EFiled: Dec 29 2022 03:48PM EST
Filing ID 68751114
Case Number 424,2022

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-KSJM

PLAINTIFFS-BELOW/APPELLEES' ANSWERING BRIEF

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Dated: December 29, 2022

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NATURE OF PROCEEDINGS

Plaintiffs[1] filed this action to challenge CCSB Financial Corp.'s board of directors' ("CCSB" and the "Old Board") instruction to the inspector of elections immediately before CCSB's January 28, 2021 annual meeting (the "2021 Election") to exclude 37,416 votes for the Park Nominees in a contested director election (the "Instruction"). The Instruction was not disclosed at the 2021 Election, flipped the outcome of the 2021 Election, and allowed the Old Board to declare its nominees the winners.[2]

To justify the Instruction, the Old Board "adopted a new interpretation" of Article FOURTH of CCSB's certificate of incorporation (the "Certificate"), which prevents a stockholder owning more than 10% of the Company's outstanding shares from voting more than 10% of the shares outstanding in an election (the "Voting Limitation").[3] Under its new interpretation, the Old Board determined it could "aggregate multiple stockholders' holdings if [it] perceived the stockholders to be

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[1] "Plaintiffs" are Park G.P., Inc. ("Park") and its nominees for the 2021 Election: DeAnn Totta ("Totta"), Laurie Morrissey ("Morrissey") and Chase Watson ("C. Watson, and with Totta and Morrissey, the "Park Nominees").

[2] "Old Board" means Mario Usera ("Usera"), Deborah Jones ("Jones"), Louis Freeman ("Freeman"), David Feess ("Feess"), Debra Coltman ("Coltman"), Robert Durden ("Durden"), and George McKinley ("McKinley," collectively, the "Old Board"). The "Old Board Nominees" are Usera, Jones, and Freeman.

[3] *Totta v. CCSB Fin. Corp.*, 2022 WL 1751741, at *2, 22 (Del. Ch. May 31, 2022).

acting in concert with one another."[4] Relying on a legally incorrect interpretation of "acting in concert," the Old Board aggregated the stockholdings of Park, Park's owner David Johnson ("Johnson"), the Park Nominees, and 37,175 shares held by non-party DEW, LLC ("DEW").[5] The Old Board purported to apply the Voting Limitation to exclude 37,416 votes already cast, including all of DEW's votes, for the Park Nominees.[6]

Following well-settled law, the Court of Chancery applied enhanced scrutiny under *Blasius Industries, Inc. v. Atlas Corp*[7] to the Board's machinations.[8] In its post-trial opinion, the court held that Johnson and DEW were not acting in concert under CCSB's Certificate.[9] The court further held that the Instruction to disqualify DEW's votes was "void under *Blasius* for failing to demonstrate a compelling justification," invalid under the terms of CCSB's Certificate, and "invalid under equitable principles."[10] The court ruled that DEW's shares should have been counted and, as a result, the Park Nominees won the 2021 Election.[11] In a later

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[4] *Id.* at *1.

[5] *Id.* at *10.

[6] *Id.*

[7] 564 A.2d 651 (Del. Ch. 1988).

[8] *CCSB*, 2022 WL 1751741, at *12-13.

[9] *Id.* at *26-27.

[10] *Id.* at *1, 24-27, 29.

[11] *Id.* at *26 n.244.

opinion, the trial court granted Plaintiffs' application for reimbursement of attorneys' fees and expenses for the significant benefits conferred on CCSB's stockholders.[12]

On appeal, CCSB argues that the Court of Chancery erred (i) by interpreting the Voting Limitation and deciding whether the Board's Instruction to disqualify votes was legally authorized under the Certificate, instead of deferring to the Board's action under the business judgment rule, (ii) by finding that, even if enhanced scrutiny applied, that it was not satisfied, (iii) in concluding that Johnson and DEW were not acting in concert and (iv) in awarding the reimbursement of Plaintiffs' attorneys' fees and expenses. In making those arguments, CCSB relies on ***dozens*** of authorities it did not present below. CCSB's arguments premised on those authorities are waived under Supreme Court Rule 8 and cannot be considered. Even if any of those arguments are considered, CCSB's arguments (new and old) have no merit and Plaintiffs respectfully request that the Court affirm the Court of Chancery's May 31 and November 3, 2022 opinions.

[12] *Totta v. CCSB*, 2022 WL 16647972, at *2 (Del. Ch. Nov. 3, 2022).

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly held that CCSB's Certificate could not modify or eliminate the jurisdiction of Delaware courts to interpret corporate certificates, determine whether a board of directors had legal authorization to act, and equitably review director conduct by restricting the standard of review to business judgment and precluding review by any heightened standard. CCSB is wrong that the trial court could not rule that the Board's action to exclude dissident votes under the Voting Limitation was legally incorrect or inequitable unless it determined that the Board acted in bad faith. As the trial court noted, CCSB's approach would "foreclose[] judicial review for legal validity and under otherwise applicable equity standards and require the court to evaluate the [Board's Voting Limitation] determination under the business judgment rule."[13] The trial court rejected CCSB's argument because it "contravenes fundamental principles of Delaware corporate law."[14]

2. Denied. The court below did not err in determining that enhanced scrutiny applied to the Board's invocation of the Voting Limitation to exclude votes for the Park Nominees. The court below did not err in refusing to apply the *Unocal* standard of review.

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[13] *CCSB*, 2022 WL 1751741, at *14.

[14] *Id*.

3. Denied. The court below did not err in refusing to find that the Board satisfied the *Unocal* standard of review, because CCSB never argued below that *Unocal* applied.

4. Denied. The court below did not misapply the burden of proof. Instead, the court below noted that Plaintiffs had the burden to prove that the Voting Limitation was incorrectly applied, while CCSB had the burden to show the Board's actions satisfied enhanced scrutiny under *Blasius*.[15] Furthermore, the court below did not commit clear error in finding that Johnson and DEW were not acting in concert under CCSB's Certificate. That factual finding is well supported by the record.

5. Denied. The court below did not abuse its discretion in finding that Plaintiffs conferred significant benefits on CCSB's stockholders, which warranted an award of reimbursing Plaintiffs for their attorneys' fees and expenses under the corporate benefit doctrine.

[15] *Id.* at *12.

STATEMENT OF FACTS

The trial court's May 31, 2022 post-trial factual findings are entitled to considerable deference.[16] Plaintiffs respectfully incorporate those factual findings herein, and only include a short recitation below of the points most critical to the appeal.

A. The Old Board Concocts an "Acting in Concert" Argument to Steal the 2021 Election

Prior to the 2021 Election, Park had run proxy contests to try to replace incumbent nominees on CCSB's Board, noting that CCSB had continued to lose money and needed improvement to management and profitability.[17] Park had not been successful prior to the 2021 Election, but the results were very close in 2020. As the 2021 Election approached, the Old Board knew it was likely to lose.

On January 20, 2021—eight days before the 2021 Election—the Old Board decided for the first time that Johnson "may be acting in concert with others," relying on two events.[18] *First*, after the Old Board requested details of Johnson's beneficial

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[16] *See Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 94-95 (Del. 2021).

