IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE INVESTORS BANCORP, INC. STOCKHOLDER LITIGATION	)	No. 169, 2017 PUBLIC VERSION
	)	
	)	Court below: Court of Chancery of the State of Delaware
	)	
	)	Consolidated C.A. No. 12327-VCS

<u>ANSWERING BRIEF OF DEFENDANTS BELOW-APPELLEES</u>

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June 26, 2017

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NATURE OF PROCEEDINGS

Plaintiffs have appealed the Court of Chancery's dismissal of their claim for breach of fiduciary duty against the directors of Investors Bancorp, Inc. ("Investors Bancorp" or the "Company") in connection with equity awards issued in full compliance with an equity incentive plan approved by an overwhelming majority of Investors Bancorp's stockholders. Adhering to established Delaware law, and in particular the Court of Chancery's guidance in *Calma v. Templeton*, 114 A.3d 563 (Del. Ch. 2015), the Court below correctly concluded that because the equity awards fell within specific limits on director compensation that Investors Bancorp's stockholders had approved, the appropriate standard of review is business judgment. Because the plan had a proper business purpose and because Plaintiffs failed to plead a claim for waste, the Complaint was therefore properly dismissed. The Court below also dismissed Plaintiffs' now-abandoned claim for unjust enrichment as duplicative of the fiduciary claim.

Yet Plaintiffs now assert that the Court of Chancery abrogated Delaware law and established a new rule that all director compensation decisions are unassailable. But it is Plaintiffs who seek to establish an untenable new rule: that regardless of the structure of an equity incentive plan and regardless of the wishes of a company's stockholders, any equity award issued to directors under the plan must be second-guessed by a court.

Plaintiffs also urge this Court to find that Defendants failed to disclose material information to stockholders in seeking approval of the equity incentive plan. This claim is not pled in Plaintiffs' complaint and must be rejected for this reason alone. Even if the Court considers Plaintiffs' belated arguments, they are unavailing, as none of the allegations in the Complaint support a reasonable inference that Defendants misled stockholders into approving the equity incentive plan.

Finally, Plaintiffs assert as an alternative theory that their claims should proceed because they were excused from making a pre-suit demand on the Board pursuant to Rule 23.1. But as the Court of Chancery correctly found, Plaintiffs failed to meet their burden to show that demand would be futile as to the equity awards granted to the two non-employee directors.

This Court should affirm the Court of Chancery's opinion in its entirety.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery, consistent with decades of Delaware law, properly held that business judgment review applied to equity awards issued in compliance with a stockholder-approved equity incentive plan that imposed specific limits on awards to directors.

2. Denied. The Court of Chancery properly held that Plaintiffs failed to allege particularized facts showing that stockholder approval of the equity incentive plan was obtained through materially misleading disclosures.

3. Denied. The Court of Chancery properly held that Plaintiffs failed to raise a reasonable inference that Defendants were not disinterested as to the equity awards made to the executive directors, such that Plaintiffs failed to plead demand futility under Rule 23.1.

STATEMENT OF FACTS

Investors Bancorp is a Delaware corporation based in New Jersey. A025 ¶ 14. The Company is a holding company for Investors Bank (the "Bank"), a New Jersey chartered savings bank operating out of Short Hills, New Jersey, with 143 branches throughout New Jersey and New York. A026 ¶ 14. The individual defendants include ten non-employee directors on the Company's twelve-member board of directors (the "Board"), and two executive officers who also serve as directors. A026 ¶¶ 15-27.

A. Conversion to a Public Stock Holding Company

In October 2005, the Company's predecessor company ("Old Investors Bancorp") completed an initial public offering, selling 43.74% of its outstanding common stock for proceeds of $509.7 million. A028 ¶ 28. Following the public offering, Old Investors Bancorp's mutual holding parent company, Investors Bancorp, MHC, held 54.94% of the outstanding common shares. *Id.*[1]

[1] Based on the public offering valuing 43.74% of Old Investors Bancorp at $509.7 million, the 56.26% interest that Investors Bancorp continued to hold had a value of approximately $656 million ($509.7 million ÷ 43.74% x 56.26%).

Investors Bancorp was formed in December 2013 to undertake a "mutual-to-stock conversion" to reorganize the Bank from a two-tier mutual holding company into a fully-public stock holding company (the "MHC Conversion"). A028-A029 ¶¶ 28-30. The "second step" of the MHC Conversion was completed in May 2014. A029 ¶ 30. Under the MHC Conversion, Investors Bancorp, MHC, merged into Old Investors Bancorp and Old Investors Bancorp merged into Investors Bancorp, Inc. (previously defined as "Investors Bancorp" or "the Company"). A029 ¶ 29. Under the plan of conversion, shares of Old Investors Bancorp already publicly held were converted to shares of Investors Bancorp common stock in accordance with an exchange ratio. *Id.* The Company sold to the public 219,580,695 shares previously held by Investors Bancorp, MHC, netting proceeds of $2.15 billion. A029 ¶ 29. Between 2005 and 2014, then, the value of Investors Bancorp had more than tripled. *See* n. 1, *supra*.

