upon an ascertainable stockholder class is entitled to an award of counsel fees and expenses for its efforts in creating the benefit."[17] However, "it is not an absolute necessity that monetary benefit be conferred upon the class as a whole provided the litigation, even though unsuccessful, has specifically and substantially benefited the class which, in a derivative action, is the corporation."[18] Further, "[t]he entitlement to attorneys' fees is not necessarily predicated on a final adjudication after trial, [] because attorney's fees may be awarded, in appropriate circumstances, where a defendant corporation takes action that settles or moots the case."[19]

Here, the circumstances are unusual because the opportunity to participate in the Rights Offering provided a concrete but nonmonetary benefit, was not the result of a final adjudication, and was not conditioned on the Court's approval of the proposed settlement of which it was a part. Centerline's Board effectively mooted the Delaware Action when it extended the Rights Offering because that was the relief Off sought. Accordingly, to recover her attorneys' fees, Off must show that: " (1) the suit was meritorious when filed; (2) the action producing benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and (3) the resulting corporate benefit was causally related to the lawsuit."[20] The Court, however, may exercise its discretion to deny attorneys' fees "altogether if the Court finds that the litigation did not result in any ascertainable benefit to the corporation."[21] Therefore, I must determine at the threshold whether or not extending the Rights Offering provided a specific and substantial benefit to the class.

1. Was the benefit specific and substantial?

As explained by the Supreme Court of Delaware, "[t]he definition of a corporate benefit . . . is elastic . . . and need not be measurable in economic terms."[22] For example, "[c]hanges in corporate policy or . . . a heightened level of corporate disclosure . . . may justify an award of counsel fees."[23] In *Initio Partners v. Tandycrafts, Inc.*, the plaintiff alleged that the

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[17] *United Vanguard*, 693 A.2d at 1079 (citing *Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1164 (Del. 1989)); *see also Chrysler*, 223 A.2d at 386.

[18] *Chrysler*, 223 A.2d at 386.

[19] *Greenfield*, 1992 WL 301348, at *3.

[20] *United Vanguard*, 693 A.2d at 1079 (citing *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980)); *see also Grimes v. Donald*, 791 A.2d 818, 821 (Del. Ch. 2000).

[21] *Greenfield*, 1992 WL 301348, at *3; *see also Tandycrafts*, 562 A.2d at 1165.

[22] *Tandycrafts*, 562 A.2d at 1165; *see also Chrysler*, 223 A.2d at 386; *Allied Artists*, 413 A.2d at 878.

[23] *Tandycrafts*, 562 A.2d at 1165.

defendants submitted defective proxy materials to the company's shareholders.[24] Subsequently, the defendants issued supplementary proxy materials to meet the plaintiff's demands, rendering the litigation moot. At the company's annual meeting, the proposed amendments described in the proxy materials were soundly defeated.[25] The plaintiff then applied for attorneys' fees and expenses, claiming that its lawsuit caused the defendants to confer a specific and substantial benefit upon the company's shareholders. The court held that the act of correcting the proxy materials provided a specific and substantial benefit to the shareholders because "the omitted information was material to the issue before the shareholders."[26] The outcome of the vote was irrelevant.

I find that the opportunity afforded to Centerline shareholders to participate in the Rights Offering provided them a specific and substantial benefit. Whether the convertible preferred stock was a wise investment is not at issue, nor is it dispositive that only a relatively small number of shareholders elected to participate in the Rights Offering; the opportunity to participate was, by itself, a specific and substantial benefit. The shareholders' ability to assess the pros and cons of the Rights Offering while secure in the knowledge that, even if they chose not to participate, Centerline would have the benefit of the additional capital provided by the TRCLP Transaction was particularly significant based on the then prevailing economic climate and the potential value of the convertible preferred stock.

Defendants' reliance on the language of the November 26 Opinion, which characterized the benefit provided by the Rights Offering as "marginal,"[27] is misplaced. That statement must be viewed in context. In the November 26 Opinion, I balanced the Rights Offering's benefits against the costs attendant to a proposed settlement of the relatively narrow Delaware Action, which not only would have released the claims in that action, but also risked hamstringing the broader claims in the co-pending New York Action. In that context, I declined to approve the proposed settlement because the costs of the settlement, in terms of both the Delaware and New York Actions, outweighed the benefits of the Rights Offering, which I considered marginal in comparison.[28] I did not address the separate and distinct inquiry presented here: whether the benefit of the Rights Offering

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[24] 1988 WL 53317, at *1 (Del. Ch. May 23, 1988), *aff'd*, 562 A.2d 1162 (Del. 1989).
[25] *Id.*
[26] *Id.*
[27] *Off v. Ross*, 2008 WL 5053448, at *7 (Del. Ch. Nov. 26, 2008).
[28] *Id.* at 13.

was sufficient under the corporate benefit doctrine to justify an award of attorneys' fees on mootness grounds.[29]

2. Was the suit meritorious when filed?

A "claim is meritorious within the meaning of the rule if it can withstand a motion to dismiss on the pleadings if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success."[30] "It is not necessary that factually there be absolute assurance of ultimate success, but only that there be some reasonable hope."[31]

Off's Complaint alleged duty of loyalty violations and improper economic and voting dilution against the Centerline Board, all based on its approval of the TRCLP Transaction. At the least, these claims are colorable. Ross played a significant role in both Centerline and TRCLP and was positioned to receive a substantial benefit from the TRCLP Transaction. The facts alleged in the Complaint suggested that a majority of the Centerline Board was beholden to Ross and would have been motivated to approve the TRCLP Transaction for that reason. Further, it is plausible that the terms of the TRCLP Transaction reflected a "sweetheart deal" tailored to benefit Ross. The absence of effective procedural safeguards to ameliorate the apparent conflict of interest between Ross and Centerline's Board strengthened Off's claim. Thus, when the Complaint was filed, Off had, at a minimum, a "reasonable hope" of succeeding on her claims.

3. Did the action that produced the benefit occur before a judicial resolution?

There is no dispute that Centerline extended the Rights Offering to its shareholders on March 7, 2008, long before the provisional resolution of the Delaware Action on November 26, 2008. Moreover, Defendants did not condition the Rights Offering on the Court's approval of the proposed settlement.

4. Was the benefit causally related to Off's suit?

Defendants "ha[ve] the burden to show that 'no causal connection existed between the initiation of the suit and any later benefit to the

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[29]Indeed, I explicitly left that issue open. *See Id.* at *14 n.50.

[30]*Chrysler*, 223 A.2d at 387; *see also Grimes*, 791 A.2d at 822 (articulating the standard as whether the "claims presented could withstand a motion to dismiss.").

[31]*Id.*

shareholders.'"[32] A rebuttable presumption of causal connection exists between a plaintiff's suit and a beneficial action taken by the defendant "because it is the 'defendant, and not the plaintiff, who is in a position to know the reasons, events and decisions leading up to the defendant's action.'"[33] Therefore, Defendants must demonstrate that the lawsuit did not cause their action.[34]

In this case, Defendants deny that Off's Complaint caused them to extend the Rights Offering to the Plaintiff class. Defendants assert that they were contemplating extending the Rights Offering even before Off filed her Complaint. To prove their point, Defendants cite my November 26 Opinion, which acknowledged as "colorable" the possibility that Defendants would have extended the Rights Offering even if Off had not filed her suit.[35] In the November 26 Opinion, however, I expressly stated that "I am not convinced the Rights Offering constituted a *fait accompli*."[36] Defendants produced no additional evidence beyond what they adduced in connection with the hearing on the proposed settlement that preceded the November 26 Opinion. Despite the rebuttable presumption against them on the present motion, Defendants relied solely upon that skeletal record.

Although there is some evidence from which one could infer Defendants would have made the Rights Offering regardless of Plaintiff's lawsuit, the inference is not conclusive. Furthermore, even assuming that Defendants had decided to extend the Rights Offering before Off filed her Complaint, there is no evidence that Defendants would have done so on the precise terms to which they ultimately agreed. In fact, it is reasonable to infer that some of the terms Plaintiff's Counsel obtained through arm's-length bargaining with Defendants, such as the enlargement of the time during which the Rights Offering remained open and the backstopping provisions, would not have been part of a unilateral action taken by Defendants. In the end, Defendants had the burden of rebutting the presumption of causation and simply failed to meet this burden.

B. The Amount of Attorneys' Fees and Expenses

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[32] *Cal-Maine Foods, Inc. v. Pyles*, 858 A.2d 927, 929 (Del. 2004) (quoting *United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1080 (Del. 1997)).

[33] *United Vanguard*, 693 A.2d at 1080 (quoting *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 880 (Del. 1980)).

[34] *Id.*

[35] *Off v. Ross*, 2008 WL 5053448, at *9 (Del. Ch. Nov. 26, 2008) (citing D'Amico's affidavit).

[36] *Id.*

Plaintiff seeks $800,000 in attorneys' fees and expenses, the amount previously agreed upon in connection with the proposed settlement. Plaintiff relies in part upon the proposed settlement as justification for receiving $800,000, despite the fact that it was never approved. Additionally, Off asserts that her counsel, who are "experienced and highly capable practitioners in shareholder litigation," vigorously pursued this complex litigation.[37] Plaintiff further contends that a multiplier is appropriate here based on the contingent nature of the case. Defendants counter that if attorneys' fees and expenses are awarded, they should be calculated on a *quantum meruit* basis and only reflect the hours that Plaintiff's Counsel dedicated to the Delaware Action.

Where the achieved benefit is unquantifiable, the Court lacks "any yardstick against which to measure the reasonableness" of a fee request, other than on a *quantum meruit* basis.[38] "Under a *quantum meruit* approach, the Court would consider the work the attorneys performed to achieve the benefit, and the amount and value of attorney time required for that purpose, taking into account the experience of counsel and the contingent nature of the case."[39]

Contrary to Plaintiff's position, I accord no significant weight to the fee reflected in the proposed settlement that I declined to approve. The mere fact that Defendants previously agreed not to oppose a request for $800,000 does not make that figure appropriate. That is especially true here because I accorded less value to the claimed benefit to the class than the parties did. Instead, having determined that the Delaware Action achieved a specific and substantial, but unquantifiable benefit, I conclude that the grant of attorneys' fees and expenses here should be based on *quantum meruit*.

Plaintiff's Counsel expended 415 hours litigating the Delaware Action. Not all of the claimed 415 hours, however, are causally related to the benefit obtained. It was primarily the activities up to and including the negotiation of the proposed settlement that caused Defendants to extend the Rights Offering on the terms they did. Therefore, the hours dedicated to litigation after the parties reached agreement on the final terms of the proposed settlement are less relevant to this application. I also note that Plaintiff agreed to compensate her counsel on a contingent basis, which generally favors an award reflecting at least counsel's normal hourly rate for similar litigation. Taking into consideration all the circumstances surrounding the Delaware Action and the terms of Plaintiff's representation,

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[37]Pl.'s Br. 16-18.

[38]*In re Diamond Shamrock Corp.*, 1988 WL 94752, at *4 (Del. Ch. Sept. 14, 1988); *see also Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 152 (Del. 1980).

[39]*Diamond*, 1988 WL 94752, at *4.

I award Plaintiff's Counsel $225,000 in attorneys' fees and expenses. This award gives Plaintiff's Counsel the benefit of a generous average hourly rate in excess of $500 and a modest multiplier for contingency.[40]

III. CONCLUSION

For the reasons stated, I find that Plaintiff's actions in prosecuting the Delaware Action caused Defendants to confer a specific and substantial benefit upon Centerline's shareholders and award Plaintiff's Counsel $225,000 in attorneys' fees and expenses for their efforts in the Delaware Action. Plaintiff's Counsel shall submit, on notice, an appropriate form of judgment to implement this ruling.

SHELDON DUBROFF AND MERVYN KLEIN V. WREN HOLDINGS, LLC, JAVVA PARTNERS, LLC, CAMERON FAMILY PARTNERSHIP, L.P., CATALYST INVESTORS, L.P., CHRISTOPHER SHIPMAN, ANDERW T. DWYER, DORT A. CAMERON, III, HOWARD KATZ, TROY SNYDER, AND NINE SYSTEMS CORPORATION

No. 3940-VCN

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[40]Based on the papers submitted, Plaintiff's Counsel had an average hourly rate of $523.74. The 415 hours Plaintiff's Counsel worked yields attorneys' fees of approximately $217,641. Plaintiff's Counsel's expenses were $4,779. Therefore, the "lodestar" for their work would be $222,420, which approximates the amount of my award. Assuming something less than the full 415 hours of effort caused the claimed benefit, the amount awarded reflects a modest multiplier for contingency.

I also note that were I to award Plaintiff's Counsel (and counsel in the related actions) the requested $800,000 in attorneys' fees, they would have received a much higher multiplier of 3.68, which would have equated roughly to an hourly rate of $1,925.

