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Case Number 603,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHESTER COUNTY RETIREMENT SYSTEM, individually, and on behalf of all those similarly situated,

Plaintiff Below,
Appellant,

v.

JOSHUA L. COLLINS, DAVID A. WILLMOTT, ROBERT E. BEASLEY, JR., RONALD CAMI, ANDREW C. CLARKE, NELDA J. CONNORS, E. DANIEL JAMES, HAROLD E. LAYMAN, MAX L. LUKENS, DANIEL J. OBRINGER, BLOUNT INTERNATIONAL, INC., AMERICAN SECURITIES LLC, P2 CAPITAL PARTNERS, LLC, P2 CAPITAL MASTER FUND I, L.P., ASP BLADE INTERMEDIATE HOLDINGS, INC., ASP BLADE MERGER SUB, INC. and GOLDMAN, SACHS & CO.,

Defendants Below,
Appellees.

No. 603, 2016

On Appeal From
C.A. No. 12072-VCL
in the Court of Chancery of
the State of Delaware

BLOUNT DEFENDANTS-APPELLEES'
<u>CORRECTED ANSWERING BRIEF</u>

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- "BXXX" for references to the appendix filed in connection with this brief.
- "AXXX" for references to the appendix filed in connection with Plaintiff Below-Appellant's Opening Brief.
- "Opening Br. at __" for references to Plaintiff Below-Appellant's Opening Brief.

NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery's order dismissing Plaintiff's verified amended class action complaint (the "Amended Complaint") claiming breach of fiduciary duty and aiding and abetting in connection with the acquisition of Blount International, Inc. ("Blount" or the "Company") by American Securities LLC ("American Securities") and by affiliates of P2 Capital Partners LLC ("P2" and, together with American Securities, the "Buyers")—a transaction for which Blount's stockholders received an 86% premium to the closing price for Blount stock on the day before the Merger was announced (the "Merger"). Of Blount's total outstanding shares entitled to vote, more than 75% were cast in favor of the merger, including approximately 71% of the unaffiliated shares. This appeal thus turns on the legal effect of that fully informed and uncoerced approval of the Merger by Blount's disinterested stockholders.

By order dated December 6, 2016, the Court of Chancery properly dismissed the Amended Complaint with prejudice. The Court of Chancery held that:

(i) Plaintiff had not pled a viable disclosure claim; (ii) approval of the transaction by Blount's disinterested and fully informed stockholders required application of the business judgment rule, and Plaintiff did not allege that the Board committed waste; (iii) having failed to plead a claim for breach of fiduciary duty, Plaintiff likewise failed to plead a claim for aiding and abetting; and (iv) Plaintiff did not assert any claims against the Company.

In seeking to reverse the Court of Chancery's holding, Plaintiff argues on appeal that, despite full briefing and oral argument, the Court of Chancery ignored that the Merger was structured as a leveraged buyout. According to Plaintiff, this fact casts a light on their disclosure claims. But the structure of the deal does not render immaterial disclosure claims material to a reasonable stockholder. Plaintiff's attempt to recast its process allegations as "context" for its disclosure claims cannot and does not change the materiality standard, and Plaintiff still fails to state a material disclosure violation.

First, as the Court of Chancery properly held, alleged prior legal work by one director (Cami) from seven and eleven years ***before*** the Merger was "old and stale," and that director's later employment with the law firm retained to represent the Special Committee on which he served could not have compromised the director's independence. Additional disclosure of either old and cold representations or the prospect of future employment at a law firm with no conflicts would not have been material to a reasonable stockholder voting on the Merger in April 2016.

Second, while Plaintiff quibbles with the wording and dollar value of the disclosures regarding Goldman Sachs's relationships with the Buyers, the Proxy did disclose to Blount's stockholders that the relationships existed and were, in the Court of Chancery's words, "longstanding and thick." As the Court of Chancery properly decided, additional disclosure would not have significantly altered the total mix of information.

Third, as the Court of Chancery properly held, the magnitude of Collins and Willmott's option-based, buy-side participation was disclosed, and further detail would not have been material to a reasonable Blount stockholder. Plaintiff's sweeping—and novel—argument on appeal that performance metrics negotiated in connection with a grant of stock options must be disclosed to stockholders finds no support in Delaware law.

This Court should thus affirm the Court of Chancery's opinion in its entirety.

But in all events, Plaintiff's claims sound in breach of the duty of care—not the duty of loyalty—and are exculpated under Blount's charter. This argument was before the Court of Chancery, and, although not reached by the Court of Chancery, the Amended Complaint may also be dismissed on this ground alone.

<u>SUMMARY OF ARGUMENT</u>

1. ***<u>Denied</u>***. The Court of Chancery correctly held that Plaintiff failed to plead a viable disclosure claim. *See* Arg. § I.C.2 *infra*. Taking each of Plaintiff's alleged omissions in turn, the Court of Chancery correctly held that none of the alleged omissions identified by Plaintiff would have significantly altered the total mix of information available to Blount stockholders voting on the Merger. *Id*.

2. ***<u>Nothing to Admit or Deny</u>***. The Court of Chancery properly held under *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015), that the fully informed, uncoerced approval of the Merger by the holders of a majority of Blount's outstanding shares, including a majority of the shares held by unaffiliated stockholders, invoked the business judgment rule, thereby barring all claims asserted by Plaintiff. *See* Arg. § I.C *infra*. Regardless, because Plaintiff's breach of fiduciary duty claims sound in the duty of care, not the duty of loyalty, those claims are barred by the exculpatory provision in Blount's charter. *See* Arg. § II.C *infra*.

3. ***<u>Denied</u>***. The Court of Chancery correctly held that Plaintiff failed to plead a viable disclosure claim. *See* Arg. § I.C.2 *infra*. In so concluding, the Court of Chancery was fully aware of the "context of the Buyout," and, taking

each of Plaintiff's alleged omissions in turn, the Court of Chancery correctly held that none of the alleged omissions identified by Plaintiff would have significantly altered the total mix of information available to Blount stockholders voting on the Merger. *Id*.

COUNTERSTATEMENT OF FACTS[1]

I. THE BLOUNT DEFENDANTS

A. Blount International, Inc.

Blount is a Delaware corporation that designs, manufactures, and markets equipment, replacement and component parts, and accessories for professionals and consumers, primarily through its Forestry, Lawn and Garden segment and Farm, Ranch and Agriculture segment. (A045-46).