The prospectus filed with the Securities and Exchange Commission and provided to investors in connection with the MHC Conversion disclosed in detail in several places the type of stock option and restricted stock plan that Investors Bancorp intended to implement following the conversion, including the potential number and percentage of shares reserved for issuance and an estimate of the dollar value of such securities ($102.3 to $158.8 million). B17, 27-28, 49-51, 147-48. Those limits were equal to 14% of the shares sold in the second step offering. *Id.* This was not a coincidence, as applicable regulations of the Board of Governors of the Federal Reserve Board provide that, if a bank holding company adopts a stock-based incentive plan within one year of a mutual-to-stock conversion, it may not reserve for issuance as incentive awards more than 14% of the number of the shares issued in the second step transaction. B270-71. As a result, adoption of stock incentive plans reserving a number of shares equal to 14% of the shares issued in the second-step offering has become quite common.

B. The 2015 Equity Incentive Plan

Following the successful MHC Conversion, in March 2015 the Board decided to adopt the Equity Incentive Plan (the "EIP"). The purpose of the EIP was to "provide additional incentives for [the Company's] officers, employees and directors to promote [the Company's] growth and performance and to further align their interests with those of [the Company's] stockholders." B329.

The details of the EIP are summarized in the Company's April 30, 2015 definitive proxy statement (the "2015 Proxy"), which also appends the complete EIP. As stockholders were accurately informed, under the EIP, 30,881,296 shares of Investors Bancorp common stock are reserved for restricted stock awards, restricted stock units, incentive stock options, and non-qualified stock options for officers, employees, and non-employee directors. B329. As the 2015 Proxy further disclosed, the number of shares that the EIP reserved for stock options and restricted stock awards was equal to 8% and 6%, respectively, of the number of shares issued in the "second step" conversion – 14% in total. *Id.* Thus, the EIP provides that the Company can issue up to 17,646,455 shares as stock options and up to 13,234,841 shares as restricted stock awards, restricted stock units, or performance shares. *Id.* Furthermore, the EIP sets the following limits on awards to employees and non-employee directors:

- A maximum of 4,411,613 shares, in the aggregate (25% of the shares available for stock option awards), may be issued or delivered to any one employee pursuant to the exercise of stock options;

- A maximum of 3,308,710 shares, in the aggregate (25% of the shares available for restricted stock awards and restricted stock units), may be issued or delivered to any one employee as a restricted stock or restricted stock unit grant; and

- The maximum number of shares that may be issued or delivered to all non-employee directors, in the aggregate, pursuant to the exercise of stock options or grants of restricted stock or restricted stock units shall be 30% of all option or restricted stock shares available for awards, "all of which may be granted in any calendar year."

B329, 349-51. The Proxy Statement advised stockholders – correctly – that the "the number, types and terms of awards to be made pursuant to the Plan are subject to the discretion of the [Compensation] Committee and have not been determined at this time, and will not be determined until subsequent to stockholder approval." B336.

The Company's stockholders voted on the EIP at the Company's annual meeting on June 9, 2015. A043 ¶ 67. 96.2% of the shares voted at the annual meeting were in favor of approving the EIP, representing 79.1% of the total shares outstanding. B372.

C. The Equity Awards

After the EIP had received stockholder approval, the Board's Compensation Committee began a process to evaluate and determine appropriate equity awards pursuant to the EIP. Beginning on June 12, 2015, the Compensation Committee held four meetings at which they received guidance from outside counsel (Luse Gorman, P.C.) and an independent executive compensation consultant (GK Partners). A046 ¶¶ 72-73. At the second meeting on June 16, 2015, the Board was provided with a chart of 164 companies that had undergone similar mutual-to-stock conversion and listing the number of stock options and stock awards that each company had made to directors and officers following the conversion ("Conversion Peer Group"). A047 ¶ 75; B238-69. As the chart shows, a majority of the comparable plans authorized issuances of shares as equity awards that reflected approximately 14% of the shares issued in the second step conversion.[2] This percentage was reflected in the EIP, which reserved a maximum 17,646,455 shares (approximately 8% of 219,580,695 shares) for stock options and 13,234,841 shares (approximately 6% of 219,580,695 shares) as restricted stock. The Board was also provided with a chart of five "large" (greater than $2.5 billion in assets) companies that had undergone second step conversions, listing the number of stock options and restricted stock awards the companies had made to directors and officers following the second step conversion ("Large Conversion Peer Group"). B379-80. The Board also received a memorandum from GK Partners analyzing the performance metrics of ten (non-conversion) peer bank holding companies with equity incentive plans. B381-83.

[2] Under Federal Reserve Board rules, if a bank holding company adopts a stock-based incentive plan within one year of a mutual-to-stock conversion, it may not reserve more than 14% of the shares issued in the second step for issuance under the incentive plan. A029 ¶ 31; B270.

At the next meeting on June 19, 2015, the Compensation Committee's independent compensation consultant, GK Partners, led a discussion about Investors Bancorp's Conversion Peer Group Companies and Large Conversion Peer Group Companies that have issued stock grants following mutual-to-stock conversions. A047 ¶ 76. The Compensation Committee also discussed the specific limits on grants to directors imposed by the EIP. *Id.* Additionally, the Company's Senior Executive Vice President and COO, Domenick A. Cama, gave a proposal on grants to the Company's named executive officers under the EIP. *Id.*

Pursuant to the stockholder-approved EIP, at a meeting on June 23, 2015, the Board approved the grant to executive officers, employees and directors a total of 6,849,832 restricted stock awards and 11,576,612 stock options to purchase Investors Bancorp common stock. B414 (Definitive Proxy Statement, dated April 14, 2016 (the "2016 Proxy")). Given the market's interest in and anticipation of the grants to be made under the EIP, a Current Report on Form 8-K was filed with the SEC disclosing the aggregate grants and the anticipated quarterly accounting expense related thereto. B386.

