTION[1]

Defendants assert, time and again, that Plaintiffs do not challenge and have not appealed numerous findings of fact and conclusions by the trial court, as if repetition will make it so.[2] That is not true. Plaintiffs have appealed all of the findings and rulings, on all of their claims, that the trial court made against them, based on two overarching errors of law: *first*, that arm's-length settlements with witnesses against whom Plaintiffs also had claims, which required the witnesses to provide truthful evidence and testimony in this case, amounted to witness tampering that undermined the integrity of the proceedings below (*see*, *e.g.*, Op. Br. at 3); and *second*, that the *Koch* line of cases over the past two-plus decades – which hold that it is a breach of the duty of loyalty for corporate fiduciaries, using

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[1] Unless otherwise noted, defined terms herein have the meanings ascribed to them in Appellants' Opening Brief on Appeal (the "Opening Brief"). The Memorandum Opinion (the "Opinion") is cited herein as "Op. at __." The Opening Brief is cited as "Op. Br.", and the Director Defendants' and Horne's answering and cross-appeal briefs are cited as "ASW Br." and "Horne Br.", respectively.

[2] *See, e.g.*, ASW Br. at 41 ("Plaintiffs do not challenge … on appeal" finding of no conspiracy to remove Morelli), 61 (Plaintiffs "have not appealed" adverse rulings on conspiracy and aiding and abetting breach of fiduciary duty claims); Horne Br. at 6 ("Plaintiffs have not appealed any liability determinations resolved in Horne's favor below"), 24 ("Plaintiffs do not challenge the dismissal of their conspiracy claim"), 25 ("Plaintiffs do not challenge the dismissal of [their] breach of fiduciary duty claims", their "breach of contract and breach of the implied covenant of good faith and fair dealing claims against Horne", or their "tortious interference claim against Horne"), 26 ("Plaintiffs have not challenged the trial court's findings that Horne did not aid and abet anybody"), 27 ("Plaintiffs never directly challenge the legal standards that the lower court applied" on the witness tampering issue), 42 ("Plaintiffs do not appeal the dismissal on the merits" of their conspiracy claims), 47 ("Plaintiffs have not taken an appeal as to" trial court's rejection of claim that "Horne failed to disclose 'material conflicts'" in connection with October 20 Special Meeting), 48-49 ("Plaintiffs have not challenged … on appeal" finding that Horne did not breach his fiduciary duties, or aid and abet Director Defendants' breaches, as the architect of Amendment No. 2 strategy).

guile, trickery or deception, to seize control of the corporation and usurp the right to designate directors from the controlling stockholders[3] – "were incorrectly decided" and, therefore, need not be followed in this case. (*See, e.g.*, *id*. at 4) If this Court agrees with Plaintiffs that these were, indeed, legally erroneous rulings by the trial court, the portions of the judgment below adverse to Plaintiffs should be reversed and the case should be remanded for further proceedings consistent with a proper application of the correct controlling legal principles.

To avoid that result, and as they did below, Defendants litter their briefs with salacious, and irrelevant, material in the hope of distracting this Court from the straightforward legal errors presented in this appeal. Defendants also ask the Court to rewrite Delaware law and hold:

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[3] Horne tries to argue that Defendants and their allies' concerted efforts to get rid of Morelli were not really about "'taking control of Optimis away from Morelli,'" because "their real gripe was [merely] resource allocation." (Horne Br. at 37 n.15) But in the context of Optimis, decisions about "resource allocation" as between its primary software products, Optimis*PT* and Optimis*Sport*, and how much of the Company's clinical revenues and software developers' time to expend on each, are at the very heart of "control of Optimis." These were matters for the board – not a rump group of disgruntled managers – to decide, and Morelli and Analog, not Defendants, were contractually entitled to designate the majority of directors on that board. (*See* Op. at 61, 164 n.532, 190; A1544 ¶ 3.3(a); *see also* Op. Br. at 12, 50, 51)

It also is worth noting that the Director Defendants, in their answering brief, finally admit that there was a "strategic disagreement at the highest management levels" between them and Morelli over these fundamental "resource allocation" issues. (*See* ASW Br. at 15) Of course, from the start of the Section 225 Action, Waite told the trial court the exact opposite – that there were no "differences of opinion about the optimal strategic direction of the Company." (A1985 ¶ 2) Plaintiffs repeatedly pointed out Waite's material misrepresentation to the trial court (but the Opinion never mentions it) and on this appeal (*see* Op. Br. at 9 n.8), yet Defendants ignore, and never even try to excuse or explain, it.

- that litigation threats and entering into settlement agreements requiring truthful testimony from the settling parties constitute witness tampering;

- that insurgent directors may usurp corporate control through transactions not fully disclosed to their fellow directors; and

- that trial courts can refuse to award any damages to plaintiffs who have been harmed by defendants' breaches of fiduciary duty.

We respectfully submit that none of this is necessary or appropriate. The trial court here simply got it wrong. Settling with individuals against whom parties have legitimate claims, and requiring such individuals to tell the truth, has never been a violation of the law. Similarly, Delaware law consistently has held that it is a breach of the duty of loyalty to seize the right to designate a majority of the directors from one group of stockholders, who are legally entitled to control, and give it to other stockholders. Accordingly, the Final Judgment should be reversed in relevant part and remanded for further proceedings.

In addition, through their cross-appeals, Defendants seek to injure Plaintiffs even more. They ask this Court to reverse the trial court's fee-shifting ruling, which found that the circumstances did not warrant departure from the American Rule. Furthermore, the Director Defendants seek further absolution for their wrongdoing by asking this Court to reverse the trial court's holding that they breached their fiduciary duties of loyalty and candor. As explained below, the cross-appeals should be denied.

SUMMARY OF ARGUMENTS IN RESPONSE TO DIRECTOR DEFENDANTS' CROSS-APPEAL

6. Denied. The Director Defendants breached their fiduciary duties of loyalty and candor when they concealed Rancho's allegedly flawed corporate structure from the rest of the Optimis board and, instead, intentionally attempted to use the information for their own benefit.

7. Denied. The trial court did not err when it refused to award the Director Defendants' attorneys' fees and expenses because they failed to show why there should be an exception to the American Rule.

SUMMARY OF ARGUMENTS IN RESPONSE TO HORNE'S CROSS-APPEAL

1. Denied. The trial court did not err when it refused to award Horne's attorneys' fees and expenses because he failed to show why there should be an exception to the American Rule.

REPLY ARGUMENTS IN SUPPORT OF PLAINTIFFS' APPEAL

I. PLAINTIFFS DID NOT COMPROMISE THE INTEGRITY OF THE PROCEEDINGS BELOW.

A threshold issue on appeal is whether Plaintiffs' settlements with certain witnesses constituted witness tampering which compromised the integrity of the proceedings below. Respectfully, the answer is no. In finding otherwise, the trial court misapplied the law by creating a new (and inappropriate) legal standard[4] and also failed to provide any explanation as to how the integrity of the proceedings was compromised by the settlement agreements or alleged threats of litigation.

Defendants cite no case supporting that Plaintiffs' settlements – which required the witnesses to provide truthful sworn testimony – amounted to witness tampering, and Plaintiffs are aware of none. Nor do Defendants cite anything from the lower court's Opinion demonstrating that its fact finding abilities at trial had been impaired.

Rather, Defendants engage in an irrelevant factual recitation and *ad hominem* attacks on Morelli in a reprise of their strategy below, hoping to persuade this Court (as they did with the trial court) to view Plaintiffs as "bad" and undeserving of well-established protections provided by the corporate laws of this State. Defendants' efforts to again poison the well against Morelli should be

[4] Contrary to Defendants' contentions, Plaintiffs plainly did appeal the formulation and application of the lower court's legal standard in concluding that they had engaged in witness tampering. (*See* Op. Br. at 10, 26-36)

ignored, and this Court should remand the case for new factual findings purged of the improper taint of witness tampering sanctions and adverse inferences.

A. The Settlement Agreements Do Not Constitute Witness Tampering.

In reviewing the settlement agreements, the trial court found that Plaintiffs had tampered with certain trial witnesses by requiring them to provide truthful, sworn statements as part of their agreements. (Op. at 50-53) In their Opening Brief (Op. Br. at 26-36), Plaintiffs addressed the legal flaws in the lower court's formulation and application of the law in this context. Despite his lengthy discussion of the witness tampering issue (Horne Br. at 29-43), Horne cites no case law supporting Defendants' positions.[5] Indeed, two dispositive distinctions remain unchallenged.

First, none of the cases Defendants cite address witness testimony in the context of a settlement agreement. Here, the evidence reflects – and the trial court agreed (Op. at 51) – that Plaintiffs were settling claims they believed were legitimate against the witnesses at issue.[6] Accordingly, the releases and other consideration were exchanged to settle claims – not to improperly influence the witnesses' testimony.

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[5] The Director Defendants rely on Horne's briefing for their arguments on this issue. (ASW Br. at 27)

[6] *See* Op. at 51, 212. That Plaintiffs went to the police with their complaints only bolsters this point.

Second, as explained in Plaintiffs' Opening Brief (Op. Br. at 28 n.20), the facts of the cases cited by Horne are nothing like the actions taken by Plaintiffs. Critically, the settlements here were completely transparent – Plaintiffs voluntarily produced relevant documents in discovery, and Defendants were able to cross-examine those witnesses and present whatever information they wanted to the trial court to assess credibility. There was no effort to hide the relevant facts from Defendants or the trial court. Accordingly, for the reasons set forth in Plaintiffs' Opening Brief (Op. Br. at 26-36), the trial court's holding should be reversed.