[17] *CCSB*, 2022 WL 1751741 at *3, 6. CCSB discusses an old *Robb* judgment across multiple pages, but does not explain how the court below erred in its consideration of CCSB's arguments premised on that issue. *See* Amended Appellant CCSB Financial Corp's Opening Brief at 12-15, 48 ("Opening Brief" or "DOB"). The court below considered and properly rejected CCSB's arguments. *See CCSB*, 2022 WL 1751741, at *4-5.

[18] *CCSB*, 2022 WL 1751741, at *9.

ownership, Johnson replied via letter on December 17, 2020, which showed Johnson owned ***fewer shares*** on the December 3, 2020 record date (the "Record Date") than he did on September 30, 2020.[19] The letter reported that Johnson beneficially owned 73,948 shares on the Record Date (9.95% of the outstanding shares).[20]

Second, on November 25, 2020, Johnson sold 19,500 CCSB shares to DEW, an entity owned by D. Watson, the father of Park Nominee C. Watson.[21] D. Watson is Johnson's longtime friend and associate.[22] D. Watson/DEW was also a pre-existing CCSB stockholder, owning 17,765 shares.[23] No party argued the price DEW paid for these shares was discounted.[24] Johnson reported the sale to the IRS (inviting tax consequences) and to the Federal Reserve, which did not object to the sale.[25]

On January 18, 2021, Usera's attorney, purporting to act on behalf of the Board, sent D. Watson a letter requesting information related to both D. Watson's

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[19] *Id*. at *8.

[20] *Id*. at *3, 8. At the 2021 Election, Usera, CCSB's President and Chief Executive Officer, held 78,442 of the Company's 743,071 outstanding shares (10.56% of the outstanding shares). *Id.* at *1, 10.

[21] *Id*. at *7.

[22] *Id.* at *4.

[23] *Id*.

[24] *Id.* at *26.

[25] *Id.*

beneficial ownership and his relationship with other CCSB stockholders.[26] D. Watson responded on January 27, 2020, indicating that DEW owned 37,175 CCSB shares (about 5% of the outstanding shares), and that he did not have any agreement with, nor was he affiliated with, any CCSB stockholder.[27]

Although the Old Board held multiple meetings between December 17, 2020 and January 20, 2021, the Old Board did not discuss Johnson's December 17 letter until a January 20, 2021 Board meeting.[28] At that meeting, Usera asserted that Johnson's letter lacked certain information, but the Old Board neither informed Johnson of this purported deficiency nor requested additional information from him.[29] Instead, Usera concluded that Johnson's letter indicated that he "may be acting in concert with others."[30] The Old Board also concluded that Johnson transferred his shares to DEW "to avoid the [Voting Limitation] and that the individuals may be acting in concert."[31]

On the morning of the 2021 Election (January 28), the Old Board determined that the Voting Limitation should apply not only to Johnson, Johnson's wife and the

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[26] *Id*. at *8.

[27] *Id*. at *9; B3 (responding to B1-B2).

[28] *CCSB*, 2022 WL 1751741, at *9.

[29] *Id*.

[30] *Id*.; A0324.

[31] *CCSB*, 2022 WL 1751741, at *9; A0325.

Park Nominees, but also to DEW.[32] The Old Board did not consider whether any other stockholders were acting in concert or whether to aggregate Usera's shares with any other stockholders, including any of the Old Board members.[33] The Old Board then authored a letter to Stephanie Kalahurka, the Company's inspector of elections (the "Inspector"), detailing the Old Board's decision that Johnson was acting in concert with others so the Old Board could aggregate shares to exclude votes for the Park Nominees.[34] The letter included a table detailing shares held by each stockholder above and calculated 37,416 shares to be in excess of the 10% voting limit.[35] The letter instructed the Inspector to exclude those 37,416 shares from the official tabulation of votes for the 2021 Election (i.e., the Instruction).[36] Notably, the Instruction included ***all*** 37,175 shares held by DEW as part of the 10% Voting Limitation, rather than just the 19,500 shares DEW bought from Johnson in November 2020.[37]

Prior to applying the Voting Limitation to exclude votes for the Park Nominees, the Inspector counted 360,275 votes for the Park Nominees and 359,336

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[32] *CCSB*, 2022 WL 1751741, at *10.

[33] *Id.* at *9-10.

[34] *Id*. at *10.

[35] *Id*.; A0335-A0336.

[36] *CCSB*, 2022 WL 1751741, at *10.

[37] *Id*.

votes for the Old Board Nominees—a 939 share victory for the Park Nominees.[38] The Old Board did not disclose the Instruction to CCSB stockholders before or at the 2021 Election.[39]

B. The Old Board Unevenly Applied the Voting Limitation to Benefit the Incumbents

The Board's incorrect application of the Voting Limitation was not applied even-handedly. "The Board did not investigate whether any other stockholder was potentially acting in a manner that could justify invoking the Voting Limitation, including Usera."[40]

From November 1, 2016 to January 29, 2021, Usera personally brokered 23 transactions where either the Company, its directors, its officers, or family members of directors or officers would purchase CCSB shares from individuals that Usera considered loyal to the Old Board. Usera tracked each transaction on a cheat sheet (which he updated monthly) so he could keep tabs on who he believed would vote for the Old Board Nominees.[41] Usera's brokered transactions included "eight repurchases in which the Company bought 21,710 shares for $305,000 from Company directors, officers and their family members who wished to sell their

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[38] *Id*. at *11.

[39] *Id*. at *10-11.

[40] *Id.* at *9.

[41] *Id.* at *5.

stock."[42] "Fifteen transactions involved private, undocumented sales in which company directors, officers, and their family members purchased 22,945 shares of stock, including 16,985 by Jones, Feess, and Freeman."[43]

Collectively, the Old Board beneficially owned 23.39% of the outstanding CCSB shares on the Record Date; thus, if the sale of stock from one person to another constituted "acting in concert" conduct, the Voting Limitation should have applied to all of the shares owned by the Old Board since they participated for years in Usera's scheme to keep shares owned by individuals loyal to the Old Board.[44] Instead, the Old Board decided to apply it only to (i) Johnson, Johnson's wife, Park, the Park Nominees, and DEW and (ii) Usera. The Old Board did not even include the shares owned by Usera's daughter, a CCSB employee, as part of Usera's ownership.[45] This uneven application of the Voting Limitation by the incumbent directors let those same directors (and officers) collectively vote far more than just 10% of the outstanding shares.

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[42] *Id.*

[43] *Id*.

[44] *Id*. at *1.

[45] *Id.* at *9. Additionally, in the lead-up to the 2021 Election, Usera tried to flip votes by contacting stockholders who had already voted for the Park Nominees. *Id.* at *8.