As detailed fully in the Company's 2016 Proxy, Kevin Cummings, the Company's President and CEO, was granted 1,333,333 stock options, 750,000 shares of time-based restricted stock and 250,000 shares of performance-based restricted stock. A050 ¶ 82; B415. Cama was granted 1,066,666 stock options, 600,000 shares of time-based restricted stock and 200,000 shares of performance-based restricted stock. *Id.* These awards vested in equal installments over a seven year period beginning one year after the date of grant and ending in 2022.[3] B414-15. The ten non-employee members of the Board of Directors (the "Board") each were granted 250,000 stock options. A050-A051 ¶ 84; B434. These option awards vested in equal installments over a five year period ending 2020, except that the option awards granted to directors Cashill and Dittenhafer vested over a three year period. B445. Directors Robert M. Cashill and Brian D. Dittenhafer were granted 150,000 restricted stock awards each, and the remaining non-employee directors were granted 100,000 restricted stock awards each. A050-051 ¶ 84; B433. These restricted stock awards vest over a five year period beginning one year after the date of grant and ending in 2020, except that the restricted stock

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[3] As to the performance-based restricted stock, the actual number of shares to be earned is determined at the end of the three-year performance period. Any shares earned would vest over a three-year period thereafter. B415.

awards granted to directors Cashill and Dittenhafer vested over a three year period beginning in 2016. B445.

As the Complaint acknowledges, the 2016 Proxy disclosed the entire fair value of these equity awards (the "Awards") as of the date of the June 23, 2015 date of grant, based on the $12.54 per share trading price of Investors Bancorp's stock on the June 23, 2015 grant date for restricted shares and a Black Scholes computation for stock options. A050-A051 ¶ 84; B423-24. For example, the 250,000 stock options granted to each non-employee director had a grant date fair value of $780,000, the 100,000 restricted stock awards granted to eight directors has a grant date fair value of $1,254,000; and the 150,000 restricted stock awards to Cashill and Dittenhafer had a grant date fair value of $1,881,000. A050-A051 ¶ 84; B433-34. Thus, eight of the ten directors were scheduled to receive $156,000 of grant date fair value of options in each year of continuing service on the board (contingent on continuing service) during the five years following the June 23, 2015 grant date (Messrs. Cashill and Dittenhafer were scheduled to receive $260,000 of grant date fair value of options over the following three years of service on the board). As to restricted stock awards, eight of the ten directors were scheduled to receive $251,000 of grant date fair value in each year of continuing service on the board (contingent on continuing service) during the five years following the June 23, 2015 grant date (Messrs. Cashill and Dittenhafer were scheduled to receive $627,000 of grant date fair value over the following three years of service on the board).

All of the Awards fall within and under the limits imposed by the EIP. In total, 47.2% of the shares reserved under EIP for issuance to directors pursuant to the exercise of options, and 27.7% of the shares reserved under the EIP for issuance to directors as restricted stock awards were granted, predominantly over a five year going forward-vesting period.

D. Maximum Amount of Equity Awards Allowed

In their Opening Brief, Plaintiffs repeatedly focus on the dollar value of the equity awards issued to the directors pursuant to the EIP. As discussed below, Plaintiffs' focus is misplaced and unsupported by the law. But one specific figure on which Plaintiffs fixate is erroneous. According to Plaintiffs, under the terms of the EIP, non-employee directors could receive, *in toto*, up to $114 million in one-time equity awards. Plaintiffs argue that the alleged "limit" is so high that it is not meaningful. Appellants' Opening Brief ("OB") at 2, 6, 14, 17, 26, 30. Plaintiffs do not "show their work" for how they calculated the $114 million figure, but it appears they simply multiplied the aggregate number of shares available to all non-employee directors under the EIP (9,264,389)[4] by the restricted stock value at the time of stockholder approval of the EIP, which was $12.27 per share on June 9, 2015. But 9,264,289 share limit of the EIP has sub-limits – 3,997,452 restricted stock units, and 5,293,938 stock options.[5] As the Company's April 14, 2016 proxy statement (the "2016 Proxy") explains, the Company's stock options were not worth $12.27; their fair value was actually $3.12 per option award. B435.

Using the correct figures, the total maximum award available to non-employee directors under the EIP was therefore approximately $66 million.[6] With ten non-employee directors on the Board, the maximum award to each director, assuming equal treatment, was $6.6 million. Plaintiffs overstate the maximum possible award to any individual non-employee director, and in the aggregate, by

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4 Computed as 30,881,296 shares reserved under the EIP, multiplied by 30% that could be awarded to directors.

5 Computed as 17,646,455 stock options multiplied by 30%, and 12,234,841 restricted stock units multiplied by 30%.

6 [(30%) x (13,324,841) x ($12.54)] plus [(30%) x (17,646,455) x ($3.12)].

nearly a factor of two. This point was raised by Defendants in the trial court, but instead of correcting their math, Plaintiffs have adhered to their inflated claim.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DISMISSED THE COMPLAINT FOR FAILURE TO STATE A CLAIM THAT DEFENDANTS BREACHED THEIR FIDUCIARY DUTY IN APPROVING THE EQUITY AWARDS.