Court of Chancery of the State of Delaware, New Castle

May 22, 2009

Seth D. Rigrodsky, Esquire and Brian D. Long, Esquire of Rigrodsky & Long, P.A., Wilmington, Delaware, and Laurence Rosen, Esquire, Phillip Kim, Esquire, and Timothy Brown, Esquire of The Rosen Law Firm, P.A., New York, New York, Attorneys for Plaintiffs.

William P. Bowden, Esquire, Andrew D. Cordo, Esquire, and Stacy L. Newman, Esquire of Ashby & Geddes, Wilmington, Delaware, Attorneys for Defendants; Richard G. Haddad, Esquire and Andrew S. Halpern, Esquire, of Otterbourg, Steindler, Houston & Rosen, P.C., New York, New York, Attorneys for Defendants Wren Holdings, LLC, Javva Partners LLC, Cameron Family Partnership, L.P., Andrew T. Dwyer, Dort A. Cameron, III, Howard Katz, Troy Snyder, and Nine Systems Corporation; and Kevin C. Logue, Esquire and Asa R. Danes, Esquire of Paul, Hastings, Janofsky & Walker LLP, New York, New York, Attorneys for Defendants Catalyst Investors, L.P. and Christopher Shipman.

NOBLE, *Vice Chancellor*

I. INTRODUCTION

The Plaintiffs are two former minority shareholders of Nine Systems Corporation ("NSC" or the "Company"), a now-privately held Delaware corporation that was once known as Streaming Media Corporation, and have brought a purported class action against NSC, some of its former directors, and some of its former shareholders, alleging breaches of fiduciary duties. Defendants Wren Holdings, LLC ("Wren"), Javva Partners, LLC ("Javva"), and Catalyst Investors, L.P. ("Catalyst") were NSC shareholders and debtholders (collectively, the "Entity Defendants"). Wren is 50% owned by Defendant Dort Cameron ("Cameron"), a former member of NSC's five-member board, and 50% owned by Defendant Andrew Dwyer ("Dwyer"). Defendant Howard Katz ("Katz") is the sole equity owner of Javva and was also a member of NSC's board. Catalyst is controlled by its managing partner, Defendant Christopher Shipman ("Shipman"), also a former member of NSC's board.[1]

[1]For convenience, Cameron, Dwyer, Katz, and Shipman are sometimes collectively referred to as the 'Individual Defendants.'

From 1999 until 2001, the Plaintiffs purchased approximately $6.2 million worth of NSC common stock. They are no longer shareholders of NSC; NSC has been acquired by Akami Technologies ("Akami") by way of merger.

During 2001 and early 2002, the Entity Defendants made a series of loans to NSC; the aggregate value of these loans is unknown but is not believed to exceed $5 million.[2] Subsequently, in August 2002, NSC carried out a recapitalization transaction (the "Recapitalization") by which the Entity Defendants converted the preferred debt they each held into preferred stock. Before the Recapitalization, the Entity Defendants collectively owned 56% of NSC's stock;[3] the effect of the Recapitalization was to increase these entities' collective holdings to almost 80%, thereby diluting other shareholders' equity, including the Plaintiffs', from approximately 44% to 22%.[4] The Recapitalization was carried out by written consent of the holders of a majority of the Company's stock, primarily the Entity Defendants. After the Recapitalization, NSC shareholders (including Plaintiffs) received a notice which stated that NSC had completed a 1-for-20 reverse stock split and an exchange of preferred debt for preferred shares.[5]

In November 2006, NSC issued a proxy statement to its shareholders announcing that Akami was acquiring NSC at a purchase price of $175 million.[6] Included in the proxy statement was a listing of NSC shareholders and the number of NSC shares each held. With this information, the Plaintiffs, for the first time, were made aware of their equity dilution. The Plaintiffs brought suit in California (the "California Action"), the state in which NSC's physical operations are located. The California Action was dismissed on forum non-conveniens and lack of personal jurisdiction grounds. The Plaintiffs re-filed in New York state court, but subsequently voluntarily moved to dismiss the action. The Plaintiffs then filed the present action, alleging that the Individual Defendants and the Entity Defendants breached fiduciary duties owed to the

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[2]Compl. at ¶ 11.

[3]The individual percentages held by Wren, Javva, and Catalyst are not clearly discernible from the Complaint. Their collective holdings are set forth and the Plaintiffs have not asserted that before the Recapitalization any of the Entity Defendants separately held an interest that was otherwise material.

[4]Compl. at ¶ 68.

[5]Compl. at ¶ 83.

[6]Compl. at ¶ 95.

minority shareholders, and that the Individual Defendants aided and abetted breaches by the Entity Defendants.

The Defendants have moved to dismiss the complaint with prejudice. They argue that the Plaintiffs' claims are barred by the doctrine of laches; that the Plaintiffs lack standing to assert their claims because their claims are derivative and the Plaintiffs no longer own shares of NSC; and that the Defendants did not fail to disclose material facts. In addition, Javva and Dwyer contend that this Court lacks personal jurisdiction over them. For the reasons discussed below, the Defendants' motion is granted in part and denied in part.

II. APPLICABLE STANDARD

A motion under Court of Chancery Rule 12(b)(6) to dismiss for failure to state a claim will be granted if it appears with reasonable certainty that the plaintiff could not prevail on any set of facts that can be inferred from the pleading.[7] In considering a motion to dismiss, the Court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint.[8] All well-plead facts of the complaint and inferences that can reasonably be drawn therefrom in favor of the plaintiff are accepted as true.[9] However, a trial court neither must blindly accept all allegations as true, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences.[10]

III. ANALYSIS

A. *The Recapitalization*

The Plaintiffs' claim—that the Recapitalization diluted their equity—is one of corporate overpayment. "Normally, claims of corporate overpayment [or dilution] are treated as causing harm solely to the corporation and, thus, are regarded as derivative. The reason . . . is that the corporation is both the party that suffers the injury . . . as well as the party to whom the remedy . . . would flow."[11] In *Lewis v. Anderson*,[12] the

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[7]*Kohls v. Kenetech Corp.*, 791 A.2d 763, 767 (Del. Ch. 2000).

[8]*Gantler v. Stephens*, 965 A.2d 695, 7033 (Del. 2009).

[9]*Id.*

[10]*In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999).

[11]*Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006). *See also In re J.P. Morgan Chase & Co. S'holders Litig.*, 906 A.2d 808, 818 (Del. Ch. 2005), *aff'd* 906 A.2d 766 (Del. 2006) (When a 'board of directors authorizes the issuance of stock for no or grossly inadequate consideration, the corporation is directly injured and shareholders are injured derivatively . . . .') (internal quotation marks omitted).

[12]477 A.2d 1040, 1046 (Del. 1984).

Delaware Supreme Court held that in order for a plaintiff to have standing to assert a derivative claim, the plaintiff, pursuant to 8 *Del. C.* § 327 and Court of Chancery Rule 23.1, must be a stockholder at the time of the alleged wrongdoing and must maintain her stockholder status in the corporate entity throughout the litigation.[13]

Following an acquisition, the acquired company's former shareholders no longer have an equity interest in that entity—i.e., their shares are converted for cash or acquirer company stock. Thus, shareholders of an acquired company generally lose standing to assert a derivative claim on behalf of the acquired company.[14] In *Gentile v. Rosette*,[15] however, the Delaware Supreme Court emphasized that there is an exception to this general rule. There, the Court held that claims based upon equity dilution can be both direct and derivative in certain circumstances.[16] In particular, the Court noted that

> [a] breach of fiduciary duty claim having this dual nature arises where: (1) a stockholder having majority or effective control causes the corporation to issue "excessive" shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders.[17]

Although equity dilution claims are, by definition, derivative because the corporation has suffered an injury (inadequate payment for its shares) and, therefore, any recovery would flow to the corporate treasury,[18] the

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[13] *Id. See Feldman v. Cutaia*, 956 A.2d 644, 654 (Del. Ch. 2007) (citing *Anderson*, 477 A.2d at 1046).

[14] *See, e.g.*, *In re Syncor Int'l Corp. S'holders Litig.*, 857 A.2d 994, 998 (Del. Ch. 2004) ('[A] merger which eliminates a shareholder's ownership of stock in a corporation also eliminates his or her status to bring a derivative suit on behalf of the corporation, on the theory that upon the merger the derivative rights pass to the surviving corporation which then has the sole right or standing to prosecute the action.' (citing *Anderson*, 477 A.2d at 1045-46)).

[15] 906 A.2d 91 (Del. 2006).

[16] *Id.* at 99 ('There is, however, at least one transactional paradigm—a species of corporate overpayment claim—that Delaware case law recognizes as being both derivative and direct in character.').

[17] *Id.* at 99-100.

[18] *See supra* text accompanying note 11. *See also Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

Gentile-type of equity dilution claim—one in which a corporation issues more shares to its controlling shareholder and dilutes the minority shareholders' equity—is also direct. As the *Gentile* Court explained:

> Because the shares representing the "overpayment" embody both economic value and voting power, the end result of this type of transaction is an improper transfer—or expropriation—of economic value and voting power from the public shareholders to the majority or controlling stockholder. For that reason, the harm resulting from the overpayment is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares. A separate harm also results: an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest. As a consequence, the public shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefited. In such circumstances, the public shareholders are entitled to recover the value represented by that overpayment—an entitlement that may be claimed by the public shareholders directly and without regard to any claim the corporation may have.[19]

Gentile and its progeny make clear that a shareholder's claim can be both derivative and direct in a unique situation: where a controlling shareholder causes the corporate entity to issue more equity to the controlling shareholder at the expense of the minority shareholders. Here, the Plaintiffs are no longer stockholders of NSC because their equity was redeemed when NSC was acquired by Akami Technologies. Therefore, the Plaintiffs lost standing to assert their claims derivatively. The Plaintiffs, however, argue that their claims are also direct under *Gentile*. It is alleged that the Entity Defendants—none of whom alone is a controlling

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[19]*Gentile*, 906 A.2d at 100 (footnote omitted). *See also Gatz v. Ponsoldt*, 925 A.2d 1265, 1274 (Del. 2007) ('[W]here a significant or controlling stockholder causes the corporation to engage in a transaction wherein shares having more value than what the corporation received in exchange are issued to the controller, thereby increasing the controller's percentage of stock ownership at the public shareholders' expense, a separate and distinct harm results to the public shareholders, apart from any harm caused to the corporation, and from which the public shareholders may seek relief in a direct action.').

shareholder—collectively formed a controlling shareholder group. This "control group" caused the Company to conduct the Recapitalization resulting in the accretion of Wren's, Javva's, and Catalyst's equity, and a corresponding dilution of the "minority" shareholders'—including the Plaintiffs'—equity. Accordingly, only if there were some arrangement among the Entity Defendants to act as a control group would the Plaintiffs' challenge to the Recapitalization survive this motion to dismiss.[20]

Gentile's linkage of equity dilution claims to a controlling shareholder grows out of the principle that a controlling shareholder owes fiduciary duties to the shareholders of the corporation she controls.[21] Under Delaware law, "a controlling shareholder exists when a stockholder: 1) owns more than 50% of the voting power of a corporation; or 2) exercises control over the business and affairs of the corporation."[22] Although a controlling shareholder is often a single entity or actor, Delaware case law has recognized that a number of shareholders, each of whom individually cannot exert control over the corporation (either through majority ownership or significant voting power coupled with formidable managerial power), can collectively form a control group where those shareholders are connected in some legally significant way—e.g., by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal.[23] In that case, the control group is accorded controlling shareholder status, and, therefore, its members owe fiduciary duties to their fellow shareholders. However, a "stockholder is entitled to vote its shares as it chooses, including to further its own financial interest."[24] Accordingly, if all a complaint alleges is that a group of shareholders have "parallel

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[20] *Cf.* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255 (2008) (arguing that activist shareholders should owe fiduciary duties, basing this reasoning in part on the rationale for imposing fiduciary obligations upon controlling shareholders).

[21] *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113-14 (Del. 1994); *Williamson v. Cox Commc'ns, Inc.*, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006).

[22] *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006).

[23] *See id.* at *10 ('The record . . . does not support the proposition that these various director-stockholders and their family members [(the alleged control group)] were involved in a blood pact to act together. To that point, there are no voting agreements between directors or family member. Rather, it appears that each had the right to, and every incentive to, act in his or her own self-interest as a stockholder.'); *id.* at *9 ('The problem for the plaintiffs here is that they did not prove that the PNB board may be conceived of as a single, monolithic controller.'); *Emerson Radio Corp. v. Int'l Jensen Inc.*, 1996 WL 483086, at *17 (Del. Ch. Aug. 20, 1996) ('If Shaw and Blair Fund could be viewed collectively as a 'controlling' stockholder, they would have fiduciary duties to the minority in certain limited circumstances, but the record does not establish that those two shareholders are connected together in any legally significant way (e.g., by common ownership or contract).').

