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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CCSB FINANCIAL CORP., Defendant-Below, Appellant, v. DEANN M. TOTTA, LAURIE MORRISSEY, CHASE WATSON, AND PARK G.P., INC. Plaintiffs-Below, Appellees.	No. 424-2022 Court Below: Court of Chancery of the State of Delaware C.A. No. 2021-0173

AMENDED APPELLANT CCSB FINANCIAL CORP.'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

Defendant-Appellant CCSB Financial Corporation ("CCSB") respectfully submits this Opening Brief in Support of its Appeal from the Court of Chancery's May 31, 2022 Post-Trial Memorandum Opinion, July 18, 2022 Order granting declaratory judgment and costs to Plaintiffs/Appellees, November 3, 2022 Letter Decision granting attorneys' fees, and November 4, 2022 Order granting reimbursement of attorneys' fees and Final Judgment.

This is an appeal from a decision of the Court of Chancery holding that CCSB's incumbent Board of Directors (the "Board") improperly and inequitably applied a provision in CCSB's Certificate of Incorporation limiting any stockholder's voting rights to ten percent of the Company's outstanding shares (the "Voting Limitation"). The Voting Limitation was applied to the 2021 annual stockholder vote in which an executive of CCSB's competitor, David Johnson, and a company owned by him nominated rival directors to CCSB's Board. Following application of the Voting Limitation to Johnson and other stockholders acting in concert with him (consistent with the Certificate of Incorporation), the Board's nominees won election to the Board and Johnson's nominees lost.

Plaintiffs filed a Section 225 suit seeking a declaratory judgment that the application of the Voting Limitation was invalid. Following a one-day trial on the paper record, the Court concluded that enhanced scrutiny should apply, that the

Board lacked a compelling justification supporting application of the Voting Limitation, and that the Board's action was thus invalid. The Court thus concluded that Johnson's nominees should be seated as directors. As set forth below, however, the Court's ruling suffers from legal error and mistaken factual findings, and should be reversed for several independent reasons.

SUMMARY OF THE ARGUMENT

1. The Court erred in refusing to apply the business judgment rule to the Board's application of the Voting Limitation. CCSB's Certificate of Incorporation provides that "any constructions, applications, or determinations made by the Board" with respect to the Voting Limitation shall be "conclusive and binding upon the Corporation and its stockholders."[1] That includes any determination regarding the "applicability or effect of the Voting Limitation."[2] Such language clearly invokes the business judgment rule, as the Court below recognized. Delaware law recognizes the rights of stockholders to modify the default standard of review applicable to corporate governance. Yet, while superficially recognizing the distinction between the standard of review and standard of conduct, the Court conflated the two, citing authorities dealing with a company's ability (or lack thereof) to modify the content of directors' substantive fiduciary duties and asserting that CCSB was trying to insulate the Board's actions from review. That was error. In fact, it is consistent with Delaware law that stockholders of a community bank can, through the certificate of incorporation, modify the standard of review of a board decision applying a voting provision adopted to further the goals of Congress when it passed the Change in Bank Control Act of 1978, 12 U.S.C §1817(j) ("CIBCA").

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[1] A00023 art. 4(C)(6).

[2] A00022 art. 4(C)(4).

2. Even assuming enhanced scrutiny were to apply to the Board's actions, the Court erred in applying the *Blasius* standard of review.[3] Unlike *Blasius*, this is not a case where a board adopted anti-takeover provisions directly in response to an existing threat to its control of the company from a stockholder. Instead, the provision was adopted and placed into the Certificate of Incorporation. The facts here do not support that the Board adopted the Voting Limitation out of an entrenchment motive—the main consideration that justifies application of *Blasius*. Instead, the Voting Limitation was adopted twenty years ago, on a "clear day," long before Johnson even became a stockholder of CCSB. Thus, even if enhanced scrutiny were to apply, the Court should have applied the *Unocal* standard of review because the Board acted in response to a threat to CCSB's effectiveness rather than to entrench its own power.[4]

3. The Board's application of the Voting Limitation easily passes scrutiny under *Unocal*, as it was reasonable and proportional. But even under *Blasius*, the Board's action was supported by a compelling justification. It both was responsive to the concerns underlying CIBCA and ensured that CCSB's affairs are conducted in the interests of all stockholders, not only large ones. Moreover, enforcement of

[3] *See Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

[4] *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

the Voting Limitation is appropriate here, where an executive of CCSB's competitors seeks to use his economic might to acquire an outsize percentage of CCSB's outstanding stock and use it to impose his will on the remaining stockholders. That is a "compelling justification."

4. The Court also misapplied the burden of proof in finding that no "control group" existed sufficient to group together stock owned by affiliated stockholders for purposes of invoking the Voting Limitation. Although the opinion below nominally recognized that Plaintiffs bore the burden of proof with respect to their challenge to the Board's action, in effect, the decision placed the burden on CCSB to prove the existence of a "control group" rather than on Plaintiffs to disprove the existence of such a group. That is even more clearly error because the applicable regulations impose a rebuttable presumption of "acting in concert" with respect to immediate family members and certain executives of corporations,[5] and because the Chancellor erroneously concluded that the Kansas City Federal Reserve determined that the company owned by a friend of Johnson's, DEW, LLC ("DEW") was not a member of the control group led by Johnson (the "Johnson Control Group"). Plaintiffs failed to proffer evidence rebutting the "acting in concert" presumption or disproving the existence of a control group.

[5] 12 C.F.R. § 225.41(d).

5. Finally, the Court's award of attorneys' fees should be reversed, both because its finding of liability should be overturned and because the Court abused its discretion in awarding fees.

STATEMENT OF FACTS

I. The Parties

CCSB is a Delaware corporation that wholly owns Clay County Savings Bank (the "Bank"), a community bank operating in Clay County, Missouri.[6] As of December 3, 2020—the record date for the meeting of stockholders at issue in this case (the "Record Date")—the Company had 743,071 shares of common stock outstanding, comprising all of its outstanding voting power.[7] As of that date, CCSB's Board consisted of David Feess (who also served as the chairman of the Board), Mario Usera, Deborah Jones, Louis Freeman, Debra Coltman, Robert Durden, and George McKinley.[8] Usera is CCSB's and the Bank's president and CEO, and was the beneficial owner of approximately 10.56% of CCSB's stock as of the Record Date.[9] CCSB's Board is staggered; only three of the seven Board seats were up for election at the 2021 election.[10]

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[6] A0368 ¶5.

[7] A0367 ¶1, A0368 ¶5.

[8] A0368 ¶6.

[9] A0369 ¶9.

[10] A0368 ¶6.

Plaintiff-Appellee Park G.P., Inc. ("Park") owned 3,398 shares of CCSB's common stock as of the Record Date.[11] Non-party David Johnson is the sole stockholder of Park.[12] He also is the controlling stockholder and a board member of First Missouri Bank, a competitor of the Bank, and a stockholder of every other bank in the Kansas City Area.[13] Plaintiff-Appellee DeAnn Totta is Park's president.[14] Plaintiff-Appellee Chase Watson is a manager of MLake 96 LLC ("MLake"), which is majority-owned by Johnson and which itself owned 500 shares of CCSB as of the Record Date.[15] Plaintiff-Appellee Laurie Morrissey, who performed marketing work for Johnson over a period of several years, beneficially owned 100 shares of CCSB as of the Record Date, which she purchased at Johnson's recommendation.[16] Park nominated each of Totta, Chase Watson, and Morrissey for election to the

[11] A0367 ¶2.