B. The Trial Court's Fact Finding Ability Was Not Impaired.

The lower court also failed to identify specifically how the trial was compromised or how its fact finding ability was impaired, and Defendants likewise fail to identify any such impediments. *First*, there is nothing in the Opinion suggesting that the lower court even considered any of the extraneous "facts" recited in Horne's answering brief.[7]

Second, even if the trial court had considered Horne's allegations, he only points to alleged prejudice impacting his summary judgment motion. (Horne Br. at

[7] Horne discusses at length "other misconduct by Plaintiffs" in yet another attempt to muddy the waters as to the relevant issues on this appeal. (Horne Br. at 18-24) There is nothing in the lower court's Opinion suggesting that it ever considered any of the alleged "other misconduct" in reaching its decision, and Horne does not explain how any of it impacted the trial court's fact finding ability. Moreover, much of Horne's recitation mischaracterizes the record. For example, Plaintiffs did voluntarily produce the settlement agreements and negotiation documents without court order and months in advance of the discovery cutoff.

17, 19-20, 36, 40-41) But Defendants did not appeal from the lower court's decision denying summary judgment and, therefore, these arguments have been waived. *See* Sup. Ct. R. 7(b); *Trowell v. Diamond Supply Co.*, 91 A.2d 797, 801 (Del. 1952) ("In the construction and application of a statute or rule providing for the perfecting of an appeal by the filing or service of a notice of appeal and requiring the notice to specify the judgment appealed from, it is generally held that if the specification of the judgment or order appealed from is clear and unambiguous, it is binding on the appellant and is ineffectual to bring up for review any judgment or order other than specified.")

Third, on the merits of his argument, Horne has not demonstrated any actual prejudice. Setting aside his *ad hominem* rhetoric, Horne's argument appears to be that his discovery rights somehow were impaired. But during the course of this litigation, Plaintiffs did not obstruct Horne's access to evidence or alter, destroy or conceal any documents or materials having potential evidentiary value. To the contrary, Defendants at all times were able to obtain discoverable information (through document requests or deposition testimony) from anyone with whom Plaintiffs settled. Each of the settlement agreements entered into by Plaintiffs expressly contemplated that Defendants ***would seek*** discoverable information from the settling parties and required them to meet all of their legal obligations with

respect thereto.[8]

Moreover, in settling with Geller, Plaintiffs did not adversely affect the integrity of the judicial process by asking her to refrain from voluntarily providing information to Defendants.[9] It is entirely proper to require that a person refrain from volunteering relevant information to another party where such person is an employee of the client and "the lawyer reasonably believes that the person's interests will not be adversely affected" by so refraining.[10] *See* DLRPC 3.4(f)(1)-(2); DLRPC 3.4 cmt. 4 ("Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party.").[11]

Here, it was proper for Plaintiffs to require that Geller not volunteer information to Defendants. When she negotiated and entered into her settlement

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[8] *See* A1249 ¶ 7; A1332 ¶ 2; A2134 ¶¶ 9-10; A2155 ¶ 2; A2158 ¶ 2.

[9] The circumstances of Geller's settlement were extraordinary and justifiably caused Plaintiffs to be concerned that she might later perjure herself, since she had become close friends with Horne and his secret girlfriend (Morelli's ex-wife) and was recruited by Horne and Waite to make false harassment claims as a pretext to remove Morelli and seize control from him and Analog. (A173, 307:23-308:8 (Morelli); A176, 321:10-18 (Morelli); A190, 376:22-377:9 (Morelli); AR50, Morelli Dep. 66:17-67:10; AR51, Morelli Dep. 83:11-84:1; AR52, Morelli Dep. 111:4-18; A2145 ¶¶ 4-5)

[10] The settlement agreements with Fearon and Levine do not contain any provisions requiring them to refrain from voluntarily giving relevant information to another party. (*See generally* A2155-A2157; A2158-A2160) Therefore, those settlements do not implicate Professional Conduct Rule 3.4(f). Even if they did, such a non-cooperation provision would have been appropriate, since Fearon and Levine were Optimis employees whose interests were aligned with Plaintiffs'. *See* DLRPC 3.4 cmt. 4.

[11] Horne's suggestion that Plaintiffs provided no support for the proposition that non-cooperation and release agreements are routine (Horne Br. at 42) is not true. (*See* A853 at 78 & n.103; A1080 at 48 & n.133)

agreements, Geller was an Optimis employee.[12] (*See* A2133 ¶ 3 (noting Geller's "current employment with Optimis")) Moreover, Plaintiffs reasonably believed Geller's interests were protected because she was represented by counsel throughout the settlement negotiations.[13] (*See* A2136 ¶ 14; A2138 ¶ 24; *cf.* A2697, Schaedel Dep. 79:6-12)

Regardless, Geller was not prohibited from communicating with Defendants. Paragraphs 10 and 11 of Geller's settlement did not prohibit her from communicating with anyone else who might contact her. (*See* A2134-36 ¶¶ 10-11) Rather, it expressly contemplated that Geller ***may*** engage in communications ***initiated*** by Defendants, but required her to disclose such communications within 72 hours. (*Id.* ¶ 10) Defendants offered no evidence that the non-cooperation provisions of the Geller settlement agreement prejudiced Defendants or other

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[12] While Geller's employment at Optimis terminated at the time of her December 2013 settlement agreement, the agreement contemplated that she would provide ongoing consulting services to the Company. (A2133 ¶¶ 3-4) Although Geller never did provide any such consulting services, Defendants offered no evidence to prove that Plaintiffs' request that Geller not voluntarily cooperate with them "has prevented, or threatens to prevent, [Defendants] from obtaining information that would otherwise be obtainable." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Stauffer Chem. Co.*, 1990 WL 140438, at *1 (Del. Super. Ct. Sept. 13, 1990). Indeed, Defendants got all the information they wanted from Geller.

[13] Because Horne, Waite and their co-conspirators had once persuaded Geller to make false claims against Morelli, Plaintiffs reasonably believed that Defendants and their allies would try to do so again, despite the settlement, and Plaintiffs wanted to be informed if that were to happen. That concern proved to be justified, as Geller dramatically changed her story at her deposition, after disputes over her entitlement to payments under the settlement agreement arose and her counsel threatened to reach out to Waite and Horne if Optimis did not capitulate to her payment demands. (*See* A288-89, 629:2-631:2 (Morelli); AR53-54, Morelli Dep. 201:2-202:7; A2144-45 ¶¶ 3-5)

proceedings. As a consequence, there has been no prejudice to Defendants or the proceedings.

Moreover, the integrity of the judicial process has not been harmed by the non-cooperation provisions. Geller's settlement agreement obligated her to provide truthful information to adverse parties when required under legal process. (*See* A2134 ¶ 9) Horne subpoenaed Geller for deposition testimony and, indeed, she was deposed for two days (on September 16 and October 6, 2014), long before the trial court ruled on Defendants' summary judgment motions (on January 28, 2015). Nothing prevented Horne from supplementing the summary judgment record with Geller's testimony if he wanted the lower court to consider it, but he did not do so.

C. The Trial Court's Error Was Not Harmless.

Horne also argues that the lower court's holding with respect to Plaintiffs' conduct was harmless error. "'Harmless errors are those that do not constitute significant prejudice to the adversely affected party that would operate to deny that party a fair trial.'" *Czech v. State*, 945 A.2d 1088, 1095 (Del. 2008) (citation omitted). Here, Plaintiffs were clearly adversely affected by the trial court's witness tampering finding. The lower court held that Plaintiffs' litigation conduct had tainted the proceedings, and it harshly sanctioned Plaintiffs by dismissing their conspiracy claim and making countless credibility determinations against them. Accordingly, Plaintiffs appealed all the adverse factual findings – including those

that led the court to dismiss the conspiracy claim on its merits – precisely because the trial court's witness tampering holding improperly permeated the entirety of its findings.

II. DEFENDANTS BREACHED THEIR DUTY OF LOYALTY BY ATTEMPTING TO GAIN CONTROL OF OPTIMIS.

A. Delaware Precedent Does Not Conflict With Section 141(a).

The trial court held that the *Koch* line of cases conflicts with DGCL section 141(a) and, therefore, was decided incorrectly. (Op. at 173-74) In support of that holding, the Director Defendants argue that "[a]llowing Morelli to exercise his contractual removal and replacement rights would have prevented Waite and the rest of the Board from following the advice … of counsel[.]" (ASW Br. at 30) Neither the court's holding nor the Director Defendants' argument establishes any conflict between section 141(a) and the facts at issue in this action.

In support of their argument, the Director Defendants rely upon the hypothetical that the trial court based its decision on: "Allowing Morelli to exercise his contractual removal and replacement rights ***would have*** prevented Waite and the rest of the Board [from removing him for cause]." (ASW Br. at 30) (emphasis added) That hypothetical, however, is not supported by the facts. Here, due to Defendants' actions, the Initial Stockholders were denied the opportunity to exercise their director removal and replacement rights at the October 20 Special Meeting. What might have happened if the Initial Stockholders had been given that opportunity is pure speculation and not the subject of any ripe conflict.