[24] *Emerson Radio*, 1996 WL 483086, at *17.

interests," such allegations are insufficient as a matter of law to support the inference that the shareholders were part of a control group.[25]

The Plaintiffs' argument that their claims are direct under *Gentile* fails as a matter of law because the Complaint contains no facts from which the Court can infer that the Entity Defendants formed a control group.[26] The Complaint states in conclusory fashion that the Entity Defendants "controlled the NSC board of directors,"[27] but the Complaint does not point to any facts that could explain how the Plaintiffs would expect the Court to arrive at that conclusion. In their brief, the Plaintiffs argue that

> Plaintiffs' claim that Java, Catalyst, and Wren worked in concert as a single controlling shareholder group is *not conclusory* because it is supported by 10 specific facts: that these 3 entities 1) exclusively benefited from the Self-Dealing Transactions, 2) together owned 56% of [NSC's] voting stock, 3) together controlled 4 of the 5 directors of [NSC], 4) agreed to work together to effect Self-Dealing Transactions, 5) had a contractual agreement to work together, 6) did not form an independent committee to evaluate and approve the Self-Dealing Transactions, 7) voted as directors (through their representatives Cameron, Katz and Shipman) to approve the Self-Dealing Transactions, 8) voted together as majority shareholders to approve the Self-Dealing Transactions, 9) did not provide notice to minority shareholders of the Self-Dealing

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[25] *Williamson*, 2006 WL 1586375, at *6 ('[T]he allegation that Cox, Comcast and AT & T [(the alleged control group)] had parallel interests [is in]sufficient to allege that the Cable Companies were part of a 'controlling group." (citing *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 550-51 (Del. Ch. 2003))).

[26] As discussed, a stockholder is a controlling shareholder where the stockholder either (1) owns more than 50% of the voting power of the corporation; or (2) exercises control over the business and affairs of the corporation. None of the Defendants individually meets the first test. The Plaintiffs have not alleged that any of the Defendants *individually* met the second test. Accordingly, the Court does not consider whether any of the Defendants individually meets the second test. *See Williamson*, 2006 WL 1586375, at *4 ('To survive [a] motion to dismiss, plaintiff must allege domination and control by [the alleged controlling shareholder or shareholder group] through *actual* control of corporate conduct.') (emphasis in original).

[27] Compl. at ¶ 64. *See id.* at ¶ 63 ('Defendants . . . controlled the board of directors.'); *id* ¶ 39 ('At all relevant times, the [Entity Defendants] acted as a group of controlling shareholders of [NSC] to control and dominate the Company and exert their power over the Company and its board of directors to benefit themselves to the exclusion and detriment of the minority shareholders.').

> Transactions, and 10) did not request minority shareholders to vote to approve the Self-Dealing Transactions.[28]

The Defendants contend that only "facts" 4 and 5 are even arguably relevant. They are correct because apart from "facts" 4 and 5, all of the references to the Defendants' conduct do not indicate that the Defendants should be grouped together as a control group—i.e., they do not allege that the Defendants are tied together in some legally significant way. The other references may be consistent with the existence of a control group but they do not establish the necessary linkage among the Entity Defendants.

Facts 4 and 5—that the Defendants agreed to work together to bring about the Recapitalization, and that the Defendants had a contractual agreement to work together, respectively—if true, would justify the inference that the Defendants comprised a control group. Unfortunately for the Plaintiffs, those facts are absent from the Complaint; the Complaint is devoid of any facts demonstrating an agreement or that the Defendants were tied together in some legally significant way. In fact, at the hearing on this motion to dismiss, the Plaintiffs conceded that there were no facts in the Complaint from which the Court could infer that an agreement existed.[29] At the hearing, the following colloquy took place:

> [Counsel for Plaintiffs]: . . . . So you know, I think *Gatz v. Ponsoldt* very much permits our cause of action. They talk about—I believe in *Gatz* they talk about asserting actual—or asserting domination, asserting direct control, verbs like that, or nouns like—direct control, having actual control of the transaction. And in this case . . . the facts are very clear that these three shareholders, they—and directors, they, for a number of months, discussed how to do these—this set of transactions. And they talked amongst themselves, how they would do it, and who would do what, exactly what the price would be.
>
> THE COURT: Excuse me. Where do I find those facts in the complaint?
>
> [Counsel for Plaintiffs]: Your Honor, I apologize for that. I

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[28]Pls.' Br. in Opp'n to Defs.' Mot. to Dismiss at 23 (emphasis in original).

[29]*See* Oral Argument Tr. for Hr'g on Mot. to Dismiss (Jan. 20, 2009) at 56-59.

> was—I did not anticipate this argument. This is—this was not something that defendants had raised before. And I assumed that three shareholders who issued themselves stock—three shareholders who control percent of the company and control the board of directors, when they issue themselves stock, it's pretty obvious it's a controlling group . . . . But I agree, Your Honor, and I apologize that we didn't put those [facts] . . . in the complaint.[30]

The Plaintiffs' counsel went on to state that, although the Complaint on its face perhaps did not contain any facts from which the Court could infer an agreement of some kind, the documents attached as exhibits to the Complaint—documents that form part of the complaint—created such inferences on their own.[31] The documents which Plaintiffs argue evince an agreement among the Defendants to form a control group, however, do not support their position. In particular, the Plaintiffs point to a document titled "Action By Written Consent Of The Stockholders Of Streaming Media Corporation," claiming that it is an "overpowering fact[] . . . demonstrating a controlling shareholder group."[32] However, this document demonstrates nothing more than the fact that the Entity Defendants each voted for the Recapitalization. And, as discussed, shareholders are entitled to vote based on their own self-interest, regardless of whether their interests are consistent with the interests of other shareholders.[33]

The Plaintiffs also claim that the Entity Defendants "signed a shareholders agreement to work together."[34] This conclusion, however, is a mischaracterization of the document upon which the Plaintiffs rely. The document, an exhibit to the Complaint,[35] is simply a letter, dated October

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[30] *Id.* at 56-57. *See also id.* at 57-58 ('THE COURT: I'm struggling with why, when you received the defendants' opening brief and Argument II.B.2, is, 'The Plaintiffs' Claims are Not Direct in Nature Under Gentile Because the Plaintiffs Have Not Adequately Alleged the Existence of a Controlling Stockholder,' why you didn't amend your complaint to set forth the facts that you now claim would have satisfied that standard? [Counsel for Plaintiffs]: Well, Your Honor, I—I think the complaint, as it stands, is sufficient.').

[31] *See id* at 57-58 (Counsel contending that the Complaint is sufficient even in the absence of allegations of an agreement because the Court can rely upon the documents attached to the complaint as evidence of an agreement).

[32] Pls.' Br. in Opp'n to Defs.' Mot. to Dismiss at 34.

[33] *See supra* notes 24-25 and accompanying text.

[34] Pls.' Br. in Opp'n to Defs.' Mot. to Dismiss at 25.

[35] *See Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842, at *4 (Del. Ch. June 13, 2008) ("While the court may not consider matters outside the pleadings when assessing a motion to dismiss for failure to state a claim, the court may consider documents that are integral to a plaintiff's claim and

18, 2006, from Wren, signed by its principal, Cameron, to NSC notifying NSC of its intention to transfer shares; in it Wren references a "Stockholders Agreement." There is no mention of any of the other Entity Defendants or of the substance of the "Stockholders Agreement." Accordingly, it would be unreasonable to infer from this rather bare letter that the letter represents the Entity Defendants' signed agreement to work together.

Because neither the Complaint nor any supporting document contains any facts from which the Court may infer that the Defendants were tied together in some legally significant way, the Defendants' motion to dismiss the substantive claim regarding the Recapitalization with prejudice must be granted as to the Plaintiffs.[36]

B. *The Disclosure Claims*

Because the Recapitalization was accomplished by written consent of those stockholders holding a majority of the voting stock, there was neither a vote nor a solicitation of the Plaintiffs' approval. By 8 *Del. C.* § 228(e), "[p]rompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders . . . who have not consented in writing . . ."[37] The Plaintiffs challenge the sufficiency of the notice sent to inform them of the Recapitalization. That notice provided in part: "[NSC] has recapitalized by converting its outstanding subordinated debt into shares of several new series of convertible preferred stock, and by declaring and implementing a one-four-twenty reverse stock split on all outstanding shares of common stock of the Company."[38] The notice, however, did not inform the

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incorporated into the complaint as well as facts subject to judicial notice.").

[36]The Plaintiffs ask the Court to deny the Defendants' motion to dismiss, or, in the alternative, to grant the motion without prejudice. The Plaintiffs presumably would seek to amend the Complaint to include facts from which the Court could infer a common undertaking among the Entity Defendants. The Court declines to do so. Pursuant to Court of Chancery Rule 15(aaa), the Plaintiffs already had ample opportunity to amend the Complaint upon the Defendants' filing of their motion to dismiss. Instead, the Plaintiffs chose to file an answering brief, thereby running afoul of Rule 15(aaa). The Plaintiffs have failed to set forth any good cause that would allow the Court to conclude that dismissal with prejudice would not be just. Accordingly, the claims relating to the substance of the Recapitalization are dismissed with prejudice.

[37]The Plaintiffs chafe at the notion that the Recapitalization could have been accomplished without their having had an opportunity to vote. They neither cite to 8 *Del. C.* § 228 nor set forth any reasons, such as a provision to the contrary in the Company's certificate of incorporation, as to why the mode of written consent in lieu of a stockholders' meeting was procedurally infirm.

[38]Long Aff. Ex. 3 at 1. The Update stated that "a round of $3.8 million in senior debt was raised from existing investors." *Id.* at 2. It did not state who those investors were or provide any other numbers that would provide a context to enable the Plaintiffs to understand the full consequence of the transaction. The notice also indicated that, if the convertible preferred shares were all converted,

stockholders that the Entity Defendants were the primary recipients of the new convertible preferred stock. Moreover, it did not inform the stockholders of the pricing of the conversion of the Entity Defendants' debt into convertible preferred stock.[39] The Plaintiffs argue that they were injured by a material omission from the notice because, "had the Update contained accurate and full disclosures, Plaintiffs could have made a claim for rescissory relief."[40]

The notice provided to the Plaintiffs following the Recapitalization accurately described the precise action accomplished through the written consent, but, as the Plaintiffs' contend, material facts—who benefited from the Recapitalization and what benefits did they achieve—were omitted. And such a failure to disclose material facts necessitates the conclusion that the Plaintiffs have stated a claim that the NSC board breached its fiduciary duties regarding disclosure of material information.

Delaware case law has not addressed the question of whether the notice required by 8 *Del. C.* § 228(e) triggers a fulsome disclosure akin to that required when stockholder approval is being solicited.[41] The Court need not delineate the parameters of the disclosure required by § 228(e) because the Court holds that regardless of the precise scope, the Plaintiffs have stated a claim for breach of fiduciary duty.

The Delaware Supreme Court has held that

> [w]henever directors communicate publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty. It follows *a fortiori* that when directors communicate publicly or directly with shareholders about corporate matters the sine qua non of directors' fiduciary duty to shareholders is honesty.[42]

8,989,786 additional common shares would be issued.

[39]As a result of the Recapitalization, the Entity Defendants' equity holding in the Company, on a fully diluted basis increased from approximately 56% to approximately 80%. This expansion of the Entity Defendants' equity ownership rights was not disclosed. 40 Pls.' Ans. Br. at 38.

[40]Pls.' Ans. Br. at 38.

[41]*See Unanue v. Unanue*, 2004 WL 2521292, at *8-9 (Del. Ch. Nov. 3, 2004) (discussing, without deciding, this issue). *See* EDWARD P. WELCH, ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW, § 228.4.6 (5th ed. 2008) (observing that Delaware courts have not resolved the scope of disclosure that must be made in accordance with § 228). For an in-depth discussion of the duty of disclosure see *Pfeffer v. Redstone*, 965 A.2d 676, 684-90 (Del. 2009).