[12] *Id*. ¶1.

[13] A0373 ¶32; Mem. Op. at 5-6; A0338 ¶2.

[14] A0367 ¶2.

[15] A0368 ¶3.

[16] A0361-362 at 22:18-23:19, A0363 at 28:2-8; A0368 ¶4.

Board at CCSB's 2021 annual meeting.[17] Usera, Jones, and Freeman stood for re-election.[18]

II. CCSB's Certificate of Incorporation

The Bank was founded in March 1922 as a savings and loan association.[19] CCSB was incorporated in September 2002 as a holding company for the Bank, which converted to a federally chartered savings bank in 2003.[20] CCSB's Certificate of Incorporation, which was filed on September 13, 2002, sets forth a "Voting Limitation."[21] The Certificate provides:

> Notwithstanding any other provision of this Certificate of Incorporation, in no event shall any record owner of any outstanding Common Stock which is beneficially owned, directly or indirectly, by a person who, as of any record date for the determination of stockholders entitled to vote on any matter, beneficially owns in excess of ten percent (10%) of the then-outstanding shares of Common Stock (the "Limit") be entitled, or permitted to any vote in respect of the shares held in excess of the Limit.[22]

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[17] A0372 ¶24.

[18] A0368 ¶6.

[19] A0018.

[20] *Id.*

[21] A0020-21.

[22] A0020-21 art. 4(C)(1).

"Person" is defined to include "a group acting in concert."[23] The Certificate further provides that "any constructions, applications, or determinations made by the Board of Directors pursuant to this section in good faith and on the basis of such information and assistance as was then reasonably available" shall be "conclusive and binding upon the Corporation and its stockholders."[24] Notably, those determinations explicitly include "all determinations necessary or desirable to implement" that section, "including but not limited to matters with respect to (i) the number of shares of Common Stock beneficially owned by any person, (ii) whether a person is an affiliate of another, (iii) whether a person has an agreement, arrangement, or understanding with another as to the matters referred to in the definition of beneficial ownership, (iv) the application of any other definition or operative provision of this section to the given facts, or (v) any other matter relating to the applicability or effect of this section."[25]

III. Johnson's Historical Attempts to Seat Directors on CCSB's Board and Gain Control of the Bank

As early as 2011, Johnson attempted to seat himself and another nominee to two CCSB Board seats that were up for election through a company named Jefferson

[23] A0022 art. 4(c)(2)(d).

[24] A0023 art. 4(C)(6).

[25] A0022 art. 4(C)(3).

Acquisition LLC ("Jefferson Acquisition").[26] Jefferson Acquisition's nominees lost, and it filed suit in Missouri state court against CCSB and the Board, alleging that the Board had breached its fiduciary duties in connection with the election.[27] That action was dismissed, and its dismissal was affirmed on appeal.[28]

Jefferson Acquisition again nominated candidates at CCSB's 2012 Board election, and lost again.[29] Johnson issued a letter to CCSB's stockholders (who he termed "Our Fellow Aggrieved Shareholders") on June 14, 2012 raising the "threat of a regulator take-over" due to the Bank's alleged poor performance.[30] CCSB rebutted Johnson's claims, and in response, Johnson sued CCSB's then-CEO and Usera for defamation and other causes of action.[31] Johnson also lost that action.[32]

Several years later, in a Federal Register notice dated May 19, 2015, the Federal Reserve announced that Johnson and his wife had each applied to acquire

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[26] Mem. Op. at 7.

[27] *Id*.

[28] *Id*. at 7-8.

[29] *Id*. at 8.

[30] *Id*.; A00208.

[31] A0209.

[32] A0209, A0215.

more than 10% of CCSB's common stock.[33] The notice further stated that Johnson and his wife, "acting in concert" together with Park, sought to acquire up to 24.99% of the voting shares of CCSB.[34] A month later, on June 24, 2015, the Federal Reserve Bank of Kansas City notified Johnson and his wife that the Federal Reserve Bank did not object to their individual acquisition of more than 10% of CCSB's voting shares, but that Park should not hold more than five percent of the outstanding shares.[35]

In a letter to CCSB's Board dated July 14, 2015, Johnson acknowledged the Voting Limitation and requested that the Board waive it.[36] On July 22, 2015, CCSB informed Johnson that, based on the advice of counsel, the Board could not waive the Voting Limitation.[37]

IV. The *Robb* Judgment

Between 2011 and 2014 (*i.e.*, during the period of time Johnson was attempting to place nominees on CCSB's Board), an investment company named

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[33] A0217.

[34] *Id*.

[35] A0220. This limitation is in compliance with regulations providing that "control" of a bank means "[o]wnership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting securities." 12 C.F.R. § 225.2(e)(1)(i).

[36] Mem. Op. at 9; A0222.

[37] A0224.

Bond Purchase, LLC ("Bond Purchase") made four loans to three companies owned by Randy Robb, an acquaintance of Johnson (the "Robb Companies").[38] Johnson was the 85% owner and managing member of Bond Purchase.[39] In exchange for the loans, the Robb Companies pledged 23,007 shares of CCSB stock as collateral under three of the four notes.[40] After certain interest payments were not made, Robb told Bond Purchase's bookkeeper that the Robb Companies may sell CCSB stock to raise funds to pay the loans.[41] The bookkeeper promptly alerted Johnson that those shares may be sold.[42] Once Johnson found out about the potential sale of CCSB stock, he offered to buy the 23,007 CCSB shares for $10 per share, $3-4 less than the book value of the stock.[43] Robb then approached CCSB, which agreed in principle to purchase the shares at $11 per share.[44] Before effectuating the purchase, CCSB asked Robb to provide the pay-off amount owed to Bond Purchase in order

[38] A0238-241.

[39] A0237.

[40] A0239-240.

[41] A0238, A0241.

[42] A0241.

[43] A0242-243.

[44] A0243.

for CCSB to purchase the shares free and clear of any liens.[45] Bond Purchase refused to provide that information to Robb.[46] Instead, at Johnson's direction, Bond Purchase declared a default, accelerated payment of the debt, and notified Robb that it was pursuing a foreclosure sale of the shares.[47] The day before the foreclosure sale was scheduled, Bond Purchase, again at Johnson's direction, sent Robb inflated payoff statements that included over $120,000 in additional charges and fees, and refused to accept anything less.[48]

At the foreclosure sale, a company named DEW purported to purchase 17,765 of the CCSB shares for $7 per share, despite the fact that it was not in formal existence at the time and was not formed until two days after the sale.[49] DEW is owned by David Watson, who has been a friend of Johnson's since 1978.[50] David Watson also is the father of Chase Watson, one of Johnson's 2021 nominees to CCSB's Board. David Watson came to be a CCSB stockholder because Johnson

[45] *Id*.

[46] A0244.

[47] A0244-245.

[48] A0248-249.

[49] A0250-251.