B. The Individual Defendants

Prior to the Merger, the Board consisted of ten members, eight of whom were independent, outside directors at all relevant times. Four of the eight independent, outside directors comprised the Special Committee.

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1 The following facts are drawn from those alleged in the Amended Complaint, without conceding the accuracy of the Amended Complaint's allegations or Plaintiff's ability to ultimately prove them, and the disclosures set forth in Blount's public filings with the SEC. The Court may take judicial notice of Blount's public filings with the SEC. *See Solomon v. Armstrong*, 747 A.2d 1098, 1121 n.72 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000) ("[W]here certain facts are not specifically alleged (or in dispute) a Court may take judicial notice of facts publicly available in filings with the SEC . . . [and of] documents incorporated by reference into the complaint.") (citations omitted). Because Plaintiff relies on Blount's public filings and has incorporated them by reference, they cannot have the court draw inferences in their favor that contradict these documents unless they *plead* non-conclusory facts contradicting them.

The Special Committee members were:

- Robert E. Beasley, Jr. ("Beasley"), chairman of the Committee, who was formerly chairman, president and CEO of Hunter Fan Company ("Hunter Fan"), which was owned at one point by Lehman Brothers Merchant Banking ("Lehman"). He has extensive experience in sourcing, manufacturing and distributing consumer, commercial and industrial products. (*See* A051; B525).

- Ronald Cami ("Cami"), who was previously a partner at Cravath, Swaine & Moore LLP ("Cravath"), focusing on mergers and acquisitions, leveraged transactions and general corporate and board advice, including having previously served as outside legal counsel to Blount, Lehman and American Securities before he left Cravath in 2010. (A051-53). From 2010 through 2015, Mr. Cami was the general counsel of TPG Global ("TPG"). (*E.g.*, A040, A052). Mr. Cami is currently a partner at Davis Polk & Wardwell LLP ("Davis Polk"). (A051-53).

- Max L. Lukens ("Lukens"), who has served as CEO of a public company and was qualified as a "financial expert," as that term is defined under applicable SEC and NYSE rules and regulations. (B528-29).

- Daniel J. Obringer ("Obringer"), who served as the CEO of Echo Incorporated, a company with substantially similar markets and channels to those of Blount. (B529).

The other independent directors were:

- E. Daniel James ("James"), who worked at Lehman from 1988 until 2009 and has been a managing partner and president of Trilantic North America, a private equity investment firm and successor to Lehman, since 2009. (A053-54).
- Andrew C. Clarke ("Clarke"), who was qualified as a "financial expert," as that term is defined under applicable SEC and NYSE rules and regulations. (B526).
- Nelda J. Connors ("Connors"), who is the founder of Pine Grove Investments, which provides advisory services to private equity firms and investment firms and limited investments to small and midsized businesses. (A053). Connors was a member of a special committee formed in 2014 to evaluate a different potential

transaction involving P2 and Party A among other potential business combination proposals. (A170).

- <u>Harold E. Layman</u> ("Layman"), who served as an executive officer of Blount for nine years, including two years as president and CEO, but ceased being a Blount employee in 2002. (B528).

The two directors who did not cast votes with respect to the Merger were:

- <u>Joshua Collins</u> ("Collins"), who has served as Blount's chief executive officer ("CEO") since 2009. From 1996 to 2008, Collins worked at Lehman, which acquired Blount in 1999 and took the Company public in 2004. (A049-50).
- <u>David Willmott</u> ("Willmott"), who joined Blount in 2009 and was the president and chief operating officer ("COO") beginning in 2011. Willmott worked at Lehman from 1997 to 2008. Willmott formerly served as a director and chairman of the board of Hunter Fan Company, of which Beasley was formerly the president and CEO. (A050-51).

II. <u>THE TRANSACTION</u>

A. <u>Blount Received an Unsolicited Proposal from the Buyers.</u>

On August 6, 2015, Blount received an unsolicited informal preliminary acquisition proposal from the Buyers.[2] The Buyers indicated that they expected Blount's CEO (Collins) and COO (Willmott) would retain their management positions after the closing of such deal. (A068). The Blount Board met on August 8, 2015 to discuss the proposal and instructed Collins and Willmott not to discuss with the Buyers the terms of a potential transaction, or their potential roles (if any) after a merger, without prior approval from the Board. (A069; *see also* A172).

B. <u>The Board Formed a Special Committee of Independent Directors.</u>

On September 9, 2015, "in light of the fact that the [Buyers] appeared to want to retain Company management," the Board formed a "Special Committee to establish a process [to] negotiate, evaluate and provide a recommendation to the Board relating to the [Buyers'] proposal as well as any other potential proposals." (A083, A172). Although Plaintiff criticizes the Board for not forming the Special

[2] At the time, American Securities was an unaffiliated third party, and P2 owned approximately 15% of Blount's outstanding shares. (A257).

Committee earlier (A039-40, A069-70), the only activity before the Special Committee was formed was the negotiation of customary confidentiality agreements, containing customary standstill provisions, and limited due diligence. (A171-72).

The four members of the Special Committee were independent and disinterested. The Amended Complaint does not challenge the independence of two of the Special Committee members (Lukens and Obringer). On appeal, Plaintiff argues that potential conflicts for Cami and Beasley "demand particular scrutiny" based on "their long relationship" with Collins and Willmott "and their private equity mindset." (Opening Br. at 8).

Without articulating whether the supposed problem is with independence or disinterestedness, Plaintiff contends that Beasley is "conflicted" because, in ***2003***, a different company he ran was acquired by Lehman, with which Collins and Willmott were affiliated at the time. (*See* A070). Plaintiff has failed to allege any facts as to why or how that transaction, or Lehman's ensuing four-year ownership interest in Hunter Fan while Beasley remained president and CEO (A071), disabled Beasley from faithfully considering the merits of Blount's Merger over a decade later. But in all events, the 2003 acquisition and Lehman's brief ownership interest concluded long ago.