[42]*See Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998); *Shamrock Holdings of California, Inc. v. Iger*, 2005 WL 1377490, at *5 (Del. Ch. 2005) ("If the statements were not made in connection with seeking shareholder action, there are well-pled facts in the complaint sufficient for me to reasonably

For purposes of the present analysis, it is immaterial whether § 228 requires full fiduciary duty disclosure of all material information as in the context of a request for shareholder action. If it does, the Complaint asserts well-plead facts sufficient for the Court to infer reasonably that the board materially misled shareholders about the Recapitalization. If it does not, there are well-plead facts in the Complaint sufficient for the Court to infer reasonably that the board deliberately omitted material information with the goal of misleading the Plaintiffs and other shareholders about the Defendants' material financial interest in, and benefit conferred by, the Recapitalization not shared with other shareholders.[43] Thus, the motion to dismiss with respect to the Plaintiffs' disclosure claims must be denied.[44]

C. *Laches*

The Defendants argue that Plaintiffs' claims are barred by the doctrine of laches because the Defendants were on inquiry notice that interested parties converted their shares. The words set forth in the Update which the Defendants contend put the Plaintiffs on inquiry notice, however, inform only that senior debt converted in the Recapitalization "was raised from existing investors." Because the Update did not state that those "existing investors" were also members of NSC's board of directors (or,

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infer that the board deliberately misinformed plaintiffs and other shareholders about the process of the search for a new CEO, either by virtue of the statements having been false or misleading when made, or because subsequent events rendered those statements false or misleading when corrective disclosures were not made.").

[43]*See Shamrock Holdings*, 2005 WL 1377490, at *5. This conclusion may, at first glance, appear to be at odds with the previous section of this memorandum opinion. The previous section concluded that the Plaintiffs failed to state a claim for breach of fiduciary duty by the alleged control group because the Plaintiffs did not point to any facts from which the Court could infer that the Defendants agreed to work together. This section concludes that the Plaintiffs have stated a claim for breach of fiduciary duty because of the failure to disclose the fact that certain directors (and the shareholder entities that they represented) were interested in the Recapitalization. If the Defendants were not acting as a control group, then how could their financial interest in the Recapitalization have been material information (the failure of which to disclose in the Update could constitute a breach of fiduciary duty)? The mere failure to plead facts—the grounds for dismissal in the previous section—does not mean that such facts do not exist. Therefore, the Court did not conclude that the Defendants were not acting as a control group; the Court concluded only that the Plaintiffs failed to plead the existence of one. Because corporate fiduciaries may not presume immaterial the fact that members of its board of directors indirectly benefited from a financial transaction to the material detriment of the other stockholders, the Plaintiffs have adequately pleaded a disclosure claim.

[44]The allegations of the Complaint with respect to aiding and abetting the conduct challenged in the disclosure claim, however marginal, do, nonetheless, survive under the standards of Court of Chancery Rule 12(b)(6). The breach of fiduciary duty claim, however, against the corporation, NSC itself, fails because the Plaintiffs have not established the basis for imposing any duty on it or for treating it as an aider and abetter. Accordingly, any claim against NSC is dismissed.

more accurately, entities related to those directors), the Plaintiffs were not put on inquiry notice of an alleged self-dealing transaction. Accordingly, the Defendants' laches argument must be rejected.[45]

D. *Personal Jurisdiction*

Defendants Dwyer and Javva have moved to dismiss all claims against them for lack of personal jurisdiction.[46] The Plaintiffs rely upon the so-called conspiracy theory of personal jurisdiction which has five elements:

> (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.[47]

The Plaintiffs' argument that personal jurisdiction may be asserted under the conspiracy theory fails under the first *Istituto Bancario* element, for the same reason their claims that the Defendants constituted a control group: conclusory allegations are insufficient.[48] As discussed above, the Plaintiffs have failed to allege any facts from which the Court can infer that the Defendants agreed to work together. Such "conclusory allegations . . . that are unsupported by evidence . . . will not be sufficient to overcome a

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[45]This conclusion also is informed by recognition that it is a difficult task to pursue successfully a laches defense in the context of a motion to dismiss. *See Reid v. Alenia Spazio*, 2009 WL 962683, at *4 (Del. Apr. 9, 2009). Even though equity will frequently, if not routinely, "borrow" the corresponding statute of limitations, the mere passage of time which enabled, as alleged, certain Defendants to continue keeping from other shareholders knowledge of the benefits of the Recapitalization does not allow, in the context of a motion to dismiss, for dismissal of the disclosure claims.

[46]*See* 10 *Del. C.* § 3104(c)(1). Neither Dwyer nor Javva is a "resident" of Delaware.

[47]*Istituto Bancario Italiano SpA v. Hunter Engineering Co., Inc.*, 449 A.2d 210, 225 (Del. 1982).

[48]*See Computer People, Inc. v. Best Intern. Group, Inc.*, 1999 WL 288119, at *7 Del. Ch. (April 27, 1999) ("conclusory and unsupported allegations that there was a conspiracy" are insufficient); *supra* Section III.A. (dismissing the Plaintiffs' claims for failure to plead the existence of an agreement to form a control group).

motion to dismiss for lack of personal jurisdiction."[49] Thus, this Court lacks personal jurisdiction over Dwyer and Javva.

IV. CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss the Complaint with prejudice is granted with respect to Plaintiffs' challenge to the Recapitalization. The motion of Dwyer and Javva to dismiss for lack of personal jurisdiction is also granted. All claims against NSC are dismissed. The Defendants' motion to dismiss with respect to the disclosure claim asserted in the Complaint is denied.

IT IS SO ORDERED.

SUSAN A. MARTINEZ V. REGIONS FINANCIAL CORPORATION

No. 4128-VCP

Court of Chancery of the State of Delaware, New Castle

August 6, 2009

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[49] *Computer People*, 1999 WL 288119, at *6. To the extent the Plaintiffs rely upon Dwyer's and Javva's other alleged contacts to support personal jurisdiction, such reliance is misplaced. While some of those contacts could in theory establish personal jurisdiction as to the decision to carry out the Recapitalization (although the Court doubts that they do), those contacts are insufficient to establish personal jurisdiction as to the disclosure claim (the only claim that survives this motion to dismiss). In particular, the conclusory allegations regarding any involvement that Javva and Dwyer may have had in the alleged inadequate disclosures are insufficient to support the exercise of personal jurisdiction. Accordingly, the Court cannot exercise personal jurisdiction over Dwyer and Javva.

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PARSONS, *Vice Chancellor*

This is an action by a former bank executive to enforce a change of control agreement she entered into with a first bank against a second bank into which the first later merged. The agreement provided the employee with certain rights during a two-year employment period after the effective date of any change of control and included "golden parachute" provisions, which came into effect if the new employer terminated her employment other than for cause or disability before the end of the employment period. In particular, the former executive, who was terminated without cause about midway through the employment period, seeks to obtain both the laundry list of severance benefits specified in the agreement and payment of her salary and other employment benefits for the year or so remaining in the contractual employment period, as if she had continued to be employed by the bank. The employee's claims also involve a dispute as to the amount of her most recent bonus. In addition, the former employee seeks advancement of her legal fees and expenses in connection with this litigation under a broad advancement provision that, by its terms, applies "as a result of any contest (regardless of the outcome thereof)." The successor bank has denied all liability.

Plaintiff, the former employee, has moved for partial summary judgment on her advancement claim. The defendant bank responded by seeking to preempt the advancement claim by shifting the focus of the litigation to the merits of the employee's claims for additional compensation under the change of control agreement. In that regard, the bank seeks summary judgment on all the counts of the complaint. The bank argues first that all the employee's claims for additional pay, bonus, and other benefits are not only without merit, but also objectively unreasonable. On that basis, the bank urges this Court to reject the employee's advancement claim, because it applies only to legal fees and expenses the executive "reasonably" incurred and, therefore, does not encompass the employee's claims here.

For the reasons stated in this opinion, I grant the employee's motion for summary judgment as to her right to advancement of her fees and costs in this action. I also grant, in large part, the successor bank's motion for

summary judgment based on my determination that, as a matter of law, the employee is not entitled to her salary and other employment benefits for the remainder of the employment period. I deny the bank's motion in part, however, in that it has not established the absence of any genuine issue of material fact as to that portion of Counts I and III of the complaint relating to the employee's claim that the bank failed to pay her the proper amount for her bonus in 2007, and thereby breached the change of control agreement and the covenant of good faith and fair dealing implicit in that agreement.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, Susan A. Martinez, was a Senior Executive Vice President with AmSouth Bancorporation ("AmSouth") before its merger with Defendant.

Defendant, Regions Financial Corporation ("Regions" or the "Company"), is a Delaware corporation with its principal place of business in Birmingham, Alabama. When Regions merged with AmSouth in 2006 and became its successor-in-interest, Regions assumed certain obligations to Martinez under an employment agreement upon which this dispute is based.

B. Martinez's Employment History

In connection with being promoted to AmSouth Senior Executive Vice President and Member of the Corporate Management Committee, Martinez entered into an employment agreement with AmSouth on February 1, 2004 (the "Employment Agreement" or "Agreement").[1] The Agreement was not a product of individualized negotiations between Martinez and AmSouth. Rather, AmSouth entered into the same Agreement with all its executives based on the Board's decision to provide the executives with "golden parachute" change of control contracts.

According to the recitations in the Employment Agreement, AmSouth's Board decided it would benefit the Company to align the interests of the executives with those of investors in AmSouth and secure the executives' dedication to AmSouth by providing them with compensation and benefit arrangements upon a change of control that were competitive to those of other corporations.[2] Thus, AmSouth made clear to

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[1]Verified Compl. ("Compl.") Ex. A, Employment Agreement, § 2.

[2]*Id.* at 1.

the executives that the Employment Agreement would become effective only upon a change of control. In November 2006, almost three years after Martinez signed the Agreement, a change of control event occurred—AmSouth merged with Regions.[3] This triggered the terms of the Employment Agreement and, as a successor-in-interest to AmSouth, Regions assumed AmSouth's obligations under the Agreement.[4]

Following the merger, Martinez remained employed with Regions as a Senior Executive for almost one year. On September 15, 2007, however, Regions proposed an alternative employment agreement to Martinez and other executives, offering less favorable terms than those provided by their existing contracts. With its offer, Regions informed the executives that if they declined to enter into the new employment agreement by October 15, 2007, their employment with Regions would be terminated.

Desiring to keep the more favorable terms of her current Employment Agreement, Martinez opted not to sign the new agreement with Regions and so advised Regions. On October 12, 2007, after Martinez had confirmed that she would not sign the new agreement, Regions notified Martinez they were terminating her employment effective November 30, 2008.[5] The parties later agreed that Martinez would work through December 31, 2007, which she did.[6]

On July 15, 2008, well after her termination, the Company paid Martinez severance benefits under the Employment Agreement totaling $7,136,120. That amount resulted from a formula articulated in section 6(a) of the Agreement, and represents the sum of three times her salary and largest prior annual bonus, plus three times a $1,000,000 long-term incentive grant. Unsatisfied, Martinez seeks additional employment benefits under the contract, including payment of the salary she would have received had she continued to be employed by Regions for a second year in 2008, and a larger amount reflective of her bonus history and based on the annual bonus she contends she should have received for 2007.

The obligations relevant to this dispute mainly involve sections 3, 4, and 6 of the Employment Agreement. Section 4 guarantees the executive, in this case, Martinez, her position and compensation, including an annual salary and bonus, during the "Employment Period."[7] Under section 3 of the

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[3]The merger constituted a "Change of Control as defined in § 2(c) of the Employment Agreement.

[4]*See* Employment Agreement §§ 1(a)-(b).

[5]Compl. ¶¶ 22, 27; Aff. of Susan A. Martinez, filed Nov. 26, 2008 ("First Martinez Aff."), ¶ 11.

[6]Aff. of Susan A. Martinez, filed Mar. 23, 2009 ('Second Martinez Aff.'), ¶ 11.

[7]As an employment benefit under section 4(b)(ii), Martinez is entitled to receive an annual bonus "for each fiscal year ending during the Employment Period" that shall be "at least equal to the Executive"s highest bonus under the Company"s Executive Incentive Plan, or any

Employment Agreement, the Company agreed "to continue the Executive in its employ . . . subject to the terms and conditions of this Agreement, for the period commencing on the Effective Date [the date of the merger, i.e, November 4, 2006] and ending on the second anniversary of such date," which constitutes the "Employment Period."[8]

Another term of the Employment Agreement, section 6, applies if the Company terminates the executive without cause, as occurred in Martinez's situation. Under section 6, "If, during the Employment Period, the Company shall terminate the Executive's employment other than for Cause," then "the Company shall pay to the Executive in a lump sum in cash within 30 days after the Date of Termination the aggregate of" certain specified monetary benefits and provide additional nonmonetary benefits.[9] The list of severance benefits spans nearly three pages.[10] Further, the

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comparable bonus under any predecessor or successor plan, or otherwise, for the last three full fiscal years prior to the Effective Date (annualized in the event that the Executive was not employed by the Company for the whole of such fiscal year) (the "Recent Annual Bonus")." Employment Agreement § 4(b)(ii).

[8] *Id.* § 3(a).

[9] *Id.* § 6(a).

[10] *See id.* The most relevant 'golden parachute' severance benefits provided in section 6(a) are described in the following excerpt from that section.