[50] A0351 at 16:8-24.

recommended that he invest in CCSB.[51] Notably, a spreadsheet Johnson kept tracking the stock he beneficially owned identified the shares that DEW purchased as continuing to be beneficially owned by Johnson.[52]

In February 2017, the Robb Companies sued Bond Purchase in Missouri state court.[53] On November 27, 2017, the Missouri court found that, without any "justification other than a desire to gain control of Clay County Savings Bank by acquiring the CCSB Financial stock pledged by plaintiffs at seventy cents on the dollar, Johnson was successful in interfering with the plaintiffs' ability to sell their stock or refinance the debt that was legitimately due."[54] Those findings were affirmed in June 2019.[55]

V. The Federal Reserve Bank Notifies Johnson of a Violation of the CIBCA

On February 19, 2019, the Federal Reserve Bank of Kansas City notified Johnson that a recent transfer of CCSB shares had resulted in a violation of the CIBCA.[56] The Federal Reserve Bank indicated that it understood that Johnson

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[51] A0352 at 24:19-22.

[52] A0251.

[53] A0237.

[54] A0270.

[55] A0294-298.

[56] A0275.

"transferred 30,000 shares of CCSB stock to MLake 70, LLC (MLake)," of which Johnson was the majority owner, "in order to bypass the 10 percent voting limitation per shareholder imposed by the Certificate of Incorporation of CCSB."[57] The Federal Reserve informed Johnson that it presumed "Chase Watson and Brian Rooney as managing members of MLake" to be acting in concert with Johnson and his wife[58] and the transfer thus "resulted in a violation of the CIBCA."[59] The Federal Reserve stated that it was engaging in a comprehensive ownership review "to identify all parties presumed to be acting in concert as members of the Johnson Control Group, resolve the violations in a single Change in Control filing, and prevent future violations and untimely filings under the CIBCA."[60] The Federal Reserve therefore requested the number of shares of CCSB stock that Johnson and his wife individually owned or controlled, as well as the number of shares owned by Park, Totta, Chase Watson, Bryan Rooney, and MLake as potential members of the Johnson Control Group.[61] It also requested information regarding the number of shares owned by any "immediate family members" of the potential members of the

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[57] *Id*.

[58] A0276.

[59] A0275.

[60] *Id*.

[61] A0276.

Johnson Control Group,[62] as those individuals would be rebuttably presumed to be acting in concert with the Johnson Control Group by regulation. "Immediate family" is defined to include "a person's father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, . . . the spouse of any of the foregoing, and the person's spouse."[63]

Following the Federal Reserve's ownership review, it gave Johnson two options: (i) unwind the transfer of stock to MLake, or (ii) submit filings on behalf of, *inter alia*, Totta, MLake, Chase Watson, Rooney, and any immediate family members of Totta, Chase Watson (such as David Watson), or Rooney who owned or controlled CCSB stock in order for them to become approved members of the Johnson Control Group.[64] The record does not reveal how this issue was resolved.

VI. The 2020 Board Election and Ensuing Litigation

CCSB held its annual meeting on January 23, 2020. Two Board seats were up for election.[65] Park nominated Totta and Morrisey to fill those seats, while the

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[62] A0276-277.

[63] 12 C.F.R. § 225.41(b)(3).

[64] A0275.

[65] A0370 ¶17.

directors who had occupied them (Coltman and McKinley) stood for reelection.[66] In connection with the election, Johnson disclosed that he owned 76,235 shares.[67] He voluntarily complied with the Voting Limitation and only voted 74,200 of those shares.[68] Usera disclosed that he beneficially owned 76,324 shares and likewise voluntarily complied with the Voting Limitation.[69]

DEW voted all 17,765 of its shares in favor of Totta and Morrissey at the meeting.[70] All of those shares were counted and none were aggregated with Johnson's shares for purposes of complying with the Voting Limitation.[71] According to the election inspector's 2020 report, Totta and Morrissey lost the 2020 election.[72] That result is the subject of a separate litigation in the Chancery Court that has been stayed in favor of litigation filed by Totta in Missouri alleging that CCSB made defamatory statements in election-related communications.[73] Given

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[66] A0370-371 ¶¶17-18.

[67] A0371 ¶19.

[68] *Id*.

[69] *Id*. ¶22.

[70] *Id*. ¶23.

[71] *Id*.

[72] *Id*.

[73] Mem. Op. at 16. On November 14, 2022, the Court entered partial summary judgment to Defendants, finding that two of the three statements at issue were not capable of defamatory meaning. The Court reserved judgment on the third

that Totta and Morrissey lost the election even when all of DEW's shares were counted, they would have lost by an even bigger margin had DEW's shares been aggregated with the Johnson Control Group's.

VII. The 2021 Board Election

Three Board seats were up for election at CCSB's 2021 annual meeting. On September 10, 2020, Park nominated Totta, Morrissey, and Chase Watson for those seats.[74] Five days later, Park made a tender offer to certain stockholders to purchase up to 30,000 CCSB shares for $16.33 per share.[75] The letter offering to purchase shares indicated that Park "continue[s] to offer to buy shares" because it believed that CCSB must "1. Add new board members; 2. Make improvements to management and profitability; and 3. Consider selling the bank."[76]

On September 16, 2020, the Board set the Record Date for the election.[77] On October 1, 2020, CCSB requested that Johnson, his wife, and two other non-party

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statement. This Court may properly take judicial notice of the outcome of that litigation. *See Carrero v. State*, 115 A.3d 1214, 2015 WL 3367940, at *2 n.3 (Del. 2015).

[74] A0372 ¶24.

[75] A0306.

[76] *Id*.

[77] A0372 ¶25.

stockholders provide information about their beneficial stock ownership.[78] Among other things, CCSB asked about the number of shares held as a "group pursuant to any agreement, arrangement or understanding (whether written or unwritten) for the purpose of acquiring, holding, voting or disposing of any shares of" CCSB's stock.[79]

On October 21, 2020, the Board's nominating committee nominated Usera, Jones, and Freeman to stand for election to the Board.[80] On November 2 and December 4, 2020, CCSB sent follow-up letters to Johnson inquiring about his beneficial ownership of shares.[81]

In November 2020, Johnson approached David Watson and asked whether he would be interested in purchasing additional CCSB stock.[82] On November 24, 2020, Johnson emailed Totta and others stating, "I am going to have David watson [*sic*] buy 19500 shares from me ASAP . . . *want to beat the record date*."[83] Johnson

[78] *Id*. ¶27.

[79] A0312-316.

[80] A0372-373 ¶28.

[81] A0373 ¶29.

[82] *Id.* ¶30.

[83] A0317-318 (emphasis added).

ultimately conveyed to DEW 19,500 shares of CCSB stock for $16.42 a share.[84] The transfer was completed on November 27, 2020.[85]

On December 15, 2020, Johnson sent a letter to the Federal Reserve Bank of Kansas City providing notice of his sale of shares to DEW.[86] Among other things, Johnson disclosed that DEW was owned by David Watson, and represented that "DEW LLC owned shares of CCSB before this purchase, but DEW LLC is not part of the Johnson Control Group."[87] The letter further represented that "[n]either Mr. Watson nor any member of the Johnson Control Group is a party to any agreement, contract, understanding, relationship, or other arrangement regarding the acquisition, voting, or transfer of voting securities of CCSB."[88] The record does not contain a written response from the Federal Reserve Bank.