Cami's alleged "[d]eep [p]rivate [e]quity [t]ies" (Opening Br. at 8) stem from his career in private practice during which time he represented Blount, Lehman and American Securities, among other clients, before he left Cravath in 2010. (A072-75).[3] As the Court of Chancery correctly held, these former business relationships are "old and stale." (Ex. A ¶ 6). Nor does Cami's later employment by Davis Polk create any conflict. As the Court of Chancery properly held, "[t]he Davis Polk connection could not have compromised Cami's independence. If anything, it indicates that Davis Polk would have worked even harder to represent the interests of the Special Committee on which Cami served." (Ex. A ¶ 6).

Subsequent to the Special Committee's formation, diligence continued for approximately one month until, on October 8, 2015, the Buyers provided an indication of interest in acquiring Blount at $8.25-$8.50 per share. (A174). The Special Committee met the next day and unanimously determined that the indication of interest was "unattractive and an insufficient basis to pursue further

[3] On appeal, Plaintiff argues that Cami donated money to a charitable organization supported by Collins. (Opening Br. at 9). The Amended Complaint, however, alleged that *Collins* made a single donation of $850 more than a decade ago to a private university in Kosovo of which *Cami* is a founder and trustee. (A073-74). Regardless, Plaintiff failed to plead any facts to support a reasonable inference that such a small amount could have been material to Cami or Collins either at the time of the donation in 2005 or during the Merger process in 2015-16.

discussions." (A174). Accordingly, Beasley and Cami informed the Buyers that the Committee was terminating discussions regarding a potential transaction. (A174).

C. The Special Committee Was Advised by Competent and Independent Financial and Legal Advisors.

A few days later, on October 12, 2015, the Buyers returned with a substantially improved proposal of $9.75-$10.00 per share. (A174). The Special Committee met the next day and determined that, with a higher price now on the table, it would be advisable for the Committee to retain its own financial advisor. (A174). The Special Committee ultimately retained Greenhill & Co., Inc. ("Greenhill") as its financial advisor and both Davis Polk and Morris, Nichols, Arsht & Tunnell LLP as its legal advisors. (A175-77). None of these advisors' independence or competence is challenged. Plaintiff implies that these advisors were engaged too late in the process to advise the Special Committee effectively (A040-41, A084), but as set forth above, the Committee had not yet begun to negotiate the terms of the Merger at the time of their engagement; it had only rejected the October 8 indication of interest and terminated discussions. When the Buyers returned with a price from which meaningful discussions could occur, the Special Committee decided to engage independent advisors. (A174).

The Special Committee also desired to continue receiving input from Blount's longtime financial advisor, Goldman, Sachs & Co. ("Goldman Sachs"), and took steps to confirm that Goldman Sachs was free of conflicts. (A174). In executive sessions with Davis Polk, the Committee twice reviewed potential conflicts of interests and concluded that none of the prior relationships between Goldman Sachs and the Buyers would compromise Goldman Sachs' advice to Blount, the Board, or the Special Committee. (A180, A184).[4] There is no allegation that the Committee was unaware of Goldman Sachs' past interactions with the Buyers. In any event, the Special Committee received additional independent financial advice from Greenhill.

D. The Special Committee—with the Help of Its Advisors—Evaluated the Merger and Other Strategic Alternatives in Search of the Best Price Reasonably Available.

Once the Special Committee had selected its advisors, negotiations with the Buyers began. On October 19, 2015, pursuant to a Special Committee determination earlier that day, Cami called the Buyers to tell them that their

4 While Plaintiff previously challenged the extent of the disclosures regarding the terms of Goldman's engagement by Blount, Plaintiff now seems to concede—as the Court of Chancery correctly held—that the terms were adequately disclosed. (Ex. A ¶ 7).

increased indication of interest was sufficient to allow them to continue the diligence process and that the Special Committee would respond substantively in due course (*i.e.*, once the Committee's advisors were up to speed). (A176). Over the next two months, Cami and Beasley (and sometimes Cami alone) had numerous discussions with the Buyers on behalf of the Special Committee regarding price and other terms of a potential transaction. (A176-84). In the months leading up to the execution of the Merger Agreement, the Special Committee met 28 times to consider proposals from the Buyers, the Merger, and strategic and other alternatives potentially available to Blount. (A173). Over the course of these meetings, the Special Committee received multiple financial analyses from Greenhill, as well as financial analyses from Goldman Sachs. (A173, A175, A181, A183-84).

Among the other strategic alternatives considered, the Special Committee discussed potential combinations with other parties that had indicated an interest, including deliberating about transactions involving either Party C or Party D at numerous meetings. (A176-81).

For instance, Blount and Party C, which was a customer of Blount, had discussed a potential acquisition of Blount on multiple occasions over the prior several years on a general and preliminary basis. (A172, A181). At a meeting with Collins and Willmott in November 2015, representatives of Party C indicated that they were not interested in pursuing a transaction at that time and that any potential business combination would require "significant work" to assess regulatory considerations. (A178). Blount and Party C, nonetheless worked together to establish a "clean room"—in compliance with applicable competition law—to facilitate the assessment of the regulatory considerations. (A178). The Special Committee eventually decided not to pursue a transaction with Party C, however, because of, among other things, (i) Party C's indication that it did not believe it would be able to offer a premium significantly in excess of typical acquisition premiums (which implied a price per share meaningfully lower than the then-current indicative price range of the Buyers); (ii) potential regulatory considerations; and (iii) the failure of previous discussions to proceed past a preliminary stage. (A191-92).

The Special Committee also directed Greenhill and Goldman Sachs to have an initial confidential conversation with Party D regarding a potential transaction, which they did. (A178). However, Party D expressed its view that the then-current trading price of Blount's common stock (which had closed at $5.64 on the last trading day prior to the meeting) reflected the fair value of the Company and that it had no interest in pursuing further discussions regarding a potential transaction. (A180).

E. The Buyers Lowered Their Proposed Price Due to "Significant" and "Continued" Headwinds Facing Blount and Difficulty Obtaining Financing.

During negotiations, the Buyers' "indicative price range" rose as high as $10.55-$10.80. (A180). But the Company's performance continued to deteriorate, bringing its closing price as low as $5.10 in the weeks before the execution of the Merger Agreement, (A118), more than 27% below the $7.03 closing price on the day the Buyers first approached the Company regarding the Merger. (A171). At the direction of the independent directors, on November 5, 2015, Blount management provided the Buyers with revised projections reflecting management's view that the Company's EBITDA would be lower than previously projected. (A091-93).