The Director Defendants attempt to remedy this defect by noting that Morelli did remove certain directors after the October 20 Special Meeting. (ASW

Br. at 30 n.28 (citing Op. at 136, 175)) However, such after-the-fact action is not the proper focus of the analysis.[14] As a consequence, the trial court's holding is an impermissible advisory opinion. (*See* Op. Br. at 40-41); *see also Stroud v. Grace*, 606 A.2d 75, 96 (Del. 1992). The Director Defendants' vague reference to *dicta* in *Klaassen* (ASW Br. at 31-32) does not remedy this defect.

B. Defendants Breached Their Duty Of Loyalty By Failing To Provide Proper Notice Before The October 20 Special Meeting.

The Director Defendants also argue that *Koch* and its progeny do not apply to the facts in this case. (ASW Br. at 33-42) Their attempts to distinguish these cases fail.

The Director Defendants argue that none of the *Koch* line of cases or *Fogel* "justified an award of money damages to remedy the invalid corporate action." (ASW Br. at 34) This is true only because those cases involved different proceedings or contexts: (i) *Adlerstein* and *Koch* were actions under DGCL section 225 which, by their nature, seek relief that is declaratory and injunctive in nature;[15] (ii) the plaintiff in *VGS* sought only equitable relief for its breach of

[14] Moreover, there is no record evidence that the Initial Stockholders' newly-appointed directors subsequently breached their fiduciary duties in conflict with section 141(a).

[15] *See Adlerstein v. Wertheimer*, 2002 WL 205684, at *1, *12 (Del. Ch. Jan. 25, 2002); *Koch v. Stern*, 1992 WL 181717, at *1, *7 (Del. Ch. July 28, 1992), *vacated as moot*, 628 A.2d 44 (Del. 1993).

fiduciary duty claim;[16] and (iii) in *Fogel*, the court found no breach in connection with a claim that was based on another theory and different circumstances than those implicated here.[17] Thus, nothing in those cases precludes Plaintiffs from recovering damages for Defendants' breaches of fiduciary duties.

Moreover, Defendants are not entitled to a free pass on their breaches under Delaware law. Delaware courts routinely award damages for breaches of the duty of loyalty – the type of breach here. *See, e.g., Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 437, 445 (Del. 1996); (*see infra* Section II) It also bears repeating that in the earlier Section 225 Action, Morelli and Analog ***prevailed*** in (i) invalidating Defendants' takeover efforts, including Horne's Amendment No. 2 strategy, (ii) having Waite held in contempt of the *status quo* order for "acting in concert with" Smith and Atkins to secretly approve $1 million worth of employment agreements for themselves, and (iii) getting those employment agreements declared void. (*See* A2004-06 (Mar. 21, 2013 Final Judgment Order in Section 225 Action); A2129-31

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[16] *See generally VGS, Inc. v. Castiel*, 2000 WL 1277372 (Del. Ch. Aug. 31, 2000), *aff'd*, 781 A.2d 696 (Del. 2001) (ORDER); *see also* AR61-68 at AR62, AR65 (in December 8, 2003 motion to strike plaintiff's requests for damages, *VGS* defendant noted that plaintiffs' complaint, which it had filed "more than three and one-half years" earlier, "request[ed] declaratory and injunctive relief, but d[id] not seek damages" and that plaintiff never amended its complaint); *cf.* AR69-72 at AR70-71 (June 1, 2004 Order of Final Judgment which, among other things, dismisses plaintiff's claims for damages with prejudice).

[17] *See Fogel v. U.S. Energy Sys., Inc.*, 2007 WL 4438978, at *4 (Del. Ch. Dec. 13, 2007) (finding no breach of fiduciary duty where defendants ignored call for special meeting because court found directors' decision "was not made with the 'princip[al] purpose of preventing the shareholders from electing a majority of new directors'") (citation omitted), *overruled on other grounds by Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035 (Del. 2014).

(Sept. 25, 2013 Contempt Order))

Next, the Director Defendants argue that each of the cases in the *Koch* line "involved a calculated, deceitful plan to remove a controlling director, and that plan resulted in the director's removal," as if their own acts were not intentional or deceitful. (ASW Br. at 34, 36, 38, 41-42) But the facts, as found by the court below, are to the contrary: (i) prompted by Horne, Defendants secretly prepared Amendment No. 2, (ii) Waite noticed the October 20 Special Meeting without disclosing the plan to remove Morelli and strip him and the Initial Stockholders of their rights under the Stockholders Agreement,[18] and (iii) Waite solicited signatures to Amendment No. 2 under false pretenses. (*See* Op. at 124-25, 128, 182-83; *see also* Op. Br. at 7-8 n.6) While Morelli's alleged sexual activity was the given "reason" for the board's action at the October 20 Special Meeting, the Director Defendants' actions and failure to follow proper corporate governance are not excused. Morelli and the Initial Stockholders still were entitled to proper

[18] The Director Defendants actually argue that Zilberman gave "sound advice" to Waite not to inform the board of the claims against Morelli in advance of the October 20 Special Meeting. (ASW Br. at 21 n.24) Delaware law is the opposite – "Any director who has actual knowledge of facts suggesting a material problem in the company is duty-bound to initiate board or management consideration of the trouble." R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 4.16 (3d ed. 2015); *cf. In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 799 (Del. Ch. 2009) ("Indeed, for present purposes, it is inferable that even when Matthews and Tizzio were not directly complicitous in the wrongful schemes, they were aware of the schemes and knowingly failed to stop them. In that regard, I find it inferable that Matthews and Tizzio were aware of misconduct that should have been brought to the attention of AIG's independent directors (including the Audit Committee) but chose to conceal their knowledge, despite having a fiduciary duty to speak."), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011) (TABLE).

notice of the plan to strip their rights. *Adlerstein v. Wertheimer*, 2002 WL 205684, at *9 (Del. Ch. Jan. 25, 2002); (*see also* Op. Br. at 42-46) Regardless of whether Morelli had some "awareness of his potential removal" as a result of Solomon's investigation (ASW Br. at 36-37), Waite was not excused from his fiduciary responsibility to provide notice to Morelli and the rest of the Optimis board of the purpose of the meeting, especially given the significant corporate governance ramifications of the planned actions. *Adlerstein*, 2002 WL 205684, at *10. As for Horne, a senior officer (CFO), while he was not the notice-giver for the October 20 Special Meeting, he knew what was planned, did not disclose it to Morelli or the other directors, and actively tried to conceal it from them.[19]

Finally, the Director Defendants try to distinguish the *Koch* line of cases individually. They do not argue any further distinctions as to *Koch* or *Fogel* beyond those already discussed. (ASW Br. at 36, 42) *VGS*, as discussed in the Opening Brief, involved a limited liability company, a distinction without a difference on the present facts. (Op. Br. at 43) For the reasons explained in the Opening Brief, *Adlerstein* is directly on point. (*Id.* at 43-44) As for the Director Defendants' effort to distinguish *Adlerstein* by arguing that Optimis did not involve

[19] *See* AR47, Sussman Dep. 138:22-140:5 (during October 7, 2012 call, Horne discouraged Sussman from disclosing Geller's allegations to Morelli); AR39 ¶¶ 7-8, 10 (in subsequent calls, Horne discouraged Sussman from speaking with Morelli about Amendment No. 2); *cf.* A366, 816:9-817:2 (Sussman) (confirming that between Horne's initial call and the October 20 Special Meeting, Sussman did not discuss the matter with any directors other than Waite).

a restructuring (ASW Br. at 40), the facts at bar – where the CEO was ousted and control over who could elect the majority of the Optimis board was transferred – are every bit as significant and impactful as the structural changes in *Adlerstein*.

C. Amendment No. 2 Was Secured Under False Pretenses.

1. Waite Misrepresented Amendment No. 2 To The Optimis Board And Stockholders.

To effectively amend the Stockholders Agreement, Defendants had to get approval from majorities of both the board and the stockholder parties to the agreement. (A1548 § 6) The Director Defendants confuse these two separate actions and claim that they did not breach their fiduciary duties in obtaining Amendment No. 2 because (i) the trial court evaluated Waite's "approach" to stockholders and did not find a breach (ASW Br. at 44), (ii) Amendment No. 2 ended up as a "void" act (*id.*), (iii) Waite solicited and obtained consents to Amendment No. 2 in his role as a stockholder (*id.* at 45), and (iv) Plaintiffs did not establish that a majority of the board failed to appreciate the significance of the amendment (*id.* at 46-47). These arguments are flawed.