On December 17, 2020, Johnson sent CCSB a statement of ownership indicating that he beneficially owned 87,348 shares as of September 30, 2020 and 73,948 shares as of December 3, 2020.[89] On January 18, 2021, CCSB, though

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[84] A0373 ¶30.

[85] *Id*. ¶31.

[86] A0373-374 ¶33.

[87] *Id*.

[88] *Id*.

[89] A0374 ¶34.

counsel, sent a letter to DEW, David Watson, and Canvas Wealth Advisors, David Watson's money manager[90] requesting information about their beneficial stock ownership.[91]

The Board held a meeting on January 20, 2021 at which Johnson's December 17 letter was discussed.[92] At the meeting, Usera stated that he believed that Johnson's letter provided incomplete share ownership and that he had "evidence to believe that Mr. Johnson may be acting on concert with others."[93] On January 27, 2021, David Watson, assisted by Johnson (although that fact was unknown to CCSB at the time), responded to the January 18 letter through his counsel representing that DEW owned 37,175 shares, that it did not have an agreement to vote those shares, and that it was not an affiliate of any other stockholder.[94] David Watson also disclosed that he intended to vote DEW's shares for his son, Chase Watson, one of Park's nominees.[95]

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[90] A0353-354 at 34:16-35:9.

[91] A0374 ¶36; A0355 at 72:15-23.

[92] A0324-325.

[93] A0324.

[94] A0355-356 at 72:8-73:6, A0357 at 79:9-20; A0438 ¶38.

[95] A0375 ¶38.

The Board held a special meeting immediately before CCSB's 2021 annual meeting on January 28, 2021.[96] The minutes reflect that the "purpose of this meeting was to discuss whether stockholders were acting in concert, whether they were in violation of the 10% beneficial ownership rule . . . and whether the Board of Directors was in a position to enforce its authority . . . at today's Annual Meeting."[97] The Board ultimately determined that Johnson, Johnson's wife, David Watson, Chase Watson, Morrissey, and Totta were "acting in concert in order to get their alternate slate elected" in what the Board considered to be a violation of the Voting Limitation.[98] The Board resolved to deliver a letter to the inspector of elections relaying its conclusion that those individuals were acting in concert in violation of the Voting Limitation.[99] The Board directed that votes "in excess of 10% owned by the aforementioned parties are not valid votes and should not be counted . . . ."[100]

After application of the Voting Limitation, the Board's nominees (Freeman, Usera, and Jones) had each received 359,336 votes, and Park's nominees (Totta,

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[96] A0331.

[97] *Id*.

[98] A0333.

[99] *Id*.

[100] A0335.

Chase Watson, and Morrissey) had each received 322,859 votes.[101] Thus, the Board's nominees won the election.

VIII. This Litigation

Plaintiffs filed this litigation on February 26, 2021, seeking a declaratory judgment under 8 Del. C. § 225 that the Board's instruction not to count the excluded votes in favor of the Park nominees was improper and that the Park nominees had won the election. The Court held a one-day trial on the paper record on February 17, 2022. On May 31, 2022, the Court issued its post-trial memorandum opinion. The Court concluded that the *Blasius* standard should apply to the Board's challenged conduct, and that the Board failed to show the "compelling justification" required by that standard, leaving only the issue of attorneys' fees outstanding. The Court ruled on Plaintiffs' application for attorneys' fees on November 3, 2022, and entered judgment on November 4, 2022. CCSB timely filed this appeal on November 14, 2022.

[101] A0333-334.

ARGUMENT

I. The Court Erred in Refusing to Apply the Business Judgment Rule to the Board's Actions

A. Question Presented

Whether the business judgment rule should apply to the Board's application of the Voting Limitation in CCSB's Certificate of Incorporation.[102]

B. Scope of Review

"The construction or interpretation of a corporate certificate or by-law is a question of law subject to de novo review by this Court."[103] Charters "are regarded as contracts between the shareholders and the corporation," and thus "[a] judicial interpretation of a contract presents a question of law that this Court reviews de novo."[104] Accordingly, "words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language."[105]

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[102] A0423, A425-427, A0431-433.

[103] *Centaur Partners, IV v. Nat'l Intergroup, Inc*., 582 A.2d 923, 926 (Del. 1990); *Activision Blizzard, Inc. v. Hayes*, 106 A.3d 1029, 1033-34 (Del. 2013).

[104] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

[105] *Del. Bay Surgical Servs., P.A. v. Swier*, 900 A.2d 646, 652 (Del. 2006) (quoting 1 Del. C. § 303).

C. Merits of Argument

It is settled law in Delaware that corporate charters are contracts among a corporation and its stockholders.[106] Consistent with Delaware's public policy prioritizing private freedom of contract, stockholders and corporate managers are afforded "great leeway to structure their relations, subject to relatively loose statutory constraints"[107] from the Delaware General Corporate Law ("DGCL").[108] Indeed, DGCL 102(b)(1) affirms that a certificate of incorporation may contain "any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, . . . if such provisions are not contrary to the laws of this State."[109] And when corporate actions require stockholder action—for instance, adopting a charter provision—the provision "should be respected as a

[106] *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006); *In re Explorer Pipeline Co.*, 781 A.2d 705, 713 (Del. Ch. 2001) ("Certificates of incorporation are not only contracts among a corporation and its shareholders, but also are contracts among the shareholders.").

[107] *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 845 (Del. Ch. 2004).

[108] *See Salzberg v. Sciabacucchi*, 227 A.3d 102, 116 (Del. 2020) ("the DGCL allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise.").

[109] 8 Del. C. § 102(b)(1).

matter of policy" and "[a]t a minimum, [] should not be deemed violative of Delaware's public policy."[110]

Here, CCSB's Board applied a provision of its Certificate of Incorporation—the Voting Limitation—and triggered the Certificate's "conclusive-and-binding" provision, which subjected the Board's action to review under the business judgment rule. The Certificate provides that "any constructions, applications, or determinations made by the Board of Directors pursuant to this section in good faith and on the basis of such information and assistance as was then reasonably available" shall be "conclusive and binding upon the Corporation and its stockholders."[111] As the opinion below recognized, this "conclusive-and-binding" provision "effectively tracks the business judgment rule,"[112] which itself "[acknowledges] . . . the managerial prerogatives of Delaware directors under Section 141(a)" and presumes that directors make business decisions "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[113]

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[110] *Sciabacucchi*, 227 A.3d at 116; *see also, e.g., Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996) ("[A]ll amendments to certificates of incorporation and mergers require stockholder action. Thus, Delaware's legislative policy is to look to the will of the stockholders in these areas.")

[111] A0023 art. 4(C)(6).

[112] Mem. Op. at 34.

[113] *Id.* at 34 n.170 (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)).

The provision explicitly affords the business judgment presumption to "determinations . . . necessary or desirable to implement" that section of the charter, including "matters with respect to (i) the number of shares of Common Stock beneficially owned by any person, (ii) whether a person is an affiliate of another, (iii) whether a person has an agreement, arrangement, or understanding with another as to the matters referred to in the definition of beneficial ownership, . . . or (v) any other matter relating to the applicability or effect of this section."[114]

Despite concluding that the Certificate invoked the business judgment rule, the Court refused to apply it. But under basic principles of Delaware corporation law, stockholders' decision to assent to a charter provision invoking the business judgment rule and be bound by its terms should be given effect. No statute justifies contravening the will of CCSB's stockholders as expressed through the Certificate, nor does it "achieve a result forbidden by the settled rules of public policy."[115] It does not change the substantive standard of conduct applicable to challenged actions.[116] Nor does it foreclose judicial review: the Board's action may still be challenged, but those challengers would have the burden of rebutting the business

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[114] A0022 art. 4(C)(4).