On November 9, 2015, Blount announced third-quarter net income had decreased approximately 24% compared to the third quarter of 2014. (A180). Blount explained that it "continued to experience significant headwinds in the third quarter driven by the strength of the U.S. Dollar" and that sales had been hampered by current global economic conditions, resulting in Blount further reducing both production rates and head count. (A062, A180). Company management then updated its projections in December to reflect actual results from November 2015 and Blount's 2016 budget proposal. (A096-97).

The Buyers also experienced substantial difficulty in securing financing. (A180-83). On December 4, 2015, the Buyers reduced their proposed price to $9.85 per share, citing (i) "uncertainty as to whether the Company would be able to achieve its projections"; (ii) "changes to the debt financing terms proposed by the [Buyers'] debt financing sources"; and (iii) certain matters identified during the course of their due diligence of Blount. (A096; A183-83).

F. The Special Committee Negotiated Hard to Obtain the Best Price Reasonably Available.

At a Special Committee meeting held on December 4, 2015 to discuss the revised price, both Greenhill and Goldman Sachs updated the Special Committee on then-current conditions in the leveraged finance market, which the Committee noted could negatively impact the Buyers' ability to obtain financing on more favorable terms. (A096-97). In light of the Special Committee's understanding of the Company's standalone valuation and the global economic headwinds facing the Company, the Committee concluded that the reduced price "did not appear to be unreasonable." (A183). Nevertheless, the Special Committee sought an increase in the offer price. (*See* A098; A183). The Buyers were unwilling to consider increasing the price without the Committee first making a counterproposal, so the Committee countered with $10.30 per share. (A184).

On December 7, 2015, approximately four months after their initial unsolicited proposal, the Buyers communicated a "best and final" offer of $10.00 per share. (A184, A042). Over the following two days, both the Committee and the independent members of the Board, with the benefit of input from their respective financial and legal advisors, unanimously determined that the Merger was in the best interests of Blount's unaffiliated stockholders. (A184-86).

The $10.00 per share cash offer represented an 86% premium to Blount's closing price on the day before announcement (December 9, 2015), an 82% premium to Blount's 30-day average closing price, and a 68% premium to Blount's 90-day average closing price. (A188).

G. The Special Committee Engaged in a Vigorous Post-Signing Go-Shop Process.

On December 10, 2015, following the announcement of the Merger, Greenhill and Goldman Sachs commenced the go-shop process on behalf of the Special Committee. (A187). During this period, the Committee sought out entities believed by the financial advisors to be capable of and possibly interested in acquiring Blount. Per the express instruction of the Special Committee, Collins's and Willmott's arrangements with the Buyers permitted them to participate in a transaction proposed by an alternative buyer. (A182). During the go-shop period, Greenhill and Goldman Sachs contacted 91 such parties, including 35 strategic parties, to solicit their interest in acquiring Blount. (A186-87). Thirteen parties executed confidentiality agreements and were granted access to certain of Blount's non-public information. (A187). None of the 91 parties contacted, or any other party, submitted a competing proposal. (A187). The go-shop process ended on January 29, 2016. (A187).

H. Blount Supplemented Its Already-Thorough Disclosures in the Definitive Proxy.

On January 12, 2016, Blount filed a preliminary proxy with the SEC. (*See* A043). After receiving comments on its preliminary proxy from the SEC, Blount filed an amended preliminary proxy on February 16, 2016, with additional disclosures (the "Preliminary Proxy"). The Preliminary Proxy contained more than 118 pages of detailed disclosures about the Proposed Transaction, followed by annexes containing additional documents relevant to a stockholder's voting decision. (*See generally* B242-B500).

The Preliminary Proxy, both originally and as amended, described the sale process in detail, including the background of the Merger, the formation of the Special Committee, potential buyers that were identified and solicited, the facts and circumstances considered by the Board and the Committee in reaching their decision, and the reasons why both the Special Committee and the Board concluded that the Merger was in the best interests of the unaffiliated stockholders. (B276-99). The Preliminary Proxy also discussed Goldman Sachs' and Greenhill's engagements and analyses at length, with six pages dedicated to each fairness opinion. (B302-15). The full opinions of Goldman Sachs and Greenhill were included as Annexes B and C, respectively, to the Preliminary Proxy. (*See* B487-89, B490-93). The Preliminary Proxy also disclosed all material facts necessary for stockholders to assess whether Goldman Sachs and Greenhill had any conflicts of interest. (B308, B314).

On March 4, 2016, Plaintiff filed its original verified class action complaint (the "Original Complaint").

Blount filed its definitive proxy statement on March 9, 2016 (the "Proxy"). Although the disclosure claims in the Original Complaint (as in the Amended Complaint) were without merit, Blount supplemented its already-thorough disclosures to avoid any risk of delay in Blount's stockholders receiving the merger consideration and any risk that a litigation-driven delay of the stockholder vote could pose to the consummation of the Merger. The Proxy provides additional disclosures regarding (i) Goldman Sachs' and Greenhill's compensation; (ii) the prior relationship among P2, funds affiliated with Goldman

Sachs' "private equity" arm, and Interline Brands, Inc. ("Interline Brands"); (iii) the vesting conditions and price terms of stock options that Collins and Willmott received in the post-Merger company; and (iv) additional bases for the Special Committee's understanding of Blount's "standalone" value. (*See* A180; A200-206; A211-13).

I. The Unaffiliated Stockholders Approved the Merger.

On April 7, 2016, Blount's stockholders voted overwhelmingly in favor of the Merger. Of Blount's total outstanding shares entitled to vote, more than 75% were cast in favor of the Merger, including approximately 71% of the shares held by unaffiliated stockholders. (*See* B501-06, A261). The Merger closed on April 12, 2016. (B508).

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT THE BUSINESS JUDGMENT RULE APPLIES TO THE MERGER AND BARS PLAINTIFF'S CLAIMS.

A. Question Presented

Whether the Court of Chancery correctly held that the fully informed, uncoerced, approval of the Merger by the holders of a majority of Blount's outstanding shares, including a majority of the shares held by unaffiliated stockholders, invokes the business judgment rule, thereby barring all claims asserted by Plaintiff. This issue was presented to the Court of Chancery. (B140-42, B215-24).

