INSIGHTS

THE CORPORATE & SECURITIES LAW ADVISOR

Volume 22 Number 6, June 2008

CORPORATE GOVERNANCE

Commanding Officers: The Fiduciary Duties of Officers under Delaware Law

For years, the nature and scope of non-director officers' fiduciary duties has been unclear. But the Delaware Court of Chancery recently held that non-director officers are subject to the same general fiduciary standards as are directors, suggesting also that these officers are entitled to the presumption of the business judgment rule. This and other opinions raise important issues for non-director officers, particularly with respect to their potential liability. Accordingly, these officers are urged to review their corporation's indemnification arrangements and D&O liability coverage to determine whether they are adequately protected.

by John Mark Zeberkiewicz and Blake Rohrbacher

For roughly three-quarters of a century (at least), the Delaware courts have lumped together officers and directors when discussing fiduciary duties to the corporation and its stockholders. For example, in the seminal case of *Guth v. Loft*, the Delaware Supreme Court held that "[c]orporate officers and directors are not permitted to use their position of trust and confidence to further their private interests."[1] For most of that time, however, the question whether fiduciary duties attached to non-director officers was of little practical concern, and the nature and scope of the duties of these officers remained unexamined and, as a result, uncertain.[2]

Until 2004, it was difficult for the Delaware courts to address this issue, because it was virtually impossible for Delaware to exercise personal jurisdiction over defendants who were officers but not directors.[3] But when 10 *Del. C.* § 3114 was amended to allow plaintiffs to sue non-resident, non-director corporate officers directly, the question as to the fiduciary duties of non-director officers suddenly became important.[4] The Court of Chancery in its 2004 *Disney* decision came as close as any to addressing the issue of fiduciary duties of non-director officers, but it ultimately sidestepped the issue: "To date, the fiduciary duties of officers have been assumed to be identical to those of directors."[5]

The language in *Disney*, though it did not directly address the issue, has been used to stand for the proposition that officers have fiduciary duties,[6] but the Delaware Court of Chancery now has definitively answered the question as to whether non-director officers owe fiduciary duties. In the February 2008 case, *Gantler v. Stephens*,[7] the Court held that officers owe fiduciary duties of care and loyalty to the corporation they serve and its stockholders.

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One question that flows from this holding, of course, is whether these officers, now charged with fiduciary duties, are entitled to the presumption of the business judgment rule. For years, the Delaware courts had suggested in dicta that decisions of officers may be protected by the business judgment rule,[8] but these pronouncements were far from clear, and the issue continued to be a subject of academic debate, receiving intense focus shortly after the amendments to Section 3114.[9] *Gantler* has arguably ended this debate.[10] Although the *Gantler* Court did not say so explicitly, its holding strongly suggests that the decisions of non-director officers are accorded the presumption of the business judgment rule.

While the statements in *Gantler* should not be surprising to scholars and practitioners of Delaware corporate law, the implications may be. For example, the question whether a *Caremark* claim may be brought against non-director officers was apparently answered in the affirmative by the Bankruptcy Court for the District of Delaware in the April 2008 case, *Miller v. McDonald*.[11] While this article does not pretend to address all the possible consequences of imposing fiduciary duties on non-director officers, it discusses the implications of *Gantler*, the fiduciary duties that apply to non-director officers, and how they may be able to mitigate the increased possibility for liability.

Gantler: Ordinary Fiduciary Duties of Non-Director Officers

Gantler's key statement on officers' fiduciary duties was actually a minor feature of the case, which primarily involved the decision by the board of directors of First Niles Financial, Inc. to abandon the sale process it previously had initiated in favor of a privatization proposal that had been advanced and supported by three members of senior management (two of whom were also directors).[12] Although the board received advice that three of the bids First Niles received were within an acceptable range and were all superior to "retaining First Niles shares," the Board took no action on those bids.[13] At the same meeting, however, the board reviewed management's privatization proposal.[14]

A month later, with two bidders remaining, the board directed management to proceed with the due diligence process with respect to those bids.[15] After management failed to produce due diligence materials in a timely fashion, one of the two remaining bidders withdrew.[16] Although it also encountered difficulties in the due diligence process, the second bidder ultimately completed its diligence and submitted a bid within a range that First Niles's financial advisor deemed acceptable.[17] That second bidder subsequently increased its offer, but the board rejected the offer without discussion and again discussed management's privatization proposal.[18]

