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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE RAVENSWOOD INVESTMENT COMPANY, L.P., individually, derivatively and on behalf of a class of similarly situated persons, Plaintiff-Below, Appellant/Cross-Appellee v. THE ESTATE OF BASSETT S. WINMILL, THOMAS B. WINMILL, MARK C. WINMILL and WINMILL & CO. INCORPORATED Defendants-Below, Appellees/Cross-Appellants.	No. 496, 2018

APPELLANT'S REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

Dated: January 14, 2019

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SUMMARY OF ARGUMENT IN RESPONSE TO DEFENDANTS' CROSS-APPEAL

DENIED. The Trial Court ("Court") correctly determined that Plaintiff/Appellant/Cross-Appellee ("Plaintiff") was entitled to an award of attorneys' fees as a result of a corporate benefit created by this litigation. As to the applicable legal principles, Defendants specify no legal error below and there was no error. The Court properly rejected Defendants/Appellees/Cross-Appellants' ("Defendants") attempt to conflate and equate the concept of nominal damages with monetary damages and, consistent with long-standing precedent, also rejected Defendants' implicit contention that in any action where a common fund is created, an award under the corporate benefit theory is precluded. The Court's factual determinations were not a clear abuse of discretion and should be affirmed. The Court's determination of the existence of a corporate benefit and the amount of the fee and expense award are factual findings based upon evidence in the record below. Defendants do not challenge that, assuming some Corporate Benefit fee award is appropriate, the amount of the fee awarded was within the discretion of the Court.

STATEMENT OF FACTS

Reply Statement of Facts

Certain of Defendants' stated "facts" are without record citation and are not supported by the record. Further, despite professing a desire to avoid including the "tortious" history of this and related litigations and to limit their statement of facts to matters "relevant to this appeal" (Appellees' Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal at 12 ("DAB" or "Defendants' Answering Brief")), Defendants missed their mark in two respects. Not only have Defendants included matters not relevant to any issue on appeal, but they omitted facts necessary to put their statements in proper context. In this section, Plaintiff shall address those errors and omissions.

1. No Claim was Abandoned.

Without citation, Defendants assert Plaintiff abandoned certain of its direct claims regarding the adoption of the PEP and the issuance of options under it. DAB at 19. This never happened, Instead, as Defendants themselves note, at the request of the Defendants, the Court dismissed these claims and precluded Plaintiff from pursuing them. *Id*.

2. Objection was Made to Evidence Improperly Withheld Until the Eve of Trial.

Defendants also assert, inaccurately, that Plaintiff did not object to Defendants' evidence of payments of interest and the payments by Bassett Winmill's

Estate. Such objections were made. Even Defendants concede that Plaintiff objected to the late produced documents relating to purported forgiveness of the notes and purported payments of them. DAB at 21 n. 11; Trial Transcript ("TT") 3:16-15:3 (A825-837).

Defendants contend that they did not produce the documents relating to the forgiveness of the promissory notes and purported payment of interest until 2 days before trial, because one month before trial, the Court of Chancery "was persuaded to expand the scope of the case." DAB at 20. This is inaccurate. In its decision, the Court rejected Defendants' stilted and excessively narrow interpretation of the claims based upon a prior ruling of the Court. B469. Nothing in the ruling suggests any decision by the Court to "expand the scope of the case." Thus, Defendants actually concede that they failed to timely produce this information.

In any event, any suggestion that Defendants are not already obliged to have produced in discovery all documents relating to the issuance of the options, the notes, payments relating to the notes and forgiveness of the notes, is inaccurate. Plaintiff's First Set of Interrogatories and First Request for Production, served on August 26, 2010, (A335–355, C.A. 3730 D.I. 25) asked for the identification and production of all documents *relating to* the Defendants' compensation (A353) (precisely what Defendants claimed the forgiveness was (See B469)), and every document which "discusses, describes or *relates to* the basis for and/or reasons for

the creation, adoption and operation… [of the PEP]… including but not limited to all documents *relating*… [to] all grants… [or] an exercise of options …". (A355) (emphasis added). The responses identified as responsive and indicated "responsive documents will be produced." *Id.* See also, C.A. 3730, D.I. 62; Plaintiff's Opening Brief in Support of Its Motion to Compel at 11 (complaining that as of October 31, 2012, Defendants had only produced a photocopy of a single check as proof of payments for the options or notes and as proof of their compensation). The Court denied the motion based upon Defendants' representations that no other documentation existed. *Ravenswood v. Winmill*, 2013 WL 6228805 at *4 (Del. Ch. November 27, 2013).

The chart produced for trial (A746) shows virtually all of the purported payments were made before November 16, 2012, the date of Defendants' representation that no documents beyond the single check existed. (C.A. 3730, D.I. 67). The previously unproduced documents clearly were requested and withheld. So, too, were responsive documents from which it would have been possible to verify the accuracy and authenticity of the selectively produced documents.

Defendants claim to have been obliged to produce this material only because the Court expanded the claims to be tried is inaccurate. Indeed, Defendants produced a cancelled check representing payment of the par value of the stock subject to an exercise by Thomas, on November 16, 2012. See, C.A. 3730, D.I. 62 (Plaintiff's

Opening Brief in Support of Its Motion to Compel at 11). Obviously, Plaintiff sought documents relating to payments for the exercise of the options.

Whether there were objections to the trial testimony about the OTC market price of Winmill stock at the time of trial, the amount of cash Winmill had on hand as of the time of trial, or the mere *possibility* of Winmill filing an amended tax return (with no specified likelihood nor any unspecified cost) is irrelevant as Plaintiff has not challenged the admission of those statements. Indeed, that testimony established that Winmill had over $2,500,000 in available cash alone.[1]

3. No Asserted Error in the Court's Valuation of the Options was Properly Raised by Defendants.

Defendants assert some error in the valuation of the options granted, although they do not address the purported consequences to this appeal from it. DAB at 9 n. 6. The purported "error" Defendants challenge, however, is not Plaintiff's. The Court found "Defendants each were granted options valued at approximately $300,000. Yet they each paid less than $2,000 in cash (the par value) to exercise those options and then, in lieu of cash, made a promise to pay the substantial balance owed with interest as reflected in the Notes." *Opinion*[2] at 43. Defendants did not

[1] Thomas Winmill testified the repayment obligation was 10% or Winmill's available cash and that the amount due, in his opinion, would be over $252,000. $10,000 for him, $30,000 for Mark and $212,472. DAB 25; A473.

