IN THE SUPREME COURT OF THE STATE OF DELAWARE

VLADIMIR GUSINSKY REVOCABLE TRUST, Derivatively on Behalf of Nominal Defendant RTX CORPORATION,

Plaintiff below,
Appellant,

v.

GREGORY J. HAYES, TRACY A. ATKINSON, LLOYD J. AUSTIN III, MARSHALL O. LARSEN, THOMAS A. KENNEDY, GEORGE R. OLIVER, ROBERT (KELLY) ORTBERG, MARGARET L. O'SULLIVAN, DINESH C. PALIWAL, ELLEN M. PAWLIKOWSKI, DENISE L. RAMOS, FREDERIC G. REYNOLDS, BRIAN C. ROGERS, JAMES A. WINNEFELD, JR., and ROBERT O. WORK,

Defendants Below,
Appellees,

and

RTX CORPORATION,

Nominal Defendant Below,
Appellee.

No. 347, 2024

Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-1124-MTZ

PUBLIC VERSION
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APPELLANT'S REPLY BRIEF

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I. PRELIMINARY STATEMENT

The Chancery Court wrongly dismissed this derivative action against RTX's Board for failing to obtain required stockholder approval when repricing equity awards.[1] The Board delegated power and authority to a Special Committee to finally approve the adjustments to equity awards in contravention of, and without considering, the LTIPs' explicit requirement that stockholders approve the repricing. The repricing violated a clear and unambiguous term of RTX's stockholder-approved compensation plans, as it conferred an undeserved financial windfall on RTX executives. The Chancery Court accepted for purposes of the motion to dismiss that stockholder approval was needed but erred when it ruled that the powers the Board gave the Special Committee did not give it authority to approve the EMA Amendment without first getting stockholder approval, authority the Board lacked. Additionally, the Chancery Court erred when it declined to infer Board knowledge from the well-pled violation of a plain and unambiguous term of the plans since the minutes did not reflect any discussion of the stockholder approval requirement.

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[1] Capitalized terms not defined herein have the meaning defined in Plaintiff's Opening Appeal Brief.

As set forth in detail Plaintiff's opening brief, this controversy stems from two events: an April 2020 spinoff of UTC's subsidiaries, which was followed by UTC's merger with Raytheon to form RTX, and a May 2020 amendment to an Employee Matters Agreement ("EMA") that retroactively adjusted the conversion ratio of equity awards. Initially, the equity awards were converted at the time of the spinoff to preserve their value post-spinoff. However, the EMA Amendment, six weeks after the spinoff, substituted a new ratio using the lowest possible stock price by hindsight, [redacted]. The EMA Amendment was a separate transaction from the spinoff conversion and therefore required stockholder approval under accounting rules and the Company's compensation plans.

The Chancery Court erred in two ways: by misinterpreting the Special Committee's authority as not including final approval power, and by failing to a lack of good faith from the Board's violation of a clear and unambiguous term of the compensation plans. The directors had a fiduciary responsibility to understand and comply with the stockholder approval requirements, and their failure to do so should not shield them from liability. By dismissing the case, the Chancery Court's ruling effectively allows boards to ignore clear plan requirements by failing to document its consideration of them. Plaintiff respectfully requests that this Court reverse the dismissal, holding the Board accountable for bypassing the mandatory approval process.

II. ARGUMENT

A. The Board Delegated Final Approval Power to the Special Committee

The Chancery Court's erroneous interpretation of the Board's delegation to the Special Committee was based on a mistake. Opening Br., at 28-29 (the Chancery Court was mistaken that "[t]he Resolutions did not identify the Special Committee, or anyone else, as the source of approval."). [redacted]; *see also Tetragon Fin. Grp. Ltd. v. Ripple Labs Inc.*, 2021 WL 1053835, at *4 (Del. Ch. Mar. 19, 2021) (looking to "surrounding words" to determine correct meaning in contract). [redacted] This language does not condition approval on further stockholder consent or additional procedural steps. The absence of qualifying terms in the resolutions makes clear that the Special Committee itself held the power to approve the amendment.