First, Waite admitted that he told varying stories about the need for Amendment No. 2 to the Optimis stockholders from whom he solicited consents prior to the October 20 Special Meeting. (A433, 1083:19-1084:22 (Waite); AR43-44, Garlock Dep. 21:23-23:2; AR26; B2139, Abdelhamid Dep. 46:19-47:3; A2762-64, Waite Dep. 481:8-483:19) When considering Waite's solicitation

efforts, the trial court observed that his approach did "not appear to satisfy Delaware law[.]" (Op. at 125) However, the trial court then declined to decide if Waite's actions were a breach of fiduciary duty since they were "largely moot" because Amendment No. 2 was "vacated" by the settlement in the Section 225 Action. (*Id.*) Defendants have no response for Waite's actions and, as explained in the Opening Brief, the trial court's failure to evaluate Waite's breach of fiduciary duty when he misled other stockholders, separate from the actions taken at the October 20 Special Meeting, was legal error. (Op. Br. at 47)

Second, Defendants argue that "one cannot breach his fiduciary duty in connection with a 'void' act." (ASW Br. at 44) However, the trial court gave effect to Amendment No. 2 by excusing the Director Defendants, on the basis of that amendment, from their contractual obligation to sign Morelli's written consents to replace certain board members at the October 20 Special Meeting. (Op. Br. at 47; Op. at 183-84) Indeed, Defendants themselves characterize the passage of Amendment No. 2 as a voidable act that only became void in March 2013 with the settlement of the Section 225 Action. (ASW Br. at 50-51) At the end of the day, whether Amendment No. 2 was "void" or "voidable," Defendants breached their fiduciary duties by obtaining its passage by deceit.[20]

[20] Of course, if the passage of Amendment No. 2 was void, then the Director Defendants breached the Stockholders Agreement by refusing to sign the written consents presented by Morelli at the October 20 Special Meeting. (*See infra* Section III)

Third, Waite also claims that he could not have breached his fiduciary duties because he solicited the consents as a stockholder and, since the Director Defendants were not majority stockholders, Waite owed no fiduciary duties when he misrepresented Amendment No. 2. (ASW Br. at 45) Waite offers no explanation as to how he shed his director and officer (COO) hats while speaking with stockholders, some of whom were also board members (*i.e.*, Abdelhamid), or any legal support for his position. (*See id.*) This purported excuse should be rejected. *Cf. Technicorp Int'l II, Inc. v. Johnston*, 2000 WL 713750, at *5 (Del. Ch. May 31, 2000) (directors have a duty "'in any of their relationships'" with the corporation not to injure it or its assets) (citation omitted); *Manchester v. Narragansett Capital, Inc.*, 1989 WL 125190, at *7 (Del. Ch. Oct. 19, 1989) ("Furthermore, given the fact that the individual defendants are all employees, shareholders, officers, and directors of the corporation, it would be artificial to distinguish their actions as having been taken in different guises when, as directors, they control the corporation.").

The Director Defendants also claim that Plaintiffs did not offer evidence of Waite's deceit at the October 20 Special Meeting. To the contrary, and as discussed in the Opening Brief (Op. Br. at 48), the trial court agreed that Waite's misrepresentations – that Amendment No. 2 was "just a small thing" and "not going to affect Alan at all" – were inaccurate and potentially misleading. (*See* Op.

at 183)

In addition, the Director Defendants (as did the trial court) point to documents exchanged among Waite, Brys and Abdelhamid and his attorney to discredit Abdelhamid's testimony regarding the October 20 Special Meeting. (*See* ASW Br. at 47; Op. at 183) However, all those documents show is that, during Waite's solicitation of him prior to the meeting, Abdelhamid understood how Amendment No. 2 would affect his own rights. (*See* B1509-18) This is separate from, and does not call into question Abdelhamid's recollection of, Waite's statements during the special meeting.[21]

2. Horne Breached His Fiduciary Duties With Respect To Amendment No. 2 And Morelli's Ouster.

Horne also argues at length that he did not breach his fiduciary duties with respect to notice of, and the actions taken at, the October 20 Special Meeting. (Horne Br. at 44-50) That is a red herring. Plaintiffs' argument is that Horne, as the architect of Amendment No. 2 and an officer of Optimis, breached his fiduciary duties for the reasons discussed above and in the Opening Brief. (*See* Op. Br. at 38 & n.33) To complete their wrongful ouster of Morelli, Horne and the Director

[21] The Director Defendants also argue that their breaches were "justified." (ASW Br. at 47-48) Plaintiffs do not contend that a board of directors may not act against a controlling stockholder under certain circumstances, including when proper notice is provided. (*See id.*) However, no matter how "justified" the Director Defendants may contend their actions were, "it is in such times of dire consequence that the well-established rules of good board conduct", including advance notice of plans to remove the CEO and strip controlling stockholders of their contractual control rights, "are most important." *See Adlerstein*, 2002 WL 205684, at *11.

Defendants (i) held the October 20 Special Meeting without proper notice, (ii) solicited signatures for Amendment No. 2 from other stockholders under false pretenses, and (iii) misled the board as to the effect of the amendment. Recognizing the Initial Stockholders' rights under the Stockholders Agreement, Horne aided the Director Defendants in these breaches, and therefore breached his own fiduciary duties, by devising and implementing Amendment No. 2. (A433, 1084:3-6) (Waite)) Horne does not respond to this argument or his role in these breaches. (*See generally* Horne Br. at 44-50)

III. DEFENDANTS BREACHED THE STOCKHOLDERS AGREEMENT.

The trial court held that there was no direct breach of the Stockholders Agreement because it found that Morelli did not attempt to present his written consents prior to the ad hoc committee meeting convening on October 20,[22] and that when Morelli did present the written consents after the full board meeting reconvened, Amendment No. 2 already had been passed and the Director Defendants had no contractual obligation to sign them. (Op. at 191) The Director Defendants adopt the trial court's findings and argue that the passage of Amendment No. 2 was a voidable act, and, therefore, still was effective and valid when they ignored Morelli's request for them to agree to the written consents during the October 20 Special Meeting. As their theory goes, since the Stockholders Agreement had been amended by the time Morelli was able to present his written consents the second time, he and the Initial Stockholders no longer had any right to request such written consents because Amendment No. 2 had stripped them of their rights and, as a consequence, there could be no breach of contract.[23] (ASW Br. at 49-51)

As explained in Plaintiffs' Opening Brief, the Stockholders Agreement required the parties to execute acts reasonably required to "effect the transactions

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[22] As discussed in the Opening Brief, this finding is factually inaccurate. (Op. Br. at 50-51 n.44)

[23] The Director Defendants acknowledge that the passage of Amendment No. 2 was a void act as of the settlement of the Section 225 Action. (ASW Br. at 51)

contemplated by this Agreement," and section 3.3(a) gave the Initial Stockholders the right to appoint the majority of the Optimis board. (Op. Br. at 50 (quoting A1550 § 11); A1544 § 3.3(a); A1550 § 11) In addition, the parties agreed in the settlement of the Section 225 Action that actions taken at the October 20 Special Meeting, including the passage of Amendment No. 2, were void.[24] (A1997; A752-53) But the Director Defendants, and the trial court, ignored these contractual provisions when they gave effect to Amendment No. 2. (*See* ASW Br. at 51; Op. at 191)

As a result, Plaintiffs respectfully ask the Court to find that Defendants breached the Stockholders Agreement and remand to the trial court for further proceedings.

[24] The Director Defendants misrepresent to this Court that "Smith and Atkins did not sign" the Section 225 Action settlement agreement and, therefore, Amendment No. 2 cannot be void as to their actions. (ASW Br. at 51) In fact, both Smith and Atkins were parties to, and did indeed execute, this settlement agreement and agreed that Amendment No. 2 was void. (*See* A2000)

IV. PLAINTIFFS ARE ENTITLED TO MONETARY DAMAGES.

A. Standard And Scope Of Review

Defendants acknowledge that this Court reviews the trial court's application of legal precepts *de novo*. (ASW Br. at 52) Plaintiffs' Opening Brief demonstrates that the court below misapplied established Delaware law damages principles by failing to award Plaintiffs ***any*** monetary damages to remedy Defendants' breaches of fiduciary duty and contract. (Op. Br. at 52-59) Thus, the trial court's damages judgment should be reversed.

B. Delaware Law Supports Plaintiffs' Entitlement To Damages.

Defendants contend the trial court correctly denied Plaintiffs' recovery of any damages because (i) there was no breach, (ii) Plaintiffs are not entitled to attorneys' fees and costs, and (iii) seeking those amounts repackages Plaintiffs' fee-shifting request. (*See* Horne Br. at 51-52; ASW Br. at 54-55) Defendants are wrong.[25]

First, Defendants rely on the trial court's ruling that they are not liable for any breach in relation to the October 20 Special Meeting and Amendment No. 2 to justify denying a damages award to Plaintiffs. (*See* Horne Br. at 51; ASW Br. at 52-53) This misses the point. As discussed in Sections II and III above,

[25] Defendants' reliance on *Cline v. Grelock*, 2010 WL 761142 (Del. Ch. Mar. 2, 2010), to support the trial court's ruling is misplaced. (*See* ASW Br. at 54) Even in *Cline*, where the trial court found plaintiff did "not prove[] that he was harmed" by defendant's breach of fiduciary duty, the court assessed the costs of the action against defendant. 2010 WL 761142, at *3. Thus, *Cline* offers no support for a wholesale denial of a remedial award.

Defendants are directly liable for breach of the duty of loyalty under *Adlerstein* and for breach of the Stockholders Agreement.