[115] *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. 1952).

[116] *See* J. Travis Laster, *Revlon Is A Standard of Review: Why It's True and What It Means*, 19 Fordham J. Corp. & Fin. L. 5, 26 (2013) ("Regardless of what standard of review applies, the directors' standard of conduct does not change.").

judgment rule.[117] That deference is in accord with the principles motivating Congress's passage of the CIBCA—to monitor and regulate takeovers of federally insured institutions. Furthermore, stockholders could prefer that deference to provide additional protection against surreptitious takeover efforts by a competitor. Unsurprisingly, therefore, anti-takeover provisions like this one are not uncommon in bank holding companies.[118] And, in analogous circumstances, Delaware courts have recognized that an informed stockholder vote can impact the standard of review.[119]

The Court below construed CCSB's argument to mean that "a corporate charter may alter the directors' fiduciary obligations and the attendant equitable

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[117] *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006).

[118] *See*, *e.g.*, Amended & Restated Certificate of Incorporation of Sterling Bancorp art. 4, https://bit.ly/3uwGXlu; Certificate of Incorporation of Berkshire Hills Bancorp, Inc. art. 4, https://bit.ly/3P84N0l.

[119] *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 304 (Del. 2015) (when a transaction otherwise subject to enhanced scrutiny is approved by a fully informed, uncoerced vote of disinterested stockholders, that vote has the effect of changing the standard of review from enhanced scrutiny to business judgment rule review); *see Solomon v. Armstrong*, 747 A.2d 1098, 1117 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000) (stockholder approval of challenged transaction "provides an *independent* reason to maintain business judgment protection for the board's acts") (emphasis added); *In re MFW S'holders Litig.*, 67 A.3d 496, 526 (Del. Ch. 2013), *aff'd sub nom. Kahn v. M&F Worldwide Corp*., 88 A.3d 635 (Del. 2014) (transaction with a controlling stockholder that was conditioned upon the approval of both an empowered, dutiful special committee and an informed, uncoerced majority-of-the-minority stockholder vote is entitled to business judgment review).

standards a court will apply when enforcing those obligations," and rejected that contention.[120] While ostensibly recognizing a distinction between charter provisions altering the standard of *review* and the standard of *conduct*, the Court conflated the two concepts and, in doing so, reached an erroneous result.

While "[t]he standard of conduct describes what directors are expected to do and is defined by the content of the duties of loyalty and care, . . . [t]he standard of review is the test that a court applies when evaluating whether directors have met the standard of conduct."[121] CCSB's Certificate modifies the standard of review by invoking the business judgment rule. The Board's application of the Voting Limitation is entitled to that presumption, as it was made in good faith, with care, and in the belief that its application was in the best interests of CCSB.

The cases cited in the Court's opinion do not address the question of whether a charter provision can alter the applicable standard of review, but rather relate to a corporation's ability (or lack thereof) to eliminate substantive fiduciary duties.[122] First, *eBay Domestic Holdings, Inc. v. Newmark* did not engage in any substantive discussion of modifying standards of review. Rather, *eBay* makes clear that its discussion of "standards"—on which the opinion below relied—refers to the

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[120] Mem. Op. at 34.

[121] *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 35-36 (Del. Ch. 2013).

[122] Mem. Op. at 35-44.

uncontroversial "standard" of "acting to promote the value of the corporation for the benefit of its stockholders," not any particular standard of review.[123] Second, *Leonard Loventhal Account v. Hilton Hotels Corporation* addresses the elimination of *liability*, not a modification of the standard of review.[124] That decision certainly does not stand for the proposition that a company and its stockholders cannot modify the standard of review applicable to equitable claims through the corporate charter.

Here, CCSB invoked the business judgment standard of review by including the "conclusive-and-binding" provision in the Certificate of Incorporation, subject to which its stockholders purchased their stock and thus agreed to be bound by its terms. Their decision to do so is not in violation of Delaware public policy, and so should be accorded respect.

* * *

In sum, concluding that a corporation may change the standard of review through its constitutional documents is consistent with the principles of freedom of contract essential to how Delaware has long characterized itself—as permitting

[123] 16 A.3d 1, 34 (Del. Ch. 2010).

[124] 2000 WL 1528909, at *11 (Del. Ch. Oct. 10, 2000), *aff'd*, 780 A.2d 245 (Del. 2001) ("members of the Hilton Board, like members of every other board of directors, may not insulate themselves from liability" for breach of fiduciary duty).

maximum flexibility and private ordering among corporate constituencies.[125] Indeed, Delaware's respect for private corporate governance *supports* that the business judgment rule should apply here; at minimum, that conclusion does not violate public policy. This Court should thus apply the correct standard, reverse, and enter judgment in CCSB's favor.

[125] *See Maxwell Shoe Co.*, 883 A.2d at 845 ("[Delaware corporations have] the broadest grant of power in the English-speaking world to establish the most appropriate internal organization and structure for the enterprise.") (citation omitted); *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 698 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

II. Even If Enhanced Scrutiny Applies, the Board's Actions Should Be Upheld

A. Question Presented

Whether the Court erred in applying the *Blasius* standard of review or in finding that the Board's actions did not pass muster under *Blasius* or *Unocal*.[126]

B. Scope of Review

The Court of Chancery's finding that the Board breached its duties is a mixed question of law and fact. While the Court's legal conclusions are reviewed de novo, its factual findings are disregarded only where there is clear error.[127]

For the *Blasius* standard to apply, Plaintiffs needed to prove that the Board's motivation for enforcing the Voting Limitation was "for the primary purpose of impeding and interfering" with stockholders' power to "effectively exercise their voting rights in a contested election for directors."[128] If *Blasius* applied, under that standard, a board must establish a "compelling justification" for the challenged actions.[129]

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[126] A0438-441.

[127] *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chi.*, 75 A.3d 101, 108 (Del. 2013).

[128] *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1132 (Del. 2003).

[129] *Blasius*, 564 A.2d 661.

The *Unocal* standard applies to board action taken in response to a perceived threat relating to corporate control.[130] *Unocal* incorporates a two-part analysis that should be resolved prior to applying the business judgment rule. First, the court should conduct "a *reasonableness* test, which is satisfied by a demonstration that the board of directors had reasonable grounds for believing that a danger to corporate policy and effectiveness existed."[131] Second, the court should conduct "a *proportionality* test, which is satisfied by a demonstration that the board of directors' defensive response was reasonable in relation to the threat posed."[132]

C. Merits of Argument

1. The Chancery Court Erred in Applying the *Blasius* Standard of Review

The opinion below concluded that because the dispute at issue concerned a Board election, the *Blasius* standard should apply.[133] But that conclusion is unwarranted by the facts of this case.

There is no basis to apply *Blasius* to a provision approved by stockholders and binding upon the Board. In his seminal decision, Chancellor Allen noted the

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[130] *Unocal*, 493 A.2d at 955.

[131] *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995).

[132] *Id*.