[2] Plaintiff adopts the definitions from its Appellant's Opening Brief ("POB").

appeal from this aspect of the Court's decision and therefore may not now, on appeal, challenge this factual finding nor anything flowing from it.

4. Defendants Concede That They Did Not Reveal the Alteration of the Purportedly Operative Consent to PEP.

As to the altered consent purportedly adopting the PEP, Defendants produced that as part of Winmill's § 220 production and subsequent initial document production during the stay of proceedings, asserting it was the document by which the PEP was adopted. DAB at 45. Years later a version of that document with a fax tag line, post-dating the date on the consent, was produced in discovery. *Id.* Defendants admit they never informed Plaintiff that the document *with the tag line* was the document by which the consent was adopted, thus, predating the altered document, and identify no basis on which Plaintiff could have suspected the alteration or that the altered document, originally produced in response to a § 220 demand, was not the operative document, as represented. DAB at 47 n. 19. At trial, Defendants relied on the later produced document with the fax tag line as the consent signatures actually sent to the Company. B636-645.

5. No Improper Delay in Prosecution of the Case Occurred and None was Raised Below Nor Serves as the Basis for any Decision Subject to this Appeal.

Defendants have included out-of-context statements, in an apparent effort to suggest some failure to diligently prosecute this case. This suggestion is inaccurate and, even had it been true, it would not be relevant to any issue before this Court and

Defendants make no argument suggesting otherwise. Defendants suggest a failure to timely serve discovery or notice depositions. Defendants do not inform this Court that discovery was not initially stayed because of an informal stipulation among counsel staying the action, of which the Court was informed and to which it assented, (C.A. 3730, D.I. 7–8). The purpose was to provide Defendants an additional opportunity to produce documents pursuant to 8 Del. C. § 220. It was during this period that Defendants claimed to have produced the documents adopting the PEP and documents showing payments made.

During that period, the parties also discussed settlement and had a dispute as to whether a settlement was reached. C.A. 3730, D.I. 14, 16, 18, 21–23. Specifically, whether Defendants could condition a settlement in which they agreed to rescind all options upon an agreement by Plaintiff's counsel as to the amount of any fee it would seek. *Id*. During the pendency of that motion, based upon Plaintiff's understanding that a settlement had been reached, no discovery was appropriate. Ultimately, however, the Court decided that Defendants could condition a settlement upon Plaintiff's counsel agreeing to a specified fee. C.A. 3730, D.I. 23.[3] That decision, however, was not issued until March 2010 almost two years after the case had been commenced. Indeed, Defendants' counsel did not enter an appearance (and then it

[3] While Plaintiff respectfully disagrees with the Court's decision that Defendants were permitted to impose such a condition, Plaintiff did not appeal from that ruling.

was because they needed to brief that motion), until 16 months after the case had been commenced. (C.A. 3730, D.I. 15.)

Subsequently, after receiving an extension to respond, Defendants moved to dismiss. C.A. 3730, D.I. 24. Although Plaintiff promptly served discovery (see, C.A. 3730, D.I. 25, 26), Defendants refused to participate in discovery until their motion was resolved. That decision was not issued until May 31, 2011. C.A. 3730, D.I. 36. Subsequent disputes regarding documentary discovery, consolidation of these related actions and amendments to the complaints were not resolved for years, (e.g., see, C.A. 3730, D.I. 73, 100) effectively forestalling the ability to depose the Defendants.

Answering Statement of Facts

Defendants' Statement of Facts on Cross-Appeal appears to have been put in their Argument on Cross-Appeal Section I.C.2. Plaintiff responds to that here. Plaintiff agrees that the Court awarded attorneys' fees and expenses and under the corporate benefit doctrine and that the fees and expenses awarded are a modest fraction (10% of the fees incurred and 75% of the expenses incurred) of the total fees and expenses incurred by Plaintiff's counsel in the prosecution of the case. Neither below nor on this appeal do Defendants challenge the amount of total fees and expenses incurred by Plaintiff's counsel. Neither does Defendants' cross-appeal assert that, assuming a corporate benefit fee and expense award is appropriate, that the amount awarded, $165,000, is excessive.

Instead, Defendants assert factually that Plaintiff only sought monetary damages. DAB at 58. Not only is this statement irrelevant, it is inaccurate. It is irrelevant for the reasons set forth in Plaintiff's Argument on Cross-Appeal Section I.C.1, *infra*. It is factually inaccurate because, contrary to Defendants' statement made without citation to the record, the Complaint makes clear that Plaintiff demanded "compensation and equitable relief" for the alleged wrongs. A609-610. The Court noted that Plaintiff sought "whether or not the Board in this instance, and based on a pattern, complied with its fiduciary duties? Because certainly [plaintiff] got that. [Plaintiff] got the declaration that [it] asked for, that there was a breach of

fiduciary duty." Fee Decision of August 15, 2018 at 17–18, Defendants' Cross-Appeal, Exhibit B ("Fee Decision").

Contrary to Defendants' claim that there was no evidence of a corporate benefit (DAB 59), the Court specifically stated that it declared that the Individual Defendants' pattern and process for dealing with self-interested decisions as to the grant of options and their compensation failed to meet their fiduciary duties. *Id.* "[T]he Court has declared a practice with respect to this board's creation of stock option plans and, more to the point, awards of stock options, the Court has stated that that's a practice that violates the board's fiduciary duty and that now is the result of this trial." *Id.* at 14. The Court stated that it "found that what, by the evidence at least, was an ongoing practice is now going to subject the Board to potential liability in the event that it continues…" *Id.* The Court concluded that "declaration was significant …." *Id.* In finding a corporate benefit, the Court concluded that, especially when it came to a breach of the duty of loyalty (*Id.* at 18), there was a "long-term benefit of having declared a breach and having said that this past practice is not acceptable…". *Id.* at 26. The Court found that its decision "serves to prevent or at least dissuade this Board from repeating its past practices… by having declared that the board's past practices… implicate and, if repeated, violate the fiduciary duty of loyalty". *Id.* at 34.