C. The Court of Chancery Declares the Park Nominees the Victors at the 2021 Election

On May 31, 2022, after a half-day trial on a paper record composed of 113 exhibits, nine witness depositions, and forty-six stipulations of fact, the Court of Chancery granted judgment in Plaintiffs' favor. The court held that the Old Board's determination that Johnson and D. Watson (DEW) acted in concert under the Voting Limitation was wrong and invalid. The court considered all of the potential rationales and post-hoc justifications the Old Board developed through discovery and concluded that none of them "individually or in the aggregate, support a finding that Johnson and D. Watson are or were acting in concert pursuant to a mutual agreement, arrangement, or understanding as to how D. Watson would vote his shares."[46]

The court also evaluated the Instruction through enhanced scrutiny, noting "the [Old] Board's sole justification for its decision to exclude the votes at issue is 'protecting [the Company's] shareholders' from Mr. Johnson's effort to 'take control' and 'consider selling the bank.'"[47] The court found numerous factual deficiencies with CCSB's characterization of Johnson and its "corporate-raider" justification argument generally.[48] The court concluded that even if accurate,

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[46] *Id.* at *26.

[47] *Id.* at *28-29 (citations omitted).

[48] *Id*. at *29.

however, CCSB's argument "is directly contrary to the well-established law of this state" and its sole justification was "foreclosed under Delaware law."[49] The court held that the "[I]nstruction to the inspector of elections was improper as to DEW's 37,175 votes."[50] The determination that DEW's votes should have been counted resulted in the Park Nominees winning the election.

Because the finding that DEW's votes should have been counted was dispositive, the court did not resolve Plaintiffs' other arguments, including that (i) other shares should not be aggregated with Park and Johnson's, (ii) the Old Board had not applied the Voting Limitation in good faith and with information reasonably available to it, and (iii) if CCSB's proffered interpretation of the Certificate was correct, the Old Board's stockholdings should have been aggregated under the Voting Limitation.

D. Plaintiffs Conferred Significant Benefits on All CCSB Stockholders

On November 3, 2022, the Court of Chancery determined that "the judgment fortifies the Company's stockholder franchise generally" and "Plaintiffs vindicated not only their own votes, but also the majority vote of the unaffiliated stockholders who properly elected the [Park Nominees]."[51] The court characterized this benefit

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[49] *Id*. at *29.

[50] *Id.*

[51] *CCSB*, 2022 WL 16647972, at *2.

as "substantial," noting that this litigation retroactively corrected the Old Board's interpretation of the Voting Limitation for the 2021 Election, but also "proactively set[] the interpretation for future elections" which "prevents future [CCSB] stockholders from being similarly harmed by an erroneous application of the Voting Limitation."[52] After applying the *Sugarland* factors,[53] the court concluded that Plaintiffs' reimbursement request was "altogether reasonable" and "comparable to awards in other cases."[54]

[52] *Id*.

[53] *Sugarland Indus. Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).

[54] *CCSB*, 2022 WL 16647972, at *3-4.

ARGUMENT

I. THE COURT BELOW DID NOT ERR BY INTERPRETING THE VOTING LIMITATION AND DETERMINING WHETHER THE OLD BOARD'S INSTRUCTION WAS LEGALLY AUTHORIZED

A. Question Presented

Whether the trial court committed legal error by interpreting the Voting Limitation and determining whether the Old Board's Instruction to disqualify votes was legally authorized instead of deferring to the Old Board's action under the business judgment standard of review.[55]

B. Scope of Review

The application of legal standards is subject to *de novo* review.[56] Only questions fairly raised below may be presented for appeal.[57]

C. Merits of the Argument

CCSB's primary argument is that the trial court should not have interpreted the Voting Limitation and determined whether the Old Board's instruction was legally authorized. CCSB argues the trial court instead should have applied the business judgment standard of review to the Old Board's interpretation because CCSB's Certificate provides that "any constructions, applications, or determinations

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[55] *CCSB*, 2022 WL 1751741, at *11-21; A0477-A0479; A0553-A0554; B50-B61; B95-B103.

[56] *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997).

[57] Supr. Ct. R. 8.

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"[58] shall be "conclusive and binding upon the Corporation and its stockholders."[59] According to CCSB, the Conclusive-And-Binding Provision prevented the trial court from considering whether the Board's exclusion of dissident votes under the Voting Limitation was legally incorrect or inequitable, unless it first determined that the Board acted in bad faith.[60]

The trial court correctly rejected this argument. It concluded that CCSB's Certificate could not modify or eliminate the jurisdiction of Delaware courts to equitably review a corporate director's conduct by restricting the standard of review to business judgment and precluding review by any heightened standard. Under Delaware law, director actions are "twice-tested."[61] The first test asks whether the action was legally authorized (by positive law, statute or constitutive documents).[62]

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[58] The Voting Limitation falls within the above quoted language.

[59] DOB at 9-10, 27-28; A0023 art. 4(C)(6). The opinion below referred to this as the "Conclusive-And-Binding Provision."

[60] DOB at 27-29. The trial court noted that CCSB's approach would "foreclose[] judicial review for legal validity *and* under otherwise applicable equity standards and require the court to evaluate the [Board's Voting Limitation] determination under the business judgment rule." *CCSB*, 2022 WL 1751741, at *14 (emphasis in original).

[61] *In re Invs. Bancorp. S'holder Litig.*, 177 A.3d 1208, 1222 (Del. 2017).

[62] *CCSB*, 2022 WL 1751741, at *12.

The second test analyzes whether board action was equitable and looks to whether the directors complied with their fiduciary duties.[63] This is well-settled Delaware law.

CCSB advocated for "a totally different analytical approach, testing the Board's action only once under a highly deferential standard."[64] The trial court rejected CCSB's argument because it

> contravenes fundamental principles of Delaware corporate law. In essence, the Company asks the court to hold that a corporate charter may alter the directors' fiduciary obligations and the attendant equitable standards a court will apply when enforcing those obligations. The Company would treat a corporate charter like the constitutive agreement that governs an alternative entity.[65]

The trial court's ruling was based on a thorough analysis of Delaware law, including Delaware's Constitution, the Delaware General Corporation Law, the Delaware Revised Uniform Partnership Act, the Delaware Revised Uniform Limited Partnership Act, the Delaware Limited Liability Company Act, the Delaware Statutory Trust Act, and decades of well-developed case law.[66] On appeal, CCSB does not substantively address the trial court's legal analysis, much less explain how

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[63] *Id*.

[64] *Id.* at *13.

[65] *Id*.

[66] *Id.* at *15-18.

the trial court committed legal error.

Instead, CCSB argues that its approach "resetting the orientation of Delaware corporate law,"[67] was permissible because of freedom of contract.[68] CCSB's Certificate, however, "may not contain provisions that are 'contrary' to, or 'inconsistent' with, Delaware law because they transgress a public policy settled by the common law or implicit in the General Corporation itself."[69] Furthermore, "the 'latitude for substantial private ordering' granted by the DGCL is constrained by 'statutory parameters and judicially imposed principles of fiduciary duties.'"[70]

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[67] *Id.* at *19. The trial court noted that to support this new paradigm, CCSB relied on four cases, but none supported its position. *Id*. On appeal, CCSB abandoned even those cases. It did not cite two of those cases at all and the other two cases are cited, but not to support this new paradigm. *See* DOB at 26-27, 29 (citing *In re Walt Disney Derivative Litigation*, 906 A.2d 27 (Del. 2006) to support an argument that challengers of the board's determination have the burden of rebutting the business judgment rule and *Williams v. Geier*, 671 A2d 1368, 1381 (Del. 1996) to erroneously argue that a "charter provision . . . should be respected as a matter of policy and at a minimum should not be deemed violative of Delaware's public policy").