[133] Mem. Op. at 32.

question *Blasius* review is meant to answer: "a decision by the board to act for the primary purpose of preventing the effectiveness of a shareholder vote inevitability involves the question who, as between the principal [the stockholders] and the agent [the Board], has authority with respect to a matter of internal corporate governance." *Blasius*, 564 A.2d at 659-60. That question is not present here because the Voting Limitation was approved and accepted by the CCSB's principals—the stockholders—through the certificate of incorporation.

Far from demonstrating an entrenchment motive, the Board acted reasonably in the face of a danger to CCSB's corporate effectiveness from a concentrated bloc led by a competitor by enforcing a preexisting charter provision that had been adopted long before the events giving rise to this suit. The Board's conduct also comported with the federal policy priorities enshrined in the CIBCA. Even if enhanced scrutiny were to apply, *Blasius* does not.

a) The Voting Limitation Was Adopted on a "Clear Day" Without an Entrenchment Motive

The Voting Limitation was adopted in 2002, long before this dispute began, and long before Johnson even became a stockholder.[134] Unlike *Blasius*, this is not a case where the Board adopted anti-takeover provisions directly in response to a threat from a stockholder. *Blasius* involved a circumstance where, in direct response

[134] *See* A0019.

to a majority stockholder's consent solicitation to increase the size of the board from seven to fifteen members (the maximum size allowed under the company's charter) and elect eight new directors, the board decide to increase its size by two directors and appoint two nominees to those seats to ensure that the incumbent board maintained a majority in the event the stockholder prevailed.[135] Then-Chancellor Allen concluded that "in creating two new board positions" and electing two directors to fill those positions, "the board was principally motivated to prevent or delay the shareholders from possibly placing a majority of new members on the board."[136] That conclusion was "critical to [the] analysis of the central issue posed," and "[i]f the board in fact was not so motivated, but rather had taken action completely independently of the consent solicitation, which merely had an incidental impact upon the possible effectuation of any action authorized by the shareholders, it is very unlikely that such action would be subject to judicial nullification."[137]

The facts here fall squarely in the latter camp: the Board applied the preexisting Voting Limitation, which has been in existence for nearly twenty years, and which had not been applied before only because its application would have made

[135] *Blasius*, 564 A.2d at 657.

[136] *Id*. at 655.

[137] *Id*.

no difference to the outcome of any prior election.[138] Indeed, from the moment that CCSB offered shares, its Certificate of Incorporation contained the Voting Limitation.[139] The stockholders who purchased stock in CCSB did so subject to that fully disclosed condition. The facts do not support the conclusion that the board acted to entrench themselves or to interfere specifically with Johnson's voting rights, who was not even a stockholder at the time.[140]

The opinion below concluded that the fact that the Voting Limitation was adopted in the absence of any outstanding threat "is irrelevant" because "[e]ven when a board mechanically applies voting restrictions adopted on a clear day, its

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[138] The opinion below asserted that the Voting Limitation had never been implemented prior to the January 23, 2020 vote. Mem. Op. at 5. But the only other time a vote was held involving a stockholder holding more than 10% of outstanding shares occurred on January 25, 2018, when one stockholder owned 10.24% of the shares outstanding. A0453 at 5:5-11. There, the vote results were so overwhelming that application of the Voting Limitation was unnecessary, because it would have had no impact on the outcome. The record does not support the Court's implicit conclusion that there was rampant disregard of the Voting Limitation in prior elections. *See Strategic Inv. Opportunities LLC v. Lee Enterprises, Inc.*, 2022 WL 453607, at *18 n.185 (Del. Ch. Feb. 14, 2022) (whether provision is "unusual. . . . is not the test," and "hypothetical abuses" of the requirement were not before the court).

[139] A0019-21 art. 4(C).

[140] *See Rosenbaum v. CytoDyn Inc*., 2021 WL 4775140, at *2 (Del. Ch. Oct. 13, 2021) (application of *Blasius* inappropriate where challenged "bylaw had been in place for years," "the bylaw was adopted on the proverbial 'clear day'", and "Plaintiffs were well aware of, and understood, the" bylaw); *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd*., 224 A.3d 964, 975 (Del. 2020) (board appropriately enforced bylaw adopted on a clear day).

application of those restrictions may be subject to enhanced scrutiny."[141] But none of the cases cited for this proposition applied the exacting *Blasius* standard.[142] To be sure, where a board adopts an anti-takeover provision and such a threat later emerges, a court may decide to apply the *Unocal* standard, as discussed *infra*. But applying *Blasius*, which focuses on the potential motive for entrenchment,[143] to provisions that were adopted in the absence of a threat is illogical and inconsistent with the principles motivating the application of *Blasius*.

[141] Mem. Op. at 50.

[142] The Court in *Strategic Investment Opportunities LLC v. Lee Enterprises, Incorporated* conflated the *Blasius* and *Unocal* standards. 2022 WL 453607, at *15. Even if the opinion is construed to apply the *Blasius* standard, however, the Court found that the Board's conduct satisfied the standard, reasoning that the board's rejection of a controlling stockholder's nomination notice was simply the enforcement of a bylaw provision adopted on a clear day before the stockholder came on the scene, *id*. at *16—a situation highly analogous to the facts here.

[143] S*ee Blasius*, 564 A.2d at 655,

b) In the Event Heightened Scrutiny Applies, the Board's Conduct Is Reviewed Under the *Unocal* Standard

Blasius has been heavily criticized.[144] And, up until this Court's June 2021 ruling in *Coster v. UIP Companies, Inc.*,[145] the Court had barely referenced the standard for years. Whatever its continuing validity in other contexts, however, application of the *Blasius* standard is inappropriate to the facts of this case. This is not a case where a conflicted board issued additional stock to dilute a stockholder's interest and thus break a deadlock in a contested director election.[146] Instead, the facts of this case are more analogous to cases applying *Unocal* to board action in response to a threat to the corporation and subsequently according business

[144] *See, e.g.*, *Mercier v. Inter-Tel (Del.), Inc*., 929 A.2d 786, 806 (Del. Ch. 2007) (describing the "trigger" for the application of *Blasius* to be a "label for a result"); *Chesapeake Corp. v. Shore*, 771 A.2d 293, 323 (Del. Ch. 2000) ("In reality, invocation of the *Blasius* standard of review usually signals that the court will invalidate the board action under examination. Failure to invoke *Blasius* typically indicates that the board action survived (or will survive) review under *Unocal*.").

[145] 255 A.3d 952 (Del. 2021).

[146] *Compare Coster*, 255 A.3d at 953.

judgment rule protections to challenged board actions.[147] As detailed *infra*, the Board's actions should be upheld under that standard.

2. Even if Heightened Scrutiny Applies, the Board's Conduct Was Permissible

Even if heightened scrutiny did apply to the challenged conduct here, the Court erred in holding that the Board's conduct was legally invalid. "The enhanced scrutiny standard of review requires a context-specific application of the directors' duties of loyalty, good faith and care."[148] Thus, "the standard to be applied is one of reasonableness."[149] The defendants must "identify the proper corporate objectives served by their actions" and "justify their actions as reasonable in relationship to those objectives."[150]

The Board's conduct was appropriate under either *Unocal* or *Blasius*. The adoption of the Voting Limitation was reasonable, as it was adopted at the time the Bank converted to a federally chartered savings bank in 2003 and was responsive to

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[147] *E.g.*, *Rosenbaum*, 2021 WL 4775140 (applying business judgment rule to board's decision to enforce advance notice bylaw adopted years before the vote at issue); *see also Williams v. Geier*, 671 A.2d 1368 (Del. 1996) (finding business judgment rule applied in the absence of unilateral director action in the face of a claimed threat or act of disenfranchisement).