A. Question Presented

Whether the Court of Chancery properly dismissed the Complaint on the grounds that the Company's stockholders had ratified equity awards made in compliance with stockholder-approved limits on director compensation.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's dismissal of a complaint pursuant to Rule 12(b)(6). *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167-68 (Del. 2006).

C. Merits of Argument

1. The EIP is not a "blank check" for director compensation.

The Court of Chancery correctly applied the principles of decades of Delaware law to conclude that the equity awards were not subject to entire fairness review, and that accordingly, the Complaint failed to state a claim for breach of fiduciary duty. As the Court of Chancery recognized, a critical feature of a compensation plan that is ratifiable by stockholders is that the plan imposes specific limits on compensation to directors. That is exactly what the EIP does: it provides for limits on equity awards, *to the share*, that may be issued to directors (as opposed to employees or officers).

Unable to argue that the equity awards exceeded the EIP's limits, Plaintiffs instead contend that the limits themselves were simply not "meaningful" enough, so that the EIP amounted to "blank check" authority for the directors to grant themselves excessive compensation. OB at 17-18. But Plaintiffs misconstrue both the terms of the EIP and Delaware law.

As described above, the EIP imposes limits on the amount of equity that can be awarded to plan participants, and also includes separate limits on equity awards to non-employee directors. Plaintiffs acknowledge that the EIP's beneficiaries include directors, employees, officers and others (OB at 20), but gloss over the fact that the EIP delineates specific caps on the awards that can be issued to directors.

The EIP is thus similar to compensation plans that the Delaware courts have upheld as subject only to business judgment review. In *In re 3COM Corporation Shareholders Litigation*, the Court rejected a challenge to "lavish and excessive" options granted to directors under a stockholder-approved option plan.

1999 WL 1009210, at *1 (Del. Ch. Oct. 25, 1999). Finding that the options were indisputably under the specific ceilings already approved by stockholders, the Court concluded that "the board's actions are entitled to the protection of the business judgment rule." *Id.* at *2. The Court reasoned that

> [o]ne cannot plausibly contend that the directors structured and implemented a self-interested transaction inconsistent with the interests of the corporation and its shareholders when the shareholders knowingly set the parameters of the Plan, approved it in advance, and the directors implemented the Plan according to its terms.

Id. at *3.

Plaintiffs attempt to distinguish *3COM* from this case by arguing that unlike the EIP, the plan in *3COM* applied only to directors and that it contained more detail. OB at 23, 25. But the trial court correctly rejected Plaintiffs' arguments. As to the fact that the *3COM* plan was specific to director beneficiaries, the Court found that Plaintiffs had failed to show how "stockholder approval of a director-only option plan, that includes specific limits for those directors, differs in any meaningful respect from a company-wide plan that includes director-specific limits for all director beneficiaries as a component of the plan." Mem. Op. at 21. Indeed, "[i]n either case, the key point is the specific focus on the limit or limits imposed on awards to various beneficiaries of the plan, particularly, in this case, non-employee and executive directors. The EIP contained such limits." *Id.*

Plaintiffs also contend that the *3COM* plan was sufficiently more detailed because it provided for different option awards based on types of board service. OB at 25. But the trial court recognized that this is "a distinction without a difference." Mem. Op at 22. The EIP, like the *3COM* plan, sets forth clear and specific limits on potential awards that can be issued collectively and individually to directors—limits that the stockholders in both cases approved. Thus, under *3COM*, the EIP is subject only to business judgment review.

Similarly, the Court has upheld other compensation plans on the basis that they included director-specific parameters that company stockholders voted to approve. *See, e.g.*, *Cambridge Ret. Sys. v. Bosnjak*, 2014 WL 2930869, at *8-9 (Del. Ch. June 26, 2014) (dismissing challenge to directors' issuance of equity awards to themselves pursuant to a stockholder-approved director compensation plan); *Criden v. Steinberg*, 2000 WL 354390, at *3 (Del. Ch. Mar. 23, 2000) (dismissing challenge to directors' re-pricing of stock options issued to certain directors and employees pursuant to a stockholder-approved option plan authorizing such re-pricing); *Steiner v. Meyerson*, 1995 WL 441999, at *7-8 (Del.

Ch. July 19, 1995) (dismissing challenge to stock options issued to directors pursuant to a stockholder-approved stock option plan).

The cases that Plaintiffs cite to support their argument that the EIP is a "blank check" for director compensation are inapposite. In *Seinfeld v. Slager*, the Court of Chancery found that business judgment review did not apply to a stock plan that provided for up to 10.5 million shares to be issued as incentive awards to "employees, officers, and directors." 2012 WL 2501105, at *10 (Del. Ch. June 29, 2012). The problem, to the Court, was that the plan did not distinguish between plan participants. As a result, the directors could theoretically award the entire pool of shares to themselves. *Id.* at *11. In contrast to the *Seinfeld* plan, the EIP differentiates between plan participants and sets out specific limits on possible awards available to directors. Thus, unlike in *Seinfeld*, the Investors Bancorp directors were not free to issue all of the shares under the plan to themselves, having obtained stockholder approval of a plan meant to award and incentivize employees and officers as well.