It should be noted that the Court was scathing in its assessment of the Individual Defendants' conduct. See, Argument I.C. at pp. 24-25 below. In its Fee Decision, awarding Plaintiff's counsel a small portion of the total fees and expenses incurred in establishing Defendants' misconduct, the Court noted that the Individual Defendants continue to serve as Winmill directors, had consistently throughout trial defended their actions as appropriate, and would now be guided by the Court's valuation of that conduct going forward.

The Court, applying the broad and flexible standard for a "corporate benefit" found that Plaintiff, having brought this conduct to light and subjected it to the Court's independent evaluation, conferred a corporate benefit upon Winmill by providing an effective proscriptive and prophylactic guide as to the Individual Defendants future actions. While Defendants suggest this benefit is speculative, they do not suggest, as they could not, that their prior approaches and conduct was severely chastised, nor do they suggest that in the future they will ignore this lesson.

REPLY ARGUMENTS IN SUPPORT OF PLAINTIFF'S APPEAL

I. The Court Erred in Not Awarding Any Relief.[4]

A. Defendants Do Not Dispute Many of the Errors Raised by Plaintiff.

1. The Failure of an Appellant to Address an Argument or Cite Supporting Authority on an Issue Can be a Waiver.

Plaintiff raised a number of arguments in its Opening Brief which Defendants either ignore or concede. When a party has raised an issue, the failure to address it in an answering brief can be a waiver, unless the issue is nonwaivable. *Woods v. Woods*, 146 A.3d 357 at *2 (Del. 2016); *Hancock v. Citifinancial, Inc.*, 878 A.2d 461 at *1 (Del. 2005). As to other of their arguments and propositions, Defendants cite no authority. The failure to cite legal authority in support of an argument constitutes a waiver. See, *Flamer v. State*, 953 A.2d 130, 134–135 (Del. 2008).

2. Defendants Concede the Court's Decision Permits a Wrong Without a Remedy.

Defendants do not address Plaintiff's Opening Argument Section I.C.7. Defendants do not dispute that the evidence below established that the Individual Defendants in a series of self-interested decisions made without proper documentation, without any independent oversight or input, and without any

[4] Pursuant to Supreme Court Rule 14(c)(1), Plaintiff does not repeat its argument headings verbatim, nor does it repeat its questions presented and scope of review. Plaintiff does not abandon any aspect of its Opening Brief.

objective supporting evidence, granted themselves options, accepted Notes as payment for the exercise of those options and then forgave those Notes "long before the principal balance was even touched." *Opinion* at 43-44. "[T]he Board did nothing meaningful to ensure that the decisions it made were fair…".) *Id.* at 40. Thus, the Individual Defendants collectively received property worth at least $900,000 (and ultimately stock worth far more than that) for which they paid approximately $4,500. *Id.* at 15, 45.

Defendants do not dispute that the Court's decision provided them approximately 14% of Winmill's equity for essentially nothing.[5] POB at 29 and authorities cited therein. Its failure to award any remedy is reversible error. "Quite simply, equity will not suffer a wrong without a remedy." *Weinberger v. UOP, Inc.*, 1985 WL 11546 at *9 (Del. January 30, 1985). This Court has found reversible error when "the Court of Chancery viewed its remedial authority too narrowly." *Brinckerhoff v. Enbridge Energy Co., Inc.,* 159 A.3d 242, 262 (Del. 2017). "Once liability has been found and the court's powers shift to the appropriate remedy, the Court of Chancery has broad discretion to craft a remedy to address the wrong." *Id.*

[5] Defendants contention that interest payments and gifts constituted payments for the options is flawed as set forth in Section I.A.3.

Defendants never explain how the result here is consistent with these equitable principles.

3. Defendants Do Not Address the Identified Flaws in the Court's Decision Regarding the Amounts to be Returned to the Defendants in a Rescission and the Purported Effect on Winmill.

The Defendants either ignore or concede Plaintiff's challenges to the Court's determination of the amount to be repaid to the Individual Defendants if rescission is ordered. Defendants concede Plaintiff's Opening Argument Section I.C.3 and ignore Plaintiff's Opening Arguments Sections I.C.4, I.C.5 and I.C.6.

a. Defendants Concede the Court's Conclusion that Winmill Lacked Sufficient Funds to Pay for Rescission was Erroneous.

As to Plaintiff's Opening Argument Section I.C.3, Defendants seek to dismiss as an irrelevant "overstatement" the denial of rescission based on the erroneous conclusion that Winmill did not have sufficient funds to make any required repayment. *Opinion* at 3. Respectfully, the Court's explanation of "overstatement" as to that basis for this aspect of its decision does nothing to provide any evidentiary support for or explain the remaining balance of its conclusions: that paying 10% of currently available cash constituted an unacceptable "material amount"; or would do Winmill "more harm than good." April 27, 2018 Opinion at 14-15, POB Ex C. There was no evidence of that and Defendants' Answering Brief cites to none. Defendants never explain how this could be true. They avoid such explanations because they

would be unavailing and would show that the only remaining basis for the result is the legally erroneous conclusion that the amount to be repaid exceeded the value of the stock to be returned, determined solely by reference to a legally inappropriate illiquid current "market price."

The argument that Plaintiff's challenge to the use of the illiquid OTC price comes "way too late" (DAB at 34) fails to identify when Plaintiff was ever put on notice that anyone would claim the illiquid OTC price was the fair market value of Winmill stock in Winmill's hands. Until the Opinion, Plaintiff never was. How Plaintiff's response was "too late" is never explained. Nor do Defendants put forth any basis on which Plaintiff was obliged to submit evidence at trial of the current fair market value of Winmill stock to obtain rescission or any other relief. Indeed, the Court in its motion to dismiss, barred Plaintiff from seeking to prove that the option price was set too low and thus rendered evidence of the fair market value of Winmill's stock irrelevant and inadmissible.

b. Defendants to Not Deny the Impropriety of Relying Upon an Illiquid Stock Price for Fair Market Valuation.