> 6. Obligations of the Company upon Termination. (a) Good Reason; Other Than for Cause, Death or Disability. If, during the Employment Period, the Company shall terminate the Executive's employment other than for Cause or Disability or the Executive shall terminate employment for Good Reason:
>
> (i) except as specifically provided below, the Company shall pay to the Executive in a lump sum in cash within 30 days after the Date of Termination the aggregate of the following amounts:
>
> A. the sum of (1) the Executive's Annual Base Salary through the Date of Termination to the extent not theretofore paid, (2) the product of (x) the higher of (I) the Recent Annual Bonus and (II) the Annual Bonus paid or payable . . . for the most recently completed fiscal year during the Employment Period, if any (such higher amount being referred to as the "Highest Annual Bonus") and (y) a fraction, the numerator of which is the number of days in the current fiscal year through the Date of Termination, and the denominator of which is 365 and (3) any compensation previously deferred . . . and any accrued vacation pay . . . ; and
>
> B. the amount equal to the product of (1) three and (2) the sum of (x) the Executive's Annual Base Salary, (y) the Highest Annual Bonus and (z) the value determined . . . to be a competitive annual long term incentive grant . . . ; and
>
> C. An amount equal to the actuarial present value equivalent of the aggregate benefits accrued by the Executive as of the date of termination under the terms of the Supplemental Retirement Plan . . . . For this purpose, the Executive's interest

Agreement defines the "Date of Termination" for an executive terminated without cause as "the date on which the Company notifies the Executive of such termination."[11]

The required lump sum payment consists of several components. The first involves certain Accrued Obligations for unpaid salary through the Date of Termination, the bonus that would be due for the current fiscal year, which was to be pro-rated if the Executive worked only part of the year based on the number of days she worked as of the Date of Termination, and any previously deferred compensation and accrued vacation pay. The second component consists of a payment equal to three times the sum of the Executive's annual base salary, highest annual bonus, and a competitive long-term incentive grant. The remaining components are based on other benefits of the Executive, such as the present value of her interest in the Company's Supplemental Retirement Plan, any accrued interest in the

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> under the Supplemental Retirement Plan shall be fully vested and such benefits shall be calculated under the assumption that the Executive's employment continued following the date of termination for the number of years remaining in the term of this Agreement (i.e., additional years of service credits shall be added)... ; and
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> * * * *
>
> E. An amount equal to three times the sum of: (i) the Executive's annual club dues bonus (if applicable); plus (ii) the Executive's annual automobile allowance (if applicable) for the year in which the Executive's Date of Termination occurs.
>
> (ii) for three years after the Executive's Date of Termination . . . the Company shall continue benefits to the Executive . . . at least equal to those which would have been provided [as] . . . described in Section 4(b)(iv) of this Agreement if the Executive's employment had not been terminated . . . ;
>
> (iii) the Company shall, at its sole expense as incurred, provide the Executive with outplacement services the scope and provider of which shall be selected by the Executive in his sole discretion;
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> * * * *
>
> (v) the Company shall pay or provide, as the case may be, relocation benefits under the relocation policy of the Company . . . which are requested by the Executive . . . within two years following the Date of Termination . . . ; and
>
> (vii) [sic] the Company shall continue officer and director liability insurance coverage . . . in the same amounts, as in effect immediately prior to the Date of Termination for the benefit of the Executive until the expiration of all applicable statutes of limitations . . . .

Employment Agreement at 8-10 (subsection numbering as in original).

[11] *Id.* § 5(e)(ii), which states: "If the Executive's employment is terminated by the Company other than for Cause or Disability, the Date of Termination shall be the date on which the Company notifies the Executive of such termination." I also note that, although section 13(b) provides that any notification under the Agreement is sufficient if it is in writing, there is no requirement that the Company notify the Executive in writing of a termination other than for cause.

Supplemental Thrift Plan, and an amount equal to three times the Executive's annual club dues bonus and automobile allowance.

In arguing that she is entitled to both her employment benefits through the remainder of the Employment Period and the specified severance package, Martinez also relies on section 7 of the Agreement. Section 7 provides:

> Nothing in this Agreement shall prevent or limit the Executive's continuing or future participation in any plan, program, policy or practice provided by the Company or any of its affiliated companies and for which the Executive may qualify, nor, subject to Section 3(b), shall anything herein limit or otherwise affect such rights as the Executive may have under any contract or agreement with the Company or any of its affiliated companies. Amounts which are vested benefits or which the Executive is otherwise entitled to receive under any plan, policy, practice or program of or any contract or agreement with the Company or any of its affiliated companies at or subsequent to the Date of Termination shall be payable in accordance with such plan, policy, practice or program or contract or agreement except as explicitly modified by this Agreement.

Additionally, under section 8 of the Employment Agreement, the Company agreed to pay Martinez's attorneys' fees and advance those fees and expenses for any claims she brought to enforce her rights under the Agreement. Section 8 states in pertinent part:

> The Company agrees to pay as incurred, to the full extent permitted by law, all legal fees and expenses which the Executive may reasonably incur as a result of any contest (regardless of the outcome thereof) by the Company, the Executive or others of the validity or enforceability of, or liability under, any provision of this Agreement or any guarantee of performance thereof (including as a result of any contest by the Executive about the amount of any payment pursuant to this Agreement), plus in each case interest on any delayed payment at the applicable Federal rate provided for in Section 7872(f)(2)(A) of the Internal Revenue Code of 1986, as amended (the "Code").

C. Procedural History

On October 30, 2008, Martinez filed her Complaint in this action against Regions, asserting multiple claims. Counts I and II allege Regions breached the Employment Agreement by not providing Martinez an annual bonus and salary, respectively, under sections 4 and 6 of the Agreement for the remainder of the Employment Period or even for the time through

December 31, 2007, during which Martinez continued to work for Regions. Count III alleges, in the alternative to Count I, that Regions breached the covenant of good faith and fair dealing, implied in the Agreement, by not providing Martinez a bonus for 2007. Count IV seeks specific performance of the fee shifting and advancement clause in the Employment Agreement.[12]

Regions answered on November 25, 2008. The following day Martinez filed a motion for partial summary judgment on Count IV, her claim for advancement of her attorneys' fees. On January 14, 2009, Regions simultaneously filed an answering brief in opposition to Martinez's motion and a motion and supporting brief for summary judgment on all counts in the Complaint. Since then, the parties have fully briefed those motions and presented oral argument on them. Thus, before me now are Plaintiff's motion for summary judgment on her advancement claim, Count IV, and Defendant's motion for summary judgment on all of Plaintiff's claims, Counts I through IV.

D. Parties' Contentions

Martinez contends that Regions breached the Employment Agreement by not providing her employment benefits during the Employment Period, as required by sections 3 and 4 of the Agreement. In response, Regions argues that the terms of section 4 do not apply in the circumstances of this case. Rather, according to Regions, sections 4 and 6 are alternative provisions of the Agreement: section 4 defines the Company's obligations if the executive remains employed during the Employment Period, while section 6 specifies a golden parachute severance package to be provided to the executive if she is terminated without cause before the end of the Employment Period. Regions argues that, under the plain terms of sections 3, 4, and 6, the only reasonable interpretation of sections 4 and 6 is that they are alternative, and generally mutually exclusive, provisions. Thus, Regions contends that Martinez's claims to both employment and severance benefits under the Agreement are unreasonable.

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[12]The Complaint also includes a Count V accusing Regions of breaching a Long Term Incentive Plan, but Martinez has since withdrawn that Count. Pl.'s Answering Br. at 3 n.1; Def.'s Answering Br. at 3. Even if Martinez had not expressly withdrawn Count V, by not addressing the merits of Defendant's motion for summary judgment on Count V, she waived any arguments regarding that count. *See, e.g.*, *Whittington v. Dragon Group L.L.C.*, 2009 WL 1743640, at *7 n.41 (Del. Ch. June 11, 2009); *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief.")

Martinez also seeks the benefit of a bonus for the full year 2007 under sections 4(b)(ii) and 6(a)(i)(A) of the Employment Agreement. Martinez argues that section 4(b)(ii), together with section 4(b)(iii), requires that the Company pay her a bonus not less than the bonuses received by her peer executives for 2007. Martinez further contends she has a right under section 6(a)(i)(A) to receive the bonus portion of her severance package based on a 2007 bonus, because she worked until the end of 2007. In response, Regions denies that Martinez has any right to a bonus other than as part of her severance benefits under section 6(a)(i)(A), and contends the bonus determination under that section is linked explicitly to her Date of Termination, not her last day of work. According to Regions, Martinez's "Date of Termination" is a defined term under the Agreement, and is indisputably October 12, 2007. Because, under section 6(a)(i)(A), Martinez is entitled to a bonus for her "most recently completed fiscal year," and Martinez had not completed the 2007 fiscal year as of her Date of Termination, Regions contends Martinez is not entitled to a 2007 bonus.[13]

Additionally, Martinez contends that, even if the express terms of the Agreement deny her a bonus for the full year 2007, Regions still breached the covenant of good faith and fair dealing implied in every contract by denying her the equivalent of such a bonus. Because Martinez worked through the end of 2007, she contends that Regions acted in bad faith in denying her the 2007 bonus she allegedly earned. Regions argues, however, that because the express, unambiguous language of section 6(a)(i)(A) specifies the method of determining Martinez's bonus, she cannot use the doctrine of good faith and fair dealing to imply the existence of a clause that would contradict the explicit terms of the Agreement.

Lastly, Martinez contends that, regardless of the outcome of her other claims, she is entitled to attorneys' fees and expenses and advancement of those fees and expenses based on the clear terms of section 8. Regions disagrees and reads section 8 as entitling Martinez to attorneys' fees only if her litigation position is reasonable. Regions further contends that Martinez's position is unreasonable, because she has argued throughout this litigation that she is entitled to both a generous severance package and a salary for the remainder of the Employment Period, when at least one well-respected court from another jurisdiction previously rejected virtually the same argument.[14] Thus, according to Regions's interpretation of section 8, Martinez is precluded from recovering or obtaining advancement of the attorneys' fees she incurred in pursuing her claims in this action.

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[13]Regions's fiscal year coincides with the calendar year, and, therefore, ends on December 31.

[14]*Gerow v. Rohm & Haas Co.*, 308 F.3d 721 (7th Cir. 2002).

II. ANALYSIS

A. Summary Judgment Standard

"Court of Chancery Rule 56(c) permits summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[15] In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that no material question of fact exists.[16] The party opposing summary judgment, however, may not rest upon the mere allegations or denials contained in its pleadings, but must offer, by affidavit or other admissible evidence, specific facts showing that there is a genuine issue for trial.[17] "[S]ummary judgment may not be granted when the record indicates a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[18]

Further, when presented with disputes involving contracts, summary judgment should be granted only if the contract at issue is unambiguous and not susceptible to different interpretations.[19] A contract is not ambiguous, however, merely because the parties disagree on its intended construction.[20] Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to different meanings.[21] If a court can determine the meaning of the contract without

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[15] *Walker L.L.P. v. Spira Footwear, Inc.*, 2008 WL 2487256, at *3 (Del. Ch. June 23, 2008) (quoting Ct. Ch. R. 56(c)).

[16] *Id.* (citing *Senior Tour Players 207 Mgmt. Co. v. Golftown 207 Holding Co.*, 853 A.2d 124, 126 (Del. Ch. 2004)).

[17] *Id.* (citing *Levy v. HLI Operating Co.*, 924 A.2d 210, 219 (Del. Ch. 2007)); Ct. Ch. R. 56(e).

[18] *Id.* (citing *Pathmark Stores v. 3821 Assocs., L.P.*, 663 A.2d 1189, 1191 (Del. Ch. 1995) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962))).

[19] *Rossi v. Ricks*, 2008 WL 3021033, at *2 (Del. Ch. Aug. 1, 2008).

[20] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 n.8 (Del. 1997).

[21] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992).

any other guide than knowledge of the simple facts on which, from the nature of language in general, its meaning depends, the parties are bound by the plain meaning of the contract and no ambiguities exist.[22] With those principles of contract construction in mind, I turn to the parties' motions and proposed constructions of the Employment Agreement.

The two pending motions for summary judgment address different portions of the Employment Agreement and do not entirely overlap. Therefore, I must address them separately. I begin with Defendant's motion, which focuses on the monetary benefits to which Martinez was entitled in terms of salary, bonus, and severance benefits after her termination. I then turn to Plaintiff's motion for partial summary judgment on her claim for advancement and Defendant's cross motion on the same claim.