[68] DOB at 26. CCSB quoted a portion of *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 845 (Del. Ch. 2004) to argue that stockholders and corporate managers are afforded "'great leeway to structure their relations, subject to relatively loose statutory constraints.'" *Id*. CCSB's quotes and citations are inaccurate. *Jones Apparel* did not rule a certificate could preclude judicial review of director misconduct under heightened scrutiny. Rather, the remainder of the quote that CCSB omitted states that the structuring of the relationship between stockholders and corporate managers was subject to "to the policing of director misconduct through equitable review." *Jones Apparel*, 883 A.2d at 845.

[69] *Manti Holdings, LLC v. Authentix Acq. Co.*, 261 A.3d 1199, 1218 (Del. 2021).

[70] *CCSB*, 2022 WL 1751741, at *16 (quoting *Williams*, 671 A.2d at 1381).

CCSB's argument contradicts Delaware law and ignores the trial court's well-reasoned opinion. Delaware courts enforce fiduciary obligations that arise out of equity "through a system of judicially crafted standards of review."[71] A corporation cannot modify or eliminate the Court's ability to enforce fiduciary duties through judicially crafted standards of review just like it cannot modify or eliminate fiduciary duties at the outset. The General Assembly has granted certain types of entities "the authority to modify or eliminate fiduciary duties and the standards that are applied by this court,"[72] but not corporations.

The trial court noted the "General Assembly has acted cautiously to limit specific default rules of equity" and cited specific statutory examples, including 8 *Del. C.* § 102(b)(7) (allowing corporations to eliminate director liability for breach of the duty of care), 8 *Del. C.* § 122(17) (allowing corporations to renounce certain business opportunities in advance) and 8 *Del. C.* § 152 (providing that in the absence of actual fraud, the judgment of directors as to the value of consideration shall be conclusive). The trial court noted that even Section 152 "does not provide a defense when the underlying transaction involves unfair self-dealing proscribed by equitable fiduciary concepts."[73] CCSB does not address any of these statutes or cite any other

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[71] *Id*. at *15.

[72] *Id.*

[73] *Id.* at *17 (quoting *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1235 (Del. Ch. 2001) *rev'd on other grounds*, 817 A.2d 149 (Del. 2002)).

statute that supports its argument.[74]

CCSB is also wrong that the court below misapplied *eBay* and *Hilton*.[75] CCSB is wrong that "standards" referred to in *eBay* concerned the promotion of corporate value. The Court of Chancery in *eBay* ruled corporate "directors are bound by the fiduciary duties and standards that accompany that form" in applying the *Unocal* standard and ruling that defendants breached their fiduciary duties in adopting a rights plan.[76] CCSB's argument that *Hilton* addressed the elimination of liability, not the standard of review, misses the trial court's point. The rights plan provision was alleged to have insulated the board and its decisions from equitable review by eliminating liability "beyond the duty of care for offenses such as breaches of the duty of loyalty."[77] The Court of Chancery, citing and quoting *Moran*, reaffirmed that a rights plan is "not absolute" and directors would be "held to the

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[74] CCSB is also wrong that the court below conflated the "distinction between charter provisions altering the standard of *review* and the standard of *conduct*." DOB at 30 (emphases in original). Rather, it correctly ruled that "constitutive agreements that govern an entity can only eliminate or modify fiduciary duties *and the attendant judicial standards of review to the extent expressly permitted by an affirmative act of the Delaware General Assembly.*" *CCSB*, 2022 WL 1751741, at *14 (emphasis added).

[75] DOB at 30-31.

[76] *eBay v. Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

[77] *Leonard Loventhal Account v. Hilton Hotels Corp.*, 2000 WL 1528909, at *11 (Del. Ch. Oct. 10, 2000), *aff'd*, 780 A2d 245 (Del. 2001).

same fiduciary standards any other board of directors would be held to."[78]

The Voting Limitation affects the outcomes of elections and restricting judicial review to whether the Old Board's interpretation was made in bad faith would prevent stockholders from holding CCSB and the Old Board liable and obtaining relief in the form of a legally correct and equitable enforcement of the provision.

* * *

The Court of Chancery applied decades of settled Delaware law and concluded that the Conclusive-And-Binding Provision could not foreclose judicial review for both legal validity and under equitable standards by forcing the court to review the directors' conduct under business judgment review. This was not legal error and the judgment below should be affirmed.

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[78] *Id.* at *12 (quoting *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1354 (Del. 1985)).

II. THE COURT BELOW CORRECTLY APPLIED ENHANCED SCRUTINY

A. Question Presented

Whether the court below (i) correctly held that *Blasius* applied or (ii) abused its discretion in determining that CCSB did not satisfy its burden of proof at trial that its actions did not satisfy the two-part *Blasius* test.[79]

B. Scope of Review

"[T]he applicable standard by which the defendants' conduct is to be judged . . . is a legal question . . . subject to *de novo* review by this Court."[80] Whether an equitable remedy exists using the correct standards is an issue of law subject to *de novo* review.[81] Thus, the issue of whether *Blasius* applies is subject to *de novo* review.

The "[d]eterminations of fact and application of those facts to the correct legal standards, however, are reviewed for an abuse of discretion."[82] "An abuse of discretion occurs 'when the trial judge exceeds the bounds of reason in view of the circumstances and has so ignored recognized rules of law or practice so as to produce

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[79] *CCSB*, 2022 WL 1751741, at *13, 27-29; A0470-A0476; A0553-A0554; B50-B61; B95-B103.

[80] *Bäcker*, 246 A.3d at 94 (citation omitted).

[81] *Lingo v. Lingo*, 3 A.3d 241, 243-44 (Del. 2010).

[82] *Id.* (citation omitted).

injustice."[83] Furthermore, the Court "will not overturn the Court of Chancery's factual findings unless they are clearly erroneous."[84] Factual findings are not clearly erroneous "if they are 'sufficiently supported by the record and are the product of an orderly and logical deductive process.'"[85] "When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[86]

Only questions fairly raised below may be presented for appeal.[87]

C. Merits of Argument

1. CCSB Waived Most of Its Arguments and Authorities[88]

In its trial brief, CCSB cited ***nine cases***, ***one statute***, and ***one rule***.[89] On appeal, CCSB's four-page table of authorities cites ***43 cases***, four statutes, and nine other authorities. CCSB's Opening Brief contains substantive arguments about the new authorities, all of which are waived and cannot be considered on appeal.[90]

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[83] *TransPerfect Global, Inc. v. Pincus*, 278 A.3d 630, 652 (Del. 2022) (citation omitted).

[84] *Bäcker*, 246 A.3d at 94.

[85] *Biolase, Inc. v. Oracle P'rs*, 97 A.3d 1029, 1035 (Del. 2014) (quoting *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999)).