Defendants do not address Plaintiff's Opening Argument Section I.C.4, and therefore do not dispute, that the Court legally could not properly have relied upon Winmill's illiquid OTC "market price" as appropriate evidence of the value of the Winmill stock to be returned. POB at 24-25 and authorities cited therein. The

evidence in the record is clear. Winmill has been dark, that is no public disclosures, for a decade. Winmill pays no dividends. *Id.* and the citations therein. In short, from an investor standpoint, Winmill is a blackhole. Nonetheless, its stock still trades, intermittently, and at the time of trial had a current bid price of $1.00. No principle of Delaware law permits accepting this as the fair value or fair market value of Winmill stock, and Defendants do not argue otherwise. *Id*. The evidence in the record, Winmill's financials, show that Winmill has a substantial net book value. POB at 24-26. Thus, even were it appropriate for the Court to have considered the argument, made for the first time after trial, that rescission was not in Winmill's best interests, based upon documents produced on the eve of trial, the only reliable and legally cognizable evidence of the value of Winmill stock was that it was worth far more than any required rescission payment.

Indeed, Defendants' argument about stock price, first presented on page 58 of its post-trial brief, was not that the OTC price represented an appropriate value for Winmill and as a result rescission would injure Winmill on that basis. B1073-74. The argument as to the OTC price was that it was the value of the stock to the Individual Defendants and that rescission would benefit the Individual Defendants. *Id*. Of course, Defendants' sworn testimony that they would benefit from a rescission, is belied by their scorched earth resistance to rescission.

To the extent there is a lack of information about Winmill, it is Defendants' own doing and cannot serve to deny rescission. When a defendant's misconduct causes an "evidentiary uncertainty" in calculating damages, "such ambiguities are construed against the self-conflicted [defendant] who created them." *Auriga Capital Corp. v. Gatz Properties*, 40 A.3d 839, 875 (Del. Ch. 2012); *Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *12 (Del. Ch. October 29, 1993) (holding that "once a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer"). "A defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) (cited in *Auriga Capital Corp. v. Gatz Properties*, 40 A.3d 838, 877 n.160 (Del. Ch. 2012)).

c. Defendants Do Not Dispute That Rescissory Damages Based Upon a Price of $6.50 per Share or Compensatory Damages in the Amounts Not Paid on the Notes Could Have Been Ordered.

Defendants do not address Plaintiff's Opening Argument Section I.C.5, and therefore do not dispute, that the Court erred in concluding that the record did not contain sufficient evidence of an intervening market price of $6.50 on which it could have awarded rescissory damages. Nor do Defendants dispute that it is logically inconsistent and irreconcilable for the Court to have rejected the intervening $6.50

OTC market price as unreliable in determining whether to award rescissory damages, and to have accepted the $1.00 OTC market price as reliable in determining whether to award rescission.

Similarly, Defendants do not address that the undisputed evidence was that neither Thomas nor Mark paid any principal on their notes and, as noted below, the payment by Bassett's estate was in fact a gift. These amounts, totaled $585,000. The Court's decision that there was "no evidentiary basis" for compensatory damages (*Opinion* at 50) is simply inaccurate. Nor is it accurate, as Defendants claim, that such relief is outside what Plaintiff requested at trial. Not only does the Opinion note the request, *Opinion* at 50, the Joint Pre-Trial Stipulation and Order at 10 asks as relief "such other and further relief as the Court deems just, proper and equitable." A816.

d. Defendants Do Not Dispute the Entire Principal Balances of the Notes Were Forgiven.

Defendants do not address Plaintiff's Opening Argument Section I.C.6 and therefore do not deny that the entire principal balances of the Notes were forgiven. Nor do Defendants address Plaintiff's cited authorities holding that, because the "repayment" by Bassett's estate was on a note *reinstated at his request*, the payment was a gift, not consideration for the exercise of the options. POB at 27-29.

B. The Court's Conclusion That the Repayment of Interest Was Required for Rescission Was Flawed: Legally, Factually and Logically.

The Court's explanation that interest payments on the Notes are payments for the exercise of the options, first made in its decision on the Motion for Reargument, is a conclusion legally, factually, and logically flawed and is inconsistent with Defendants' prior contentions. Before and at trial, Defendants contended that the payment of the exercise of the options were the Notes themselves and that any subsequent activity regarding the Notes was a separate compensation issue independent of the payment for the options. B509-510. They should not now be heard to argue a contrary position, particularly one never advanced below. See, *Motorola Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859 (Del. 2008).

The options grants specify the price was $2.948 per share and the entire decision below was premised on the options having been issued and exercised at that price. See, A209. Winmill's financial statements immediately thereafter and until they were discontinued, carried the options as having been exercised at that price and stock issued thereunder as having been purchased for that price. See, A240, 295, 335, 361. The prices received by Winmill for the exercise did not vary depending on how much interest was paid on the notes. *Id*.

Further, the contention is illogical and contrary to established accounting practices. If one buys property with borrowed money, the basis or amount paid is the

principal amount paid, not the principal amount plus all interest paid on the debt. The illogic of Defendants' contention can be seen by considering that, under Defendant's interpretation, if one of the Defendants had paid cash in full upon the exercise and another had paid interest for 5 years on his Note and then paid the principal, the two defendants would have paid different amounts for the exercise of identical grants, and Winmill's records would have to reflect that difference, despite having issued identical grants to be exercised at identical prices. In short, the exercise price is the exercise price set out in the contract and no Defendant ever paid more than $1,500 of it. Thus, the amount required to be returned is approximately $1,500 each. Defendants do not deny that if these are the required repayments, rescission is appropriate.

