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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

APPELLANT CCSB FINANCIAL CORP.'S REPLY BRIEF

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PRELIMINARY STATEMENT

Appellant CCSB[1] is a holding company for a community bank that converted to a federally chartered savings bank in 2003.[2] At that time, stockholders approved CCSB's Certificate, including the two provisions at issue here: (1) the "Voting Limitation," which limits any person or group acting in concert owning over 10% of outstanding shares from voting shares over that limit; and (2) the "Conclusive-and-Binding Provision," which provides that good-faith determinations by CCSB's Board to apply the Voting Limitation are conclusive and binding upon CCSB and its stockholders—which (as the Court below noted) places such decisions within the ambit of the business judgment rule.[3] The Court of Chancery erred by failing to respect CCSB stockholders' decision to adopt both of those provisions on a "clear day" long before this dispute arose. This Court should reverse and afford the business judgment rule's rebuttable presumptions to the Board's application of the Voting Limitation during the 2021 election for three seats on CCSB's Board.

These provisions are not unique. In fact, the charters of many other community bank holding companies incorporated in Delaware include the same language.[4] They are also consistent with the federal Change in Bank Control Act of

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[1] Capitalized terms have the same meaning ascribed in Appellant's Opening Brief ("Br."). "Opposition" or "Opp." refers to Appellees' Answering Brief.
[2] Br. at 7.
[3] Mem. Op. at 34.
[4] *See*, *e.g.*, Br. at 29 n.118.

1978, 12 U.S.C § 1817(j) ("CIBCA"), which applies to such institutions. Given the concern that raiders may seek to buy up community banks to exercise monopoly power over banking in certain areas of the country, it is no wonder that stockholders approve these provisions to safeguard their interests.

There was good reason for application of the Voting Limitation and Conclusive-and-Binding Provision here. Park's sole stockholder, David Johnson, has sought to gain control of CCSB since at least 2011.[5] Less than a week before the 2021 Record Date, Johnson transferred 19,500 shares of CCSB stock to DEW LLC.[6] DEW is owned by David Watson, Johnson's friend of over 40 years.[7] According to Johnson, this transfer was made because he "want[ed] to beat the record date" so that he would avoid triggering the Voting Limitation.[8] Due to these close ties and the stock transfer, the Board determined that Johnson and David Watson were "acting in concert in order to get their alternate slate elected" and discounted DEW's votes in excess of the 10% restriction in the Voting Limitation.[9]

Rather than honoring the Voting Limitation and the Conclusive-and-Binding Provision approved by CCSB stockholders, the Court of Chancery applied heightened scrutiny and overturned the Board's determination that Johnson was

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[5] A0398-99.
[6] A0317-18.
[7] A0369 ¶8; A0351 at 16:8-24.
[8] A0318; A0411.
[9] A0327-330.

acting in concert with David Watson.[10] In so doing, the Court of Chancery made multiple fundamental errors that require reversal. ***First***, the trial court improperly disregarded the Conclusive-and-Binding Provision to apply heightened scrutiny to the Board's enforcement of the Voting Limitation. ***Second***, even if heightened scrutiny applied (and it does not), the trial court erroneously applied the *Blasius* standard of review, and not *Unocal*, in invalidating the Board's application of the Voting Limitation. ***Third***, the trial court's conclusion that Johnson and David Watson were not acting in concert misapplied the law and rested on a material misstatement of fact. ***Last***, the Court abused its discretion in awarding attorneys' fees to Appellees.

Appellees' Opposition tries to paint CCSB's actions as extreme. But it is Appellees' effort to nullify the stockholder-approved Voting Limitation and Conclusive-and-Binding Provision that is extreme and inconsistent with bedrock Delaware law. All CCSB asks is that this Court apply the law to the facts at hand: that the board of a community bank holding company is entitled to enforce a charter provision, adopted by stockholders on a clear day and consistent with federal law, based on a standard of review short of *Blasius*.

For these reasons, and as explained further below, CCSB respectfully requests that this Court reverse the lower court's decision.

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[10] Mem. Op. at 32, 60-63.