B. Defendant's Motion for Summary Judgment

1. Whether Martinez is entitled to a salary and benefits under section 4, in addition to her section 6 severance package

Because it presents the broadest issues, I begin with Count II of the Complaint. Three provisions of Martinez's Employment Agreement are relevant in determining whether she is entitled to both salary for the remainder of the two-year Employment Period and severance—namely, sections 3, 4, and 6. Martinez reads sections 3 and 4 as guaranteeing her an unconditional salary and benefits during the Employment Period, regardless of whether she remains employed with the Company. According to Martinez, she is entitled to employment benefits even though she was terminated and received a severance package under section 6. In contrast, Regions reads sections 4 and 6 of the Agreement as alternative provisions—*i.e.*, section 4 governs Martinez's benefits if she remains employed with Regions, while section 6 specifies her benefits if she is discharged. Regions argues further that its construction reflects the only reasonable reading of the plain terms of the Employment Agreement. Although I do not consider the issues to be as clear-cut as Regions contends, I find that Martinez's rights to the lucrative severance package provided for in section 6 preclude her from also receiving payment for the remainder of the Employment Period during which she indisputably did not work for Regions.

Section 3(a) provides in relevant part:

> The Company hereby agrees to continue the Executive in its employ, and the Executive hereby agrees to remain in the

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[22] *Id.*

> employ of the Company *subject to the terms and conditions of this Agreement*, for the period commencing on the Effective Date and ending on the second anniversary of such date (the "Employment Period").[23]

Section 4 delineates Martinez's employment benefits during the Employment Period. Section 6(a) of the Agreement then explicitly limits the Company's obligations under sections 3 and 4. Section 6(a) provides: "If, *during the Employment Period*, the Company shall terminate the Executive's employment other than for cause," as Regions did here, the executive shall receive a specified severance package, which Martinez largely received.[24] Those severance benefits, spelled out in detail in nearly three pages of the Agreement, became the obligations of Regions when it terminated Martinez's employment.

After Martinez was terminated without cause by Regions she qualified for and received over seven million dollars in severance benefits, including three times the amount of a representative bonus and a competitive annual long-term incentive grant, three times the sum of her annual country club dues and automobile allowance, three years of medical, prescription, dental, life, and long-term disability insurance, outplacement services, and relocation services. Assuming Martinez's employment with Regions did not end until December 31, 2007, as she alleges, she still would have had almost a full year remaining in the Employment Period. Yet, Martinez contends that, in addition to the severance package, she also was entitled under the Agreement to receive her salary and all her benefits during the remainder of the Employment Agreement. I consider this aspect of Martinez's Complaint unpersuasive, because it makes no business sense and is contrary to a fair reading of the Agreement as a whole.

Faced with interpreting similar provisions in an executive contract, the United States Court of Appeals for the Seventh Circuit in *Gerow v. Rohm & Haas Co.*,[25] held the severance package of an executive, Gerow, replaced his right to receive employment benefits under the contract.[26] While the provisions at issue in *Gerow* were similar, they differ from Martinez's Employment Agreement in that the provision pertaining to the employment period did not contain the express limiting language, "subject to the terms and conditions of this agreement."[27] In *Gerow*, the Seventh

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[23]Employment Agreement § 3(a) (emphasis added).

[24]*Id.* § 6(a) (emphasis added). Martinez disputes the adequacy of certain aspects of the severance package she received, regarding primarily the portion based on her bonuses. This dispute forms the basis for Count I of her Complaint and is discussed *infra* Part II.B.2.

[25]308 F.3d 721 (N.D. Ill. 2001) (Easterbrook, J.).

[26]*Id.* at 723.

[27]*See id.*

Circuit held that the provision entitled "obligations of the Company upon termination" explicitly limited any right the executive had to employment benefits during the remainder of the employment period.[28] Similar to the situation here, that provision opened with the language: "If, *during the Employment Period*, the executive is terminated without Cause," then the executive receives a laundry list of severance benefits.[29]

Indeed, the Seventh Circuit found the only reasonable interpretation of Gerow's contract was that his employment period created, on the one hand, a protective period with employment benefits, which included a position, an office, a salary and benefits, and, on the other hand, a liquidated damages provision, in the form of a "golden parachute" severance package.[30] Similarly, Martinez's Agreement contains a protective two-year Employment Period with employment benefits that are expressly "subject to the terms and conditions" of section 6, for example. Section 6 expressly recognizes Regions's ability to terminate Martinez other than for cause during the Employment Period and specifies a laundry list of valuable monetary payments and other benefits it would have to give Martinez in that event. The value of the generous "golden parachute" severance package called for in section 6 clearly exceeds the value of the employment benefits under section 4 that they replaced. In addition, if Martinez also were to receive the benefits provided for in section 4 for 2008, she would receive certain benefits or parts thereof twice, for no apparent reason. Thus, Martinez's reading of the Employment Agreement does not conform to its terms and must be rejected.

In resisting this conclusion, Martinez argues that section 6 cannot limit section 4 because section 6(a), which applies in the case of a termination without cause, does not state that the Agreement shall terminate "without further obligations," as do other provisions in section 6. Specifically, Martinez notes that section 6(b), which specifies the Company's severance obligations if the executive dies before the Employment Period ends, states, "this Agreement shall terminate without further obligations . . . other than for payment of Accrued Obligations and the timely payment or provision of Other Benefits," which are then explicitly defined.[31] Martinez urges this Court to infer from the omission of the "without further obligations" language in section 6(a), that further

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[28] *Id.* at 725.

[29] *Id.*

[30] *Id.* at 723-24.

[31] Sections 6(c) and 6(d) of the Employment Agreement, which deal with termination for Disability and for Cause, respectively, contain the same language. In each of sections 6(b), (c), and (d), however, the additional benefits to be provided differ materially from those specified in the severance package of section 6(a).

obligations exist, including a requirement to provide the employment benefits she seeks under section 4.

But, as the Seventh Circuit cautioned when Gerow advanced a similar argument:

> Drawing inferences from omissions is risky in the best circumstances and untenable here, for the language "without further obligations" would have been out of place. There were further obligations . . . .[32]

Indeed, here, based on the material differences between the benefits provided for in section 6(a) compared to the other subsections of section 6 and the continuing nature of several of the section 6(a) benefits, I do not believe the omission of the "without further obligations" language supports the inference Martinez urges. As the court observed in *Gerow*, "Why impute significance to the non-parallel phraseology when the underlying substance was not parallel?"[33] Therefore, I find the omission of the language "without further obligations" in section 6(a) immaterial for purposes of construing the contract terms in issue.

I also find untenable Martinez's argument that section 7, the "non-exclusivity provision," somehow provides Martinez the salary she would have earned in 2008, as well as severance. Martinez analogizes section 7 to an "all remedies provision," under which the United States Court of Appeals for the Eighth Circuit held that an executive, Deal, in another case could recover damages based on loss of her salary, in addition to a severance payment.[34] The "all remedies provision" in *Deal*, however, expressly stated that "in addition to severance payments," Deal is entitled to *all remedies* for breach of the terms under this contract.[35] Consistent with the express terms of Deal's agreement, the court granted Deal her salary in addition to her severance payments.[36] Unlike the provision in *Deal*, which entitled her to the *right* to receive salary in addition to severance, Martinez's provision merely states she is entitled to those rights and amounts established under any contract with the Company except as explicitly modified by her Employment Agreement.

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[32]*Gerow*, 308 F.3d at 724.

[33]*See id.*

[34]*Deal v. Consumer, Inc.*, 470 F.3d 1225 (6th Cir. 2006).

[35]*See id.* at 1225, 1230.

[36]*Id.* at 1230-31 ("We agree with the district court that under 'the plain language of the employment agreement, Deal's lump-sum cash payment was awarded *in addition to—not in lieu of*—all other remedies she may have for breach of her employment agreement.' Nothing in subsection 6(d)(2) limits Deal's right to recover both the severance payment and any damages resulting from a breach of contract.") (emphasis in original).

Section 7 states, in pertinent part:

> [N]or, subject to Section 3(b), shall anything herein limit or otherwise affect such rights as the Executive may have under any contract or agreement with the Company . . . . Amounts which are vested benefits or which the Executive is otherwise entitled to receive under any . . . contract or agreement with the Company or any of its affiliated companies at or subsequent to the Date of Termination shall be payable in accordance with such . . . contract or agreement except as explicitly modified by this Agreement.[37]

To the extent this provision might be construed as treating Martinez's claim to future salary based on the second year of the Employment Period as a "vested benefit," I hold that the provisions of section 6(a), read in the context of the Agreement as a whole, modify the Agreement to preclude such a double recovery. Martinez's construction of the Agreement would render many express terms meaningless or mere surplusage, contrary to well-established rules of contract construction.[38]

Indeed, the express terms of section 6(a) make clear that the benefits it provides for are premised on Martinez's employment having terminated. For example, Martinez receives "welfare benefits coverage" under section 6(a)(v) and "relocation expenses incurred within two years of the Date of Termination" under section 6(a)(i)(E). Moreover, as indicated *supra* note

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[37]Employment Agreement § 7.

[38]*Seabreak Homeowner's Ass'n v. Gresser*, 517 A.2d 263, 269 (Del. Ch. 1986) ("A contract must be construed as a whole, giving effect to all of its provisions and avoiding a construction which would render any of those provisions illusory or meaningless."). For example, Section 6(a)(i)(C) of the Agreement provides for the payment of:

> An amount equal to the actuarial present value equivalent of the aggregate benefits accrued by the Executive as of the date of termination under the terms of the Supplemental Retirement Plan . . . . For this purpose, the Executive's interest under the . . . Plan shall be fully vested and such benefits shall be calculated under the assumption that the Executive's employment continued following the date of termination for the number of years remaining in the term of this Agreement (i.e., additional years of service credits shall be added); provided, however, that, for the purposes of determining "final average pay" under the benefit calculation, the Executive's actual pay history as of the date of termination shall be used.

Notwithstanding Martinez's argument regarding the nonexclusivity provision in section 7, the express language quoted above from section 6(a) indicates that the parties knew how to make their intentions as to the handling of obligations stemming from the remainder of the Employment Period plain, when appropriate. Therefore, the absence of such language in the provisions in section 6 dealing with Martinez's salary is telling.

38, Martinez is entitled to a "Supplemental Retirement Plan," that "shall be calculated under the *assumption* that the Executive's employment continued following the Date of Termination for the number of years remaining in the term of this Agreement."[39]

In addition, while Martinez asserts she is entitled to a salary under section 4, that same section provides for her to receive numerous other benefits, such as an office.[40] Does that require the Company to maintain an office for Martinez during the remainder of the Employment Period? Furthermore, according to Martinez's interpretation of the Agreement, the Company granted her identical benefits twice in the event of a termination without cause: once as an employment benefit and a second time as severance. For example, the Company would be required to provide a lump sum payment to Martinez for three times her annual club dues as part of her severance under section 6(a)(ii), while continuing to pay those same dues in 2008 as an employment benefit under section 4(b)(iv), even though she was no longer employed.

AmSouth's express purpose for entering into the Employment Agreement was to grant benefits to its executives, like Martinez, "competitive to those of other corporations." Nothing in the record suggests that, in the event of a permissible termination without cause, it would have been necessary or advisable to remain competitive for a bank like AmSouth to sweeten the lucrative severance package the Agreement contemplates by supplementing it with the executive's lost salary and other employment benefits for the remainder of the Employment Period.[41]

Therefore, I reject as contrary to the explicit terms of the Agreement Martinez's interpretation that, after being discharged, she had a right to receive termination benefits, in the form of an attractive "golden parachute" severance package, *and* employment benefits. Because I find Regions's construction in this regard consistent with the unambiguous language of the agreement,[42] I grant its motion for summary judgment and dismiss Count II of Martinez's Complaint.

2. Whether Martinez is entitled to a 2007 bonus

Regions also moved for summary judgment on Count I, in which Martinez alleges she is entitled to the benefits of a bonus for the 2007 fiscal year, ending December 31, 2007, under the terms of sections 4(b)(ii) and

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[39]Employment Agreement § 6(a)(i)(C).

[40]*Id.* § 4(a).

[41]*See Gerow*, 308 F.3d at 723 (noting the purposes behind golden parachutes do not call for compensating an executive twice on a change of control, once through guaranteed salary, and a second time through guaranteed severance over the same period).

[42]*See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992) (noting a contract is not ambiguous, and thus proper for summary judgment, if the contract is susceptible only to one reasonable interpretation).

6(a)(i)(A). While the resolution of Count II of Plaintiff's Complaint, for which I grant summary judgment in Defendant's favor, rests on the proper interpretation of the language of the Employment Agreement, the issues presented by Count I are more fact-intensive. Martinez's right to receive the requested relief in Count I depends on the implementation or execution of the Employment Agreement in connection with the payment of Martinez's bonus. Accordingly, I examine whether, drawing all reasonable inferences in Martinez's favor, there is any possibility that she is entitled to a bonus for the full year 2007, based on her evidence that she worked for Regions for the entire year.