The cases cited by the Court, in its decision on the Motion for Reconsideration, to support its conclusion that the payment of interest on the Notes constitutes payment for the exercise of the options simply do not support its conclusion. *Cigna Health and Life Insurance Company v. Audax Health Solutions, Inc.*, 107 A.3d 1082, 1088 (Del. Ch. 2014) say nothing about equating the payment of interest on a note given as consideration with payment on the principal underlying obligation. *Enloe v. Gorkin*, 1990 WL 263563 (Del. Super. Dec 26, 1990), cited by the Court, and the rest of footnote 28 of the Court's April 27, 2018 letter opinion make clear that the consideration for the exercise, was the Notes, not subsequent

interest payments. *Pyle v. Gallaher*, 75 A. 373, 375 (Del. Super. 1905), also cited by the Court, makes clear that an interest payment is a payment "on account of the note" not the underlying obligation. The question of what a note was issued in consideration for, is a separate issue.

Defendants never even address these authorities nor the Court's decision, except to say in a general manner that it was correct. DAB at 34. Further, even were the Court corrected as to a principal amount being due to Bassett and that amount exceeding the value of the stock, which it was not, rescission should have been ordered, particularly as to the other Individual Defendants.

C. The Trial Court Erred in Permitting a Defense to Rescission First Raised Post-Trial and in Placing on Plaintiff the Burden of Anticipating and Disproving That Defense.

While Defendants assert the Court properly admitted evidence of repayment and other matters not disclosed in discovery, Defendants never address the error of the Court in allowing a defense to rescission first raised post-trial, albeit in a form different than as applied by the Court. The defense as applied by the Court was never raised.

Defendants do not, and cannot, deny that their defense to rescission was not raised in the pretrial order. See A815–816 (listing Defendants' issues of fact and law which remained to be litigated, none of which suggests any challenge to the availability of rescission should Plaintiff prevail on its breach of fiduciary duty

claim). Defendants first raised the contention that rescission was not appropriate on page 58 of their Post-Trial Answering Brief. B1073. Defendants 1½ page argument, as it related to the value of Winmill stock, only stated that rescission would benefit the Individual Defendants as the current stock price was less than they paid. B1074. The purported harm to Winmill was spending approximately $276,000 of its $2,760,000 available cash and possibly having to refile tax returns. *Id*. Nowhere did Defendants ever contend that the illiquid stock price on the OTC market constituted an appropriate basis to value Winmill stock in the hands of Winmill.

The purported injury to Winmill was the use of 10% of its available cash (based upon an inflated repayment obligation) and the speculation that revised tax returns might be required. B1073-1074. How payment, even of the inflated amount, would be an unacceptable cost, when Winmill's cash alone was ten times the amount Defendants claim was owed, appears nowhere in the record and has never been explained. The mere fact that some repayment was required cannot be a cognizable basis to prevent rescission; otherwise rescission would never be available. How the mere possibility of refiling a tax return at an unspecified cost could have been an unacceptable risk to the Company also appears nowhere in the record or Defendants' Answering Brief.

In short, not only was Plaintiff never given fair notice that any defense as to the availability of rescission would be raised at trial, Defendants did not even make

the argument used by the Court to deny rescission. For these reasons and based upon the authorities cited in Plaintiff's Opening Brief at 22-23, this was reversable error.

Defendants concede the Court placed on Plaintiff the burden of disproving Defendants' contention regarding the unavailability of rescission. Defendants argue that even in an entire fairness case, a plaintiff has the burden of establishing damages, which they equate to a burden of proscriptively disproving every possible defense to rescission. This argument is flawed.

The remedy of rescission is not a damages remedy. *Zebroski v. Aggressive Direct Insurance Company*, 2014 WL 2156984 (Del. Ch. April 30, 2014); *Winston v. Mandor*, 710 A.2d 831, 833–34 (Del. Ch. 1996); *Russell v. Universal Homes, Inc.*, 1991 WL 94357 (Del. Ch. May 23, 1991). Thus, Defendants' citations as to cases where monetary damages are sought are inapposite. See, *Beard Research, Inc. v. Cates*, 8 A.2d 573 (Del. Ch. 2010); *In re PLX Technology Inc. Stockholder Litigation*, 2018 WL 5018535 (Del. Ch. October 16, 2018); *Klein v. Greylock*, 2010 WL 761142 (Del. Ch. March 2, 2010). Indeed, the foregoing cases did not even involve entire fairness. *Encite, LLC v. Soni*, 2011 WL 5910896 (Del. Ch. November 28, 2011) ("*Encite*"), also cited by Defendants, did involve entire fairness but, was a decision denying summary judgment in favor of the party who bore the burden of proving entire fairness. As it related to Plaintiff's burden on damages, the case again addressed monetary damages and simply stated that it was plaintiff's obligation to

identify a viable damages theory which related to those damages to the alleged wrong. *Id* at *24.

Indeed, *Encite* highlights the error of the Court in this case. "Where this Court finds that a breach of a fiduciary duty has occurred, the specificity and amount of evidence required from the Plaintiff on the issue of damages is minimal. … . [A] duty of loyalty breach loosens the stringent requirements of causation and damages. Any uncertainty in awarding damages is resolved against the wrongdoer." *Id* at *25 (internal quotations and footnotes omitted).

A right to rescission is established by showing it would be unjust and inequitable to permit a person to retain property or a benefit improperly obtained. *Norton v. Poplos*, 443 A.2d 1, 4 (Del. 1982); *Kostyszyn v. Martuscelli*, 2014 WL 3510676 at *5 (Del. Ch. July 14, 2014); Restatement (First) of Restitution §§3, 55. An argument that a change of circumstance makes rescission impractical is a *defense* to rescission. Restatement (First) of Restitution §§69 (2), 142, 143 (1937) (emphasis added). Even were it Plaintiff's burden to have proved Defendants' unjust and inequitable conduct made unjust and inequitable the retention of the stock obtained through improperly issued options and the improper forgiveness of Notes, such proof was clearly made and accepted by the Court. See *Opinion* at 35-46 (in discussing the purported basis for the options and Note forgiveness the Court used unequivocal language: "the evidence reveals that there really was no process" … "no evidence"

… "no indication" … "troubling lack of any contemporaneous evidence" … "severely flawed" … "no evidence (contemporaneous or otherwise)" … "simply not credible" … "could not reasonably have believed"… "nothing meaningful to ensure that the decisions … were fair"… "no attempt to document… [anything] that would justify"… "focused on the[ir] personal interests … throughout").