Defendants argue that "[n]othing in the plain text of the resolutions precluded the special committee, as part of its broad authority over whether to approve any amendment, from deciding not to approve the amendment, or conditioning such approval on a stockholder vote." Response Br., at 24-25, 26.[2] According to Defendants, the Board could only have exceeded its authority if it had prevented the Special Committee from seeking stockholder approval. But that argument does not address the facts of this case. Here, Plaintiff alleges the Board exceeded its authority by granting a more expansive power to the Special Committee than the Board had to grant – the ability to finally approve the EMA Amendment.

The Board gave the Special Committee the option and ability to finally approve the EMA Amendment without stockholder approval. The Committee then used the power the Board gave it and finally approved the EMA Amendment without seeking stockholder approval. "Any action of the board that falls outside the rather broad scope of its authority is not entitled to the protection of the business judgment rule and demand is excused." *California Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *11 (Del. Ch. Dec. 18, 2002). If the well-pled allegation that stockholder approval was required is taken as true (as it was below and as it should be here), then the Board delegated a power that it did not have, and the Committee used that power as the Board expressly permitted it to. The Chancery Court erred by failing to credit Plaintiff's reasonable interpretation of the Special Committee delegation at the motion to dismiss stage. The Chancery Court should have "decline[d] to rule on construction… at the motion to dismiss" and instead denied

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[2] Citations to "Response Br., __" refer to Defendants' Response Brief.

the motion to dismiss where "one plausible" interpretation, that of the non-movant, rendered demand excused. *Coulter*, 2002 WL 31888343, at *11.

Supporting Plaintiff's allegations and interpretation of the delegation, [redacted] *In re S. Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 797 n.134 (Del. Ch. 2011), *aff'd sub nom. Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012) (failure to expressly empower special committee to take a specific action resulted in uncertainty on part of committee members as to what their responsibilities and authorities are). Defendants' argument that the Committee "could decide whether and how to provide any approval" tries to overcome the express language of the delegation by reference to powers that Defendants claim are implied. Response Br., at 2. However, there is at minimum a fact question as to whether powers not expressly delegated to a Committee are within its purview. *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 414 (Del. Ch. 2010) (special committee not authorized to negotiate or to consider other alternatives). Similarly, although Defendants claim the Committee was given "broad decisionmaking authority" (Response Br., at 24), [redacted]

[redacted] Authority to negotiate "terms and conditions" (Response Br., at 27) of the EMA Amendment refers to the details of the amendment itself and is not connected in any way to obtaining a stockholder vote or complying with the LTIPs.

If Defendants were correct that the Special Committee believed that its final approval power was somehow qualified or that it might be required to obtain stockholder approval under the LTIPs, [redacted] The Committee's single reference to the section of the LTIPs that allows adjustments in the event of a spinoff in its resolution approval of the EMA Amendment (*see* Response Br., at 25 (discussing resolutions' mention of UCT 2018 LTIP Section 3(e)(ii) and UTC LTIP Section 10(b))) does not support a reasonable inference that it considered stockholder approval under the LTIPs as they do not even refer to stockholder approval. *See* A045, ¶58 (quoting UCT 2018 LTIP Section 3(e)(ii)), A047, ¶60 (quoting UTC LTIP Section 10(b)).

The absence of any reference to the requirements of the LTIPs in the "broad" grant of authority given to the Committee [redacted] combined with the express grant of final approval authority, supports Plaintiff's interpretation of the delegation to the Special Committee.