ARGUMENT

I. The Court of Chancery Erred in Refusing to Apply the Business Judgment Rule to the Board's Application of the Voting Limitation.

CCSB's Opening Brief explains why the Court of Chancery should have honored the Conclusive-and-Binding Provision's invocation of the business judgment rule to the Board's application of the Voting Limitation.[11] Delaware law holds freedom of contract in high regard, and poses no impediment to recognizing the ability of stockholders of a community bank holding company to modifying the standard of review in the corporation's constitutional documents.

As CCSB showed, Delaware has long recognized that corporate charters are contracts among a corporation and its stockholders and the attendant "public policy favoring private ordering" of corporate governance.[12] The Conclusive-and-Binding Provision is a bargained-for clause of the contract between CCSB and its stockholders. In purchasing CCSB stock, stockholders voluntarily agreed to this provision and reasonably would have expected the Board to apply it. But rather than honor that contract, the trial court held that heightened scrutiny applied.[13] That was error.

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[11] Br. at 26-32.
[12] Br. at 26-27; *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); *Manti Holdings, LLC v. Authentix Acquisition Co. Inc.*, 261 A.3d 1199, 1217 (Del. 2021).
[13] Mem. Op. at 32-33.

The Conclusive-and-Binding Provision's invocation of the business judgment rule does not contravene any Delaware statutory authority or particular public policy. Rather, as CCSB has argued on appeal and at trial, the Conclusive-and-Binding Provision and Voting Limitation jointly effectuate federal public policy as reflected in CIBCA.[14] Both provisions were adopted as "permitted by federal regulation"—CIBCA—"to protect the interests of [CCSB] and its stockholders from any hostile takeover."[15]

Rather than confront CCSB's argument head-on, Appellees contend that CCSB argued 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."[16] Appellees argue this stance contravenes Delaware's "twice tested" framework for reviewing director actions.[17] Appellees are wrong. Instead, as CCSB's Opening Brief makes clear, the Board's actions would still be "twice tested" if the Conclusive-and-Binding Provision were properly applied: *first*, to assess whether the Voting Limitation was legally

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[14] Br. at 40-41; A0394-95. Appellees' argument that CCSB waived any argument under CIBCA is addressed *infra* at p. 18.
[15] Br. at 29; A0502-03; *see also* A0170-71 (disclosure in CCSB's Prospectus that "… the board of directors believes that it is appropriate to adopt provisions permitted by federal regulation to protect the interests of the converted association and its stockholders from any hostile takeover.").
[16] Opp. at 16.
[17] *Id*.

authorized and, *second*, to assess whether the Board's application of the Voting Limitation was equitable and complied with the directors' fiduciary duties.[18] Accordingly, the actual dispute in this matter is whether that review is governed by the business judgment rule pursuant to the stockholders' direction in the Conclusive-and-Binding Provision, or some heightened scrutiny.

Further, Appellees argue that CCSB misconstrues *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*,[19] because it "did not rule a certificate could preclude judicial review of director misconduct under heightened scrutiny."[20] Not so. While recognizing that director action is subject to equitable review, as both parties agree, *Jones* nonetheless emphasizes stockholders' and corporations' power to structure the affairs of the corporation subject to "relatively loose" statutory strictures.[21]

Applying the business judgment rule to the Board's application of the Voting Limitation pursuant to the Conclusive-and-Binding Provision does not leave Appellees, or any other stockholder, without redress. The business judgment rule reflects a *rebuttable* presumption that in making a business decision, directors act with due care, in good faith, and in the honest belief that the action taken was in stockholders' best interest.[22] It does not insulate inequitable director conduct from

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[18] Br. 28-29.
[19] 883 A.2d 837 (Del. Ch. 2004)
[20] Opp. at 18 n.68.
[21] *Jones*, 883 A.2d at 845.
[22] *Citron v. Fairchild Camera & Instrument Corp*., 569 A.2d 53, 64 (Del. 1989).

review: "The burden falls upon the proponent of a claim to rebut the presumption by introducing evidence either of director self-interest, if not self-dealing, or that the directors either lacked good faith or failed to exercise due care."[23] That opportunity is sufficient to protect stockholders here.