Plaintiff is unaware of and Defendants cite to no case where a plaintiff was required to anticipate and disapprove at trial all possible defenses to rescission, even in a case not involving entire fairness. Delaware places on a defendant the burden of proving defenses to or matters constituting an avoidance of requested remedies. See, *TA Operating LLC v. Comdata, Inc.*, 2011 WL 3981138 at *21 (Del. Ch. September 11, 2013); *In re Oxbow Carbon Unitholder Litigation*, 2018 WL 818760 at *48 (Del. Ch. February 12, 2018); *In re Nantucket Island Associates Ltd. Partnership Unitholders Litigation*, 2002 WL 31926614 at *2 (Del. Ch. December 16, 2002); Chancery Rule 8(c).

D. The Trial Court Considered But Erroneously Rejected an Award of Damages or Rescissory Damages.

1. The Issue of Damages was Presented to and Ruled Upon by the Court.

"I agree with Plaintiff that compensatory damages are an appropriate means by which to remedy a breach of the duty of loyalty." *Opinion* at 50. Defendants' assertion that a request for compensatory damages was not presented below is belied

by the Opinion itself, as to which Defendants have claimed no error.[6] This issue was presented and ruled upon, albeit erroneously, by the Court.

2. The Court Erred in Holding No Evidence Existed Upon Which Compensatory Damages Could Be Awarded.

In its ruling the Court stated: "the Board [the Individual Defendants] forgave those Notes [from the Individual Defendants to the Company] long before the principal balance [$585,000 in total] was even touched." (Opinion at 43-44). The Court further stated: "Plaintiff, however, presented absolutely no evidence upon which the Court could justify an award of compensatory damages to the Company." (Opinion at 50). These two statements are irreconcilable. The uncontroverted evidence, in the unchallenged factual finding[7] by the Court, is that the Individual Defendants improperly forgave $585,000 in debt they owed the Company.

This constitutes an appropriate basis for an award of compensatory damages and neither the Court nor Defendants have explained otherwise. Therefore, to the extent the Court was looking in the record for evidence of monetary damages, it is

[6] For further example, in the pretrial order, Plaintiff requested such other relief as the court found just and appropriate. A816.

[7] The only principal payment even arguably that was made, by the estate of Bassett Winmill, was indisputably voluntary and at Bassett Winmill's request. Defendants did not address any of Plaintiff's authorities establishing that under the circumstances this unquestionably was a gift and does not constitute consideration for the options. See, Argument I.A.3.d, *supra*.

clear that Winmill was damaged in at least the amount of approximately $600,000, the principal amounts not paid, plus interest.

3. The Court Erred in Holding No Evidence Existed Upon Which Rescissory Damages Could Be Awarded.

There is also unchallenged evidence that the intervening stock price of Winmill reached at least $6.50 per share. While Plaintiff asserted that the thinly traded OTC market did not constitute a reliable basis to value Winmill stock, the Court rejected this argument, when it found the even less liquid OTC price of $1.00 as of trial was a reliable indicator of Winmill stock's value. If the OTC price is reliable, the Court should have accepted the intervening $6.50 price as sufficient to warrant rescissory damages. See, *Opinion* at 57–59.

Because, at all times, Plaintiff contended that the option price itself was unfair, an argument Plaintiff was precluded from presenting at trial as a result of interlocutory rulings by the Court, requiring Plaintiff to abandon this claim, that the options pricing was unfair upon issuance, and to pursue "specific performance" (in the Court's words) was not required. This is particularly true since, the Court's decision as to denying rescission was premised upon surprise evidence improperly admitted at trial and a variation of a theory even Defendants admit they did not raise until after trial. How Plaintiff could be faulted for not presenting trial evidence about

or briefing, prior to trial, a theory that Defendants did not raise until after trial, is never explained.

D. The Court Erred in Permitting Untimely Evidence Not Disclosed in Discovery and in Considering an Issue Not Set Forth in the Pretrial Order.

Trial by surprise is unfair. See POB at 22-23, and authorities cited therein.

The evidentiary material admittedly withheld by the Defendants was responsive to the discovery requests served early in the case. That material also was the subject of a motion to compel which was denied based on Defendants' representations that no such documents existed. Plaintiff made timely objection to the material. A825-837. The Court's reliance upon this evidence, by definition, means the evidence was material and admitting it was error. See, authorities cited in POB at 12-14, 22-23. Any contention that having objected to the admission of the documents, Plaintiff was then obliged to continue objecting to testimony related to those documents is without merit. *Hoey v. Hawkins*, 332 A.2d 403, 405 n. 1 (Del. 1975). Similarly, Defendants' bald claim that this same evidence would have been admissible by testimony, even if the Court had excluded the documents for failure to have produced them timely, simply makes no sense. DAB at 26 n. 12. Withholding evidence is withholding evidence, regardless of its form.

Similarly, the assertion that rescission was not in the best interests of Winmill, in addition to relying on the improperly admitted evidence, was in issue not set forth

in the Pretrial Order. Thus, even if the Court properly admitted the disputed evidence, considering the untimely issue was improper. See, authorities cited in POB at 22-23.

II. The Court Erred Denying, as a Matter of Law, Plaintiff's Challenges to the Adoption of the PEP.

As to this argument, Defendants' Answering Brief raises only three points warranting a reply. As to the rest of Defendants' argument, Plaintiff relies upon and does not repeat the points raised in its Opening Brief. Supreme Court Rule 14(c)(1).

First, as to the Court's finding of laches regarding the altered consent purporting to adopt and authorize the PEP, Defendants fail to identify the purported prejudice they suffered. Prejudice is a required element of laches. *Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000) ("*Fike*"). Finding that prejudice existed, without even permitting the parties to take discovery so that the Court could know the extent of prejudice, if any, was reversible error.