Second, Defendants argue Plaintiffs are not entitled to recover attorneys' fees and costs, but Delaware law is to the contrary. Under *Thorpe*, Plaintiffs are entitled to recover, as damages, the legal fees and costs incurred on account of Defendants' fiduciary breaches, including not only the duty of candor (*see* ASW Br. at 54-55; Horne Br. at 52), but the duty of loyalty as well. (*See* Op. Br. at 53-54) The Director Defendants' attempts to distinguish *Thorpe* are unsuccessful.[26] (*See* ASW Br. at 54-55) In *Thorpe*, this Court reversed a trial court decision that found the plaintiff corporation was not entitled to any damages for defendants' loyalty violation.[27] After articulating *Thorpe*'s two guiding principles, and despite the trial court's finding that plaintiff had not been harmed and defendants had not profited substantially from their breach, this Court held that defendants were still liable for "damages incidental to their breach of duty[,]" including reimbursing plaintiff "for any expenses, including legal … costs, that the corporation incurred" on account of defendants' breach. 676 A.2d at 437, 445. Delaware courts have

[26] As for Horne, he fails to address *Thorpe* altogether. (*See generally* Horne Br. at 51-56)

[27] *Thorpe* recognizes that "the scope of recovery" for a breach of the duty of loyalty "is not to be determined narrowly" and "require[s] that … the beneficiary not be harmed by such conduct." 676 A.2d at 437, 445. (*See also* Op. Br. at 53 (quoting *Thorpe*))

since followed *Thorpe* to properly award attorneys' fees and costs as damages for loyalty breaches where appropriate, as here.[28]

Third, Horne ignores Delaware law when he accuses Plaintiffs of "repack[aging]" their fee-shifting request by improperly seeking such amounts as damages. (*See* Horne Br. at 52) As Plaintiffs previously noted (*see* Op. Br. at 53 n.46), this Court affirmed an award of attorneys' fees and costs solely on the basis of faithless conduct of defendants and without the need for a fee-shifting analysis under the bad faith exception to the American Rule. *See William Penn P'ship v. Saliba*, 13 A.3d 749, 758-59 (Del. 2011) (explaining that such award is "supported by Delaware law in order to discourage outright acts of disloyalty by fiduciaries"). Indeed, "it would be unfair and inequitable for [plaintiff] to shoulder the costs of litigation" attributable to defendants' breaches of fiduciary duty. *Id.* at 759. Here, the judgment below "penalize[s] [Plaintiffs] for bringing a successful claim against [Defendants] for breach of their fiduciary duty of loyalty." *See id.* That ruling should not be allowed to stand.

C. The Court Erred In Rejecting Plaintiffs' Damages Calculations.

1. Defendants Should Not Be Permitted To Repudiate The Reliability Of Management's Projections.

Defendants should not be permitted to disclaim the reliability of Optimis management's projections, especially when doing so allows them to escape liability

[28] *See, e.g.*, *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *3 (Del. Ch. May 11, 2001).

for their loyalty violations.[29] As explained in Plaintiffs' Opening Brief, under *Kessler*,[30] it may be appropriate to preclude parties, like Defendants here, from disclaiming the reliability of projections when they created them and their *post hoc* repudiation of the projections serves Defendants' litigation purpose.[31] (*See* Op. Br. at 54-55) Horne elevates form over substance by arguing that *Kessler* does not mention the word estoppel (Horne Br. at 54), but the principle articulated in *Kessler* applies squarely to the circumstances here.

2. The Court Erred By Finding Management's Projections Speculative And Unreliable.

Defendants argue that the trial court correctly rejected management's projections underlying Plaintiffs' damages calculations as unreliable and speculative. (ASW Br. at 55-59; Horne Br. at 53-55) Defendants, however,

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[29] Horne's contention that Plaintiffs waived their estoppel argument by not raising it below is wrong. (*See* A1075 at 43 & n.118 (Plaintiffs respond to Defendants' post-trial attempt to disclaim the reliability of those projections by asking the lower court to reject Defendants' self-serving repudiation in order to further their litigation objective and citing *Kessler* for support)); *see also Watkins v. Beatrice Cos.*, 560 A.2d 1016, 1020 (Del. 1989) ("In determining whether an issue has been fairly presented to the trial court, this Court has held that the mere raising of the issue is sufficient to preserve it for appeal."); *Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002) (legal theory "implicitly raised below" was fairly presented to the trial court and preserved for appeal, even where the trial court had not addressed the theory below).

[30] *Del. Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 332 (Del. Ch. 2006).

[31] Other Delaware cases support the underlying notion of estoppel in *Kessler*. *See, e.g.*, *Barton v. Club Ventures Invs. LLC*, 2013 WL 6072249, at *6 (Del. Ch. Nov. 19, 2013) ("Under the doctrine of quasi-estoppel, the Court may 'preclude[ ] a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken.'") (citation omitted). *See, e.g.*, *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008) (estopping party from denying that a statute controlled given the previous position taken by that party), *aff'd*, 970 A.2d 256 (Del. 2009) (TABLE).

cannot dispute that: (i) Horne, Waite and other members of Optimis's management prepared the 2012 projections underlying Bratic's damages calculations;[32] (ii) those same individuals prepared the Company's projections for several years prior to 2012;[33] (iii) nothing in the record suggests that any Optimis board members expressed concern or disagreement with the projections in 2012; (iv) the Optimis board unanimously blessed the projections;[34] (v) the projections formed part of Optimis's 2012 private placement and presentations conducted by Horne and Morelli to potential investors in the fall of 2012;[35] and (vi) the trial court did not find that management falsified any of the projections underlying Bratic's calculations or that they were prepared outside the ordinary course of business, such as in anticipation of litigation.[36] Under these circumstances, the projections were entitled to deference from the trial court under Delaware law. (Op. Br. at 55-57)

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[32] *See* Op. at 206-07; Op. Br. at 54 & n.47; A530, 1323:23-1324:9 (Horne).

[33] *See* A550, 1402:8-18 (Horne) (acknowledging that projections prepared in 2009 through 2012 by Horne, Waite, Rohlinger and Morelli were their "best" good faith efforts to give reliable forecasts).

[34] *See* A1326 at Part VI (unanimously voting at June 5, 2012 board meeting to pursue private placement memorandum, which incorporated 2012 projections underlying Bratic's calculations).

[35] *See* Op. at 208 n.630 (noting that "senior management of Optimis, including Horne, were willing to give these Projections to investors"); *see also* A211-13, 459:8-469:11 (Morelli); B2091, Horne Dep. 494:3-496:21 (Horne confirms he was present at all investor presentations in 2012 and he helped prepare the underlying forecasts); B1349 (projections in Sept. 2012 PPM); A1861 (projections in August 2012 presentation deck to investors).

[36] *See* Op. at 206 n.624 (declining to reach Horne's arguments on these issues).

Moreover, as the Opening Brief explains, Delaware courts "rightly … give heavy weight" and defer to management-prepared projections as "the best first-hand knowledge of a company's operations," which are deemed reliable if free of certain hallmarks of unreliability. (Op. Br. at 56) The cases cited by Defendants in support of the trial court's erroneous departure from this Delaware precedent are easily distinguishable, as they involve defects not present in the projections here.[37]

Defendants also cite *Nine Systems*[38] to support finding projections unreliable where they "'are grossly inconsistent with the corporation's recent performance.'" (ASW Br. at 56 (quoting *Nine Systems*)) But the projections in *Nine Systems* suffered from several unreliability markers not present here. Unlike in *Nine Systems*, the record here indisputably shows that the Optimis board adopted the projections and management used them to support their efforts to raise capital from potential investors. *See Nine Sys.*, 2014 WL 4383127, at *41 (holding projections

[37] *See, e.g.*, *Merion Capital, L.P. v. 3M Cogent, Inc.*, 2013 WL 3793896, at *11 (Del. Ch. July 8, 2013) ("'management had never prepared projections beyond the current fiscal year, the possibility of litigation, such as an appraisal proceeding, was likely,' [] the projections 'were made outside of the ordinary course of business,'" and the preparers of the projections "'risked losing their positions if the ... bid succeeded[.]'") (citation omitted); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2011 WL 227634, at *4-5 (Del. Ch. Jan. 14, 2011) (projections unreliable and not entitled to deference because they were not created in ordinary course of business and expert had fabricated his own, litigation-driven and theoretically misguided projections); *Cooper v. Pabst Brewing Co.*, 1993 WL 208763, at *4 (Del. Ch. June 8, 1993) (rejecting expert's – not management's – projections used in discounted cash flow analysis because several critical assumptions underlying earnings and sales projections were seriously flawed).

[38] *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127 (Del. Ch. Sept. 4, 2014), *aff'd sub nom. Fuchs v. Wren Holdings, LLC*, 2015 WL 8528870 (Del. Dec. 11, 2015).

would not be given any weight in court's fair price analysis after finding, in part, that board minutes did not show that board had adopted projections at issue and there was "no evidence that management used the … projections to run the Company"). Moreover, the *Nine Systems* court declined to award damages because of fundamental issues with plaintiffs' ability to show harm that would support an award.[39] That issue is not implicated here.

3. The Court Erred In Finding That Damages Allocation Issues Affected Plaintiffs' Entitlement To Damages.

Defendants also argue, without any legal support, that Plaintiffs are not entitled to a recovery because they failed to apportion damages among (i) claims, (ii) Plaintiffs, and (iii) Defendants. (*See* ASW Br. at 60-62; Horne Br. at 55) Defendants are incorrect.