Appellees echo the Court of Chancery's conclusion that applying the business judgment rule here would "contravene[] fundamental principles of Delaware corporate law" by allowing a corporate charter to "alter the directors' fiduciary duties and the attendant equitable standards a court will apply when enforcing those obligations."[24] Appellees are wrong. As CCSB explained at length in the Opening Brief, Appellees' argument fails to appreciate that applying the Conclusive-and-Binding Provision would not alter the content of *any* director duties.[25] Appellees fail to recognize the distinction between a charter provision altering or exculpating a standard of *conduct*—e.g., eliminating a fiduciary duty—with a provision altering a standard of *review*.[26] Appellees' confusion is underscored by their reliance on the trial court's argument that corporate charters may only modify fiduciary duties *and* the attendant standards of review "to the extent expressly permitted by an affirmative act" of the Delaware General Assembly.[27] But neither Appellees nor the trial court

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[23] *Id.* (citing *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).
[24] Mem. Op. at 34; Opp. at 16-18.
[25] *E.g.*, Br. at 29-30.
[26] *Id*.
[27] Opp. at 19.

identified any authority for the proposition that only an affirmative act of the General Assembly may allow corporate boards to modify a *standard of review*.[28] Indeed, the three statutes cited by the trial court and Appellees for this conclusion, 8 Del. C. §§ 102(b)(7), 122(17), and 152, all concern the regulation of director *conduct*.[29]

Appellees likewise fail in their attempt to rebut the Opening Brief's discussion of *eBay Domestic Holdings, Inc. v. Newmark*[30] and *Leonard Loventhal Account v. Hilton Hotels Corporation*.[31] Appellees ignore that the Court of Chancery's admonishment in *eBay* that "having chosen a for-profit corporate form," directors must act in accordance with "the standards that accompany that form" refers to the standards that "*include acting to promote the value of the corporation for the benefit of the stockholders*."[32] *eBay* thus addressed directors' substantive obligation to maximize stockholder value, and not what standard of review applies to that conduct. Similarly, *Hilton* stands only for the proposition that boards of directors are all subject to the same *fiduciary* standards—e.g., standards of conduct—and cannot disclaim liability therefor.[33] In the case at hand, the Board is not disclaiming the duties of care or loyalty, and its actions are still subject to judicial review under the

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[28] Opp. at 19; Mem. Op. at 35.
[29] Mem. Op. at 39-41; Opp. at 19-20.
[30] 16 A.3d 1 (Del. Ch. 2010).
[31] 2000 WL 1528909 (Del. Ch. Oct. 10, 2000), *aff'd*, 780 A.2d 245 (Del. 2001).
[32] *eBay*, 16 A.3d at 34 (emphasis added).
[33] *Hilton*, 2000 WL 1528909 at *12 (citation omitted).

contracted-for business judgment standard set forth in CCSB's charter. Further, *Hilton* concerned a limitation of liability in a rights plan adopted by the board, not a corporate charter.[34] As previously discussed, the nature of the corporate charter as a contract among the corporation and its stockholders requires the Conclusive-and-Binding Provision be afforded a higher level of deference.[35]

Vice Chancellor Will's recent opinion in *Delman v. Gigacquisitions3, LLC*,[36] underscores the harm that would ensue if the trial court's erroneous view is permitted to stand. The *Delman* Court cited the opinion below for the proposition that only the General Assembly "has the authority to eliminate or modify fiduciary duties and the standards that are applied by this court, or to authorize their elimination or modification."[37] But *Delman* did not involve a stockholder-approved charter provision as here. Instead, the *Delman* Court rejected defendants' argument that the plaintiff was estopped from both bringing claims for breach of the duty of loyalty against the conflicted directors and controller of a special purpose acquisition company ("SPAC") and invoking entire fairness review because of the disclosure of defendants' alleged conflicts of interests.[38] Here, in contrast, CCSB does not seek to preclude Appellees from pursuing breach of fiduciary duty claims, but merely to