B. The Board Exceeded Its Authority by Delegating Final Approval Power

In their response brief, Defendants argue that because a majority of the Board was not directly involved in approving the EMA Amendment, demand could not be futile. However, the Board's delegation of final approval power to the Special Committee violated its own authority under the LTIPs. The LTIPs expressly require stockholder approval for amendments to stock options or SARs that modify their terms or exercise price unless such amendments are made "in the event of" a corporate transaction like the spinoff. The EMA Amendment, approved over a month after the spinoff, was a separate modification, not part of the spinoff transaction itself. Thus, the Board lacked the power to approve the amendment or to delegate this authority to the Special Committee without obtaining stockholder approval.

As Defendants concede, the Special Committee referred specifically to its mandate and the grant of final approval power in approving the EMA Amendment. Response Br., at 25. The delegation of final approval power to the Special Committee *did* "pre-decide" that the Special Committee was not obligated to seek stockholder approval under the LTIPs. *Cf. Id*. Reading the resolutions "as a whole," giving "each provision and term effect" requires interpreting final approval power as just that – the power to approve the EMA Amendment without seeking any additional imprimatur from any other body. *See* Response Br., at 26 (quoting

Weinberg v. Waystar, Inc., 294 A.3d 1039, 1044 (Del. 2023)). The issue therefore is not, as Defendants describe it, the "stripping… the committee of any power to condition approval on a stockholder vote," (Response Br., at 27) but the grant of a power that permitted the Committee to do something the Board had no power to do.

Defendants are correct that there does not appear to be any Delaware decision directly addressing the specific issue presented here: a delegation by a board of authority that it lacked. Response Br., at 23; *but see Zapata*, 430 A.2d at 786 (Del. 1981) (there are limits to the authority to delegate). However, it is well established that "[b]oards of directors have no discretion to exceed the intra-entity limitations on their authority." *Allen v. El Paso Pipeline GP Co., L.L.C.*, 90 A.3d 1097 (Del. Ch. 2014). By purporting to empower the Special Committee to approve a modification requiring stockholder consent, the Board exceeded its authority, rendering the delegation invalid. *Coulter*, 2002 WL 31888343, at *10 ("the business judgment rule may not be invoked to shelter unauthorized actions of a board of directors"); *Ryan v. Gifford,* 918 A.2d 341, 354 (Del. Ch. 2007) (violation of an express term of an incentive compensation plan is a breach of fiduciary duty); *accord Conrad v. Blank*, 940 A.2d 28, 40 (Del. Ch. 2007) (same). Any action exceeding the Board's authority is not protected by the business judgment rule and constitutes a breach of fiduciary duty.

Defendants are incorrect that directors who delegated final approval authority to the Committee "were not the decisionmakers on the transaction that plaintiff challenges." Response Br., at 23. [redacted] The directors therefore were the decisionmakers on a transaction challenged by Plaintiff. But for the Board's decision to delegate the powers it did to the Committee, the Committee would have lacked the authority to approve the EMA Amendment without stockholder approval.

Under Defendants' interpretation of the law, the Committee had expansive implied powers that could even contradict the express ones it was granted, and they simultaneously argue that directors should not be exposed to "non-exculpated claims of bad faith based on drafting choices in their resolutions." Response Br., at 27. This cannot be. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 786 (Del. 1981) (the "authority to delegate is not unlimited."). As Defendants would have it, a board could grant any authority to a committee, regardless of whether it contravenes a company's governing documents, and a committee could take almost any action based on implied powers so long as there is a catchall provision in the delegation. There is no limiting principle to this argument, and it should be rejected.

C. The EMA Amendment Was a Separate Transaction

Although the Chancery Court credited Plaintiff's allegation that the EMA Amendment was a separate transaction (A046-48, ¶¶59, 61, A072, ¶¶101-02, A090-91, ¶¶132-34, A099, ¶153), Defendants again dispute the point on appeal. The EMA Amendment was a distinct transaction with a separate purpose, grant date, and terms, and it affected a different subset of awards than those adjusted in the Conversion tied to the spinoff. Unlike the Conversion, which sought to preserve the pre-spin value of awards for all employees, the EMA Amendment aimed to address post-spin market volatility and disproportionately benefited RTX executives. A049-52, ¶¶66-72, A096-99, ¶¶148-53.