Defendants' argument that they were under no obligation to inform Plaintiff of the alteration of the consent originally produced (DAB at 47 n. 19), in fact concedes that they never informed Plaintiff of this fact. This identifies another fatal error in the Court's laches decision. At what point and by what event was Plaintiff put on notice of the alteration? A required element of laches is that the party knew or was on notice of the claim. *Fike, supra*. Defendants have never explained, nor did the Court's decision identify, any event or date by which Plaintiff learned of or was on notice of this alteration. Therefore, never having found or established the date by which Plaintiff knew or should have known of the alteration, even assuming it was

a different claim than the existing challenge to the options, the decision by the Court that Plaintiff waited *too long thereafter* to bring the claim, is logically and fatally flawed.

Second, as to the initial dismissal of the challenge to adopting the PEP, Defendants acknowledge that, on reargument, the Court acknowledged its calculation error and that based on the allegations in the Complaint, the PEP was designed to provide the Individual Defendants more than 50% of the total equity of Winmill and control of all votes of any nature. DAB at 39. Thus, the conclusion that the Complaint failed to allege facts sufficient to include a claim of impairment of voting rights is not defensible.

As the Opinion recognized, the Individual Defendants were the "only beneficiaries" of the PEP. *Opinion* at 40. The Complaint also alleged the PEP was adopted by the interested conflicted Individual Defendants without any independent review or input or indicia of fairness. C.A. 3730, D.I. 1. The factual allegations of self-dealing and lack of any indicia of fairness in adopting the PEP, were the same facts ultimately proven at trial which were found to establish the breaches of the duty of loyalty as to the issuance of the options and their exercise.

The Defendants concede that the Complaint alleged the disclosed basis to price options was stated to be fair value and that the PEP did not use this standard

but instead used a standard of 110% of the illiquid OTC market price. The Complaint alleged these were not equivalent, and Delaware law is clear that an illiquid thinly-traded market price is not a reliable indicator of value. See A593-594, 598-605. Defendants postulating a "typo" as the reason for the disparity between the disclosures and the purported fact is irrelevant to the validity of the claims asserted. What is relevant is that the Court impermissibly ignored the specific allegations of the Complaint, consistent with the disclosures, and accepted Defendants' contrary factual contentions. Based upon these allegations and the granting of total control to the Individual Defendants without adequate consideration (even accepting the use of 110% of the illiquid market price), the Complaint also alleged valid derivative and individual claims as to the adoption of the PEP.

III. The Court Erred in Dismissing, as a Matter of Law, Substantially All of Plaintiff's Claim That the Individual Defendants Operate Winmill Solely for Their Own Benefit and in Denying the Remainder After Trial.

Defendants acknowledge that the Court piecemeal dismantled Plaintiff's Self-Interested Operation Claim. DAB at 1, 49, 52. They never explain, however, why a claim as set out in Plaintiff's proposed amended complaint (A530–577) that the Individual Defendants: do not operate Winmill "for the benefit of all stockholders, but to maximize their own personal financial rewards and compensation…" (¶ 24), "without any legitimate purpose, have caused the Company to refuse to give appropriate financial information to its shareholders…" (¶ 55), one purpose of Defendants' actions "is to keep the price of the Company's stock depressed so as to be able to issue themselves options and favorable prices [and]… to keep the stock price depressed so as to lower the cost of buyback shares…" (¶ 65), and "defendants instead operate the Company in secret and as if they had have no other stockholders" (¶ 97), all incorporated and summarized in the proposed Count VIII (A575) supported by the specific allegations Plaintiff made, would not state a claim for breach of fiduciary duty. Indeed, Defendants fail to identify a single thing Defendants have done in the last 10 years that was of a benefit to anyone other than themselves. Critically, no decision by the Court ever explains why such a claim fails. POB Ex. D-H.

Nor, as explained in Plaintiff's Opening Brief, is the denial of the narrowed claim regarding preparing financial statements defensible. Not only does the timing of terminating the preparation of statements belie Defendants' self-serving explanation, they never explain, and there was no evidence presented at trial, to justify anything beyond terminating the *outside audit* of those statements. The record is without any justification for the termination of the preparation of the statements themselves. The cited testimony in Defendants' Statement of Facts (B736–738, B895–896), related solely to the cost of "audit[ing]" the financial statements. Defendants failed to cite to any, and there is no evidence in the record justifying the termination of preparation of unaudited financial statements. The claim in Defendants' brief that such statements are in fact prepared, is belied by the very documents which they cite. Joint Trial Exhibits 91 and 63-65 (A484, 511, 513, 515), do not contain anything beyond generalized aggregated information, do not contain any of the usual information found in financial statements regarding assets, insider compensation, related party transactions, risk factors, etc., and do not include, as Defendants claim (DAB at 13), even summary total employment costs, rent occupancy costs or taxes. The Court erred in finding for Defendants on this claim.

ARGUMENT ON CROSS-APPEAL

I. The Court of Chancery Correctly Ruled That Ravenswood Was Entitled to $140,000 in Legal Fees and $25,000 in Expenses Under the Corporate Benefit Doctrine.

A. Question Presented

Whether the Court Properly Exercised Its Discretion in Awarding Plaintiff's Counsel's Fees and Expenses Under the Corporate Benefit Doctrine and Properly Rejected Defendants' Legal Argument that an Award was Precluded by the Common Fund Doctrine?

B. Scope of Review

An award of a fee under the corporate benefit doctrine will be sustained absent a clear showing of abuse of discretion. *Tandycraft, Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989). The legal principles applied by the Court in reaching a fee decision under the corporate benefit doctrine are reviewed *de novo*. *Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011, 1015 (Del. 2007).

C. Merits of Argument

1. The Court Properly Rejected Defendants' Implied Legal Argument That a Corporate Benefit Award was Impermissible.

Defendants' argument on cross-appeal is bereft of both authority and clarity. With the exception of the contention that the Court's determination of the existence of a corporate benefit was an abuse of discretion, Defendants do not make clear at all what else they consider to be the Court errors of law or abuses of discretion. Defendants' Cross-Appeal Argument Section I.C.1 is a general recitation of certain authorities without any effort to tie those authorities legally or factually to the instant

case. As a result, Plaintiff does not know how, if at all, Defendants contend those authorities either support or contradict the decision below.