[148] *Lee Enterprises, Inc*., 2022 WL 453607, at *16.

[149] *Id*.

[150] *Mercier*, 929 A.2d at 807.

the concerns that motivated Congress to pass the CIBCA.[151] The Voting Limitation also is proportional; it permits stockholders to acquire an unlimited amount of stock (subject to the Federal Reserve's non-objection), but limits the ability to vote the stock that exceeds the 10% limit. It therefore ensures that the affairs of the corporation are conducted in the interests of all stockholders, not only large ones.

Indeed, Delaware courts have upheld very similar restrictions on stock ownership on a percentage basis. In *Yucaipa American Alliance Fund II, L.P. v. Riggio*,[152] the Court found permissible under *Unocal* a poison pill that was "triggered when a shareholder acquires over 20% of Barnes & Noble's outstanding stock, or when two or more shareholders, who combined own over 20%, enter into an 'agreement, arrangement or understanding . . . for the purpose of acquiring, holding, voting . . . or disposing of any voting securities of the Company.'"[153] Declining to apply the *Blasius* standard, the Court held that the rights provision was permissible notwithstanding that it could have the potential effect of lessening Yucaipa's voting power.[154]

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[151] *See Unitrin, Inc. v. Am. Gen. Corp*., 651 A.2d 1361, 1373 (Del. 1995); *Ivanhoe Partners v. Newmont Min. Corp*., 535 A.2d 1334, 1344 (Del. 1987).

[152] 1 A.3d 310 (Del. Ch. 2010), *aff'd*, 15 A.3d 218 (Del. 2011).

[153] *Id*. at 312–13.

[154] *Id*. at 350 (board was "entitled to take reasonable, non-preclusive action to ensure that an activist investor like Yucaipa did not amass, either singularly or in concert with another large stockholder, an effective control bloc that would allow it to make

The Board's conduct easily passes muster under *Unocal*. But even if *Blasius* were to apply, the Board's actions were still appropriate. In the Chancery Court's decision in *Coster* on remand, while applying the *Blasius* standard, the Court found that the defendants had established the compelling justification required by *Blasius* because, *inter alia*, the stock sale ordered by defendants "was consistent with the succession plan that [directors had] devised on a clear day."[155] Here, likewise, the exercise of the Voting Limitation fulfilled the intent of including it in the Certificate of Incorporation in the first place. The Prospectus announcing the initial public offering nearly twenty years ago disclosed that the board of directors "believe[s] that it is appropriate to include certain provisions as part of CCSB Financial Corp.'s certificate of incorporation to protect the interests of CCSB Financial Corp. and its stockholders from takeovers which the board of directors of CCSB Financial Corp. might conclude are not in the best interests of Clay County Savings, CCSB Financial Corp. or CCSB Financial Corp.'s stockholders."[156] The Voting Limitation is one of those anti-takeover provisions, and was intended to ensure that one large stockholder

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proposals under conditions in which it wielded great leverage to seek advantage for itself at the expense of other investors," and could thus "cabin[] Yucaipa at a substantial, but not overwhelming, level of voting influence").

[155] *Coster v. UIP Companies, Inc.*, 2022 WL 1299127, at *14 (Del. Ch. May 2, 2022).

[156] A0168.

(or a group of stockholders) could not unilaterally run CCSB in such a person's own sole interest. Enforcement of the Voting Limitation makes particular sense here, where the stockholder seeking to evade the restriction is an executive and stockholder of CCSB's competitors and it reasonably could be concluded that his interests do not align with CCSB's remaining stockholders. That is not an "entrenchment" motive, but rather a desire to protect the interests of all stockholders.

Moreover, applying the Voting Limitation in the circumstances here comported with the policy rationale underlying Congress's passage of the CIBCA in the first place. The notice provisions of the CIBCA were passed in order to ensure that banking regulators had the opportunity to weigh in on proposed changes in control for banking institutions, and thus retain control over potential acquisitions.[157] Here, the stockholder to whose group the Voting Limitation was applied, Johnson, was not just any stockholder, but an affiliate of CCSB's competitors. Given that specific circumstance and Johnson's likely motives, it makes sense to limit his ability to create a group acting in concert to take control of CCSB. That conclusion

[157] *See* H.R. 95-1383, 1978 U.S.C.C.A.N. 9273, 9276 (1978) (CIBCA would "give the financial supervisory agencies power to monitor and regulate takeovers of federally insured institutions"); *id*. at 9371 (bill is "based on the principle that one who acquires control of a financial institution should undergo scrutiny similar to that which an applicant for a new charter must undergo").

is consistent with the federal policy against shadow takeovers of community banks enshrined in the CIBCA.

III. The Chancery Court's Conclusion That No "Control Group" Existed Misapplied the Burden of Proof and Hinged on a Materially Incorrect Finding of Fact

A. Question Presented

Whether the Chancellor erred in holding that CCSB had failed to show that Johnson and David Watson were acting in concert and thus constituted a control group.[158]

B. Scope of Review

The Court of Chancery's finding that CCSB had failed to show that Johnson and David Watson were acting in concert and thus were a control group is a mixed question of law and fact. While the Court's legal conclusions are reviewed de novo, its factual findings are disregarded only where there is clear error.[159]

C. Merits of Argument

Even though the decision below acknowledged that a stockholder plaintiff challenging the legal validity of board action bears the burden of proof,[160] in effect, the opinion placed the burden of proof on CCSB, not Plaintiff. The Court recognized CCSB's argument that David Watson was acting in concert with Johnson, but then

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[158] A0432-437.

[159] *Jud. Watch, Inc. v. Univ. of Delaware*, 267 A.3d 996, 1003 (Del. 2021) (allocation of burden of proof reviewed *de novo*); *Tri-State Vehicle Leasing, Inc. v. Dutton*, 461 A.2d 1007, 1008 (Del. 1983) (same).

[160] Mem. Op. at 31.

held that none of the facts identified by CCSB (including the fact that David Watson was Chase Watson's father) "individually or in the aggregate, support a finding that Johnson and David Watson are or were acting in concert."[161]

But because the burden is on Plaintiffs to show that the Board's decision to count the DEW shares as part of the Johnson Control Group was legally invalid, *Plaintiffs* bore the burden to show that Johnson and the Watsons were *not* acting in concert. Crucially, the Chancery Court erred in crediting Johnson's deposition testimony that the Kansas City Federal Reserve did not conclude that DEW was acting in concert with Johnson.[162] In fact, the Federal Reserve previously had informed Johnson that his sale of shares to MLake 70, of which Chase Watson is a managing member, violated the CIBCA.[163] The Federal Reserve observed that it presumed that Chase Watson was a member of the Johnson Control Group, and gave Johnson the option either to unwind the sale of shares *or* submit filings requesting that certain identified affiliates, including Chase Watson's family members (and by extension their affiliated companies, including DEW), be allowed to retain control of CCSB stock and become approved members of the Johnson Control Group. The Federal Reserve's presumption that Chase Watson (among others) was acting in

[161] *Id*. at 61.