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[34] *See id.* at *10.
[35] *See* Br. at 26-28.
[36] 2023 WL 29325 (Del. Ch. Jan. 4, 2023).
[37] *Delman*, 2023 WL 29325, at *14 (citing Mem. Op. at 37).
[38] *Id.* at *13-14.

implement the stockholders' invocation of the business judgment rule in the Certificate. Appellees also cannot avail themselves of the *Delman* Court's inferential citations to *Glassman v. Unocal Exploration Corp.*,[39] and 8 Del. C. § 253.[40] As *Glassman* makes clear, Section 253 reflects the General Assembly's determination that, "absent fraud or illegality, appraisal is the exclusive remedy" available to minority stockholders for a short-form merger.[41] This case and section do not concern a stockholder-approved charter amendment setting the standard of review. Regardless, *Delman*'s repetition of the trial court's erroneous statement that stockholders can never alter the standard of review underscores the ripple effects of that sweeping statement if not corrected by this Court.

In short, CCSB has never sought to foreclose an assessment of whether the Board breached a fiduciary duty in applying the Voting Limitation. But under the stockholder-approved Conclusive-and-Binding Provision, that analysis should be analyzed through the rebuttable presumption of the business judgment rule.

[39] 777 A.2d 242 (Del. 2001).
[40] *See Delman*, 2023 WL 29325, at *14 n.150.
[41] 777 A.2d at 248.

II. The Board Appropriately Applied the Voting Limitation.

A. *Unocal* Applies, and the Board's Action Passes that Test.

1. In similar circumstances, Delaware courts have rejected *Blasius* and applied *Unocal*.

Even if heightened scrutiny is appropriate here (and it is not), the proper standard of review is that from *Unocal Corp. v. Mesa Petroleum Co.*,[42] not *Blasius Indus. v. Atlas Corp*.[43] As CCSB argued in its Opening Brief, the situation at issue falls squarely within *Unocal*, which applies in the context of a threat to the corporation itself, not *Blasius*, which applies to *unilateral* board action with the primary purpose of thwarting the stockholder franchise.[44]

Unlike *Blasius* and its progeny, this case does not involve unilateral Board action. Rather, the Board applied the Voting Limitation, a preexisting charter provision that stockholders adopted on a clear day, in accordance with the antitakeover protections embodied in the Voting Limitation. It is undisputed that the Board had at least a "perception" of a threat to CCSB: Johnson, a board member of a CCSB competitor,[45] and his affiliates had been attempting to "take control" of CCSB and potentially "sell the bank" for years—and the Board knew it.[46] Indeed, Appellees do not dispute that Park had been engaged in successive proxy fights

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[42] 493 A.2d 946 (Del. 1985).
[43] 564 A.2d 651 (Del. 1988).
[44] *See* Br. at 33-34, 39-40.
[45] Br. at 8.
[46] *See* A0306; A0398-404; A0342 ¶18.

seeking that goal.[47] The Board's subsequent application of the Voting Limitation responded to that threat exactly how CCSB stockholders intended.

Numerous times, Delaware courts have rejected *Blasius* in favor of *Unocal* in similar circumstances. For example, in *Stroud v. Grace*,[48] this Court eschewed *Blasius* when "the factual predicate of unilateral board action intended to inequitably manipulate the corporate machinery is absent" when fully informed stockholders ratified the challenged charter provisions.[49] So too here, where CCSB stockholders approved the Voting Limitation and the Conclusive-and-Binding Provision.

Likewise, in *Rosenbaum v. CytoDyn Inc.*,[50] the Court of Chancery rejected *Blasius* when analyzing a board's application of an advance notice bylaw before a director election because the bylaw was adopted on a "clear day," served legitimate purposes, and was ratified by stockholders.[51] Appellees attempt to distinguish *Rosenbaum* by claiming that the decision not to apply *Blasius* was unrelated to the fact that the advance notice bylaw was adopted on a clear day.[52] Not so. The *Rosenbaum* Court held that "enhanced scrutiny under *Blasius* is not justified" because the bylaw "had been in place for years before Plaintiffs submitted their

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[47] Opp. at 6.
[48] 606 A.2d 75 (Del. 1992).
[49] *Id.* at 79, 92.
[50] 2021 WL 4775140 (Del. Ch. Oct. 13, 2021).
[51] *Id.* at *2-3, 14.
[52] Opp. at 24 n.93.