The first issue raised by Count I is what Martinez was entitled to in terms of a bonus for 2007. The parties answer that question using different factual and legal predicates. Martinez proceeds from her assertion that she worked for the entire year 2007, and that her date of termination under the Employment Agreement was December 31, 2007. The premise of Regions's argument is that under the terms of the Agreement, Martinez's Date of Termination is October 12, 2007. To sort out this dispute, I must focus on several separate determinations as to amounts owed to Martinez.

The first depends on whether Martinez was employed by Regions within the meaning of the Employment Agreement as of December 31, 2007. Martinez contends she was and, therefore, was employed for the entire 2007 fiscal year, which ended during the Employment Period, giving her a right to receive a 2007 Annual Bonus under section 4(b)(ii).

Regions argues that Martinez's Date of Termination was October 12, 2007, and suggests that her work for the Company from then to December 31, 2007, fell outside the scope of the Employment Agreement. Under Regions's theory, Martinez was not employed within the meaning of the Agreement as of the end of 2007; thus, she has no right to a bonus under section 4. Instead, whatever rights Martinez might have regarding a bonus would arise from section 6. In that regard, section 6(a)(i)(A) gives Martinez the right to receive as part of her Accrued Obligations a payment equal to the pro rata portion of her Highest Annual Bonus, which Regions contends was her 2006 bonus, corresponding to the fraction of the year represented by the period up to the Date of Termination, October 12, 2007. In addition, under section 6(a)(i)(B), Martinez's severance payment also would include a portion equal to three times her Highest Annual Bonus, or the 2006 bonus according to Regions. Martinez asserts that her putative 2007 bonus should have been used in the severance calculations.

Section 4(b)(ii) of the Employment Agreement requires payment of an annual bonus "for each fiscal year ended during the Employment

Period." Section 4(b)(iii) provides that the bonus should be calculated using a methodology no less favorable than the methodology used to calculate the bonuses awarded to Martinez's peer executives.[43] For 2007, Regions paid Martinez a bonus in the same amount as the bonus it paid her in 2006. Martinez's peer executives received 2007 bonuses that exceeded her 2006 bonus.[44]

Section 6(a)(i)(A) requires that Regions pay Martinez the "Highest Annual Bonus," which is the larger of the "Recent Annual Bonus"[45] and the annual bonus paid "for the most recently completed fiscal year during the Employment Period." There is no dispute that the bonus for Martinez's "most recently completed fiscal year during the Employment Period" is higher than her "Recent Annual Bonus." A key question, therefore, is whether 2006 or 2007 is Martinez's "most recently completed fiscal year."

Section 6(a) of the Agreement explicitly requires Regions to pay Martinez the bonus "in a lump sum in cash within 30 days after the Date of Termination." Martinez's "Date of Termination," is defined in section 5(e)(ii): "If the Executive's employment is terminated by the Company other than for Cause or Disability, the *Date of Termination shall be the date on which the Company notifies the Executive of such termination* . . . ."[46] The Company notified Martinez of her termination on October 12, 2007.[47] Hence, I find that Regions provided Martinez sufficient notice of her termination when it orally advised her she was being terminated on October 12, 2007.

Regions, therefore, has a reasonable argument that Martinez's "Date of Termination" is October 12, 2007, according to the unambiguous terms of section 5(e)(ii). As of that date, the 2007 fiscal year had not yet ended. Consequently, Regions contends Martinez's "most recently completed fiscal year" was 2006, entitling her to a bonus payment based on her 2006 bonus. Because section 6(a)(i)(A) entitles Martinez to at least a portion of her 2006 bonus, and Regions paid Martinez a full 2006 bonus, Regions denies any breach of the Agreement in regard to the bonus. Due to Regions's own actions, however, the situation is much more muddled than it acknowledges.

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[43] *See* Employment Agreement § 4(b)(iii).

[44] *See* Second Martinez Aff. ¶ 20.

[45] "Recent Annual Bonus" is defined in another section of the contract as the largest bonus received in the three years before the change of control. Employment Agreement § 4(b)(ii).

[46] *Id.* § 5(e)(ii) (emphasis added).

[47] Although Martinez argues that Regions's notification was required to be in writing, she is mistaken. While the general notice provision, section 13(b), on which Martinez relies, states notices under Martinez's Employment Agreement are *sufficient* if in writing, that does not mean they must be in writing. Moreover, Plaintiff has not offered any evidence that Regions's oral notification on October 12, 2007 was insufficient under the Agreement.

When Regions notified Martinez of her termination, Regions indicated it would be effective November 30, 2007, more than 45 days after the Date of Termination. Further, there is no dispute that Martinez and Regions later agreed to extend the effective date of her termination until December 31, 2007. One effect of this extension presumably was that, through the end of 2007, Martinez received a salary consistent with what she was receiving under the Employment Agreement.[48]

The more difficult questions are: (1) what relationship, if any, does the fact that Martinez's Date of Termination appears to have been October 12, 2007 under the terms of the Agreement have to the fact that Martinez continued to work for Regions until December 31, 2007; (2) what effect, if any, did the fact that Martinez worked until December 31, 2007 have on her right to receive a bonus for 2007, and the amount of that bonus; and (3) what effect, if any, did the fact that Martinez worked for Regions until December 31, 2007 have on the amount of the bonus portion of her severance payment, as provided for in section 6(a)(i)? For example, the fact that Martinez worked until December 31, 2007 may require Regions to award her a 2007 bonus based on the entire fiscal year, which apparently would exceed the bonus for 2006. If Martinez is entitled to a full 2007 bonus, Martinez also has raised a reasonable inference that such bonus should have been used to calculate her lump sum payment under sections 6(a)(i)(A) and (B), because 2007 was the most recently completed fiscal year.

At this point, I note that only Regions moved for summary judgment as to Count I regarding the bonus issue. Martinez resists summary judgment, arguing that there are genuine issues of disputed facts related to Count I. I agree. Even accepting Regions's position that the Date of Termination is October 12, 2007, Regions's own conduct, documents, and the statements of at least one of its human resources personnel who interacted with Martinez during the relevant time period[49] are sufficient to support a reasonable, although not conclusive, inference that Martinez should have received credit for having worked the full year 2007 in terms of both her bonus for that year and the calculation of her severance payment.[50]

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[48]Martinez has not asserted a claim for any outstanding salary for the time after October 12, 2007, that she worked for Regions.

[49]Regions's Senior Vice President of Compensation and Benefits, Jill Shelton, told Martinez that the amount of her 2006 bonus was being used as a placeholder until her 2007 bonus could be calculated. Second Martinez Aff. ¶ 16. Shelton also allegedly told Martinez she would receive a full 2007 bonus rather than a pro-rated amount based on an earlier termination date, such as October 12, 2007. *Id.* ¶ 19.

[50]The record does not disclose much about how the bonus Martinez received for 2006 compares to the bonus her executive peers received for 2007. Martinez's 2006 bonus apparently was in the range of $656,000. Second Martinez Aff. Ex. E. The 2007 bonus would have been

Because these issues cannot be resolved on summary judgment, I deny Regions's motion as it relates to Count I.

In addition, I also deny Defendant's motion for summary judgment on Count III of the Complaint. In that Count, Martinez claims she is entitled to use a 2007 bonus amount under an alternative theory of a breach of the covenant of good faith and fair dealing.[51] Martinez contends Regions did not act fairly in asserting her termination date was October 12, 2007 and denying her a bonus for that year.[52] Because she worked until the end of 2007, Martinez contends Regions acted in bad faith in denying her that bonus. In support of its motion, Regions argues that a claim for breach of the implied covenant of good faith and fair dealing cannot lie where a party relies on express language of a contract, such as the definition of "Date of Termination" here. This argument is not entirely persuasive, however, in this context. The issue here involves how the defined Date of Termination relates to a different last day of employment agreed to by all parties. The Employment Agreement does not expressly address that circumstance. In any event, Martinez's entitlement to a 2007 bonus on this alternative theory raises genuine issues of material fact. Therefore, I deny summary judgment as to Count III to the extent it relates to Martinez's claim for a 2007 bonus.

3. Whether Martinez is entitled to attorneys' fees and legal expenses

Lastly, the parties have cross moved for summary judgment on Count IV—Martinez's claim for attorneys' fees and advancement. Because this count is before me on a cross motion and neither party contends there is any disputed issue of material fact, Court of Chancery Rule 56(h) applies. "Thus, the usual standard of drawing inferences in favor of the nonmoving party does not apply," and the Court will treat the issues as to Count IV as ripe "for decision on the merits based on the record submitted with the motions."[53]

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larger.

[51]I grant, however, Defendant's motion for summary judgment on Count III to the extent it relates to Martinez's claim that she is entitled to receive a salary for the remainder of the Employment Period as well as her severance because, as noted *supra* Part II.B.1, that position is contrary to a reasonable interpretation of the express terms of the Employment Agreement. *See Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. Apr. 15, 2009) ("The implied covenant cannot be invoked to override the express terms of the contract."); *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992) ("[W]here the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play.").

[52]Indeed, during argument, Martinez's counsel characterized the "October 12th termination date [argument] [a]s a post hoc litigation fabrication by Regions that it's now clumsily attempting to make conform to the facts of what actually happened." Tr. at 44.

[53]Ct. Ch. R. 56(h); *see Walker L.L.P. v. Spira Footwear, Inc.*, 2008 WL 2487256, at *3

Further, while Delaware follows the "American rule" under which each party is responsible for their own attorneys' fees, there are limited exceptions to that rule. Under Section 145(e) of the Delaware General Corporation Law ("DGCL"), a corporation may grant its officers expenses, such as attorneys' fees, and advancement of those fees "upon such terms and conditions, if any, as the corporation deems appropriate."[54] Advancement disputes are particularly appropriate for decision on summary judgment, as in most cases "the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought."[55] As this Court has noted, resort to parol evidence in cases like this one is rarely appropriate, or even helpful, as corporate instruments addressing advancement rights are frequently crafted without the involvement of the parties who later seek advancement and often with little negotiation among any of the contending parties at all.[56] Those factors are not problematic, however, as they tend to reinforce the legal policy of this State, which strongly emphasizes contract text as the overridingly important guide to contractual interpretation.[57] Thus, if the contractual instrument unambiguously grants advancement, summary judgment is appropriate.[58]

On the subject of advancement, Section 8 of Martinez's Employment Agreement provides:

> The Company agrees to pay as incurred, to the full extent permitted by law, all legal fees and expenses which the Executive may reasonably incur as a result of any contest (regardless of the outcome thereof) by the Company, the Executives or others of the validity or enforceability of, or liability under, any provision of this Agreement or any guarantee of performance thereof (including as a result of any contest by the executive about the amount of payment pursuant to this Agreement), plus in each case interest on any delayed payment at the applicable Federal rate provided for in

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(Del. Ch. June 23, 2008).

[54] 8 *Del. C.* § 145(e). Pursuant to Section 145(k) of the DGCL, the Court of Chancery may determine summarily a corporation's obligation to advance expenses.

[55] *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761, at *3 (Del. Ch. June 18, 2002), *aff'd*, 820 A.2d 371 (Del. 2003).

[56] *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *20-21 (Del. Ch. Jan. 23, 2006) ("Advancement cases are particularly appropriate for resolution on a paper record, as they principally involve the question of whether claims pled in a complaint against a party . . . trigger a right to advancement under the terms of the corporate instrument . . . .").

[57] *Id.*

[58] *See Lillis v. AT&T Corp.*, 904 A.2d 325, 333 (Del. Ch. 2006).

> Section 7872(f)(2)(A) of the Internal Revenue Code of 1986, as amended (the "Code").

Regions reads the reference to "all legal fees and expenses which the Executive may reasonably incur" in section 8 as a limitation, requiring Martinez to have a reasonable litigation position to qualify to receive attorneys' fees. According to Regions, because Martinez argued she was entitled to both a salary and severance benefits under sections 4 and 6 of the Agreement, and the Seventh Circuit previously dismissed similar arguments by another executive, her litigation position is unreasonable and she should be denied reimbursement of her attorneys' fees. Martinez counters that Regions's interpretation renders meaningless explicit terms of section 8, such as the "regardless of the outcome thereof" language, and is contrary to the plain language of that section.