The board determined that the privatization proposal—which involved a reclassification of small shareholdings—was fair.[19] Stockholders representing approximately 57 percent of First Niles's outstanding shares approved the privatization proposal, and the reclassification became effective.[20]

Plaintiffs filed suit, alleging that, as directors and officers interested in safeguarding their positions with First Niles, the defendants had purposely undermined the company's chance of closing a value-maximizing deal.[21] Defendants responded that plaintiffs had failed to overcome the presumption of the business judgment rule.[22]

Defendant Lawrence Safarek was the treasurer and vice president of First Niles—but he was not a director.[23] Plaintiffs' chief claim against Safarek was that he had breached his fiduciary duties of care and loyalty by sabotaging the due diligence process to frustrate the potential sale.[24] With little mention of the uncertainty regarding officers' fiduciary duties, the Court held that, "[a]s an officer, Safarek owed fiduciary duties of loyalty and care to First Niles and its shareholders."[25] Nonetheless, the Court found that plaintiffs had failed to allege sufficient facts from which it could infer that Safarek had acted disloyally or that he had acted with gross negligence in breach of his duty of care.[26]

Although the Court did not state expressly that it was applying the business judgment rule to Safarek's conduct, the opinion suggests that the Court was doing just that, because it could not have otherwise so easily dispensed with plaintiffs' claims against

Safarek. That is, the Court in *Gantler* dismissed plaintiffs' claims because the complaint "fail[ed] to allege sufficient facts for this Court to reasonably infer Safarek acted in bad faith (*i.e.*, disloyally) or was grossly negligent (*i.e.*, acted with a culpable lack of due care)."[27] Such a dismissal is exactly what the protections of the business judgment rule provide[28]—a court will refuse to scrutinize a business decision when it appears to have been made in good faith and with due care.

Officers' Fiduciary Duties: What Next?

Now that the courts recognize that non-director officers owe fiduciary duties of loyalty and care, new questions arise. Can these officers be liable for a failure to disclose or a failure to exercise oversight? What protections are available to these officers? The answers to these questions cannot be stated conclusively, but hopefully merely raising them will assist officers and their counsel in focusing on issues that are now more relevant than ever.

Duty of Disclosure

Because the duty of disclosure under Delaware law "derives from the duties of care and loyalty,"[29] non-director officers theoretically could be subject to a duty of disclosure. But imposing the duty of disclosure on such officers seems awkward, particularly as the affirmative duty of disclosure has been imposed almost exclusively on directors.[30]

Directors' duty of disclosure arises in two primary situations: they are either (1) seeking stockholder action or (2) providing information to stockholders.[31] Neither of these situations typically applies to non-director officers. Under the General Corporation Law of the State of Delaware, officers, unlike directors, are not permitted or required to make decisions regarding fundamental corporate actions, such as mergers[32] or sales of all or substantially all of the corporation's assets,[33] nor are they charged with the task of declaring those actions advisable, recommending them to stockholders, and soliciting stockholder approval.[34]

Although officers may not owe a "board-level" duty of disclosure, they may be bound, by their ordinary fiduciary duties, to see that any information they disclose to stockholders (or any information they present to the board that is intended for public disclosure) is accurate or complete.[35] But it does not follow that officers would owe a duty of disclosure similar to that owed by directors, given that the duty of disclosure requires directors to disclose all material facts within their control that would have a significant effect on the stockholders' decision with regard to a proposed action.[36] Because they propose no actions to the stockholders, officers should not be charged with a duty of disclosure matching that of directors.