[86] *RBC Cap. Mkts, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015) (quoting *Bank of N.Y. Mellon Tr. Co. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011)).

[87] Supr. Ct. R. 8.

[88] As discussed below, CCSB also proffered an argument regarding the policy rationale under the CIBCA for the first time on appeal, which is also waived.

[89] A0390.

[90] Supr. Ct. R. 8.

For example, CCSB argues that the court below erred by applying the standard set forth in *Blasius* rather than the standard set forth in *Unocal Corp. v. Mesa Petroleum Co*.[91] CCSB did not argue in its trial brief or at trial that the *Unocal* standard applied or that the Board's conduct satisfied this standard.[92] CCSB's new authorities do not end with *Unocal* and *Unitrin*. CCSB's Opening Brief contains substantive argument premised on the following authorities, none of which were discussed below by CCSB:

- *Rosenbaum v. CytoDyn Inc*., 2021 WL 4775140 (Del. Ch. Oct. 13, 2021) (cited DOB at 37 and 40);[93]
- *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310 (Del. Ch. 2010),

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[91] 493 A.2d 946, 955 (Del. 1985). *See* DOB at 34, 39-40.

[92] *See* A0390 (not citing *Unocal*); *see also* A0449-A0562 (same). *Genger v. TR Inv'rs, LLC*, 26 A.3d 180, 197 (Del. 2011) (declining to hear an argument raised for the first time on appeal because "it was never fully and fairly presented to the trial court, as Supreme Court Rule 8 requires"). CCSB also relies on *Unitrin, Inc. v. Am. Gen. Corp*., 651 A.2d 1361 (Del. 1995) for the first time on appeal. *See* A0390 (not citing *Unitrin*).

[93] CCSB did not cite *Rosenbaum* below and the court's decision not to apply *Blasius* in that case was unrelated to the fact that the advance notice bylaw was adopted on a clear day. Rather, the court found plaintiffs' conduct of playing fast and loose with the requirements did not relieve them of their burden to demonstrate compliance with the bylaws. *Rosenbaum*, 2021 WL 4775140, at *15. Moreover, the court ruled that despite *Blasius*'s inapplicability, plaintiffs could "still turn to equity for relief by proving there are 'compelling circumstances' that justify a finding of inequitable conduct." *Id.* The Old Board's manipulative and inequitable application of the Voting Limitation for a legally improper justification entitled Plaintiffs to equitable relief under any standard.

aff'd, 15 A.3d 218 (Del. 2011) (cited DOB at 41);

- Change in Bank Control Act of 1978, 12 U.S.C §1817(j) (cited *passim*); and
- Federal Deposit Insurance Corporation, Notice of Acquisition of Control, Applications Procedurals Manual, Section 5 (cited DOB at 47).

CCSB did not argue that the "interests of justice" require this Court to consider these new arguments and authorities on appeal under Rule 8, and CCSB is precluded from making that argument in its reply brief.[94]

2. The Trial Court Correctly Held that *Blasius* Applied to the Board's Decision to Disqualify Stockholder Votes

"Shareholder voting rights are sacrosanct."[95] Accordingly, when director conduct "'affect[s] either an election of directors or a vote touching on matters of corporate control, the board must justify its action under the enhanced scrutiny test."[96] In proxy contests, directors "confront a structural and situational conflict because their own seats are at risk,"[97] and "the realities of the decision-making context can subtly undermine the decisions of even independent and disinterested

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[94] *See* Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

[95] *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012).

[96] *Pell v. Kill*, 135 A.3d 764, 786 (Del. Ch. 2016) (quoting *Mercier v. Inter-Tel (Del.), Inc.*, 929 A2d 786, 811 (Del. Ch. 1988)).

[97] *Id*.

directors."[98] Accordingly, when a court determines that "the primary purpose of the board's action is to interfere with or impede exercise of the shareholder franchise and stockholders are not given a full and fair opportunity to vote," Delaware courts apply enhanced scrutiny and require a compelling justification for the action.[99]

The trial court correctly held that the *Blasius* standard applied to the Old Board's instruction to the Inspector not to count stockholder votes for the Park Nominees under the Voting Limitation:

> Under these unusual circumstances, where the Board expressly instructed the inspector of elections not to count a certain number of votes from particular stockholders, it becomes self-evident that the Board took action to interfere with the ability of certain stockholders to vote their shares. Thus, the court finds that the Board's primary purpose in giving its instruction to Kalahurka was to interfere with the effective exercise of the shareholder franchise in a contested election for directors.[100]

In light of those clear findings, CCSB's argument that the trial court applied *Blasius* only "because the dispute at issue concerned a Board election" is wrong.[101]

CCSB also argues that an instruction under the Voting Limitation could never be subject to enhanced scrutiny because it was adopted on a clear day.[102] The trial

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[98] *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457 (Del. Ch. 2011).

[99] *Williams*, 671 A.2d at 1376.

[100] *CCSB*, 2022 WL 1751741, at *27.

[101] DOB at 34.

[102] *Id.* at 35-38.

court noted that "supposed distinction [was] irrelevant here" because "[e]ven when a board mechanically applies voting restrictions adopted on a clear day, its application of those restrictions may be subject to enhanced scrutiny."[103]

CCSB did not cite any case law supporting its argument below and still does not cite any here.[104] Instead, CCSB criticizes the trial court, claiming it cited no case that contradicted CCSB's *ipse dixit*.[105] It was CCSB's burden to provide the court with authority that supported its argument, not the other way around. Moreover, the trial court's ruling was well supported,[106] including its citation to this Court's ruling that enhanced scrutiny applies to preemptive defensive measures taken when the corporation was not under immediate attack.[107]

CCSB's argument that enhanced scrutiny cannot apply contradicts over 50 years of Delaware law establishing that director actions are twice-tested and "inequitable action does not become permissible simply because it is legally possible."[108] CCSB's argument is directly contrary to cases like *Schnell*, where

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[103] *CCSB*, 2022 WL 1751741, at *21.

[104] DOB at 37-38; *see CCSB*, 2022 WL 1751741, at *21 (noting that CCSB did not cite any case law).

[105] DOB at 37-38.

[106] *CCSB*, 2022 WL 1751741, at *21 & n.214 (collecting cases).

[107] *Id.* (citing *Stroud v. Grace*, 606 A.2d 75, 82 (Del. 1992) and *Moran*, 500 A.2d at 1350-53).

[108] *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

directors changed the date and location of a stockholders meeting to restrict the time dissident stockholders had to present their views to stockholders. This Court ruled that

> management has attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office; and, to tht [sic] end, for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management. These are inequitable purposes, contrary to established principles of corporate democracy . . . .
>
> Management contends that it has complied strictly with the provisions of the new Delaware Corporation Law in changing the by-law date. The answer to that contention, of course, is that inequitable action does not become permissible simply because it is legally possible.[109]

The facts here highlight the need for twice-testing. The application of the Voting Limitation at the 2021 Election was done in a conflicted, one-sided and inequitable manner. The Old Board (i) allowed Usera (whose Board seat was at stake) to investigate the dissidents, (ii) did not investigate any other stockholder, including Usera, who was permitted to "self-report," and (iii) did not apply the Voting Limitation to combine insiders' shares with Usera.[110] This case presented a prime example of why enhanced scrutiny exists and how it protects the sacrosanct

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[109] *Id.*

[110] *CCSB*, 2022 WL 1751741, at *9-10, 26.

voter franchise.