Plaintiffs' reliance on *Sample v. Morgan*, 914 A.2d 647 (Del. Ch. 2007), is also misplaced. OB at 18-19. In that case, the stock incentive plan authorized a pool of shares to be issued as awards, but imposed no limits on the amount of shares that could be issued to beneficiaries. *Sample*, 914 A.2d at 650. Furthermore, the process by which the directors obtained stockholder approval of the plan and issued awards pursuant to the plan was deficient. The directors had made affirmative misdisclosures in seeking stockholder approval and took 25 minutes to decide to award all of the shares (representing 37.1% of the company's voting power) to a mere three members of senior management, effectively locking up voting control in those managers. *Id.* at 652. The Court concluded that the directors had essentially written themselves a "blank check" while trying to use stockholder approval as a cloak. As the trial court pointed out, the *Sample* Court "concluded that the stockholder vote in that context was 'best understood as a decision by stockholders to give the directors broad legal authority and to rely upon the policing of equity to ensure that the authority would be utilized properly.'" Mem. Op. at 25 n.32 (quoting *Sample*, 914 A.2d at 664). The terms of the EIP and the process undertaken to issue the equity awards in no way resemble the egregious set of facts before the *Sample* Court in that case.

More recently, the Court of Chancery "performed an exhaustive review of the law of stockholder ratification with regard to director equity compensation" in *Calma v. Templeton*, 114 A.3d 56 (Del. Ch. 2015) ("*Citrix*").

Mem. Op. at 18. The *Citrix* Court declined to dismiss a complaint challenging a stockholder-approved stock incentive plan, on the ground that the plan covered multiple groups of beneficiaries but did not place specific limits on possible compensation to non-employee directors. 114 A.3d at 569. Plaintiffs contend that "nothing in *Citrix* suggests that business judgment review would have applied if the plan in that case, in addition to its 'generic' annual limit of 1 million shares (which applied to everyone, including directors), also had a 'separate' annual limit of 1 million (or 999,999) shares for directors." OB at 27. But that is exactly what the *Citrix* Court repeatedly stated in its opinion:

- "I further conclude that the defendants have not established that Citrix stockholders ratified the RSU Awards because, in obtaining omnibus approval of a Plan covering multiple and varied classes of beneficiaries, the Company did not seek or obtain stockholder approval of any action *bearing specifically on the magnitude of compensation to be paid to its non-employee directors*." 114 A.3d at 569 (emphases in original).

- "Critically, the plan approved by stockholders in *Slager* (like the Plan in this case) did not set forth any specific amounts (or director-specific ceilings) of compensation that would or could be awarded to directors. Instead, the plan featured a generic limit on the compensation that any one beneficiary could receive per fiscal year." *Id.* at 584.

- "[A]s I read [*Seinfeld v. Slager*], because the Republic Services stockholders had not voted in favor of the specific RSU grants at issue or to impose a limit applicable (or "meaningful") to directors specifically—as opposed to a generic limit applicable to a range of beneficiaries with differing roles—there was no ratification defense." *Id.* at 585.

- "There also was valid stockholder approval of the compensation awarded to directors in *3COM* and *Criden* because the awards at issue were within the director-specific ceilings of *3COM* and within the repricing parameters of *Criden*." *Id.* at 586.

- "In my view, Defendants have not carried their burden to establish a ratification affirmative defense at this procedural stage because Citrix stockholders were never asked to approve—and thus did not approve—*any action bearing specifically on the magnitude of compensation for the Company's non-employee directors*." *Id.* at 588 (emphasis in original).

- "[U]nlike in *3COM*, the Plan here does not set forth any director-specific 'ceilings' on the compensation that could be granted to the Company's directors." *Id.*

- "Here, as in *Slager*, the Plan does not specify any amounts (or director-specific ceilings) of equity compensation that Citrix directors would or could receive independent of the generic annual limit applicable to all the varied classes of beneficiaries under the Plan." *Id.*

- "[I]n my opinion, upfront stockholder approval by Citrix stockholders of the Plan's generic limits on compensation for all beneficiaries under the Plan does not establish a ratification defense for the RSU Awards because, when the Board sought stockholder approval of the broad parameters of the Plan and the generic limits specified therein, Citrix stockholders were not asked to approve any *action specific to director compensation*." *Id.* (emphases in original).

The trial court thus correctly concluded that the *Citrix* Court, having carefully considered sixty years of Delaware law on the issue, made a crucial distinction between plans with director-specific limits and those without: "*Citrix* is rich with helpful guidance in this area of our law, but the most salient, given the facts of this case, is the effect that 'director-specific' limits within a stockholder-approved equity compensation plan will have on the efficacy and reach of stockholder approval." Mem. Op. at 18.

The distribution drawn in *Citrix*, and adopted by the trial court, makes sense, as almost any stock incentive plan covering both employees and directors will contemplate that a majority of shares will be awarded for management and employees (70% of the total in the present case). But if there are no separate limits for directors, an unscrupulous board can hijack the plan by awarding all of the authorized shares to itself (as the *Seinfeld v. Slager* court pointed out). This is why having a separate limit for awards to non-employee directors is crucial. Unlike the plan at issue in *Citrix*, the EIP, as approved by stockholders, contained specific caps on the awards that could be issued to non-employee directors. Thus, under the reasoning articulated by the *Citrix* Court, the business judgment rule is the appropriate standard of review applicable to the EIP.