Duty of Oversight

The duty of oversight was most famously articulated in the *Caremark* case, in which the Court of Chancery stated that "a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exi[s]ts"—would demonstrate the "lack of good faith" necessary to impose liability on directors for corporate losses stemming from wrongdoing within the corporation.[37] More recently, in *Stone v. Ritter*, the Delaware Supreme Court stated that "the *Caremark* standard for so-called oversight liability draws heavily on the concept of director failure to act in good faith," noting also that "the fiduciary duty violated by [such bad-faith] conduct is the duty of loyalty."[38] Since *Caremark*, the Delaware courts have applied the so-called duty of oversight only to directors—in fact, the Court in *Stone* stated that *Caremark* "articulate[d] the necessary conditions for assessing *director* oversight liability."[39]

But a recent case from the Delaware Bankruptcy Court set forth a more expansive view of *Caremark* duties. *Miller v. McDonald* involved various claims by the bankruptcy trustee of World Health Alternatives, Inc. that World Health's officers had engaged in fraudulent conduct to misrepresent its financial condition and tax liabilities.[40] The Court in *Miller*, as in *Gantler*, had little trouble accepting the proposition that officers owe fiduciary duties to the corporation and its stockholders.[41] Then, it used that proposition to suggest that non-director officers also may owe a duty of oversight.

The relevant claim in *Miller* was against Brian Licastro, World Health's then-vice president of operations and in-house general counsel. Plaintiff alleged that Licastro "became aware of or should have been aware of the malfeasance and misdealing and discrepancies in World Health's revenues" but that he nonetheless "did not take any action consistent with [his] fiduciary duties to remedy or ameliorate the discrepancies."[42] Although much of the *Miller* Court's reasoning rested on the proposition that officers owe fiduciary duties (and partly on Licastro's status as general counsel), it also suggested that *Caremark* would apply to officers.[43] That portion of the opinion involved only one quote from *Caremark*,[44] and the Court was only denying a motion to dismiss, but the possibility of *Caremark* liability for officers bears some consideration.

The "failure to act in good faith" model of fiduciary oversight should not apply to officers.

Imposing a duty of oversight on directors makes sense, given that "monitoring" is an important part of what directors are elected to do.[45] A director's failure to exercise oversight (that is, a *Caremark* claim) logically is a failure to act in good faith. That is, intentionally failing to perform one's chief function (monitoring) is the textbook definition of bad faith: "A failure to act in good faith may be shown . . . where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[46] Or, as the Court of Chancery has put it: *Caremark* "premises liability on a showing that the directors were conscious of the fact that they were not doing their jobs."[47]

Officers, on the other hand, frequently are expected to serve in numerous capacities and perform many tasks.[48] An officer's job often includes—but is far from limited to—oversight. While chief executive officers of the very largest corporations may spend much of their time "monitoring," even they will be busy doing other things: making strategic business decisions, pursuing corporate goals, negotiating significant contracts, talking to analysts, making speeches, visiting factories, etc.

The "failure to act in good faith" model of fiduciary oversight thus should not apply to officers. An officer's failure to exercise oversight would be, at most, merely a failure to do a *portion* of his or her job; that is not bad faith. A *Caremark*-typeclaim against a non-director officer (most likely a claim of a failure to be informed of material information relevant to a certain portion of his or her job)[49] would more logically be a claim that the officer failed to exercise due care. Such a result would be consistent with, for example, *Caremark* itself, which contained suggestions that violations of the duty of oversight are extreme breaches of the duty of care.[50] Even the plaintiff's claim in *Miller* was a duty-of-care claim.[51] For non-director officers, *Caremark* simply makes more sense as a duty of care claim than as a duty of loyalty claim.

Protection for Officers

The issues raised above lead to the question regarding what protections are available to non-director officers. As noted, *Gantler* suggests that the protections of the business judgment rule will apply to decisions made by these officers. But a charter provision adopted under 8 *Del. C.* § 102(b)(7) (which essentially eliminates the liability of directors for monetary damages stemming from a breach of the duty of care) does not apply to actions taken by an officer solely in his or her capacity as an officer.[52] Thus, if a plaintiff brings a suit against a non-director officer claiming a breach of the duty of care, the officer, unlike a director,[53] will find it much more difficult to defeat the claim on a motion to dismiss. It is therefore suggested that officers and their corporations revisit their indemnification and advancement arrangements. Individual officers should consider seeking indemnification and advancement protection under separate agreements to deal with the increased possibility of liability in the post-*Gantler* and post-*Miller* world. Non-director officers also should review the terms of the corporation's directors and officers' liability policy to see that it provides adequate coverage for potential fiduciary liability of officers.