B. Standard of Review

This Court reviews motions to dismiss under Court of Chancery Rule 12(b)(6) *de novo*. *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013); *McMullin v. Beran*, 765 A.3d 910, 916 (Del. 2000). Although well-pleaded allegations are accepted as true, this Court will not "credit conclusory allegations that are unsupported by specific facts or draw unreasonable inferences in the [plaintiff's] favor." *Allen*, 72 A.3d at 100.

C. Merits of Argument

1. The Court of Chancery Correctly Held that the Business Judgment Rule Applies and Warrants Dismissal of the Amended Complaint.

"For sound policy reasons, Delaware corporate law has long been reluctant to second-guess the judgment of a disinterested stockholder majority that determines that a transaction with a party other than a controlling stockholder is in their best interests." *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 306 (Del. 2015). Where—as here—a transaction has been approved by a majority of the disinterested stockholders in a fully informed and uncoerced vote, *Corwin* applies and warrants application of the business judgment rule and dismissal of the complaint. *See, e.g.*, *Singh v. Attenborough*, 137 A.3d 151, 151-52 (Del. 2016) ("When the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result."); *Marciano v. Nakash*, 535 A.2d 400, 405 n.3 (Del. 1987) ("[A]pproval by fully-informed . . . disinterested stockholders . . . permits invocation of the business judgment rule and limits judicial review to issues of gift or waste with the burden of proof upon the party attacking the transaction."); *see also Larkin v. Shah*, 2016 WL 4485447, at *3 (Del. Ch. Aug. 25, 2016) ("In the absence of a controlling stockholder that extracted personal benefits, the effect of disinterested stockholder approval of the merger is review under the irrebuttable business judgment rule, even if the transaction might otherwise have been subject to the entire fairness standard due to conflicts faced by individual directors.”).[5]

The Court of Chancery correctly found that a majority of the disinterested shares approved the Merger. (Ex. A ¶ 5). Because the disinterested stockholders approved the Merger, the business judgment rule applies and dismissal results unless the Plaintiff has “allege[d] that facts are missing from the statement, identif[ied] those facts, state[d] why they meet the materiality standard and how the omission caused injury.” (*See* B142-43 (citing *Malpiede v. Townson*, 780 A.2d 1075, 1087 (Del. 2001) (internal citation and quotations omitted))); *see Corwin*, 125 A.3d at 306, 312; *In re Solera Holdings, Inc. Stockholder Litig.*, 2017 WL 57839, at *7 (Del. Ch. Jan. 5, 2017) (placing burden of pleading disclosure deficiency on plaintiffs when alleging vote was not fully informed). As discussed further below, Plaintiff did not plead a viable disclosure claim. (*See* section I.C.2, *infra*.) Accordingly, the Court of Chancery correctly concluded that the fully informed, uncoerced, disinterested stockholder approval of the Merger has the

5 *See also In re Formica Corp. S’holders Litig.*, 1989 WL 25812, at *10 (Del. Ch. Mar. 22, 1989) (applying the business judgment rule to a leveraged buyout transaction even where the management-led LBO “might not have been totally free of imperfections”).

legal effect of invoking the business judgment standard of review and barring all claims but waste. (Ex. A ¶ 5); *Singh*, 137 A.3d at 151-52; *Corwin*, 125 A.3d at 312.[6]

There is no controlling stockholder here, nor is one alleged. Plaintiff's reliance on decisions involving controlling stockholders to argue for a heightened standard of review for leveraged buyout transactions is therefore unavailing. (Opening Br. at 27-31); *cf. In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *1, 26 & n.13 (Del. Ch. Aug. 27, 2015) (considering LBO incentives during entire fairness review where buyer/CEO/controlling stockholder's "right-hand man" engaged in fraud that "vitiates everything"); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *32 (Del. Ch. May 3, 2004) (analyzing transaction involving buyer/CEO/controlling stockholder under entire fairness standard); *Sealy Mattress Co. of New Jersey v. Sealy, Inc.*, 532 A.2d 1324, 1326 (Del. Ch. 1987) (proposed cash-out merger involving controlling stockholder evaluated under entire fairness standard).

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6 Plaintiff did not allege waste. In any event, as this Court has observed, "the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful." *Singh*, 137 A.3d at 152 (footnote omitted).

Nor do the appraisal cases on which Plaintiff relies support applying a higher level of scrutiny to actions for breach of fiduciary duty in the context of leveraged buyouts. Indeed, there is no appraisal claim asserted here, and "the distinction between a breach of fiduciary duty case and an appraisal proceeding looms large. . . . The two inquiries are different, so a sale process might pass muster for purposes of a breach of fiduciary claim and yet still generate a sub-optimal process for purposes of an appraisal." *In re Appraisal of Dell Inc.*, 2016 WL 3186538, at *25 (Del. Ch. May 31, 2016) *reargument denied*, (Del. Ch. June 16, 2016). Indeed, the *Dell* court observed that plaintiff's process allegations would not state a claim for breach of fiduciary duty before considering the allegations in the different context of its appraisal analysis. *Id.* at *28; *see also In re Appraisal of DFC Global Corp.*, 2016 WL 3753123 (July 8, 2016) (appraisal action); *Pinson v. Campbell-Taggart, Inc.*, 1989 WL 17438, at *5 (Del. Ch. Feb. 28, 1989) (observing that an appraisal action "is legally and conceptually distinct from a 'breach of fiduciary duty' action").[7]

[7] Other decisions on which Plaintiff relies in search of a heightened standard of review are likewise inapplicable. *See In re SS & C Techs., Inc., S'holders Litig.*, 911 A.2d 816, 820 (Del. Ch. 2006) (declining to approve a settlement, including because the court had no confidence that the interests of the class were adequately represented by counsel who was "unable to correctly identify basic terms of the transactions or the basic set of legal issues thereby

(Continued . . .)