First, the Director Defendants claim that Plaintiffs' failure to apportion damages among claims precludes any recovery (ASW Br. at 60-61), but *Beard Research* demonstrates otherwise.[40] (*See* Op. Br. at 57) While the Director

[39] The "no damages" ruling in *Nine Systems* was based on the conclusion that, despite finding that defendants breached their fiduciary duties in relation to an "unfair" recapitalization process, the trial court could not assess any damages for that transaction because the $4 million valuation attributed to the company in the recapitalization was necessarily a "fair price" given evidence that the actual "fair price" of the company's equity was zero at that time. Moreover, the record in *Nine Systems* strongly suggested that it was the management of one of the director defendants that enabled the company to grow after the recapitalization. 2014 WL 4383127, at *51. Here, by contrast, no one contends Optimis was worth nothing at the time of the October 20 Special Meeting or that Defendants' breaches helped the Company grow.

[40] *Beard Research, Inc. v. Kates*, 8 A.3d 573, 607-08 (Del. Ch. 2010), *aff'd sub nom. ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010). Horne implicitly concedes that *Beard*

Defendants attempt to distinguish *Beard Research* by emphasizing that plaintiffs in that case succeeded in proving their claims, which involved wrongs with overlapping damages (*see* ASW Br. at 61), that only confirms its applicability here. As set forth in Section II above, the trial court erred by failing to find that Defendants breached their fiduciary duties in connection with the October 20 Special Meeting, and Plaintiffs' claims also involved overlapping damages.[41]

Second, Defendants cite no authority to support their extraordinary position that the failure to apportion damages among Plaintiffs is "fatal" to their recovery.[42] (*See* Horne Br. at 55; ASW Br. at 62) Moreover, Defendants fail to cite any cases rebutting Plaintiffs' proposition that damages could have been apportioned on the basis of Plaintiffs' percentage stock ownership. (*See* Op. Br. at 57-58)

Research renders this argument a non-issue. (*See* Horne Br. at 55 (declining to argue there was an issue with apportionment among claims))

[41] *See* A391, B917:11-918:11 (Bratic) (explaining that, other than for damages flowing from certain subsidiary rescissions, it was not possible to apportion the damages attributable to the other harms involved in Plaintiffs' claims since they "overlap[ped] each other").

[42] The Director Defendants also cite no authority supporting their claim that apportionment among Plaintiffs is required where part of the damages relating to the Company's claims would flow back to the Company and its stockholders. (*See* ASW Br. at 62) Their two *cf.* citations provide no such support.

Third, the Director Defendants claim that Plaintiffs also should have apportioned damages among Defendants (ASW Br. at 61), but that is the trial court's responsibility.[43] Thus, Defendants' allocation arguments fail.

D. The Court's Failure To Consider Plaintiffs' Viable Alternative Damages Measure Constitutes Reversible Error.

Defendants argue that the trial court's failure to address Plaintiffs' alternative damages measure – the diminution in the value of Optimis stock – constitutes harmless error because (i) damages apportionment issues are fatal to Plaintiffs' recovery, (ii) there was no breach, (iii) suit against Horne allegedly was not authorized, and (iv) the damages sought do not account for Morelli's alleged share of the blame for the harm caused. (*See* Horne Br. at 55-56; ASW Br. at 62-63) Defendants are wrong on all points.

First, the Director Defendants argue that the alternative measure of damages suffers from the same "fatal" apportionment issues discussed above (*see* ASW Br.

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[43] *See RBC Capital Mkts., LLC v. Jervis*, 2015 WL 7721882, at *38 n.218 (Del. Nov. 30, 2015) (noting that the parties "have assumed that [the Delaware Uniform Contribution Among Tortfeasors Act ("DUCATA")] applies to breaches of fiduciary duty – an issue of first impression in this Court[,]" finding "no error" in the trial court's determination that DUCATA applies, and agreeing with the ***trial court's*** allocation of damages by assigning the percentage responsibility of defendant at issue for the damages sustained by plaintiffs). *See, e.g.*, *In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205, 262 (Del. Ch. 2014) (court apportioned damages among defendants for breach of fiduciary duty by determining proportionate fault of defendants at issue), *aff'd sub nom. RBC Capital*, 2015 WL 7721882; *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 754 (Del. Ch. 2007) (court determined proper *pro rata* share of damages attributable to defendant at issue who had breached his duty of loyalty, in case involving multiple defendants, including with respect to damages awarded in relation to fees and expenses incurred by special litigation committee since those expenses "'were made necessary by the course of events initiated by [defendant's] breach'") (citation omitted).

at 62-63), but for the reasons just stated, those propositions lack any legal support.[44]

Second, Horne rehashes his argument that because of the no-liability conclusion below, the damages inquiry is irrelevant. (Horne Br. at 55-56) If, however, this Court agrees with Plaintiffs that the trial court's conclusion should be reversed, Horne can (and should) be held liable for the resulting damages.

Third, Horne's argument that there was no evidence that Optimis authorized litigation against him[45] so he could not have caused the resultant "flood of litigation" (Horne Br. at 56) is a *non sequitur*. The litigation here was directly attributable to the wrongful acts of Horne and the Director Defendants – not to the board's authorization of litigation that would not have been necessary in the first place if Defendants had complied with their fiduciary and contractual duties.

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[44] Defendants also take issue with the use of a control premium in calculating the decline in equity value, given that some of the breach of fiduciary duty claims belong to the Company. (*See* ASW Br. at 63) Obviously, the calculation could easily be made without the control premium for the portion of damages allocated to the Company. Moreover, although Defendants do not address Morelli's and Analog's claims, the diminution in equity value is also a proper measure of damages for Defendants' breach of the Stockholders Agreement. In recognizing that such a claim would be direct, since Morelli and Analog sued to enforce their individual contractual rights, the trial court also implied that the diminution in equity value could serve as a valid measure of damages for such a claim, under which Morelli and Analog would recover *pro rata* in proportion to their ownership of the Company's stock. *See NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 (Del. 2015).

[45] Horne never raised this alleged lack of authorization as a defense in his answer to the complaint. (*See generally* AR1-23) Moreover, notwithstanding Horne's and the trial court's statements to the contrary, there was record evidence that the board did authorize the lawsuit, including against Horne. (*See, e.g.*, AR57, Morelli Dep. 282:6-25)

Fourth, Horne suggests that Plaintiffs argue that "everything that has gone wrong is defendants' fault" and that Plaintiffs' expert somehow erred when he "did not apportion any Company harm to Morelli." (Horne Br. at 56) But Horne offered no evidence and raised no claims against Morelli for causing any harm to Optimis. And Morelli's conduct did not cause Horne and the Director Defendants to breach their fiduciary and contractual duties – they did that on their own and should pay for the harm they caused.

Thus, the trial court's error in overlooking Plaintiffs' alternative damages measure was not harmless because it further deprived Plaintiffs of recovering an award to remedy Defendants' breaches.

E. The Trial Court Erred By Awarding Nothing To Plaintiffs.

The trial court also committed reversible error by failing to craft a remedy to address the Director Defendants' breaches of their duty of loyalty.[46] At the very least, the trial court should have awarded Plaintiffs their attorneys' fees and costs, just as other Delaware courts have done in compliance with the principles established under *Thorpe*.[47]

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[46] *See Hogg v. Walker*, 622 A.2d 648, 654 (Del. 1993) (reversing trial court's "error of law" by its failure to exercise its broad discretion to "craft a remedy" for plaintiff following trustee's breach of fiduciary duty).

[47] *See, e.g.*, *Cantor*, 2001 WL 536911, at *2-3 ("plaintiff was harmed by the defendants' conduct in several identifiable, but inherently unmeasurable, ways" that would have required court to engage in "near speculation" to "express those damages by a sum certain"; "[d]espite problems in quantifying the harm to the plaintiff," trial court recognized its "'broad discretion to tailor

remedies to suit the situation as it exists'" – particularly in the context of a breach of the duty of loyalty, where "'potentially harsher rules come into play'", "'the scope of recovery … is not to be determined narrowly", and "[t]he strict imposition of penalties under Delaware law are designed to discourage disloyalty"; therefore, trial court properly exercised its discretion and found "the most appropriate award of damages would be an award measured by the plaintiff's expenditures for attorneys' fees and expenses") (citations omitted).

ARGUMENTS IN RESPONSE TO CROSS-APPEAL

V. THE TRIAL COURT PROPERLY HELD THAT THE DIRECTOR DEFENDANTS BREACHED THEIR DUTIES OF LOYALTY AND CANDOR.

A. Question Presented

Did the trial court properly hold that the Director Defendants breached their duties of loyalty and candor by attempting to usurp Rancho for themselves and failing to inform the Optimis board of the issues concerning Rancho's corporate structure that they used in that effort?