Conclusion

It now is clear that a non-director officer owes fiduciary duties of care and loyalty to the corporation and its stockholders, although it is less clear that the duties of disclosure and oversight should apply to officers in the same way as those duties apply to directors. It also is likely that the presumptions of the business judgment rule apply to decisions by such officers. But without the protections of Section 102(b)(7), those officers may wish to bolster their protection with greater attention to indemnification arrangements and D&O coverage.

NOTES

1. *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939).
2. *See* Lawrence A. Hamermesh and A. Gilchrist Sparks III, "Common Law Duties of Non-Director Corporate Officers," 48 *Bus. Law*. 215, 215 (1992) ("The precise nature of the duties and liabilities of corporate officers who are not directors is a topic that has received little attention from courts and commentators.").
3. *See, e.g.*, *Gebelein v. Perma-Dry Waterproofing Co.*, 1982 WL 8776 (Del. Ch. Jan. 12, 1982) (holding that the Court did not have personal jurisdiction over non-resident (non-director) officers by reason of their officer status alone).
4. As amended effective January 1, 2004, Section 3114(b) authorizes the Delaware state courts to exercise jurisdiction over certain non-resident officers of a Delaware corporation if the suit is brought for "violation of a duty" in an officer's capacity. 74 Del. Laws ch. 83, § 3 (2004) (codified at 10 *Del. C.* § 3114(b)). Notably, the universe of officers to which Section 3114(b) applies is fairly limited and only includes an officer of the corporation "who (i) is or was the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful, (ii) is or was identified in the corporation's public filings with the United States Securities and Exchange Commission because such person is or was 1 of the most highly compensated executive officers of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful, or (iii) has, by written agreement with the corporation, consented to be identified as an officer for purposes of this section." *Id.*
5. *In re Walt Disney Co. Deriv. Litig.*, 2004 WL 2050138, at *3 (Del. Ch. Sept. 10, 2004); *see also In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 777 n.588 (Del. Ch. 2005) ("The parties essentially treat both officers and directors as comparable fiduciaries, that is, subject to the same fiduciary duties and standards of substantive review. Thus, for purposes of this case, theories of liability against corporate directors apply equally to corporate officers, making further distinctions unnecessary."), *aff'd*, 906 A.2d 27 (Del. 2006).
6. *See, e.g.*, *Midland Grange No. 27 Patrons of Husbandry v. Walls*, 2008 WL 616239, at *7 n.32 (Del. Ch. Feb. 28, 2008) ("Thus, regardless of whether the Officer Respondents are properly characterized as 'officers' of the Grange or 'directors' of the Grange, '[t]he fiduciary duties an officer owes to the corporation "have been assumed to be identical to those of directors."'" (alteration in original)).
7. *Gantler v. Stephens*, 2008 WL 401124 (Del. Ch. Feb. 14, 2008).
8. *See, e.g.*, *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (noting that "the business judgment rule attaches to protect corporate officers and directors and the decisions they make"), *modified* 636 A.2d 956 (Del. 1994); *Haber v. Bell*, 465 A.2d 353, 357 (Del. Ch. 1983) ("The business judgment rule, which is a presumption that a rational business decision of an officer or director is proper unless facts exist which remove the decision from the protection of the rule, is a potential defense to allegations of Board interestedness and demand futility."); *Kelly v. Bell*, 266 A.2d 878, 879 (Del. 1970) ("[E]ven if they did in fact violate some such public policy, the directors or officers were not necessarily liable to the corporation because they honored the commitment, provided they exercised honest business judgment in doing so.").
9. *Compare* Lyman P.Q. Johnson, "Corporate Officers and the Business Judgment Rule," 60 *Bus. Law*. 439 (2005) (arguing generally that the business judgment rule does not apply to officers), *with* Lawrence A. Hamermesh and A. Gilchrist Sparks III, "Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson," 60 *Bus. Law*. 865 (2005) (arguing the opposite).
10. We note, however, that the Delaware Supreme Court has not addressed the issue of whether non-director officers owe fiduciary duties, nor has it explicitly addressed the application of the business judgment rule to these officers.
11. *Miller v. McDonald*, 2008 WL 1002035 (Bankr. D. Del. Apr. 9, 2008). Although the Court noted that, because World Health Alternatives was incorporated in Florida, plaintiff's claims were governed by Florida law, it stated that "Delaware law is still relevant because '[t]he Florida courts have relied on Delaware corporate law to establish their own corporate doctrines.'" *Id.* at *10 (alteration in original).
12. *Gantler*, 2008 WL 401124, at *1–2.
13. *Id.* at *3.
14. *Id.*
15. *Id.*
16. *Id.* The Court noted: "The Financial Advisor attributed Cortland's withdrawal to 'the inordinate amount of delay on the part of . . . management getting/not getting information . . . .'" *Id.* at *3 n.8 (omissions in original).
17. *Id.* at *3.
18. *Id.*
19. *Id.* at *4.
20. *Id.* at *5.
21. *Id.*
22. *Id.*