Finally, Plaintiffs rely on the Court's transcript ruling in *Larkin v. O'Connor*, C.A. No. 11338-CB (Del. Ch. Mar. 22, 2016) (Transcript), but again, the principles set forth in the ruling *support* dismissal of the Complaint. OB at 28-29. In *Larkin,* the proxy gave stockholders a convoluted proposal: the stockholders were asked to approve both a compensation plan and grants made to directors pursuant to the plan, in one vote, and the proxy disclosed "that grants that had been made to the directors and, for that matter, to anybody else for whom a grant had been made on shares that would have come from the new plan, would be nullified, in effect, if the plan wasn't approved." *Id.* at 71. Thus, the Court found that there was ambiguity as to what exactly stockholders were communicating with their vote. *Id.* Unlike the circumstances here, in that case the compensation committee had already exercised its discretion—separately from the plan—to approve specific grants that were then made "contingent" on approval of the plan. The Court was troubled by the lack of clarity in discerning what the results of a stockholder vote meant:

> The flip side is . . . if the stockholders had given a negative vote, it could mean one of at least three things. They're disapproving the plan, they're disapproving the option, or they're disapproving both. The point is there's permutations. And where those permutations exist in that format, I don't think you have the sufficient meeting of

> the minds, the phrase I'm using here, to demonstrate approval of a specific decision of the compensation committee in this case.

Id. at 71-72. Here, there is no ambiguity. If the stockholders had voted against the EIP, that would be the end of the road. There could be no equity awards approved and issued pursuant to the EIP, because there would be no EIP. The trial court correctly distinguished this case from *Larkin*, observing that "[n]o such confusion exists here. Investors Bancorp stockholders were asked to approve a plan with specific director limits baked into it. In approving the plan, they were necessarily approving the limits as part of the plan." Mem. Op. at 22 n.25.

Plaintiffs' focus on dollar amount of awards distorts the facts and is unsupported by the law. As explained in the Statement of Facts, *supra*, the "$114 million 'limit'" that Plaintiffs repeatedly attribute to the EIP (suggesting that it is a sham limit) is an amount that Plaintiffs themselves incorrectly calculated. Plaintiffs contrast the inflated $114 million figure to the dollar values in *Citrix* and *Seinfeld*, concluding that the dollar amount in itself shows that the EIP lacks a "meaningful limit." OB at 26. According to Plaintiffs, the Court of Chancery "upend[ed] Delaware law" by looking at the "*words* employed by a plan in formulating a limit rather than the *substance* of that limit." OB at 26. It is unclear what exactly Plaintiffs mean. Even if $114 million were the correct figure, the trial court correctly refused to focus on the "meaningless" of purported dollar value of the EIP's limits—because that is not the law.

Plaintiffs point to no ruling on the standard of review that turned on the absolute dollar value of the maximum awards allowed under the incentive plan at issue. That is not, and should not be, the law. Indeed, if Plaintiffs' "standard" is adopted, *every case* will be subject to judicial review, as Plaintiffs will always argue that the limit of the plan, whatever the dollar amount, is too high to be "meaningful." Here, Plaintiffs assert that the limit of $6.6 million per director, for a plan spanning five years, is too high. But they undoubtedly would make the same arguments if the limit were $4.4 million or $2.2 million. And, of course, the "reasonableness" of any limit is contextual, and must take into account the size of the issuer, its financial performance, its need to pay such awards to attract and retain competent directors, and myriad other factors. Requiring the Court to determine what limits are sufficiently "meaningful" will thus draw the Court into litigation over these issues in nearly every case. It is far better to permit stockholders to decide this issue: if compensation limits are not sufficiently "meaningful," stockholders presumably will decline to approve the plan.

As the trial court correctly observed, under existing law, the size of the awards in itself "is not sufficient to subject the awards to entire fairness review." Mem. Op. at 26 n.33. The trial court recognized that "facts could arise in which the awards to directors are so extraordinary that the court could conclude that it was reasonably conceivable the plaintiff(s) had stated a claim for waste," but here, Plaintiffs had not pled a claim for waste. *Id.* Thus, the trial court properly rejected Plaintiffs' "meaningful limit" test linked to the dollar value of awards. *Id.*

2. The EIP was approved by a fully informed stockholder vote.

Plaintiffs also take issue with the Court of Chancery's finding that the Investors Bancorp stockholders were fully apprised of all material information in deciding to approve, by an overwhelming majority, the EIP. OB at 32-36. This Court need not even consider Plaintiffs' argument, given that the Complaint fails to assert a disclosure claim. *See* A017-A079; *see also* Mem. Op. at 27 n.35 ("Plaintiffs have not pled a disclosure claim in their Complaint."). Plaintiffs' belated insertion of a misdisclosure theory should be rejected on the grounds of untimeliness alone. Where a claim "was not fairly alleged in the initial complaint," the Court will refuse to consider that claim. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999).

But even if this Court considers Plaintiffs' unpled claim, Plaintiffs' argument is non-meritorious. Plaintiffs contend that the Board had come up with a secret scheme to grant themselves excessive compensation that they hid from stockholders in seeking approval of the EIP. But their theories to support this argument fall short.

First, Plaintiffs contend that the Board's decision to time the EIP to Federal Reserve Board ("FRB") conversion rules shows that the Board had improperly schemed for over a year before making the awards. OB at 32. This claim fails on several counts. Most importantly, there is no evidence that the Board delayed acting for any reason (including the FRB rules). Rather, as the trial court correctly noted, the EIP was submitted at the first meeting of stockholders following the conversion. Mem. Op. at 29. And, the EIP *complied* with the FRB regulations limiting compensation plans adopted within a year of conversion to 14% of the shares issued in the offering (*see* p. 6, *supra*), so the size of the plan was not in fact a reason to delay.