Nomination Notice," "was adopted on the proverbial 'clear day,'" and "Plaintiffs were well aware of, and understood, the advance notice bylaw."[53] So too here. The Voting Limitation was adopted years before the 2021 election on a clear day, and Appellees indisputably were aware of the Voting Limitation.

The Court of Chancery applied *Unocal* again in *Hill Stores Co. v. Bozic*[54] when considering a board's defenses adopted on a clear day that were then used "in the heat of battle."[55] As in *Hill Stores*, the Voting Limitation was adopted on a clear day and the Board applied it to combat a longtime raider's attempt to influence improperly the stockholder franchise, and so *Blasius* does not apply.

In addition, because the Voting Limitation was a CIBCA-compliant antitakeover measure applied to prevent Johnson and his cohorts from increasing Johnson's control by undermining the stockholder vote, *Unocal* is a better match than *Blasius*. In *Kallick v. Sandridge Energy, Inc.*,[56] the Court of Chancery explained that "*Blasius*. . . does little to address situations like this, where a contractual provision [a proxy put] cannot be said to have the sole or primary purpose of impeding the stockholders' vote," because the provision was included to protect certain parties' rights *even though* it had "the obvious potential to tilt the

[53] 2021 WL 4775140 at *2.
[54] 769 A.2d 88 (Del. Ch. 2000).
[55] *Id.* at 106-07 (emphasis added).
[56] 68 A.3d 242 (Del. Ch. 2013).

electoral playing field toward the incumbent board."[57] Here too, the Voting Limitation is a contractual provision contained in CCSB's Certificate that has the legitimate purpose of integrating CIBCA-compliant antitakeover measures into the corporate charter.

Notably, Appellees do not present any substantive argument that the Board's application of the Voting Limitation fails scrutiny under *Unocal.* Instead, Appellees argue that CCSB waived the argument that *Unocal* should apply *and* that CCSB should be precluded from citing cases discussing heightened scrutiny which CCSB did not cite below.[58] Appellees' argument is unsupported. In determining whether an issue has been fairly presented to the trial court, this Court has held that "the mere raising of the issue," even if only in broad terms, suffices to preserve it for appeal.[59] Here, CCSB raised the applicable standard of review at trial—namely, that the business judgment rule, rather than enhanced scrutiny, should apply.[60] Nor is there any requirement that CCSB only cite the same cases it cited at trial on appeal, and Appellees cite no authority for this argument. To hold that CCSB waived the ability

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[57] *Id.* at 258.
[58] Opp. at 24-25.
[59] *Watkins v. Beatrice Cos.*, 560 A.2d 1016, 1020 (Del. 1989) (citation omitted); *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382-83 (Del. 2014) (rejecting a Delaware Supreme Court Rule 8 argument when the "broader issue" was raised below).
[60] A0425-27; A0438; A0494-95.

to expand on its arguments by citing additional cases would contravene the spirit of this Court's past holdings.

In all events, it is critical that this Court set the correct standard of review in this setting. Indeed, Delaware Supreme Court Rule 8 allows this Court to review arguments not raised at trial "when the interests of justice so require."[61] That is especially true where an appeal presents an appropriate vehicle to answer unsettled questions of Delaware law.[62] This case presents such a vehicle for this Court to answer what standard of review applies to director action explicitly allowed under a federal community savings bank holding company's charter—in fact, under a provision commonly found in the charters of such institutions—and remand to the Court of Chancery for application of that standard.

2. The Board's application of the Voting Limitation was proper under *Unocal*.

Although Appellees failed to address the propriety of the Board's application of the Voting Limitation under *Unocal*, CCSB briefly reiterates why it was appropriate.[63]

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[61] Del. Sup. Ct. R. 8.

[62] *See, e.g.*, *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1275-78 (Del. 2014) (addressing the merits of the *Garner* doctrine even though arguments about *Garner*'s availability under Delaware law had not been raised below).