2. The Court of Chancery Correctly Held that Plaintiff Failed to Plead a Viable Disclosure Claim.

The Court of Chancery was required to dismiss the Amended Complaint unless the Plaintiff "allege[d] that facts [were] missing from the [proxy] statement, identif[ied] those facts, state[d] why they meet the materiality standard and how the omission caused injury." *Malpiede*, 780 A.2d at 1087. It is well settled that "[o]mitted facts are not material simply because they might be helpful." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. Ch. 1999), *aff'd*, 750 A.2d 1170 (Del. 2000). Rather, for an omission to be material, there must exist a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Indus. v. Northway*, 426 U.S. 438, 449 (1976); *see Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (adopting *TSC* materiality standard). Applying these standards, the Court of Chancery correctly dismissed the Amended Complaint below.

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raised"); *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1057 (Del. Ch. 1987) (discussing management self-tender offer and LBOs solely in a single parenthetical citation to another case).

Plaintiff appeals from the Court of Chancery's decision as to certain alleged omissions regarding Cami, Goldman Sachs, and the stock options awarded to Collins and Willmott in connection with the Merger. (Opening Br. at 31-40).[8] Plaintiff argues that the Court of Chancery failed to analyze these disclosure claims "within the factual context of the Buyout." (Opening Br. at 32). But the incentives at play in a leveraged buyout do not render otherwise immaterial omissions material. *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1288 (Del. 1989) (concluding that a "recognition of these dangers" of potential conflicts with LBOs does not fundamentally alter the materiality analysis).

Moreover, the argument is belied by the record. After full briefing and nearly two hours of oral argument before the Court of Chancery (including 47 pages of the transcript devoted to Plaintiff's argument during which Plaintiff's counsel "covered all of [P]laintiff's claims") (A595-641), Plaintiff cannot credibly contend that the Court below misapprehended the fact that Plaintiff's claims arose in the context of a leveraged buyout. The Court below was fully aware of the "context of the Buyout," and, taking each of Plaintiff's alleged omissions in turn,

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8 Plaintiff does not appeal from the Court of Chancery's holdings that "Delaware law does not require directors to formulate and disclose a view of a company's standalone value" or that "the Proxy disclosed the material terms of Goldman's engagement." (Ex. A ¶ 8-9).

the Court of Chancery correctly held that none of the alleged omissions identified by Plaintiff would have significantly altered the total mix of information available to Blount stockholders voting on the Merger. (Ex. A ¶ 9).

a. The Court of Chancery Correctly Determined that Additional Disclosure Regarding Cami "Would Not Have Altered the Total Mix of Information"

Plaintiff's disclosure claims as to Cami stem from its process allegations. Specifically, Plaintiff claims that "[t]he facts surrounding Cami's background and future"—*i.e.*, Cami's prior legal representations of Lehman and American Securities well before he left Cravath in 2010 and his later employment with Davis Polk after the stockholder vote—"raise a reasonable inference that Cami was conflicted in his ability to act as an effective independent negotiator in the process." (Opening Br. at 34). Disclosure of these so-called conflicts, Plaintiff argues, would have altered the total mix of information. On appeal, Plaintiff claims that, notwithstanding full briefing and oral argument, the Court of Chancery "misapprehended the nature of the disclosure claim involving Cami[.]" (Opening Br. at 32).

None of the allegedly omitted information regarding Cami amounts to a conflict under Delaware law, let alone one that would have been material to reasonable stockholders so as to require additional disclosure.

(i) Cami's Past Legal Representations Did Not Create a Conflict and Disclosure Would Not Have Been Material to Blount's Stockholders.

As Plaintiff's counsel noted during oral argument, Cami's alleged representation of Lehman concluded in 2004. (A597 ("And from 1999 through 2004, he continued to represent Lehman in connection with Lehman's control over Blount, including all the acquisitions, the dispositions, and then the IPO.")). The Merger at issue was negotiated 16 years after Lehman's leveraged buyout of Blount (A597, A051-52), 15 years after Cami made partner at Cravath (A597, A051), and 11 years after Blount's initial public offering. (A597, A052). Cami's alleged representation of American Securities also ended almost 11 years before the Merger. (Opening Br. at 9; B162). The Court of Chancery properly classified all of these previous legal representations as "old and stale" and thus immaterial to a reasonable stockholder. (Ex. A ¶ 6); *see also Orman v. Cullman*, 794 A.2d 5, 27 (Del. Ch. 2002) (discussing immaterial long-standing business relationships).

Moreover, as Appellees argued below, Cami's only client for the five years up to and including the negotiation of the Merger was his then-employer, TPG, an entity that had no role in the Merger. (B217). And Plaintiff did not allege that Cami was somehow "substantially reliant" on Lehman, American Securities, Collins or Willmott for his "material well-being" or that any of those persons or entities had the ability to influence Cami's compensation even indirectly. (B217); *cf. Skeen v. Wadsworth*, 2003 WL 21448617 (Del. Ch. June 18, 2003) (finding that two directors were "substantially reliant" on the buyer "for their material well-being" and where a member of the buyers' board was able to "influence the level and timing of [the director's] compensation.").

Cami's long-ago concluded business relationships created no conflict, let alone a conflict that would have been material to a reasonable stockholder voting on the Merger in 2016. As the Court of Chancery correctly concluded, additional disclosure of these "old and stale" representations would not have significantly altered the total mix of information. (Ex. A ¶ 6).

(ii) Special Committee Member Cami's Future Employment with Counsel to the Special Committee Did Not Create a Conflict, and Disclosure Would Not Have Been Material to Blount's Stockholders.

Plaintiff also alleged that "Cami's anticipated employment with Davis Polk was material information in light of the charge of the Special Committee and Cami's taking the lead in the Special Committee process, especially with respect to

Cami unilaterally hiring Davis Polk to represent the Special Committee." (A113).[9] The Court of Chancery correctly concluded that "[t]he Davis Polk connection could not have compromised Cami's independence." (Ex. A ¶ 6). As the Court of Chancery observed, "[i]f anything, it indicates that Davis Polk would have worked even harder to represent the interests of the Committee on which Cami served." (*Id.*) Indeed, there is no allegation that Cami's employment with Davis Polk negatively affected the legal advice that the Special Committee received or influenced the process in any way—nor could there be. (B146-147, B163).