I agree with Martinez. Under section 8, she enjoys the right to reimbursement for "*all* legal fees and expenses" incurred as a result of a covered contest and to advancement of those fees "*to the full extent permitted by law*" "*regardless of the outcome*" of the contest. The imposition of a requirement that Martinez's claims be substantively reasonable either as a precondition to advancement or as a basis for recouping advanced fees and expenses relating to an unsuccessful claim would undermine the plain meaning of that provision. As this Court recently observed:

> In the spectrum of advancement and indemnification provisions, language that provides for payment with no provision for reimbursement if the litigation fails necessarily stand as examples of the broadest possible provision permitted under our law. That language only further evidences the change of control agreement's intent to broadly protect the plaintiff [executives] in these circumstances.[59]

Despite that broad grant of advancement and indemnification rights as to attorneys' fees and expenses here, Regions urges the Court to condition any award of fees on a determination of the reasonableness of Martinez's litigation position. Yet, the Company expressly agreed to pay Martinez's fees "as incurred." According to Regions, if Martinez had attempted to enforce the advancement provision at the outset of this litigation, I would have had to make a threshold determination of the reasonableness of her underlying claims and compare them to claims unsuccessfully pursued by

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[59] *Id.* at 332-33.

other executives in foreign jurisdictions. Such a procedure for resolving an advancement claim, however, would defeat the purpose of advancing fees altogether, and render the "regardless of the outcome thereof" language in section 8 meaningless or illusory.[60]

The Employment Agreement granted Martinez a right to payment of "all legal fees and expenses" she reasonably incurred as a result of "any contest (regardless of the outcome thereof) . . . under any provision of this Agreement or any guarantee of performance thereof (including as a result of any contest by the Executive about an amount of payment pursuant to this Agreement)."[61] Nothing in that provision limits its reach to reasonable contests or disputes, and it explicitly covers the claims raised in Martinez's Complaint. As this Court stated in *Lillis v. AT&T Corp.*: "[T]here is no requirement that advancement provisions be written broadly or in a mandatory fashion. But when an advancement provision is, by its plain terms, expansively written and mandatory, it will be enforced as written."[62] Because Martinez enjoyed broad advancement rights under the Employment Agreement, the only limitation to those rights is the implied covenant of good faith and fair dealing.[63] Thus, absent a showing that Martinez pursued this action in bad faith, she would be entitled to advancement of her legal fees and expenses.

In the circumstances of this case, Regions has not shown that Martinez acted in bad faith in bringing any of her claims for benefits under sections 4 and 6 of the Employment Agreement. Although she did not prevail on her claim for the recovery of her salary for most of 2008, for example, I cannot say it was frivolous. Likewise, the fact that one court in another jurisdiction, namely, the Seventh Circuit in *Gerow v. Rohm & Haas Co.*,[64] rejected similar arguments under a similar executive contract does not prove that Martinez brought her claim in bad faith. Nor does it bar Martinez from receiving attorneys' fees under the Employment Agreement.[65]

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[60]*Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch. May 24, 2006) ("[C]ontracts must be interpreted in a manner that does not render any provision meaningless or illusory. ").

[61]Employment Agreement § 8.

[62]*Lillis*, 904 A.2d at 332-33.

[63]*See id.* at 334 n.34.

[64]308 F.3d 721 (N.D. Ill. 2001).

[65]Regions relies heavily on the Seventh Circuit's denial of Gerow's attorneys' fees on appeal as support for the denial of attorneys' fees to Martinez. Nevertheless, the district court in *Gerow* actually granted him attorneys' fees and costs under the agreement at issue there. Indeed, the Seventh Circuit noted:

> A position may be rendered less reasonable, indeed may be shown to

Therefore, I grant Martinez's motion, and in so doing, deny Regions's cross motion for summary judgment on Count IV, and order Regions to pay Martinez the reasonable attorneys' fees and expenses she incurred in this action to date, with interest. This would include any "fees on fees."[66] In addition, Regions shall pay Martinez for any future legal fees and expenses as they are incurred, consistent with the Employment Agreement.

III. CONCLUSION

For the reasons stated, I grant Regions's motion for summary judgment on Count I of the Complaint, and dismiss that claim with prejudice. I also grant summary judgment in Defendant's favor as to Count III to the extent it relates to Martinez's claim that she is entitled to both her salary through the end of the Employment Period and her severance. I deny, however, Defendant's motion as to Count I and that part of Count III that relates to the claim that Martinez should be awarded a full year 2007 bonus and such bonus should be used to calculate her payments pursuant to section 6(a)(i)(A) and (B) of the Employment Agreement. Further, I deny Regions's motion for summary judgment on Count IV, and grant Martinez's motion for partial summary judgment on the claim for specific performance of the advancement obligation under the Agreement and for an award of damages in the amount of her attorneys' fees and expenses as to all claims in the Complaint.

Counsel for the parties shall submit an appropriate form of judgment reflecting these rulings within ten calendar days from the date of this memorandum opinion.

> be *un*-reasonable, by a judicial decision exposing its fallacies. That is a sound description of Gerow's litigation. He had a legal position never before rejected by any court. He lost in the district court, which wrote a thorough opinion exposing many of the position's weaknesses. At that point Gerow should have packed up his attaché case and retired from the fray. Instead he persevered. That was his right—his contentions are not frivolous—but under the circumstances pressing on was unreasonable and thus at Gerow's expense.

Gerow, 308 F.3d at 726. The position Martinez advances in this case has not been rejected previously by any Delaware court. This fact, together with the existence of certain differences between the agreements at issue here and in *Gerow*, and the deference our courts generally give to contractually provided advancement rights, torpedo Defendant's charges of bad faith.

[66] *See Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002) (" [W]ithout an award of attorneys' fees for the indemnification suit itself, indemnification would be incomplete").

CME GROUP INC., AND MICHAEL FLOODSTRAND AND THOMAS J. WARD V. CHICAGO BOARD OPTIONS EXCHANGE, INC.

No. 2369-VCN

Court of Chancery of the State of Delaware, New Castle

June 25, 2009

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NOBLE, *Vice Chancellor*

I. BACKGROUND

The Court recently approved the proposed Stipulation of Settlement in this class action (the "Settlement").[1] Claims of potential class members had been submitted before the Settlement was considered. The claims process was supervised and administered by Class Counsel who excluded a number of Settlement Class Members from participating in the benefits conferred under the Settlement because of their failure to comply strictly

[1] *CME Group, Inc. v. Chicago Bd. Options Exchange, Inc.*, 2009 WL 1547510 (Del. Ch. June 3, 2009). Familiarity with that memorandum opinion is presumed.

with the Settlement's conditions for eligibility.[2] Some have objected (the "Objectors") to their exclusion. The objections can be placed into five categories: (1) Objectors who, for various reasons, submitted untimely Settlement Claim Forms; (2) Objectors who failed to transfer their CME shares in book entry to Computershare during the period of October 14, 2008, through 5:00 p.m. on October 31, 2008, due to an oversight or error; (3) one Objector that falls under both categories 1 and 2 above—it filed a late Claim Form and did not comply with the Settlement's Computershare requirement; (4) Objectors who were excluded based upon Class Counsel's determination that they did not "beneficially own" the requisite Three Parts needed to qualify as a Participating Group A Settlement Class Member; and (5) one miscellaneous Objector. The Court addresses these objections in this memorandum opinion.

II. DISCUSSION

A. *Objections to Exclusion Based Upon Late Filing*

Pursuant to the terms of the Settlement, in order to qualify as a Participating Group A or Group B Settlement Class Member, a Settlement Class Member must have submitted a Claim Form by October 14, 2008 (the "Eligibility Date"). Class Counsel excluded certain Settlement Class Members from participating in the Settlement (as either Group A or Group B Settlement Class Members) based upon their failure to submit a Claim Form by the Eligibility Date. Several of these excluded Settlement Class Members have objected, arguing that excluding them from participating would be inequitable.

There are two types of later filers:(1) Class Members who, because of an inadvertent error—either their own, Class Counsel's, or the United States Postal Service's—submitted their Claim Forms late, but otherwise met the requirements in order to participate in the settlement; and (2) Class Members who in good faith submitted a Group A Settlement Class Member Claim Form that was rejected by Class Counsel and, upon receiving such rejection, promptly—but after October 14, 2008—sought to become Participating Group B Settlement Class Members. Both types of objector/late filer will be discussed in turn.

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[2]The Court overturns several of Class Counsel's decisions regarding participation in the proceeds conferred by the Settlement. Class Counsel, in the Court's judgment, fairly and accurately performed their duties. It was their responsibility to apply the terms of the Settlement strictly and consistently. They did not, however, have the Court's equitable discretion that is inherent in its supervision of the class action claims process.

1. The First Category of Late Filer

The first group of Objectors[3] all claim, in essence, that their failure to file timely Claims Forms should not prohibit them from participating in the Settlement under either the "excusable neglect" or "substantial compliance" standard. It is undisputed that each of the later filers in this first category would otherwise have satisfied all ownership and registration requirements to become a Participating Group A or Group B (depending on the particular Objector) Settlement Class Member.[4]

There is substantial overlap in the facts of all Objectors' cases in this group—i.e., all of the members of this group filed late Claims Forms because of an excusable, inadvertent error. Any difference amongst them does not alter the analysis. Accordingly, the Court will assess these Objectors' claims as a group.[5]

In determining whether to approve the Settlement, the Court was bound to exercise its own business judgment as to the fairness of the settlement.[6] "A corollary to that duty must be the duty of this Court to insure that the stockholders who are entitled to participate in the settlement are given a reasonable opportunity to file for and receive what is due to them."[7] Of course, the Court already approved as reasonable the Settlement's Eligibility Date. However, "[w]hile it is true that the function of the filing deadline is to put a time limit on the claims procedure, and . . . fair warning was given to the potential claimants concerning the deadline, nevertheless the filing deadline is not inflexible and must yield,

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[3]The late filers to whom the Court refers are: Theodore Pecora, Argex, Inc., John S. Stafford, William P. Sullivan, Anthony J. McKerr and Marry C. McKerr Trust Est. 3/13/1997, Canadian Imperial Bank of Commerce, Milton Robinson and Bryan Shaughnessy, Alan Matthew, and J.P. Morgan Futures, Inc.

[4]*See* Pls.' Mem. in Supp. of Mot. for Final Approval of the Proposed Settlement at 49 ("Class Counsel acknowledges that all of the[] objectors [at issue] were in compliance except for timely filing the appropriate Participating Settlement Class Member Claim Form . . . .").

[5]Within this group of late filers, there are two subgroups. First, there are those persons who apparently timely sent off their claim forms, but the forms were never received and recorded by Class Counsel. Whether there was a problem with the delivery service or whether their forms were misplaced by Class Counsel cannot be determined. Second, there are those who did not submit their claim forms in a timely fashion because, for example, they had not received notice of the Settlement or of the claims process. It seems apparent that the position of those who sent off their forms which were not received and recorded by Class Counsel is deserving of greater sympathy. Nonetheless, because the Court's analysis as to all the members of this group is unchanged by the subtle differences in facts among them, assigning blame for whatever error caused the late filing for a particular Objector is of no use.

[6]*Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 100 (Del. 1979).

[7]*Mendich v. Hunt Int'l Res., Inc.*, 1981 WL 7629, at *2 (Del. Ch. Oct. 21, 1981).

if necessary, to the demands of equity."[8] The parties seem to dispute the legal standard—"excusable neglect" or "substantial compliance"—the Court is to employ in determining whether the filing deadline must yield to the demands of equity. The Court need not decide this issue because it holds that under either standard, equitable principles demand that the filing deadline be waived for the Objectors in this group.

In *Mendich v. Hunt International Resources, Inc.*, the Court of Chancery held that "although a claims procedure approved by the Court should be followed, . . . substantial compliance should be adequate."[9] The Court determined that "[t]he missing of the postmark deadline, even without excuse, is substantial compliance with the procedures for the filing of claims, when all the equities are considered, if the postmark shows mailing within a few days of the deadline."[10] Here, the facts of the Objectors' cases indicate substantial compliance under *Mendich*. The Objectors either (1) mailed the Claim Form prior to the Eligibility Date but Class Counsel, for reasons that are unclear, did not receive it; or (2) received the Claim Form from Class Counsel late, also for reasons that are unclear, but promptly mailed the Claim Form upon actual receipt of it. Therefore, these Objectors have substantially complied with the terms of the Settlement under Mendich.

In *Brown v. Penn Central Corp.*,[11] this Court applied the seemingly more rigorous excusable neglect standard in order to determine whether a settlement's filing deadline should be waived for late filers. Excusable neglect is a four factor test in which the Court considers: (1) the danger of prejudice to the adverse party; (2) the length of the delay and its potential effect on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the late filer; and (4) whether the late filer acted in good faith.[12] All of the factors weigh in favor of the Objectors and they are, therefore, entitled to participate as Group A or Group B Settlement Class Members.

The first factor weighs in favor of the Objectors because there is no prejudice to the other Participating Group A and Group B Settlement Class Members. Even though other Group A Members' distributions will be diminished somewhat (because Group A Members share in the proceeds of the balance of the Settlement pool, while Group B Members received the

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[8] *Id.* at *3.
[9] *Id.* at *2.
[10] *Id.* at *3.
[11] 1986 WL 5477 (Del. Ch., May 12, 1986).
[12] *Pioneer Inv. Servs. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395 (1993).