The grant date for the EMA Amendment was May 22, 2020, nearly two months after the spinoff closed. By contrast, the Conversion had a grant date of April 3, 2020, coinciding with the spinoff's completion. Furthermore, the EMA Amendment applied only to unvested awards held by RTX employees, excluding other award holders affected by the Conversion. These differences underscore that the EMA Amendment was not an adjustment "in the event of" the spinoff but a separate modification requiring stockholder approval under the LTIPs.

The Board's reliance on [redacted] to justify treating the EMA Amendment as part of the spinoff was unreasonable. [redacted]

[redacted] Thus, the Board had no good-faith basis to conclude that stockholder approval was unnecessary.

These allegations satisfy Rule 23.1. *See, e.g.*, *Ryan v. Gifford*, 918 A.2d 341, 355 (Del. Ch. 2007) (demand excused where complaint alleged specific grants, specific language of compensation plans, specific public disclosures, and supporting analysis suggestive of backdating); *Conrad*, 940 A.2d at 34, 35 (demand excused where complaint alleged company had used incorrect measurement dates for options grants, in violation of stockholder approved compensation plan, supported by plaintiff's own analysis of dates and prices of options grants); *Coulter*, 2002 WL 31888343, at *11 ("Quite naturally, the parties disagree whether the repricings constituted a "change" to the exercise price. One plausible answer is that they did.").

Defendants' attempts to distinguish these cases as involving "objective math" fail. Response Br., at 33. In each case, the defendants had a defense that did not simply concede that the relevant compensation plans had been violated, and in each case, defendants disputed whether a plain and unambiguous violation of the plans had occurred. In *Coulter*, the parties offered "unsurprisingly, different views about the correct construction" of the compensation plan at issue, but because Plaintiff's interpretation was "plausible," and it was undisputed that the modifications were adopted "without additional shareholder approval," the court denied the motion to dismiss. *Coulter*, 2002 WL 31888343, at *11. The same result follows here.

The LTIPs prohibit amendments to stock options or SARs, including changes to exercise prices, without stockholder approval. The only exception is for adjustments made directly in connection with a corporate transaction, such as a spinoff. Here, the EMA Amendment did not meet this exception. The spinoff occurred on April 3, 2020, while the EMA Amendment was approved on May 22, 2020, and implemented changes unrelated to the spinoff's terms. The LTIPs' stockholder approval requirement is clear and unambiguous, and the Board's failure to adhere to this requirement violated its fiduciary duties.

The EMA Amendment's purpose further confirms its independence from the spinoff. Unlike the Conversion, which sought to preserve equivalent value for all employees post-spin, the EMA Amendment selectively enriched a small group of RTX executives. This windfall was not authorized by the LTIPs and required stockholder approval.

D. The Chancery Court Failed to Infer Knowledge of the LTIPs' Requirements

The Chancery Court erred by failing to infer that the Board did not act in good faith. *Cf.* Response Br., at 19 ("plaintiff does nothing to challenge the [Chancery Court's] application of the governing law on demand futility"). There are two ways that Delaware courts address the type of breach at issue here, both of which would excuse demand once the proper inference that the Board knew of the stockholder approval requirements is made.

One approach is to infer knowledge from the violation of a plain and unambiguous restriction in a stockholder approved compensation plan. *Garfield v. Allen*, 277 A.3d 296, 322 (Del. Ch. 2022). Under this approach, the fact of violation of a plain and unambiguous provision of an equity compensation plan itself excuses demand. "[W]hen a plaintiff presents particularized factual allegations that indicate that the board clearly violated an unambiguous provision of a stock plan, it is proper to infer that such violation was committed knowingly or intentionally and, therefore, that demand should be excused." *Pfeiffer v. Leedle*, 2013 WL 5988416, at *6 (Del. Ch. Nov. 8, 2013).