Moreover, that Cami intended to "re-enter[] private practice as a private equity specialist" (see Opening Br. at 33-34) would not have altered the total mix of information available. As alleged, Cami was already a private equity specialist (A051; Opening Br. at 8-9 (describing Cami's "deep private equity ties")), and had publicly announced that he was leaving TPG one full year before Davis Polk announced that it would be hiring Cami. (A085). Cami's motives for "future work" after leaving TPG would have been the same regardless of which

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9 Contrary to Plaintiff's repeated assertion, Defendants have not conceded and do not concede that "Cami expected to work for Davis Polk during the Blount sale process[.]" Plaintiff's factual allegations, which include the alleged timing of Cami's employment at Davis Polk, are assumed to be true only for purposes of the motion to dismiss. (*See* B122).

law firm he ultimately decided to join. (B218). A supplemental disclosure that he would later join Davis Polk (A044) would not have been material to a reasonable stockholder.

Plaintiff's reliance on *Hammons* to argue that the mere possibility of future work constitutes a material conflict is misplaced. (Opening Br. at 34 (*citing In re John Q. Hammons Hotels Inc. v. S'holder Litig.*, 2009 WL 3165613, at *16 (Del. Ch. Oct. 2 2009)). In *Hammons*, the plaintiff alleged that the financial advisor for the special committee made efforts during the negotiation process to secure a role in the buyer's post-acquisition debt refinancing "that would have dwarfed the value of its advisory services to the Special Committee[.]" 2009 WL 3165613 at *8. There are no such similar allegations here. Again, Davis Polk's independence is not challenged, and Plaintiff did not—because it could not—allege that either Cami or Davis Polk took steps during the Merger process to represent either of the Buyers or steer the transaction one way or the other.[10] Speculation as

[10] The other decisions on which Plaintiff relies are similarly unrelated to Cami's stale past relationships or potential future clients. *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1173 (Del. 1994), *reh'g denied* (1995) (finding generally that stockholders having "the benefit of an independent and disinterested board is particularly probative evidence" during an "entire fairness" analysis); *Paramount Communications, Inc. v. QVC Networks.*, 637 A.2d 34 (Del. 1994) (discussing director obligations under *Revlon* in granting a preliminary injunction).

to whether Cami could bring in American Securities or P2 as new clients to Davis Polk on some unknown future deal would be just that—speculation—and would not have altered the total mix of information for a reasonable stockholder. (*See* Opening Br. at 9 (arguing that Cami was leading the sales process while sitting across from his "perspective [sic], future clients"); *Loudon v. Archer–Daniels–Midland Co.*, 700 A.2d 135, 145 (Del. 1997) ("Speculation is not an appropriate subject for a proxy disclosure.").

Hammons is also inapposite with respect to the allegations concerning the law firm retained to advise the special committee. *Hammons* involved a Special Committee's failure to disclose its legal advisor's concurrent representation of the entity providing financing to the buyer *in the same merger*, which was a material conflict. *Hammons*, 2009 WL 3165613 at *16-19. Neither Cami nor Davis Polk had any such concurrent conflict here.

In sum, Cami was independent and disinterested as disclosed in the Proxy.[11] Indeed, as the Court of Chancery properly concluded, none of the

[11] Plaintiff mentions in passing—and for the first time on appeal—that Collins led a charitable event that Cami attended. (Opening Br. at 9) Plaintiff has not alleged any such "charitable activities led by Collins." *Id.* To the extent that Plaintiff intended instead to rely on its allegation that *Cami* led a charitable event in 2005 that *Collins* attended and at which he contributed a mere $850 (A073-74), that allegation is plainly immaterial, as set forth in the

(Continued . . .)

allegedly omitted information regarding Cami's long-ago legal representations or speculation as to Cami's potential future clients would have affected the total mix of information made available to voting stockholders. (Ex. A ¶ 6).

b. Additional Disclosure Regarding Goldman's Relationships to the Buyer Parties Would Not Have Significantly Altered the Total Mix of Information.

The Court of Chancery correctly held that that all material information concerning Goldman, including the terms of Goldman's engagement and its relationship with the Buyers, was properly disclosed. (Ex. A ¶ 7).

As set forth above, Plaintiff does not appeal from the Court of Chancery's determination that all material information regarding the terms of Goldman's engagement by Blount were disclosed. Rather Plaintiff retreats to the argument that the "disclosures regarding Goldman's conflicts were incomplete and misleading" as to its relationship with the Buyers. (Opening Br. at 34). But being "'[f]ully informed' [as to the facts underlying the Merger] does not mean infinitely

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Special Committee's papers below. (B233-44; B001-20) (Collins's donation amounted to $850); *cf. In re The Limited, Inc. S'holders Litig.*, 2002 WL 537692, at *7 (Del. Ch. Mar. 27, 2002) (concluding that a gift of $25 *million* to a university with which a director was affiliated "can reasonably be considered as instilling in Gee a sense of 'owingness' to Mr. Wexner.").

informed." *In re Merge Healthcare Inc.*, 2017 WL 395981, at *9 (Del. Ch. Jan. 30, 2017). Indeed, the Court of Chancery has recently observed that "disclosures that provide extraneous details do not contribute to a fair summary and do not add value for stockholders." *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 901 (Del. Ch. 2016).

Plaintiff complains that the Proxy disclosed that Goldman Sachs acted as financial advisor to American Securities on transactions worth more than $2.7 billion over two years (around $1.3 billion per year) (A205) instead of transactions worth $11 billion over six years (around $1.8 billion per year). (Opening Br. at 35). As to P2, Plaintiff would have preferred disclosures of transactions worth less than $3 billion over four years (around $750 million per year) (*id.*) as opposed to the disclosed transactions worth over $2 billion over two years (around $1 billion per year). (A205). In either case, however, as the Court of Chancery correctly determined, "the Proxy revealed . . . that Goldman had a longstanding and thick relationship with the Buyers." (Ex. A ¶ 7).[12] Plaintiff's additional laundry list of

[12] Plaintiff's assertion that the Court of Chancery reached this determination "*only with the benefit of pleadings and briefing in this action*" is unfounded. (Opening Br. at 37 (emphasis supplied)). Paragraph 7 of the Order explicitly states that "the *proxy* . . . revealed that Goldman had a longstanding and thick relationship with the Buyers." (Ex. A ¶ 7 (emphasis supplied)).

transactions would not have significantly altered the total mix of information available to stockholders regarding the fact or the significance of Goldman's relationships with the Buyers.