3. The Trial Court Did Not Abuse its Discretion Holding That CCSB Did Not Satisfy *Blasius*

The first inquiry under *Blasius* asks whether the primary purpose of the Board's action was "to interfere with or impede the effective exercise of the shareholder franchise in a contested election of directors."[111] That was satisfied here, because "the Board's primary purpose in giving its instruction to Kalahurka was to interfere with the effective exercise of the shareholder franchise in a contested election for directors."[112] The trial court's finding of fact is not challenged on appeal. CCSB only contends that the primary purpose inquiry does not apply because the Voting Limitation was adopted on a clear day.[113] That meritless argument was addressed *supra* pp. 26-27.

The second step under *Blasius* required CCSB to satisfy the compelling justification standard by showing the directors' "actions were reasonable in relation to their legitimate objective, and did not preclude the stockholders from exercising their right to vote or coerce them into voting a particular way."[114] "The belief that directors know better than stockholders is not a legitimate justification when the

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

[112] *CCSB*, 2022 WL 1751741, at *27.

[113] DOB at 35-38.

[114] *CCSB*, 2022 WL 1751741, at *28 (citing *Mercier*, 929 A.2d at 810-11).

question involves who should serve on the board of a Delaware corporation."[115] "[E]ven a board's honest belief that its incumbency protects and advances the best interests of the stockholders is not a compelling justification. Instead, such action typically amounts to an unintentional violation of the duty of loyalty."[116]

CCSB admitted that "the Board's sole justification for its decision to exclude the votes at issue is 'protecting [the Company's] shareholders from Mr. Johnson's effort to 'take control' and 'consider selling the bank.'"[117] The trial court found "numerous deficiencies with the Company's corporate-raider justification argument."[118] The trial court then ruled that regardless of whether the "corporate raider" characterization was accurate or not,

> the Company's argument is directly contrary to the well-established law of this state. Even if Park's nominees would, once seated, propose to sell the Bank, and that is not at all an obvious conclusion to draw from the record before the court, the decision to elect those nominees must be left to the Company's stockholders. The Board does not have an obligation to "protect" stockholders from that outcome by excluding votes for insurgent nominees. Quite the opposite. The Board has an affirmative obligation not to interfere with the stockholder franchise without a

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[115] *Pell*, 135 A.3d at 790; *accord Mercier*, 929 A.2d at 811 ("The notion that directors know better than the stockholders about who should be on the board is no justification at all.").

[116] *Esopus Creek Value LP v. Hauf*, 913 A.2d 593, 602 (Del. Ch.), *judgment entered*, (Del. Ch. 2006).

[117] *CCSB*, 2022 WL 1751741, at *28 (quoting A0438).

[118] *Id*.

> compelling justification, and its sole justification is perhaps the only justification the Company could possibly have raised that is foreclosed under Delaware law.[119]

CCSB does dispute factually that it made this admission or contend that the trial court erred in applying its admission to settled Delaware law to conclude that the Old Board did not have a compelling justification. In fact, CCSB confirmed its admission that the Old Board's purported motive was "a desire to protect the interests of all stockholders."[120] For that reason, this Court can affirm the trial court's *Blasius* analysis.

None of CCSB's arguments contending the Board's conduct was permissible under heightened scrutiny are relevant and actually address the *Blasius* standard, let alone a basis for reversing the trial court's decision.

First, CCSB argues the "Board's conduct was appropriate under either *Unocal* or *Blasius* [because] [t]he adoption of the Voting Limitation was reasonable . . . [and] proportional."[121] CCSB also argues that percentage restrictions on stock ownership are permissible.[122] These arguments are irrelevant. The issue at trial was whether

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[119] *Id*. at *29.

[120] DOB at 43.

[121] *Id.* at 40-41.

[122] *Id.* (citing *Yucaipa*, 1 A.3d 310, which it did not cite below). The court in *Yucaipa* did not apply *Blasius* to the adoption of a rights plan because it was not adopted for the primary purpose interfering with the effectiveness of a stockholder vote. 1 A.3d at 330-31.

under *Blasius*, the Old Board had a compelling justification for its decision to exclude votes for the Park Nominee in its conflicted, unfair, one-sided application the Voting Limitation, not whether the Voting Limitation itself was valid.

Second, CCSB cites *Coster v. UIP Cos., Inc.*, 2022 WL 1299127 (Del. Ch. May 2, 2022), which applied *Blasius* and found a compelling justification was provided.[123] The court did not rule a compelling justification existed because the stock sale was devised on a "clear day."[124] Rather, the court ruled that based on the "exceptionally unique circumstances," the board had a compelling justification for selling stock to break a 50/50 deadlock because absent the stock sale, a custodian could have been appointed, which would have created an "existential crisis" by triggering broad termination provisions in key contracts that threatened a substantial portion of the company's revenue.[125] There was no such crisis here. The Old Board excluded votes for the Park Nominees to keep themselves in office because they thought they knew better than stockholders about who should sit on the Board. That is not a compelling justification under Delaware law.

The court correctly applied *Blasius* and did not abuse its discretion in finding that CCSB did not meet its burden. Thus, the opinion below should be affirmed.

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[123] DOB at 42.

[124] *Id.*

[125] *Coster*, 2022 WL 1299127, at *12-13.

III. THE COURT OF CHANCERY CORRECTLY FOUND THAT DEW AND JOHNSON WERE NOT ACTING IN CONCERT

A. Question Presented

Did the trial court commit clear error in ruling Johnson and D. Watson (DEW) were not acting in concert under the Voting Limitation?[126]

B. Scope of Review

The trial court's ruling on which party bore the burden of proof is reviewed *de novo*.[127] The trial court's factual findings that Johnson and DEW were not acting in concert will be set aside only if it is clearly erroneous.[128]

C. Merits of Argument

1. The Trial Court Properly Ruled That the Exclusion of DEW's Votes Under the Voting Limitation was Invalid

Certificate provisions that limit stockholder voting rights must be plain and unambiguous.[129] The CCSB Certificate does not define "acting in concert."[130] The trial court properly ruled that "[a]n undefined reference to 'acting in concert' cannot reasonably go beyond" a definition that requires "an agreement, arrangement or

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[126] *CCSB*, 2022 WL 1751741, at *24-27; A0479-A0483; B67-B72; B103-B108.

[127] *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1003 (Del. 2021).

[128] *Bäcker*, 246 A.3d at 96.

[129] *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 310 (Del. Ch. 2002) (quoting *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 927 (Del. 1990)).

[130] *CCSB*, 2022 WL 1751741, at *24.

understanding."[131] As a result, the trial court defined "acting in concert" as persons having an agreement, arrangement or understanding regarding the voting or disposition of shares.[132] This was a well-reasoned, logical result.