A second approach is to infer an intentional dereliction of duty from the Board's conscious disregard of the stockholder approval requirement in the LTIPs. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66 (Del. 2006) ("an intentional dereliction of duty, a conscious disregard for one's responsibilities… is properly treated as a non-exculpable, nonindemnifiable violation of the fiduciary duty to act in good faith."). Both approaches require the same result – demand is excused as to the Board because it was aware of the LTIPs' requirements and nevertheless gave the Special Committee the power to decide an issue that only the stockholders could decide.

For that reason, Defendants and the Court of Chancery are also incorrect that the Company's § 102(b)(7) exculpatory charter provision would require dismissal here. *See* Response Br., at 20. Plaintiff alleges a breach of the duty of loyalty. *Garfield*, 277 A.3d at 331 (where allegations support a reasonable inference that a fiduciary violated a plain and unambiguous restriction on the fiduciary's authority, a claim is stated for a breach of the duty of loyalty.); *Pfeiffer*, 2013 WL 5988416, at *9 ("Knowing or deliberate violations of a stockholder approved stock plan implicate the duty of loyalty, and breaches of the duty of loyalty cannot be exculpated by a charter provision adopted pursuant to 8 *Del. C.* §102(b)(7)."). The exculpation provision does not apply to this claim, particularly at the motion to dismiss stage.

The Board, as the entity responsible for administering the LTIPs, cannot plausibly claim ignorance of its terms. Directors who solicited approval for the 2018 LTIPs and those on the Compensation Committee overseeing their administration knew—or culpably did not know—of the stockholder approval requirement. The Chancery Court's reasoning would incentivize boards to avoid considering the terms of stockholder-approved plans, undermining accountability. Properly inferring knowledge from the Board's administrative responsibilities and the LTIPs' clear provisions, demand is excused. A majority of the Demand Board knew or should have known that stockholder approval was required for the EMA Amendment, rendering the delegation to the Special Committee invalid.

The provisions of the LTIPs requiring stockholder approval are plain and unambiguous. A046, ¶59 ("In no event may any [SAR] or Stock Option granted under this Plan be amended, other than pursuant to Section 3(e) . . . unless such amendment, cancellation or action is approved by the Corporation's shareholders."); A047, ¶61(similar). The modifier "in the event of a spinoff" does not render the provision ambiguous because the spinoff had already occurred four weeks *prior* to the Board's creation of a Special Committee to consider the EMA Amendment.

The question is not whether allegations of knowledge are sufficient, but whether the allegations show that a plain and unambiguous provision of the plan was violated. *See also Garfield*, 277 A.3d at 331 (Where, as here, "the allegations of a complaint support a reasonable inference that a fiduciary violated a plain and unambiguous restriction on the fiduciary's authority, then the plaintiff has asserted a claim for a breach of the duty of loyalty that rebuts the protections of the business judgment rule."). The analysis examines whether the Board violated an express limitation, which itself gives rise to an inference of knowledge. *See e.g., id* ("The loyalty violation in that setting is the failure to act in good faith to comply with pertinent legal obligations. *In the face of a plain and unambiguous restriction on the fiduciary's authority, it is reasonable to infer that the fiduciary violated the* *restriction knowingly*." (emphasis added)); *Pfeiffer*, 2013 WL 5988416, at *9 ("[A] *prima facie* showing of such a clear violation supports an inference that the [b]oard either knowingly or *deliberately* exceeded its authority. Knowing or deliberate violations of a stockholder approved stock plan implicate the duty of loyalty, and breaches of the duty of loyalty cannot be exculpated by a charter provision adopted pursuant to 8 *Del. C.* §102(b)(7).").