B. Scope Of Review

Findings of fact are overturned only when clearly erroneous. *See In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 48 (Del. 2006). Questions of law are reviewed *de novo*. *Id.*

C. Merits Of Argument

The trial court correctly held that the Director Defendants breached their duties of loyalty and candor by purposely withholding information from the Optimis board relating to an alleged defect in Rancho's corporate structure – information that they used in their efforts to usurp Rancho for their own benefit and to the detriment of the other Optimis stockholders.[48] (Op. at 184-87) On June

[48] The Director Defendants completely failed, repeatedly, to "fulfill [their] obligation to be candid to [their] fellow directors." *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1061 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005). For example, in the spring of 2012, two months before they resigned as Optimis directors and sued to rescind their sale of Rancho to Optimis, the

26, 2013, the day after the Director Defendants resigned from the Optimis board, they sued to rescind the 2007 Rancho transaction in an attempt to strip Optimis and its stockholders of the Company's most valuable asset and shortly thereafter moved for a temporary restraining order and preliminary injunction to prevent Optimis from exercising control over its Rancho subsidiary. (A754 at II.M.3) The suit alleged that the Rancho transaction was void under California law and sought to rescind it for the benefit of the Director Defendants. (B1548 ¶ 2; B1552 ¶ 23; B1557 ¶ 46) Despite being aware of the issues for months before filing suit, the Director Defendants never disclosed the concerns expressed in their declarations in support of the rescission action to the Optimis board, never approached the Optimis board with a solution that would benefit the Optimis stockholders, and never considered the impact their decision to seek rescission might have on Optimis stockholders, all in violation of their fiduciary duties.[49] (A484, 1140:13-21 (Waite); A614, 1507:23-1508:18 (Atkins)) Instead, the Director Defendants

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Director Defendants purportedly removed Morelli, an Optimis appointee, from the Rancho board – for reasons similar to those raised in their subsequent rescission action – but never told him or anyone else, including the Optimis board, despite the Company's right to appoint two directors to the Rancho board. (*See* A1838; B1263 ¶ (b); A169-70, 292:22-293:6, 296:24-297:12 (Morelli); A417, 1021:4-14 (Waite))

[49] The Director Defendants were aware of the purported issues with the Rancho structure while they were still Optimis directors, consulted counsel about those concerns, and had a lawsuit drafted and ready to file as soon as they resigned as directors. (A484, 1137:20-1138:3, 1140:8-12 (Waite)) All of these actions took place while their loyalty should have been to the Optimis stockholders. *See In re Orchard Enters., Inc. Stockholder Litig.*, 88 A.3d 1, 32-33 (Del. Ch. 2014).

sued Optimis for their own benefit – to get back full ownership of Rancho – to the detriment of Optimis and its other stockholders. The Director Defendants challenge that holding by arguing that (i) they had no duty to disclose the defects to their fellow directors, but (ii) they nevertheless did disclose the information. (ASW Br. at 64-68) These arguments are misguided and do not excuse the Director Defendants' failure to act in Optimis's best interest.

The Director Defendants first claim that they had no duty of candor and disclosure to the Optimis board because they "did not gain anything by failing to disclose the flawed entity structure to the Board of Optimis." (ASW Br. at 65-66) That is a misapplication of Delaware law and a misstatement of the facts. As the trial court explained, the Director Defendants knew of a material problem with the corporate structure, failed to disclose it to the board, and then attempted "to exploit that very flaw." (Op. at 186) Additionally, before resigning, the Director Defendants owed fiduciary duties to Optimis and, instead of candidly disclosing the flawed Rancho structure to the Optimis board – something they knew about for months prior to filing the rescission action – they secretly plotted to file suit against the Company. (Op. at 185-86; A1052-54; A484, 1137:20-1138:3, 1140:8-21 (Waite); AR60, Smith Dep. 371:13-372:1) Simply put, the Director Defendants owed duties of loyalty to Optimis and candor to the board, which they intentionally

disregarded to benefit to themselves.[50] (Op. at 186-87 (citing *Int'l Equity Capital Growth Fund, L.P. v. Clegg*, 1997 WL 208955, at *7 (Del. Ch. Apr. 22, 1997)); *see also* A832-33)

The Director Defendants next claim that they had "no fiduciary duty to disclose matters that are already known to the company," noting that Morelli is an attorney and had access to Rancho's bylaws. (ASW Br. at 66) The trial court dismissed this "finger-pointing defense" as weak, noting that no one at the Company (other than the Director Defendants) had focused on the issue in the more than five years since Rancho had been acquired. (Op. at 186 n.579) Because the court's fact findings in support of its determination that the Director Defendants breached the duty of loyalty were not clearly erroneous, that holding should not be reversed. *See Disney*, 906 A.2d at 48.

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[50] The Director Defendants' reliance on *Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169 (Del. Ch. 2006), is misplaced. (*See* ASW Br. at 65) The court there held that a breach of the duty of disclosure was not properly alleged because (i) the defendant director's interest in the transaction at issue was "completely immaterial" to the corporation, and (ii) the plaintiff failed to sufficiently allege that the director actually knew or had reason to know about the transaction. *Big Lots*, 922 A.2d at 1184-85. Here, there is no dispute that Rancho's allegedly flawed corporate structure was material information – after all, the Director Defendants used it to try to seize ownership of Optimis's largest and most valuable clinical subsidiary – and that the Director Defendants actually were aware of the defect. The Director Defendants' interpretation of *Big Lots* also would improperly narrow a director's duty of disclosure under Delaware law. *See, e.g.*, *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1989) (characterizing duty of candor as "one of the elementary principles of fair dealing," an "unremitting obligation" and a "rigorous affirmative duty"). The Director Defendants also attempt to distinguish *Hollinger* and *Hoover Indus. v. Chase*, 1988 WL 73758 (Del. Ch. July 13, 1988) by claiming that the Director Defendants "did not gain anything by failing to disclose the flawed entity structure to the Board of Optimis." (*See* ASW Br. at 64-66) But the fact that the Director Defendants failed in their disloyal attempt to usurp Rancho for their own benefit does not excuse their efforts to do so in breach of their fiduciary duties to the Company.

The Director Defendants also argue that they were not obligated to disclose the Rancho information because that would have required them to waive their personal attorney-client privilege. (ASW Br. at 67) This argument was never presented to the court below and, therefore, may not be raised on appeal. *See* Sup. Ct. R. 8; *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 989 (Del. 2013). Regardless, the Director Defendants acknowledge that they did, in fact, disclose this purportedly privileged information to the board, which would waive any claim of privilege. (ASW Br. at 67); D.R.E. 510. Obviously, the Director Defendants' belated disclosure in their resignation letters, the day before they filed their rescission action against the Company, does not comport with "fair dealing" or satisfy their "unremitting obligation" and "rigorous affirmative duty" of complete candor. *Mills Acquisition*, 559 A.2d at 1283.

For these reasons and those in the Opinion, the trial court properly held that the Director Defendants breached their duties of loyalty and candor.

VI. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANTS' FEE-SHIFTING REQUESTS.

A. Question Presented

Did the trial court properly deny Defendants' fee-shifting requests where they failed to establish that Plaintiffs' conduct rose to the level of glaring egregiousness warranting departure from the American Rule?[51]

B. Scope Of Review

This Court reviews a trial court's denial of attorneys' fees and costs for abuse of discretion and will not "'substitute [its] own notions of what is right'" if the trial judgment was based on "'conscience and reason, as opposed to capriciousness or arbitrariness.'" *RBC Capital Mkts., LLC v. Jervis*, 2015 WL 7721882, at *44 (Del. Nov. 30, 2015) (citation omitted).

C. Merits Of Argument

"Under the American Rule, absent express statutory language to the contrary, each party is normally obligated to pay only his or her own attorneys' fees, whatever the outcome of the litigation." *Id.* (citation omitted). The trial court properly exercised its discretion when it declined to award Defendants their attorneys' fees and costs after finding an insufficient basis to depart from the American Rule. (*See* Op. at 212-13) Specifically, the trial court found that fee-shifting was not appropriate because: (i) "[a]lthough Defendants prevailed on most

[51] Horne has raised this issue, and the Director Defendants incorporate his argument by reference. (ASW Br. at 69)

issues, many of those issues were close and the Court needed to resolve numerous disputed issues of material fact regarding them"; (ii) "[s]ome of those disputes were resolved against Defendants"; (iii) "Plaintiffs' legal position regarding the *Adlerstein* case, for example, was reasonable, even if not successful"; (iv) "there was sufficient evidence to make many of the positions taken by Plaintiffs, and expertly presented by their counsel, plausible"; and (v) "I do not find that Plaintiffs engaged in bad faith or vexatious litigation conduct that would warrant departing from the American Rule and awarding Defendants, or any of them, their attorneys' fees."[52] (Op. at 212-13)

This Court should affirm the trial court's ruling since it was based on conscience and reason and, as explained below, Defendants failed to prove by clear evidence a bad faith exception to the American Rule, and their public policy argument is flawed. (*See* Horne Br. at 59-72)

1. Defendants Fail To Establish That The Bad Faith Exception To The American Rule Applies.

Under Delaware law, "'[t]he bad faith exception [to the American Rule] applies only in extraordinary cases, and the party seeking to invoke that exception

[52] Horne contends that the trial court was arbitrary and capricious in denying his fee-shifting request based on justifications that he says do not apply to him. (*See* Horne Br. at 67-68) Horne is wrong. He mischaracterizes the trial court's reasoning, stating that it relied on only two justifications – namely, that (i) Defendants only prevailed on "most" issues, and (ii) Plaintiffs' legal position based on *Adlerstein* was reasonable. (*Id.*) As discussed in the Opening Brief (Op. Br. at 38 & n.33, 41) and in Section II above, Horne's attempt to separate himself from the Director Defendants' breaches of fiduciary duties fails.

must demonstrate by clear evidence that the party from whom fees are sought … acted in subjective bad faith.'" *RBC Capital*, 2015 WL 7721882, at *44 (citation omitted); *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014) (same).[53] While the bad faith exception has been applied to cases involving "'prolonged or delayed litigation, falsified records[,] or knowingly assert[ing] frivolous claims[,]'" these actions must rise to a level of "'glaring egregiousness'" for the bad faith exception to apply. *RBC Capital*, 2015 WL 7721882, at *44-45 (citations omitted). Defendants do not meet this high threshold and fail to set forth clear evidence that Plaintiffs' purported conduct was sufficient to justify the "quite narrow" bad faith exception to the American Rule. *Carver*, 2000 WL 1336722, at *2 (citation omitted); *see also Lawson*, 91 A.3d at 552.