The trial court's definition was based on federal securities laws and regulations that govern whether individuals form a group, Section 203 of the DGCL, which uses the same concept as one of its definitions of ownership, and Merriam-Webster's definition of "concert."[133] The trial court's definition was also supported by its factual finding that "the concept of an agreement, arrangement, or understanding appears consistent with the manner in which the Company communicated to stockholders about their holdings and the manner in which Usera and Kalahurka discussed responses to those inquiries."[134] CCSB does not address the trial court's legal and factual basis for the definition of acting in concert, or contend it was in error.

Based on that legally correct definition, the trial court held that, under CCSB's Certificate, Johnson and D. Watson were not acting in concert. The trial court

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[131] *Id.* at *25.

[132] *Id.* at *24-25.

[133] *Id. See also Del. Bay Surgical Servs., P.A. v. Swier*, 900 A.2d 646, 652 (Del. 2006) ("words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language") (quoted DOB at 25).

[134] *CCSB*, 2022 WL 1751741, at *25.

summarized its factual findings that Plaintiffs proved at trial, which included "a contract evidencing a transaction which DEW purchased 19,500 shares from Johnson at a price that no party has argued was discounted," an amended tax return by Johnson reporting the sale to the IRS, "a letter to the Federal Reserve reporting the transaction, to which the Federal Reserve did not object, despite Johnson's history," and unrebutted "testimony from D. Watson that he has not entered into any voting agreement of any kind with respect to his shares, which is consistent with his representations to the Company."[135] The trial court further found there was "no evidence" of any "quid pro quo for D. Watson's votes" and "no indication" that C. Watson was nominated for any reason other than merit.[136] Based on these factual findings, the trial court ruled that the Old's Board's application of the Voting Limitation was legally invalid because Johnson and D. Watson were not acting in concert. The trial court's factual findings are entitled to a high level of deference.[137]

CCSB does not contend that the trial court ignored any of the trial evidence.[138] Indeed, the trial court considered all of CCSB's potential bases for determining that

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[135] *Id.* at *26.

[136] *Id.*

[137] *See Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005) ("This Court reviews the Court of Chancery's factual findings with a high level of deference.").

[138] Plaintiffs argued the Voting Limitation required the determination be made only based on what the Old Board knew at the time it acted. *See* B115-B116.

Johnson and D. Watson were acting in concert under the Voting Limitation, and ruled that "[n]one of these facts, individually or in the aggregate, support a finding that Johnson and D. Watson are or were acting in concert pursuant to a mutual agreement, arrangement, or understanding as to how D. Watson would vote his shares."[139] The court further explained that stockholders cannot act in concert merely because "the stockholder plans to vote the same way as another stockholder, is acquainted with another stockholder or even has a business relationship with another stockholder."[140] The court below then cited seven cases where even greater showings were insufficient to establish stockholders formed a group.[141]

On appeal, CCSB contends that the trial court erred by placing the burden on CCSB to establish Johnson and D. Watson were acting in concert when "*Plaintiffs*

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[139] *CCSB*, 2022 WL 1751741, at *26.

[140] *Id*. at *25. CCSB's primary acting in concert argument was that Johnson sold shares to D. Watson because Johnson could not vote shares above 10% in elections. The trial court ruled it was "unsurprising" and "unobjectionable" that Johnson would sell shares to his friend and business partner, noting that "Company insiders have been selling shares to one another for years, and the Company has strenuously argued that those stockholders were not acting in concert." *Id.* at *26.

[141] *Id.* at *25 & n.240 (collecting cases). CCSB does not address this ruling and only—ineffectively— attempts to distinguish one of the seven cases on which the trial court relied. DOB at 48. CCSB says that it is not advocating for the broad definition of "acting in concert" found in *Williams* and that "under applicable regulations" Johnson and D. Watson were "acting in concert." *Id.* The relevant "acting in concert" analysis is under CCSB's Certificate. As set forth herein, the court below correctly defined and applied "acting in concert" under CCSB's Certificate.

bore the burden to show that Johnson and the Watsons were *not* acting in concert."[142] CCSB does not explain how the trial court committed legal error in its analysis or articulate how Plaintiffs failed to carry any burden. More importantly, CCSB's argument is flatly contradicted by the trial court's ruling that Plaintiffs had the burden of proof that the Voting Limitation was incorrectly applied.[143]

The trial court defined "acting in concert," made factual findings, and then ruled that Plaintiffs had proven the Voting Limitation was incorrectly applied because, based upon its factual findings, Johnson and D. Watson were not acting in concert. There was no legal error in this straightforward approach to determine the invalidity of the Board's Instruction.

2. CCSB's New Argument that DEW was Presumptively Part of the Johnson Control Group was Waived and is Unsupported

CCSB also argues that the Old Board's application of the Voting Limitation "comported with the policy rationale underlying Congress's passage of the CIBCA in the first place."[144] CCSB contends the trial court erred because, under federal regulations implementing the CIBCA, DEW was presumptively part of the "Johnson Control Group" because C. Watson is D. Watson's son.[145] To support this argument,

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[142] DOB at 46 (emphases in original).

[143] *CCSB*, 2022 WL 1751741, at *12.

[144] DOB at 43.

[145] *Id.* at 46-47.

CCSB cites a Federal Reserve letter regarding an unrelated 2019 transaction between Johnson and MLake 70, in which C. Watson was a managing member, which was unwound years before any events relevant to the 2021 Election.[146]

The trial court was aware of the MLake 70 transaction (*CCSB*, 2022 WL 1751741, at *5), but CCSB never argued the transaction demonstrated some irrebuttable presumption that the trial court was bound by in determining whether Johnson and D. Watson/DEW were acting in concert years later.[147] At trial, CCSB did not even cite the authorities they claim support this supposed argument.[148] Thus, this new argument is waived.[149]

Even if this argument was raised at trial, it would have failed. The argument is a red herring: the Voting Limitation and CIBCA are distinct, and the Voting Limitation does not adopt terms or definitions from the CIBCA. The Voting Limitation expressly incorporates terms from the Securities Exchange Act of 1934

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[146] *See id.*

[147] CCSB mentioned CIBCA in passing below (*see* A0436, A0518), but never made arguments about presumptions under its "goals," Congress's supposed intent or its application to CCSB.

[148] DOB at 47-48 (citing 12 C.F.R. § 225.41(b)(1), (d)(1), (d)(4); the F.D.I.C.'s *Notice of Acquisition of Control*, Applications Procedurals Manual; *Lindquist & Vennum v. F.D.I.C.*, 103 F.3d 1409, 1413 (8th Cir. 1997); *Wellman v. Dickinson*, 682 F.2d 355, 363 (2d Cir. 1982)). *See* A0390 (not citing these authorities).

[149] *See* Supr. Ct. R. 8; *Genger*, 26 A.3d at 197.

and its associated regulations, but says nothing about the CIBCA.[150] Even if CCSB had shown that Johnson and DEW were acting in concert under a *rebuttable*[151] presumption in rules implementing the CIBCA, it would still need to show they were acting in concert under the Certificate.