At most, courts require Board knowledge of the existence of the relevant provision. *See Pfeiffer*, 2013 WL 5988416, at *10 n.59 ("At a minimum, [fiduciary] received, and was charged with knowledge of, the Plan's contents when he was awarded his Stock Options."); *accord California Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *11 (Del. Ch. Dec. 18, 2002) (denying motion to dismiss where plaintiff alleged that the violation of the compensation plan was "undertaken without the exercise of *any* business judgment." (emphasis in original)). This makes sense. The Board is trusted with administration of the compensation plans and obtained their initial approval from stockholders by making promises about the features in the plan designed to protect stockholder interests. Knowledge of those plan terms must be inferred. Otherwise, a Board could insulate itself from liability by simply being unaware of the details of its responsibilities to stockholders.

The entire Board knew of the stockholder approval requirement because it was responsible for administration of the LTIPs. The Board was ultimately responsible for administration of the LTIPs. A034-35, ¶¶12-14, A044, ¶52, A102, ¶159. The Board repeatedly told stockholders the same. The Board could not in good faith have been unaware of the stockholder approval requirement, and it must be accountable for knowledge of its own responsibilities.

Moreover, the Complaint alleges facts supporting a specific inference of knowledge of the stockholder approval requirement as to enough directors to excuse demand. The demand board was thirteen directors. Two directors, Hayes and Ortberg, were unequivocally interested. Four directors on the demand board—Larsen, O'Sullivan, Reynolds, and Rogers—played a role in seeking approval for the UTC 2018 LTIP. During the solicitation for approval in UTC's 2018 Proxy Statement, the Board asserted that the plan included "features . . . to protect shareowners' interest and mitigate potential risk." Specifically emphasizing: "[n]o stock appreciation right or stock option repricing without shareowner approval." (A048, ¶64). *See Garfield*, 277 A.3d at 335, (CEO understood plan's terms because he was on the board during the approval process and the proxy statement labeled the relevant provision as a "material term."). Although Ramos was not on the Board when the 2018 Proxy Statement was issued, she has served on the UTC Compensation Committee since December 2018. In that role, she was been responsible for overseeing the administration of LTIPs and recommending changes to incentive compensation requiring stockholder approval. (A038, ¶29; A044, ¶52).

Therefore, knowledge of the stockholder approval requirement in the LTIPs is appropriately inferred as to a majority of the Board.[3]

A claim for breach of the duty of loyalty is alleged not only when a director knew they were exceeding their authority, but also "[w]here a director consciously ignores his or her duties to the corporation… the director's actions are either 'not in good faith' or involve 'intentional misconduct,'" and therefore falls outside the liability waiver in an exculpatory charter. *Id*. at 290; accord *In re The Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 752 (Del. Ch. 2005). Where corporate directors have acted with intentional dereliction of duty or conscious disregard for their responsibilities, they act in bad faith. *In re Walt Disney*, 906 A.2d at 66. Such bad faith may occur even though a director lacks a "conflicting self-interest" in a decision but engages in "misconduct that is more culpable than simple inattention or failure to be informed of all facts material to the decision." *Id*. Bad faith conduct of this type is a violation of the duty of loyalty. *Stone v. Ritter*, 911 A.2d 36, 370 (Del. 2006)

[3] Defendants are incorrect that to excuse demand plaintiff would have to allege demand excused as to seven independent directors. Response Br., at 19. The Board is thirteen members and two are concededly interested. To excuse demand as to the Board, demand must be excused as to five other directors.

CONCLUSION

For the reasons set forth in Plaintiff's Opening Brief and herein, Plaintiff respectfully requests that the Letter Opinion granting Defendants' motion to dismiss be reversed.

Dated: November 21, 2024

By: */s/ Blake A. Bennett*

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CERTIFICATE OF SERVICE

I, Blake A. Bennett, Esquire, do hereby certify that on the 6th day of December 2024, I caused copies of the foregoing to be served on all below listed counsel of record via File & Serve*Xpress*:

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