In any event, Plaintiffs entirely fail to demonstrate why the Board's consideration of federal regulations would be improper or why, if the Board took FRB regulations (which they complied with) into account in timing their approval of the EIP, stockholders would find that information material to their vote. The proxy materials fully disclosed that the EIP was part of the Company's strategic and long-term planning, and never pretended otherwise. B329. As the Court of Chancery recognized, "any disclosures regarding the FRB rules or the timing of the EIP would have been immaterial and probably confusing." Mem. Op. at 29.

Next, Plaintiffs take issue with the initiation of the Board's process to determine equity awards to grant pursuant to the EIP following stockholder approval. The trial court found that

> [t]he fact that the Board met on the heels of the stockholders' approval of the EIP does not alone support a reasonable inference that the disclosures regarding the plan were a sham or that the Board was hiding its true intentions to stockholders all along. The stockholders were apprised of the parameters of the EIP and knew that once it was implemented the Board could immediately begin discussing implementation within those parameters.

Mem. Op. at 30. Plaintiffs, however, claim that the directors had already hatched an undisclosed plan to award themselves awards in a pre-determined amount. OB at 33-34. But as the proxy materials and documents Plaintiffs received in their books and records demand make clear, and as the Complaint acknowledges, the Board had *not* determined to issue any specific equity awards. Instead, upon following stockholder approval of the EIP, the Board undertook a process that involved multiple Compensation Committee meetings with outside legal counsel and compensation experts. A045-A049 ¶¶ 72-80. Nothing contradicts the trial court's finding that the Complaint does not lead to a reasonable inference that the Board improperly hid material facts from stockholders.

Plaintiffs again rely on *Sample v. Morgan* to support their misdisclosure claim, but again, that case is inapplicable to the facts here. *Sample* involved an egregious effort to mislead stockholders into approving a compensation plan that was nominally intended to benefit individuals across the company, but in reality would result in the issuance of all of the available stock options to just three members of senior management, would constitute the only equity the company would be permitted to issue in the next five years, and would effectively transfer voting control of the company to those three managers. 914 A.2d at 652. The ruling in *Sample* turned on extreme facts that bear no resemblance to the proper disclosures made to Investors Bancorp stockholders.

Plaintiffs also willfully misconstrue the import of the 2014 prospectus. OB at 35-36. The facts are straightforward: Investors Bancorp stockholders were informed in 2014 that the Company was contemplating establishing an equity incentive plan – which was true. But there was not "fixed" plan – the details of the plan were not worked out until formation of the EIP, which was then submitted for stockholder approval in 2015. While the actual EIP was consistent with the parameters of what was contemplated (and disclosed to stockholders) in 2014, there were some important changes between the outline disclosed in 2014 and the final EIP – for example, the percentage of awards that could be made as stock options changed from 10% discussed in 2014 to 8% in the final plan. Contrary to Plaintiffs' characterization, the Company disclosed to stockholders the material information that existed in 2014, and again in 2015.

In sum, Plaintiffs' argument boils down to the following: 1) the Board should have put forth a compensation plan to stockholders without any planning or thought as to what awards they might make under the plan if it were adopted; 2) then, the Board must have waited an undefined amount of time before taking any action under the plan, acting as if it were surprised by the stockholder vote and had not ever considered what it would do in response to approval; and 3) anything short of 1) and 2) shows that the Board had been operating under an improper scheme all along and had hoodwinked the stockholders. Plaintiffs' leaps of logic find no support in the law or in reality.

3. Plaintiffs' proposed standard of review is untenable.

Ignoring the precedent and principles of long-standing Delaware law, Plaintiffs seek a new standard for reviewing director compensation. According to Plaintiffs, the only compensation structure that would pass muster is one where specific awards to directors made under a stockholder-approved plan in compliance with limits on director compensation are nonetheless set forth for separate approval by stockholders ***and*** the potential dollar amounts of those awards set forth "meaningful limits" as determined by the Court.

Under Plaintiffs' proposed policy, all director compensation would be subject to entire fairness review and no challenge to a board's decision could be dismissed at the pleadings stage. Not only has that never been Delaware law, but such a result would be unwise. Were the Court to adopt Plaintiffs' reasoning, every single compensation decision by stockholders would be second-guessed by the courts, as the trial court recognized:

> I decline to adopt the Plaintiffs' proffered "meaningful limits" test in which the court would assess whether the specific limits within an equity compensation plan were "meaningful" before determining whether the doctrine of ratification should apply. This test would propel the court into a position where it was second-guessing the informed decision of stockholders to approve

> compensation for the company's directors and officers. This is antithetical to settled Delaware law.

Mem. Op. at 26 n.33.

Moreover, the rule urged by the Plaintiffs would mean that companies and boards could never rely on judicial pronouncements as to the proper contours of director compensation processes, because any compensation decision would be subject to the whims of the court. Again, the trial court recognized that such a result is not—and should not be—Delaware law. *Id.* ("As our Supreme Court explained, 'the long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves.'" (quoting *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 312-13 (Del. 2015)).[7]

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[7] It would be particularly unfair to retroactively impose the requirements sought by Plaintiffs on Investors Bancorp here. Investors Bancorp filed the 2015 Proxy the day *Citrix* was decided and mailed it to stockholders shortly thereafter. The Company obviously took comfort that its plan complied with *Citrix* by having a separate limit for directors, and it could have modified the then-proposed EIP if *Citrix* had imposed different requirements. To retroactively impose new requirements on a party that acted in reliance on a directly-relevant Delaware case would be extremely unfair.