23. *Id.* at *2.

24. *Id.* at *7. "Plaintiffs' claim based on the rejection of the First Place offer and termination of the Sales Process relates to Safarek only insofar as he allegedly sabotaged the Sales Process. . . . Plaintiffs' strongest allegation of sabotage relates to the Cortland bid." *Id.*

25. *Id*. (*quoting Guth v. Loft* and a case *quoting Disney*).

26. *Id*.

27. *Id*.

28. *Cf. In re J.P. Stevens & Co. S'holders Litig.*, 542 A.2d 770, 780 (Del. Ch. 1988) ("Stated generally, the business judgment rule provides that a decision made by an independent board will not give rise to liability (nor will it be the proper subject of equitable remedies) if it is made in good faith and in the exercise of due care. This means that ordinarily the policy of the rule prevents substantive review of the merits of a business decision made in good faith and with due care." (footnote omitted)).

29. *Pfeffer v. Redstone*, 2008 WL 308450, at *8 (Del. Ch. Feb. 1, 2008).

30. *See, eg.*, *Gantler*, 2008 WL 401124, at *19 ("It is well-recognized that directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action." (internal quotation marks omitted)); *see also Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998) ("The duty of disclosure is, and always has been, a specific application of the general fiduciary duty *owed by directors*." (emphasis added)). Officers are, however, often a subject of disclosure claims, in that directors are often sued for failing to disclose facts about, for example, a corporation's CEO. *See, e.g.*, *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 98 (Del. Ch. 2007) ("[A]n injunction will issue preventing the vote on the merger vote until such time as the Lear shareholders are apprised of the CEO's overtures to the board concerning his retirement benefits"); *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 813–814, 825 (Del. Ch. 2005).

31. *SeeMalone*, 722 A.2d at 11.

32. *See, e.g.,* 8 Del. C. § 251.

33. *See id.* § 271.

34. *See Bridgeport Holdings Inc. Liquidating Trust v. Boyer*, Case No. 03-12825(PJW), slip op. at 52–53 (Bankr. D. Del. May 30, 2008).

35. *Cf. id.* § 141(e) (providing that directors are entitled to rely in good faith on "information, opinions, reports or statements presented to the corporation by any of the corporation's officers"); *cf. alsoMalone*, 722 A.2d at 14 (holding that directors breach their fiduciary duties when they "are deliberately misinforming shareholders about the business of the corporation").

36. Moreover, determining the level of information the stockholders need to make such an informed decision is a business judgment best left to the board. *Cf.Malone*, 722 A.2d at 12 ("[D]irectors have definitive guidance in discharging their fiduciary duty by an analysis of the factual circumstances relating to the specific shareholder action being requested and an inquiry into the potential for deception or misinformation.").

37. *In re Caremark Int'l Inc. Deriv. Litig.,* 698 A.2d 959, 971 (Del. Ch. 1996).

38. *Stone v. Ritter*, 911 A.2d 362, 369–370 (Del. 2006).

39. *Id.* at 365 (emphasis added); *see also Bridgeport Holdings*, Case No. 03-12825(PJW), slip op. at 53–54.

40. *Miller*, 2008 WL 1002035, at*3–8.

41. *Id.* at *13.