[63] *See* Br. at 40-44.

Meeting minutes make clear that, before applying the Voting Limitation, the Board consulted with counsel, reviewed evidence regarding Appellees' and David Watson's ties with Johnson, and considered Johnson's history of trying to take control of CCSB.[64] Johnson was the controlling stockholder and a board member of a CCSB competitor,[65] a stockholder of every other bank in the greater Kansas City area,[66] and had been trying to take over CCSB in order to potentially effectuate a sale of the bank.[67] The Board thus had ample reason to suspect that Johnson's claimed motivation of seeking to improve CCSB's corporate governance was mere pretext to disguise his "creeping control" of CCSB.

The Board's application of the Voting Limitation also was proportional to the threat at hand. As explained in the Opening Brief, *Yucaipa Am. All. Fund II, L.P. v. Riggio*[68] recognizes that a board is "entitled to take reasonable, non-preclusive action" to "cabin[]" an activist investor "at a substantial, but not overwhelming, level of voting influence."[69] This is exactly the situation at hand here. Even those stockholders who chose to acquire more than 10% of CCSB's outstanding shares were still able to cast votes up to the 10% ownership level set forth in the

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[64] A0327-330.
[65] A0373 ¶32; Mem. Op. at 5; A0338 ¶2.
[66] Mem. Op. at 6.
[67] Br. at 19; A0306.
[68] 1 A.3d 310 (Del. Ch. 2010).
[69] Br. at 41 n.154; *Yucaipa*, 1 A.3d at 350.

Certificate.[70] Park and its slate could still vote and make their arguments to the unaffiliated stockholders, without unduly tilting the playing field in their favor by arranging the transfer of large blocks of shares to evade the Voting Limitation.

B. Even if *Blasius* Applies, the Board's Action Satisfies that Standard.

Appellees spend considerable space insisting that *Blasius* applies and the conduct at issue fails under that standard.[71] But, even under *Blasius*, the Board had a compelling justification to apply the Voting Limitation.

First, as the trial court noted, CCSB's position has always been that the primary purpose behind the application of the Voting Limitation "was to protect the shareholders from [a] corporate takeover."[72] Rather than rebutting that purpose, Appellees adopt the trial court's *ipse dixit* finding that the Board was motivated "to interfere with the effective exercise of the stockholder franchise in a contested election for directors."[73] That finding does no more than assume a result from the fact that the dispute involved a board election—and ignores the threat posed by a committed raider.

Second, the Board had a compelling justification for applying the Voting Limitation. The Board did so, as contemplated by stockholders and consistent with

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[70] *Compare Yucaipa*, 1 A.3d at 350.
[71] Opp. at 25-32.
[72] Mem. Op. at 64 (alteration in original).
[73] *Id.*; Opp. at 29.

federal policy, to prevent a creeping takeover by a group led by Johnson.[74] Rather than address this argument, Appellees retort that "even a board's honest belief that its incumbency protects and advances the best interests of the stockholders is not a compelling justification."[75] But that ignores that the Board was employing the Voting Limitation to guard against the very type of creeping, hostile takeover that stockholders adopted it to prevent—and which was consistent with the federal policy in CIBCA. Indeed, meeting minutes reflect that the Board believed that it had an *obligation* to apply the Voting Limitation "in order to ensure a free and fair election."[76]

Finally, Appellees are wrong that CCSB waived any argument based on CIBCA.[77] The record shows that, in pre-trial briefing and at trial, CCSB raised the applicability of CIBCA regulations, Johnson's ownership of CCSB stock, and Johnson's violations of CIBCA through his attempts to transfer stock to bypass the Voting Limitation.[78] It is understandable that Appellees wish to avoid the clear impact of CIBCA, but this Court can and should consider it here.

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[74] Br. at 42-44; *see also* A0170.
[75] Opp. at 30 (citation omitted).
[76] A0329.
[77] Opp. at 24-25.
[78] *See* A0400, A0405, A0414, A0518.