At bottom, Plaintiffs are simply unhappy with the EIP's specific limits on director compensation. But the proper recourse would be to encourage other stockholders to vote against the EIP proposal. The Court should reject Plaintiffs' invitation to overturn Delaware law and public policy in favor of an untenable and subjective standard of review.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT DEMAND WAS NOT EXCUSED AS TO THE AWARDS TO THE EXECUTIVE DIRECTORS.

A. Question Presented

Whether the Court of Chancery properly held that Plaintiffs had failed to plead demand futility with respect to the awards granted to the executive directors.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's dismissal of a derivative complaint pursuant to Rule 23.1 for failure to make a pre-suit demand upon the Board. *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008).

C. Merits of Argument

Under Court of Chancery Rule 23.1, Plaintiffs were required to make a demand upon the Board before filing a derivative suit, unless demand would be futile as a matter of law. A pre-suit demand is only excused if "under the particularized facts alleged, a reasonable doubt is created that: 1) the directors are disinterested and independent and 2) the challenged transaction was otherwise the produce of a valid exercise of business judgment." *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). The plaintiff cannot meet its burden with "conclusory statements or mere notice pleading." *Brehm*, 746 A.2d at 254. The trial court correctly concluded that Plaintiffs failed to show demand would be futile as to the equity awards made to executive directors Domenick A. Cama and Kevin Cummings (representing two of the twelve Board seats).

Plaintiffs contend that demand is excused because the awards granted to Cama and Cummings were part of a unitary conflicted transaction entailing an improper *quid pro quo*. OB at 38-40. But the allegations of the Complaint and the documents incorporated therein show that far from being "a single conflicted transaction" (OB at 39), the Board approved the awards to executives after a series of Compensation Committee meetings to consider proper compensation in consultation with outside advisors and experts. A044-A050 ¶¶ 70-81. Plaintiffs have also failed to demonstrate what the *quid pro quo* was. It is undisputed that Cama and Cummings' votes were not needed to approve the equity awards to the non-executive directors, and Plaintiffs have not made specific allegations that Cama and Cummings would have withheld support for the awards to the non-executive awards if their own awards were not granted. Mem. Op. at 35. What did the non-executive directors receive in the alleged scheme, then?

The cases that Plaintiffs rely on and selectively quote from are readily distinguishable. In *In re National Auto Credit, Inc. Shareholders Litigation*, the Court found demand was futile in that the board had in a single meeting adopted a number of back-to-back resolutions that increased compensation to the directors, increased compensation to the CEO and approved a business transaction benefiting an affiliate with a close relationship with the CEO. 2003 WL 139768, at *5-6 (Del. Ch. Jan. 10, 2003). Thus, the Court found that the allegations sufficiently called into question the disinterestedness of the majority of the board, in that the "interlocking" resolutions "constitute[d] a single plan furthering the interests of the Defendant Directors." *Id.* at *1, *10. In *Metcalf v. Zoullas*, the district court found that plaintiffs had pleaded particularized facts showing that the directors' decisions regarding self-compensation and compensation to executives were part of a single scheme by which each group "took what it could from [the company]," permitting "striking increases in compensation that bore no relation to performance or industry norms, were enacted in violation of [the company's] Bylaws and Marshall Islands law, and have endangered [the company's] viability." 2012 WL 169874, at *5 (S.D.N.Y. Jan. 19, 2012). In *Needham v. Cruver*, four directors were alleged to have issued shares reflecting nearly 30% of the company's outstanding shares to themselves for “no consideration or for a grossly inadequate consideration.” 1993 WL 179336, at *2 (Del. Ch. May 12, 1993). The Court rejected the directors’ argument that *each director’s* receipt of shares constituted a separate transaction in which the others were disinterested. *Id.* at *3. *Noerr v. Greenwood* involved an undisclosed scheme by the directors to issue themselves stock option at an exercise price “dramatically below the fair value of the Company’s shares at the time,” granted under two incentive plans, one for non-employee directors, approval of which was alleged to be *quid pro quo* for the second plan, to employee-directors and senior management. 1997 WL 419633, at *1 (Del. Ch. 1997). On those facts, the Court concluded that the “nearly identical” plans should be considered a “single transaction” *Id.* at *10.

Here, the types of equity that were potentially available to non-employee directors and employees were differentiated (*see* p. 7-8, *supra*) and none of the same egregious facts justify treating the two transactions as a unified scheme. Furthermore, Defendants do not contend that every single director’s award should be treated as a separate transaction, but rather that consistent with Delaware law, the awards to non-employee directors and to executives can appropriately be treated as two separate transactions. And as the trial court found, no reasonable inference can be drawn from the Complaint that the non-employee directors and Cama and Cummings engaged in a *quid pro quo* scheme. Mem. Op. at 34-36. Thus, Plaintiffs have failed to establish that they were excused from making a pre-suit demand as to the awards to the executive directors.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Chancery.

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June 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2017, the foregoing was caused to be served upon the following counsel of record via File & ServeXpress:

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