42. *Id.* at *8. The Court stated that "[t]he basis for the Trustee's claim is that Licastro breached his duty of care by failing to implement an adequate monitoring system and/or the failure to utilize such system to safeguard against corporate wrongdoing." *Id.* at *10.

43. *Id.* at *12.

44. *Id., quotingCaremark*, 698 A.2d at 969 ("The case can be more narrowly interpreted as standing for the proposition that, absent grounds to suspect deception, neither corporate boards *nor senior officers* can be charged with wrongdoing simply for assuming the integrity of employees and the honesty of their dealings on the company's behalf." (emphasis added)).

45. *See, e.g.*, *Grimes v. Donald*, 1995 WL 54441, at *1 (Del. Ch. Jan. 11, 1995) ("Under Section 141 of the Delaware General Corporation Law, as under analogous provisions of the incorporation statutes of other states, it is the elected board of directors that bears the ultimate duty to manage or supervise the management of the business and affairs of the corporation. Ordinarily, this responsibility entails the duty to establish or approve the long-term strategic, financial and organizational goals of the corporation; to approve formal or informal plans for the achievement of these goals; *to monitor corporate performance*; and to act, when in the good faith, informed judgment of the board it is appropriate to act." (emphasis added)), *aff'd*, 673 A.2d 1207 (Del. 1996); Leo E. Strine, Jr., "Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance," 33 *J. Corp. L.* 1, 8 (2007) ("For much of the last 40 years, corporate law reformers have sought to increase the independence of corporate directors from top corporate managers, and to constitute corporate boards that are more accountable to stockholders. These 'monitoring directors' are often idealized as platonic trustees, who are well-positioned to protect the best interests of the stockholders and corporate constituencies without worrying about their own personal self-interest. . . . Increasingly, boards are comprised of one person who knows everything about the company and who has an intense interest in its future—the CEO—and nine or ten other people selected precisely because they have no possible interest in or connection to the company that might cause them to be perceived as conflicted—or that might cause them to have any genuine concern for the corporation's future.").

46. *Stone*, 911 A.2d at 369 (internal quotation marks omitted).

47. *Guttman v. Huang*, 823 A.2d 492, 506 (Del. Ch. 2003).

48. *See Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 2008 WL 660556, at *4 (Del. Ch. Mar. 13, 2008) ("Directors must keep generally informed of corporate affairs so as to fulfill their 'affirmative duty to protect [the shareholders'] interests and to proceed with a critical eye in assessing information.' Managers, of course, have the far more onerous task of operating the company each day." (alteration in original) (footnote omitted)).

49. Such a claim could also allege the officer's failure to establish an adequate reporting system, which would be interesting since officers typically are *part* of the reporting system required by *Caremark*. *Cf. Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, 2007 WL 2982247, at *7 (Del. Ch. Oct. 9, 2007) ("[W]ith an effective compliance system in place, corporate directors are entitled to believe that, unless red flags surface, *corporate officers* and employees are exercising their delegated corporate powers in the best interest of the corporation." (emphasis added)); *Bridgeport Holdings*, Case No. 03-12825(PJW), slip op. at 54 ("It was highly unlikely that it was the responsibility of other officers to oversee, supervise or second-guess Ramaekers' performance of his job.").

50. *Caremark*, 698 A.2d at 967 ("The complaint charges the director defendants with *breach of their duty of attention or care* in connection with the on-going operation of the corporation's business." (emphasis added)).

51. *Miller*, 2008 WL 1002035, at *10 ("The basis for the Trustee's claim is that Licastro breached his *duty of care* by failing to implement an adequate monitoring system and/or the failure to utilize such system to safeguard against corporate wrongdoing." (emphasis added)); *id.* at 11 ("Therefore, the Trustee appropriately asserts that Licastro as the in-house general counsel and the only lawyer in top management of World Health during the relevant period, had a *duty to know or should have known of these corporate wrong doings* and reported such breaches of fiduciary duties by the management" (emphasis added)).

52. *See*, *e.g.*, Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1288 (Del. 1994).

53. *See, e.g.*, *Malpiede v. Townson*, 780 A.2d 1075, 1091–192 (Del. 2001) (holding that a Section 102(b)(7) provision may be considered on a motion to dismiss where the business judgment rule is the standard of review).

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