III. The Court of Chancery's Conclusion that the Johnson Group was not "Acting in Concert" was Legally Unsound and Factually Erroneous.

The trial court's holding that CCSB failed to show that Johnson and David Watson, and therefore DEW, were acting in concert relied on a legally flawed definition of that term of art and misapplied the burden of proof.

A. The Court of Chancery Erred as a Matter of Law by Failing to Apply the Correct Definition of "Acting in Concert."

The Court of Chancery committed legal error by adopting a definition of "acting in concert" that conflicts with CIBCA and the Voting Limitation's plain text.[79]

The phase "acting in concert" is a term of art under CIBCA. That federal statute defines "acting in concert" as "knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a covered institution *whether or not pursuant to an express agreement.*"[80] Delaware courts have long recognized that statutes bearing directly on the subject matter of a contract "will be given effect in the application and enforcement of the contract" unless the contract explicitly states otherwise.[81] Because CCSB is a holding company for a community bank, and the Certificate does not explicitly state anything to the contrary, CIBCA's definition should apply.

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[79] Br. at 47-49; Mem. Op. at 57-58.
[80] 12 C.F.R. § 225.41(d)(1) (emphasis added).
[81] *Koval v. Peoples*, 431 A.2d 1284, 1286 (Del. Super. Ct. 1981).

The trial court, however, instead cobbled together its own definition of "acting in concert," based in part on federal securities laws, that required an "agreement, arrangement, or understanding."[82] That standard was impermissibly high and inconsistent with the Voting Limitation and CIBCA. As shown in CCSB's Opening Brief, federal case law clearly supports that, for entities covered by CIBCA, "*[e]ven absent a formal agreement*, the shares of individuals may be considered together for determining control."[83]

Lindquist & Vennum, cited in the Opening Brief, is instructive. There, the FDIC found that a group of individuals violated CIBCA due to their concerted action.[84] The Eighth Circuit affirmed the FDIC's holding, reasoning that persons acting in concert may have only an informal agreement and need not even know each other, and that concerted action may be proven by circumstantial evidence.[85] To hold otherwise would "limit the effect of [CIBCA] to only the least sophisticated perpetrators of illegal bank takeovers."[86] But that is precisely the result of the trial court's ruling here: Only unsophisticated groups would run afoul of the Voting

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[82] Mem. Op. at 57-58.
[83] Br. at 47-48 (citing *Lindquist & Vennum v. F.D.I.C.*, 103 F.3d 1409, 1413 (8th Cir. 1997) and *Wellman v. Dickinson*, 682 F.2d 355, 363 (2d Cir.1982) ("concerted effort" does not require a written agreement; agreement may be informal, and group activity may be proven circumstantially)).
[84] *Lindquist & Vennum*, 103 F.3d at 1412.
[85] *Id.* at 1412-13.
[86] *Id.* at 1413.

Limitation through a formal agreement, when a wink and a nudge would pass under the Court's analysis.

At trial, CCSB presented significant evidence showing that Johnson and David Watson acted in concert, including:[87]

- In 2019, the Kansas City Federal Reserve sent Johnson a letter informing him that he violated CIBCA by transferring stock to a company managed by Chase Watson, David Watson's son.[88] The letter further stated that "Section 225.41(d)(2) of Regulation Y indicates that the members of an individual's immediate family are presumed to be acting in concert"—thus creating a presumption that David Watson and Johnson act in concert.[89]
- Johnson's statement just prior to the election that he was "going to have David Watson buy 19500 shares from me ASAP / want to beat the record date."[90]
- David Watson's response to CCSB's letter requesting information about DEW's beneficial stock ownership[91] was originally drafted by Johnson[92]—demonstrating a common scheme between Johnson and David Watson.

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[87] *See* Br. at 12-17, 19-23.
[88] A0275-77.
[89] A0277, *see also* 12 C.F.R. § 225.41(b)(3) ("immediate family" defined to include "a person's father.").
[90] A0317-18.
[91] A0374 ¶36; A0355 at 72:15-23.
[92] A0357 at 79:9-24.