Furthermore, CCSB presented no evidence that any presumption under the CIBCA was ever triggered, even if the CIBCA's "goals" applied to the definition of acting in concert under the Voting Limitation. Instead, the trial court found that Johnson disclosed to the Federal Reserve (i) his relationship with C. Watson and (ii) the sale to D. Watson/DEW.[152] The trial court noted:

> The Federal Reserve did not object to the sale, conclude that DEW was part of the Johnson Control Group, conclude that Johnson and DEW were acting in concert, or ask for any other information from Johnson after the sale to DEW. D. Watson testified that no government agency has ever informed him that he and Johnson are acting in concert, part of a control group, affiliates under the rules and regulations of the Securities and Exchange Act of 1934, or that they are beneficial owners of each other's stock.[153]

Thus, CCSB's entire argument is nothing more than an irrelevant disagreement with the Federal Reserve's determination that there was no issue with the stock sale under

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[150] A0021 (Article FOURTH § 2).

[151] 12 C.F.R. § 225.41(g).

[152] *CCSB*, 2022 WL 1751741, at *8.

[153] *Id.*

CIBCA.[154]

Thus, CCSB's new CIBCA argument is waived, but it also has no legal merit or factual support.

[154] CCSB's argument that D. Watson's shares must be aggregated with Johnson's shares under the goals of the CIBCA because D. Watson's son was a nominee is also belied by the fact that the Board did not aggregate Usera's shares with shares owned by his own daughter (or other directors) in applying the Voting Limitation. *Id.* at *9. If decisions interpreting the CIBCA are relevant to the Voting Limitation, then Plaintiffs' claim that Usera and other CCSB insiders' shares should be aggregated under the Voting Limitation is bolstered by *Lindquist & Vennum v. F.D.I.C.*, where the court held a group of led by two bank directors violated the CIBCA through a series of transactions they claimed were designed to "'save' the bank." 103 F.3d at 1412-15.

IV. THE COURT BELOW CORRECTLY AWARDED PLAINTIFFS THE REIMBURSEMENT OF THEIR ATTORNEYS' FEES AND EXPENSES FOR THE SIGNIFICANT BENEFITS CONFERRED

A. Question Presented

Whether the court below was correct that Plaintiffs conferred significant benefits on CCSB and its stockholders.[155]

B. Scope of Review

An award of attorneys' fees is reviewed for abuse of discretion.[156]

C. Merits of Argument

The court below correctly held that

> [b]y bringing this litigation, Plaintiffs vindicated not only their own votes, but also the majority vote of the unaffiliated stockholders who properly elected the insurgent nominees. The result obtained by this litigation prevents future stockholders from being similarly harmed by an erroneous application of the Voting Limitation. Plaintiffs' success in this case confers a substantial benefit on CCSB by retroactively correcting the incumbent board's interpretation of the Voting Limitation and, in effect, proactively setting the interpretation for future elections. The corporation is better off for a rectified election process.[157]

CCSB does not argue that the court below misapplied the law. CCSB does

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[155] *CCSB*, 2022 WL 16647972, at *4; B125-B135; B138-B141. CCSB does not challenge that the amount awarded was reasonable. *CCSB*, 2022 WL 16647972, at *4. CCSB also does not dispute its obligation to reimburse Plaintiffs' attorneys' fees and expenses incurred in this appeal. *Id*.

[156] DOB at 50.

[157] *CCSB*, 2022 WL 16647972, at *2.

not even articulate a theory as to how the court below abused its discretion. CCSB merely disagrees with the trial court's conclusions. That is not an abuse of discretion.[158]

In its Opening Brief, CCSB cited *Keyser* to argue that Plaintiffs did not confer a benefit to CCSB because they had an interest in the litigation.[159] CCSB does not argue that *Keyser* articulated a different legal standard that should apply. Thus, there is nothing in *Keyser* that alters this Court's deference to the court below, which can be affirmed for that reason.[160]

The court below considered CCSB's *Keyser* argument and correctly rejected it. Delaware courts have rejected the notion that any personal benefit disqualifies a plaintiff from fee-shifting, as every litigant has some self-interest in every

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[158] *See N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 381-82 (Del. 2014) (in applying the abuse of discretion standard, "where the record below demonstrates the judgment reached was directed by conscience and reason, as opposed to capricious or arbitrary action, we will affirm"); *see also TransPerfect*, 278 A.3d at 652 ("An abuse of discretion occurs when the trial judge exceeds the bounds of reason in view of the circumstances and has so ignored recognized rules of law or practice so as to produce injustice.") (quotation omitted).

[159] DOB at 51.

[160] *Keyser* is also factually distinguishable. There, the court held that a Series B issuance was invalid, which gave plaintiffs control of the board. *Keyser v. Curtis*, 2012 WL 3115453, at *9-12 (Del. Ch. July 31, 2012). The court held that the plaintiffs did not confer a benefit, because they may have merely "substitute[d] one controller for another – hardly a thrilling victory from the point of view of [the] stockholders . . . ." *Id.* at *19. Here, control remained with the broad base of public stockholders, whose votes were finally all counted.

litigation.[161] Here, Plaintiffs' interest was not so purely personal so as to render an award of attorneys' fees inequitable.[162] Indeed, the court below did not address whether any votes cast by any of the *Plaintiffs* were wrongfully excluded. Rather, the court focused solely on *non-party* votes, holding that their votes for the Park Nominees were wrongfully excluded.[163]

Plaintiffs vindicated important voting rights for the benefit of unaffiliated CCSB stockholders. The trial court correctly recognized that without Plaintiffs' efforts, the Old Board directors would still remain on the Board (against the will of the stockholders) and would have continued to misuse the Voting Limitation to disenfranchise CCSB stockholders indefinitely. Plaintiffs' trial victory is grounds for reimbursement of the cost they incurred to achieve that victory.[164]

CCSB has not provided any basis to conclude that the court below abused its discretion in awarding Plaintiffs their reasonable attorneys' fees and expenses.

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[161] *CCSB*, 2022 WL 16647972, at *2.

[162] *See id.* CCSB's reliance on *Martin v. Harbor Diversified, Inc*., 2020 WL 568971, at *4 (Del. Ch. Feb. 5, 2020) is also misplaced. DOB at 52. The plaintiff there "pursued [the] action in his personal interest" to sell his shares, not benefit all stockholders. *Martin*, 2020 WL 568971, at *2.

[163] *See CCSB*, 2022 WL 1751741, at *29.

[164] *See Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006) (explaining that where a class member acts to achieve a benefit shared by the class, equity may require that the class share the burden as well as the benefit of the legal action).

CONCLUSION

Plaintiffs respectfully request that the Court affirm the Court of Chancery's May 31 and November 3, 2022 opinions.

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Dated: December 29, 2022

CERTIFICATE OF SERVICE

I, Eric J. Juray, do hereby certify on this 29th day of December, 2022, that I caused a copy of Plaintiffs-Below/Appellees' Answering Brief to be served by eFiling via File&Serve Xpress upon counsel for defendant as follows:

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