Defendants' Argument on Cross-Appeal Section I.C.2 is essentially a statement of facts. Plaintiff's response to which is made, as appropriate, in Plaintiff's Answering Statement of Facts above.

Defendants' only assigned error in their cross-appeal is the alleged abuse of discretion in finding the existence of a corporate benefit purportedly without any factual basis. DAB at 59. Although not presented as legal argument, Defendants make several implied legal contentions, unsupported by any citation to authority, which are contrary to existing authority. They are:

(1) that nominal damages constitute an award of monetary damages which create a common fund (a proposition contrary to *Ravenswood Investment Company, L.P. v. Estate of Winmill*, 2018 WL 1410860 at *25 (Del. Ch. August 15, 2018) citing See, *Guthridge v. PenMod, Inc.*, 239 A.2d 709, 714 (Del. Super. 1967) (nominal damages assessed for purpose of declaring a wrong and are "damages in name only"); *Penn Mart Supermarkets, Inc., v. New Castle Shopping LLC*, 2005 WL 3502054 at *15 (Del. Ch. December 15, 2005) (nominal damages awarded where actual damages not demonstrated));

(2) that the existence of a common fund precludes an award for a corporate benefit (a proposition contrary to *Sugarland Industries, Inc., v. Thomas*, 420 A.2d 142, 152 (Del. 1980) ("*Sugarland*") and *Malone v. Brincat*, 722 A.2d 5, 12 n. 27 (Del. 1998)); and

(3) that fees can be awarded only for relief specifically sought in a complaint (a proposition not only based on a factual error but also contrary to *Franklin Balance Sheet Investment Fund v. Crowley*, 2007 WL 2495018 at *12 (Del. Ch. Aug 30, 2007) (awarding a fee despite the conclusion that the benefit obtained was not contemplated by the litigation)).

2. The Court's Finding of a Corporate Benefit is Factually Based and Not an Abuse of Discretion.

"In cases where the benefit created was not quantifiable, the *quantum meruit* approach has been utilized." *Robert N. Bass Group, Inc. v. Evans*, 1989 WL 137936 at *4 (Del. Ch. November 16, 1989) (citing *In re Diamond Shamrock Corporation*, 1988 WL 94752 (Del. Ch. September 14, 1988) ("*Diamond Shamrock*") and *Sugarland*, *supra*.) "[W]here, as here, the benefit conferred by the fee applicant cannot be quantified, the *quantum meruit* approach is often the only method that, as a practical matter, will enable the Court adequately to perform its fee-boarding function." *Id.*

"A corporate benefit need not be measurable in economic terms and as a result of changes in corporate policy or a heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees." *San Antonio Fire & Police Pension Fund v. Bradberry*, 2010 WL 4273171 at *7 (Del. Ch. October 28, 2010) (internal citations and quotations omitted) ("*San Antonio*"). *Dover Historical Society, Inc. v. City of Dover Planning Commission*, 902 A.2d 1084, 1090 (Del. 2006). "The definition of a corporate benefit… is… elastic. While the benefit achieved may have an indirect economic effect on the corporation…, the benefit need not be measurable in economic terms." *Tandycrafts, supra*. A pecuniary benefit is not a prerequisite to a fee award. *Allied Artist Pictures Corporation v. Barron*, 413 A.2d 876, 878 (Del. 1980) (citing *Chrysler Corporation v. Dann*, 223 A.2d 384, 386 (Del. 1966)). The Court considers the nature and importance of the benefit. In *San Antonio Fire & Police Pension Fund v. Bradberry*, 2010 WL 4273171 at *8 (Del. Ch. October 28, 2010), it was the corporate franchise, here it is protection from controlling shareholders self-dealing transactions. See, *Cal-Maine Foods, Inc. v. Pyles*, 858 A.2d 927 (Del. 2004) (awarding a *quantum meruit* fee for litigation regarding a transaction that was later abandoned and left the Company and shareholders in the *status quo*).

Even where the monetary benefit has been shown to be $0, *quantum meruit* will serve as a basis for a fee award. See, *Diamond Shamrock* at *4 (finding that an

increase in value from the litigation was offset by a diminution in value of "that same amount"). Indeed, in *Sugarland*, *supra* at 148, a corporate benefit was found for an "effort to bring harmony to the Kempner family …" and a fee of $500,000 (in 1980) was awarded for that benefit. Indeed, courts have awarded such fees even "after concluding that the benefit created by the litigation was meager or speculative." *In Re Golden State Bancorp Inc. Shareholders Litigation*, 2000 WL 62964 at *3 (Del. Ch. January 7, 2000).

The benefits achieved by this case, go to a "pillar" of Delaware corporate jurisprudence, protection of the shareholders' right to have the corporation run for the benefit of all shareholders against breaches of the duty of loyalty. *Opinion* at 1. See, *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433–34 (Del. 2012) (litigation showed "real evidence of loyalty breaches"). They serve an important function as to Winmill, clearly delineating the Defendants' failure to the appropriate standards in the operation of Winmill and setting a precedent for future actions by the Defendants regarding the Company. See, *San Antonio, supra.* (future impact warrants a *quantum meruit* fee).

The assertion that the decision after trial only stated that directors have a duty of loyalty, not only ignores the decision, it fails to address the Court's specific rejection of that contention. Fee Decision at 13-14, 18, 26, 33-34. Nor do Defendants cite any authority for the unstated and indefensible premise of their assertion, that

fees are available only when a decision establishes something "new under Delaware law." DAB at 60.

As Defendants have not challenged the determination of the dollar amount of the Corporate Benefit fee, Plaintiff shall not discuss the Court's obvious discretion in making that determination.

CONCLUSION

For the foregoing reasons, the decision of the Court should be reversed, and the matter remanded with instructions to order rescission premised upon repayment of the initial deposits of less than $4,500, or, alternatively, monetary damages of $585,000 interest or rescissory damages based upon $6.50 per share, plus interest, and for such further proceedings are as appropriate consistent with the modification of the relief obtained.

Dated: January 14, 2019

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