- A 2017 Missouri court found that Johnson tortiously interfered with a former CCSB stockholder's business expectations by arranging a foreclosure sale of the stockholder's shares, at which DEW purchased the stockholder's shares at a discount and held them for Johnson's beneficial ownership.[93]

Appellees do not attempt to explain away these facts. Instead, they misconstrue CCSB's position to claim that DEW, through David Watson, was "presumptively" acting in concert with Johnson, and characterize that argument as waived.[94] But the evidence shows that, in addition to being *presumed* to be acting in concert under applicable regulations, David Watson *was* acting in concert with Johnson, an argument that CCSB emphatically raised at trial.[95] The Court of Chancery's erroneous application of the term "acting in concert" vitiated CCSB's factual showing.

B. The Court of Chancery Erred as a Matter of Law by Effectively Requiring CCSB to Prove that DEW and Johnson Were "Acting in Concert."

As CCSB explained in the Opening Brief, the Court of Chancery nominally recognized that a *plaintiff* bears the burden of proof in challenging the legal validity

[93] A0268-70.
[94] Opp. at 37-40.
[95] *See, e.g.*, A0432-38.

of a board action—but then shifted that burden to CCSB in its actual analysis.[96] The trial court ultimately held that none of the facts offered by CCSB about Johnson's longstanding and significant connections with DEW, David Watson, or David Watson's son Chase Watson (one of Park's nominees to the CCSB Board) "support a finding that Johnson and D. Watson are or were acting in concert."[97] The Court's holding has in error. It was not CCSB's burden to prove Johnson and David Watson *were* acting in concert (although the facts amply show that they were); it was Appellees' burden to prove they *were not*.

Appellees argue that they met their burden because the Court of Chancery found as a matter of fact that there was no concerted action.[98] That ignores CCSB's point. The Court of Chancery committed legal error by requiring CCSB to prove the application of the Voting Limitation was valid, rather than requiring Appellees to prove the action was invalid.

[96] Br. at 45-46; *see* Mem. Op. at 31.
[97] Opp. at 37; Mem. Op. at 61.
[98] *Id*.

IV. The Court of Chancery Abused Its Discretion in Awarding Appellees Fees Because Appellees Conferred No Benefit on CCSB.

In its Opening Brief, CCSB argued that the trial court abused its discretion in awarding Appellees attorneys' fees by failing to consider crucial facts showing that this litigation was motivated by Appellees' self-interested desire to be seated on the Board and to reap the personal benefits of being seated.[99] Appellees respond that CCSB did not specifically charge the Court of Chancery with misapplying the law and therefore there was no abuse of discretion.[100] Appellees are wrong.

The Opening Brief accurately points out that this Court reviews an award of attorneys' fees for an abuse of discretion and then shows that the trial court's erroneous holding meets that standard.[101] A court abuses its discretion when it fails to "consider the unique circumstances of the case" or makes a "factual finding that [is] clearly wrong."[102] The Court of Chancery failed to consider that, had the Voting Limitation not been applied at all (*i.e.*, applied to neither Usera nor the Johnson Control Group), Park's nominees still would have lost.[103] The only way Park's nominees would have won was by not applying the Voting Limitation to the DEW shares while still applying it to Usera's shares. But the DEW shares were owned by

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[99] Br. at 50-52.
[100] Opp. at 41-42.
[101] Br. at 50-51.
[102] *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1261-62 (Del. 2012).
[103] Br. at 51.

David Watson, Chase Watson's father and Johnson's friend of over 40 years, who received 19,500 CCSB shares from Johnson so that Johnson could "beat the record date." Likewise, while Appellees accurately note that the incumbent nominees would still remain on the Board without the instant lawsuit, the Court's order put *Appellees* on the Board instead, allowing them to serve a corporate raider who has long sought control of the Bank. That outcome is not a corporate benefit, but a personal one, which does not justify the award of attorneys' fees.[104]

[104] Br. at 51 (citing *Keyser v. Curtis*, 2012 WL 3115453 at *19 (Del. Ch. July 31, 2012), *aff'd sub nom. Poliak v. Keyser*, 65 A.3 617 (Del. 2013).

CONCLUSION

For these 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.

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