[162] *Id*. at 21.

[163] A0275.

concert with Johnson (which, on the record presented to the Court below, was not rebutted) means that any immediate family member of his would *also* be rebuttably presumed to be acting in concert with Chase Watson, and thus Johnson.[164] That includes David Watson and, by extension, his company DEW.

Plaintiffs cited no evidence rebutting this presumption. The post-trial opinion also offers no analysis of any evidence proffered by Plaintiffs on this issue. The Chancery Court concluded that the "existence of an agreement, arrangement, or understanding is a sufficient basis for invoking an acting-in-concert provision," but that "[a]n undefined reference to 'acting in concert' cannot reasonably go beyond that definition."[165] But the Chancery Court overlooked the fact that "acting in concert" is defined by regulation.[166] Indeed, "[e]ven absent a formal agreement, the

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[164] *See* 12 C.F.R. § 225.41(d)(1); Federal Deposit Insurance Corporation, *Notice of Acquisition of Control*, Applications Procedurals Manual, Section 5, at 5-3, (06-2019), https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-05-changeincontrol.pdf.

[165] Mem. Op. at 59.

[166] *See* 12 C.F.R. § 225.41(b)(1) (defining "acting in concert" to "include[] knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a state member bank or bank holding company whether or not pursuant to an express agreement").

shares of individuals may be considered together for determining control," and they "need not know each other."[167]

Moreover, even if David Watson were not presumed to be acting in concert with the Johnson Control Group by regulation, the evidence amply shows that Johnson and David Watson were "parties to [an] agreement, contract, understanding, relationship, or other arrangement, whether written or otherwise, regarding the acquisition, voting, or transfer of control of voting securities":[168] Johnson facilitated David Watson's company's acquisition of CCSB stock at a discount through the Robb foreclosure sale. He sold additional shares to David Watson right before the Board election with the understanding that David Watson would vote those shares

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[167] *Lindquist & Vennum v. F.D.I.C.*, 103 F.3d 1409, 1413 (8th Cir. 1997); *see also Wellman v. Dickinson*, 682 F.2d 355, 363 (2d Cir. 1982) (agreement need not be written and may be informal, and group activity may be proven circumstantially).

The opinion below cited *Williams Cos. S'holder Litig.* to support the contention that prior cases have rejected a greater showing of connections as sufficient to establish that two stockholders are "acting-in-concert," but that case invalidated a poison pill "whose broad language sweeps up potentially benign stockholder communications 'relating to changing or *influencing* the control of the Company'" that could "encompass[] routine activities such as attending investor conferences and advocating for the same corporate action" and "aggregate stockholders even if members of the group have no idea that the other stockholders exist." 2021 WL 754593, at *37 (Del. Ch. Feb. 26, 2021), *aff'd*, 264 A.3d 641 (Del. 2021). CCSB does not advocate for a correspondingly broad definition of "acting-in-concert" here. Rather, under applicable regulations, David Watson was acting in concert with the Johnson Control Group given the undisputed corporate and familial connections between David Watson and members of the Johnson Control Group.

[168] 12 C.F.R. § 225.41(d)(4).

in support of Park's nominees, including David Watson's own son. Johnson drafted David Watson's response to the Board's inquiry with respect to his stock ownership. Those facts independently give rise to the conclusion that David Watson was acting in concert with Johnson to ensure that Johnson's preferred slate of nominees (including David Watson's son) would be elected.

In short, the Court misapplied the burden of proof to require CCSB to establish the existence of a control group, rather than holding Plaintiffs to their burden to rebut it. Moreover, under the applicable regulatory regime, David Watson was rebuttably presumed to be acting in concert with the Johnson Control Group via his relationship with Chase Watson, whom the Federal Reserve considered to be a part of the Johnson Control Group. And the evidence itself supports a finding that David Watson was acting in concert with Johnson with respect to the election of his nominees. Plaintiffs identified no evidence to the contrary. That provides an independent basis for reversal of the opinion below.

IV. The Chancery Court Erred in Awarding Plaintiffs Attorneys' Fees

A. Question Presented

Whether the Chancellor erred in finding that Plaintiffs' suit conferred a benefit on CCSB and Plaintiffs thus were entitled to attorneys' fees.[169]

B. Scope of Review

An award of attorneys' fees is reviewed for abuse of discretion.[170]

C. Merits of Argument

For the reasons set forth *supra*, the Court's finding that the Board's application of the Voting Limitation was legally invalid should be overturned, and thus the resulting fee award should be reversed. In the event that this Court affirms that underlying ruling, however, CCSB respectfully submits that Plaintiffs are not entitled to attorneys' fees. The Court below found that an award of attorneys' fees was warranted because "[w]hile in a strict sense the Post-Trial Opinion only affected Plaintiffs' votes, the judgment fortifies the Company's stockholder franchise generally."[171] But it is *Plaintiffs* who reaped the benefit of their litigation success, having secured their membership on the Board.

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[169] A0563-575.

[170] *William Penn P'ship v. Saliba*, 13 A.3d 749, 758 (Del. 2011); *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 876 (Del. 2015).

[171] Attorney Fees Order at 5.

Keyser v. Curtis[172] is on point. That case involved the validity of a written consent purporting to elect plaintiffs to the board of Ark Financial Services.[173] Despite concluding that the written consent was effective and that plaintiffs should be seated on the board, the court denied plaintiffs' application for attorneys' fees. The court reasoned that while "Plaintiffs have benefitted Ark[,] . . . the principal beneficiaries of this action are the Plaintiffs."[174] Because plaintiffs were "principally motivated by a desire to benefit [themselves], not a desire to benefit Ark," the case "does not present the type of situation that calls out for an award of attorneys' fees."[175]

The same logic applies here. Plaintiffs' suit was motivated by the desire to place themselves on the Board. If the Voting Limitation were entirely disregarded and all stockholder votes counted, CCSB's nominees would have won by a simple majority. And even if there were some incidental benefit to CCSB based on a limitation of the Voting Limitation, it is clear that Plaintiffs' decision to sue was prompted by personal interest, not an altruistic desire to benefit stockholders. In that

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[172] 2012 WL 3115453 (Del. Ch. July 31, 2012),), *aff'd sub nom. Poliak v. Keyser*, 65 A.3d 617 (Del. 2013).

[173] *Id*. at *1.

[174] *Id*. at *19.

[175] *Id*.

circumstance, "it would be inequitable to grant fees to the Plaintiff where it is clear that the corporate benefit was a mere externality to the Plaintiff's ultimate goal. . . ."[176]

[176] *Martin v. Harbor Diversified, Inc*., 2020 WL 568971, at *4 (Del. Ch. Feb. 5, 2020), *aff'd*, 244 A.3d 682 (Del. 2020).

CONCLUSION

For the foregoing reasons, CCSB respectfully requests that this Court reverse the Court of Chancery's May 31, 2022 Post-Trial Opinion, July 18, 2022 Order, November 3, 2022 Letter Decision, and November 4, 2022 Order and enter judgment in CCSB's favor. In the alternative, CCSB respectfully requests that the Court reverse and remand this matter for further proceedings.

Respectfully submitted,

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