Horne primarily argues that the bad faith exception should be applied based on the trial court's findings concerning Plaintiffs' and their counsel's purported litigation misconduct. (*See* Horne Br. at 59-66) As explained below, the trial court findings were based on an erroneous legal standard and, in any event, are insufficient to satisfy the bad faith exception.

First, as set forth in Plaintiffs' Opening Brief (Op. Br. at 26-36) and Section I above, the trial court erred – as a matter of both law and public policy – when it

[53] *See also In re Carver Bancorp, Inc.*, 2000 WL 1336722, at *2 (Del. Ch. Aug. 28, 2000) ("Importantly, in order for the Court to award fees, the [] party must be found to have acted in ***subjective*** bad faith. And, a finding of bad faith involves a more stringent 'clear evidence' standard of proof. These requirements combine to set quite a high bar[.]") (emphasis added).

concluded that Plaintiffs' conduct and settlements with certain third-party witnesses amounted to witness tampering or other litigation misconduct. That error tainted the entire proceeding below, since the trial court imposed serious merit-based sanctions against Plaintiffs, including dismissing their conspiracy claims and making adverse credibility determinations leading to numerous erroneous factual findings throughout the Opinion. Because the challenged conduct was neither improper nor unlawful, it cannot serve as the underlying basis to invoke the bad faith exception to the American Rule.

Second, even if the trial court's findings relating to litigation misconduct were not erroneous (which they are), Defendants still fail to establish by clear evidence that such conduct rose to the level of "glaring egregiousness" that Delaware case law requires to shift fees. *See RBC Capital*, 2015 WL 7721882, at *45. In *RBC Capital*, the Court of Chancery found several instances of "aggressive" and "problematic" bad faith litigation conduct on the part of RBC, including making intentional and misleading statements before the court. *Id.* "Despite the fact that these misrepresentations struck at central issues before the Court of Chancery for adjudication, the trial court concluded that fee shifting was not warranted because RBC's misstatements did not cross the threshold of 'glaring egregiousness.'" *Id.* (citation omitted). This Court affirmed, noting that even though it might have come to a different conclusion than the trial court, the Court

of Chancery did not abuse its discretion in declining to shift fees.[54] *Id.*

Here, the trial court specifically addressed its findings regarding Plaintiffs' purported litigation conduct when declining to shift fees. Specifically, the trial court found that "apart from the witness tampering discussed at length *supra*, I do not find that Plaintiffs engaged in bad faith or vexatious litigation conduct that would warrant departing from the American Rule and awarding Defendants, or any of them, their attorneys' fees." (Op. at 212-13) The court below did not abuse its discretion in reaching this conclusion.[55]

The cases Horne relies on are inapposite. In each of them, unlike here, the trial court found that conduct rose to the requisite level of glaring egregiousness.[56]

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[54] Horne's attempt to distinguish *RBC Capital* fails. (*See* Horne Br. at 71-72) Horne focuses on one sentence in this Court's opinion – which noted only that "the trial court cited to several instances of what it believed to be potentially demonstrative of RBC's bad faith litigation conduct arising throughout the proceeding below" – but ignores the rest of the Court's discussion. The opinion, fairly read, references numerous examples of plaintiff's misconduct, which the trial court characterized as "aggressive," "problematic" and "troubling." *See RBC Capital*, 2015 WL 7721882, at *45 (explaining that plaintiff made numerous "intentional and misleading misstatements of fact in its briefs and at trial" which "struck at central issues before the Court of Chancery for adjudication", and including a bulleted sampling of eight such intentional and misleading misstatements).

[55] Horne also asserts that fees should be shifted because "Morelli, in bad faith, caused the company to sue Horne out of vindictiveness and to further Morelli's own cause in the divorce proceedings." (Horne Br. at 60 n.24) However, as Horne admits, the trial court ruled that his proffered evidence to support this theory was inadmissible. (Horne Br. at 9) Because Horne did not appeal that evidentiary ruling, there are no record facts to support his argument.

[56] *See, e.g., Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 228-29 (Del. 2005) (affirming fee-shifting where CEO lied under oath, destroyed documents, and intentionally set unfairly low merger price based on "fatally flawed" valuation methodology and where company destroyed requested discovery after court ordered its production); *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1093-94 (Del. 2006) (awarding fees where

In addition to the absence of facts to establish that Plaintiffs' litigation conduct rose to the level of "glaring egregiousness," Defendants also failed to meet their heavy burden of establishing that Plaintiffs acted in "subjective bad faith." *RBC Capital*, 2015 WL 7721882, at *44 (citation omitted); *Lawson*, 91 A.3d at 552 (same). The trial court found to the contrary,[57] and those findings were not clearly erroneous. Therefore, there is no basis to reverse the decision below denying Defendants' fee-shifting requests.

2. Public Policy Does Not Support Defendants' Request To Shift Fees.

Lastly, Horne argues that the trial court erred as a matter of public policy, because unless he is awarded his fees, "there is no down-side" to plaintiffs who engage in litigation misconduct. (Horne Br. at 68) This argument was not raised

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defendant intentionally destroyed historical buildings that were "the very subject matter that the lawsuit [sought] to protect and preserve" and noting that "[i]t is difficult to imagine conduct more abusive"); *Beck v. Atl. Coast PLC*, 868 A.2d 840, 855-56 (Del. Ch. 2005) (conduct described as "fraud by concealment" and "a stealthy spoliation of evidence" involving frivolous action brought in bad faith and violations of Del. Ch. Ct. R. 11 and 37); *Choupak v. Rivkin*, 2015 WL 1589610, at *21-23 (Del. Ch. Apr. 6, 2015) (shifting fees under bad faith exception where defendant's conduct included, among other things, falsifying records, committing perjury, and "knowingly assert[ing] frivolous claims"), *aff'd*, 2015 WL 8483702 (Del. Dec. 4, 2015) (ORDER); *Kaung v. Cole Nat'l Corp.*, 2004 WL 1921249, at *3 (Del. Ch. Aug. 27, revised Aug. 30, 2004) ("Since the filing of the complaint, the plaintiff has turned a simple summary proceeding into an appalling display of harassment and delay."), *aff'd in relevant part*, 884 A.2d 500 (Del. 2005); *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 505-07 (Del. 2005) (affirming fee-shifting where plaintiff and representatives "made excessive and duplicative deposition requests while ignoring their own discovery obligations," engaged in "highly inappropriate" behavior at depositions, and failed to respond to certain discovery requests).

[57] Op. at 51 ("I also assume that … Morelli and his counsel believe their rhetoric regarding a vast conspiracy to take control of Optimis away from Morelli for the alleged insurgents' own self-serving motives."); *id.* at 212 (finding that Plaintiffs advanced reasonable and colorable bases for their claims in the litigation).

below and, therefore, is procedurally barred on appeal. *See* Sup. Ct. R. 8; *Tumlinson*, 106 A.3d at 989.

On its face, the argument is also fundamentally flawed. The American Rule "is premised on the idea that automatic fee-shifting will dissuade litigants, particularly those with limited resources, from bringing viable claims for fear of having to pay the other parties' fees and costs if they lose for any reason." *Blue Hen Mech., Inc. v. Christian Bros. Risk Pooling Trust*, 117 A.3d 549, 559 (Del. 2015). Where, as here, the trial court finds that Plaintiffs acted in good faith and advanced a colorable basis for their litigation claims,[58] the policy underlying the American Rule supports the trial court's ruling and appropriate exercise of its discretion to decline to shift fees under the bad faith exception. *See P.J. Bale, Inc. v. Rapuano*, 888 A.2d 232, 2005 WL 3091885, at *1-2 (Del. 2005) (TABLE) (trial court did not abuse discretion in finding that "there was a colorable basis for Appellees' position", even though it proved to be a losing claim, and, therefore, declined to shift fees based on the bad faith exception).

Unable to prove a bad faith exception, Horne ignores the American Rule and instead proffers a hypothetical based on facts not before the Court.[59] Then Horne

[58] *See supra* note 57.

[59] *See* Horne Br. at 69 (hypothetical involving plaintiff whose motive for bringing suit against defendant was vindictiveness). As discussed above, Defendants never established a bad faith motive for Plaintiffs bringing this litigation, and the trial court never found one.

argues that ***if*** Horne is entitled to be indemnified by the Company for his legal fees and expenses under 8 *Del. C.* § 145(c) at the conclusion of litigation, it would only be fair to make Morelli jointly liable. To support this premise, Horne again complains about the denial of his summary judgment motion which he did not appeal and is not properly before the Court. (*See supra* Section I.B)

For all these reasons, Defendants have failed to show that the trial court abused its discretion in denying their requests to shift fees. Therefore, that decision should be affirmed.

CONCLUSION

For all of the foregoing reasons and those in the Opening Brief, the judgment below should be reversed in part, and Defendants' cross-appeals should be denied in their entirety.

Respectfully submitted,

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DATED: January 11, 2016