Plaintiff further argues that "the Proxy's disclosure with respect to the nature of Goldman's and P2's partnership in Interline is materially misleading." (Opening Br. at 35). Specifically, Plaintiff alleges in the Amended Complaint that the Proxy failed to fully disclose the terms of Goldman's engagement with the Company, with Interline Brands, and with American Securities. (A113-14). Here, however, the Proxy disclosed the existence of a corporate relationship between "funds affiliated with Goldman Sachs" and P2 through their mutual affiliate, Interline. (A205).[13] Plaintiff's allegation that the Proxy should have also disclosed the (already public) "how" and "when" the corporate relationship between P2 and

[13] Throughout its Opening Brief, Plaintiff appears to conflate the Goldman Sachs entity that served as financial advisor to the Company with the Goldman Sachs entity that was co-owner of Interline. (*E.g.*, Opening Br. at 36). Even the Amended Complaint, however, identifies the co-owner of Interline as "the private equity arm of Goldman Sachs" (A114)—not the financial advisor arm of Goldman Sachs. (In fact, the co-owner was, as the Proxy disclosed, funds affiliated with Goldman Sachs.) To the extent that Plaintiff is arguing on appeal that the Proxy should have disclosed Goldman Sachs, the financial advisor, was co-owner of Interline, such a disclosure would itself be misleading and is contradicted by both the Proxy and the allegations in the Amended Complaint.

the private equity arm of Goldman Sachs began in 2012 and ended shortly after the Buyers' initial bid in August 2015 (A114) is an immaterial tell-me-more claim. *Cf. In re Trulia*, 129 A.3d at 905-906 (concluding that the supplemental disclosure of already-public information was not material or even helpful).[14] Plaintiff has failed to show how its preferred language would have significantly altered the total mix of information available to Blount stockholders.

Having found that "[t]he Proxy disclosed the material terms of Goldman's engagement and revealed that Goldman had a longstanding and thick relationship with the buyers," the Court of Chancery correctly concluded that additional disclosures would not have changed the total mix of information. (Ex. A ¶ 7).

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[14] Plaintiff also alleged in the Amended Complaint that "Goldman Sachs represented Interline Brands in its sale to Home Depot in August 2015." (A114). This was disclosed in the Proxy. (A205 (noting that the Investment Banking Division of Goldman Sachs acted "as financial advisor to Interline Brands, Inc. with respect to its sale to Home Depot in August 2015.")).

c. Delaware Law Does Not Require Disclosure of Performance Benchmarks Negotiated in Connection with the Grant of Stock Options.

Finally, Plaintiff argues that the failure to disclose the "predetermined performance targets" and "predetermined cash-on-cash return thresholds" associated with the stock options granted to Collins and Willmott is a material omission. (Opening Br. at 38). Plaintiff argues once again that the Court of Chancery failed to evaluate its disclosure claims in the context of its factual allegations, including Collins's and Willmott's "expectation and understanding that they would be . . . equity partners with the Buyers, and, as such, had a financial incentive to ensure the Buyout price was as low as possible to enhance their personal upside." (Opening Br. at 38). But the Proxy disclosed that Collins and Willmott "are expected to collectively receive a grant of options to purchase an aggregate share of 6% of the fully diluted common shares of" the new post-closing company subject to vesting criteria, including satisfaction of certain predetermined performance targets or predetermined cash-on-cash return thresholds. (A217). As the Court of Chancery correctly determined, these disclosures were "sufficient for stockholders to understand the magnitude of Collins and Willmott's option-based, buy-side participation." (Ex. A ¶ 9). Because the performance benchmarks only affect whether Collins and Willmott receive the full 6% or some lesser amount, the supplemental disclosure of these metrics would not have significantly altered the total mix of information available to a reasonable stockholder evaluating the extent of the Management Directors' "personal upside" interest in the Merger. (B154).

Plaintiff's reliance on *Cambridge Retirement Systems v. Bosnjak*, 2014 WL 2930869 (Del. Ch. June 26, 2014), is unavailing. There, the plaintiff alleged that stockholder approval of director equity grants was not valid because a proxy statement omitted information related to director compensation at comparable firms. *Id.* at *8 (Del. Ch. June 26, 2014). The court did not address whether vesting conditions for the stock options included performance thresholds or whether such additional vesting conditions must be explicitly disclosed in connection with a stockholder vote on a merger. *Id.* at *9 (noting that the proxy disclosed the number of options, exercise price, and vesting schedule).[15]

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15 The Court of Chancery's decision in *Crescent/Mach I Partners, L.P. v. Turner* is similarly inapposite. 846 A.2d 963, 971 (Del. Ch. 2000) (declining to dismiss allegations that defendants failed to disclose the terms of various "side deals" pursuant to which the Chairman and CEO of "would stand to gain a substantial equity interest in Bottling Group and Holdings and ABC would become a wholly owned subsidiaries [sic] of Bottling Group"). As the Court of Chancery properly held here, additional disclosure beyond "the magnitude of Collins and Willmott's option-based, buy-side participation" would not have changed the total mix of information." (Ex. A ¶ 9).

Plaintiff also offers another theory—for the first time on appeal—as to the materiality of the performance metrics. Specifically, Plaintiff now argues that "what future performance metrics the Management Directors and Buyers negotiated to establish their equity relationship" constitutes a "third data point" in addition to the June 2015 investor presentation and "conflicting management projections in the Proxy."[16] (Opening Br. 22, 39-40). Even if this novel argument were not waived, which it is, Plaintiff has pleaded no facts to support a reasonable inference that negotiated performance benchmarks with respect to a private company, under new ownership and an operative reality wholly divorced from Blount as a public company, would be a sufficiently reliable indicator of Blount's

[16] The Court should consider this argument waived, given Plaintiff's failure to raise this issue squarely before the Court of Chancery. *See, e.g.*, *Russell v. State*, 5 A.3d 622, 627 (Del. 2010), *denial of post-conviction relief aff'd*, 134 A.3d 759 (Del. 2016), as corrected (Sept. 29, 2010) (concluding that under both Delaware Supreme Court Rule 8 and "general appellate practice" the Delaware Supreme Court "may not consider questions on appeal unless they were first fairly presented to the trial court for consideration."). While Plaintiff includes references to the Amended Complaint for this new allegation, nowhere in these references, and indeed, nowhere in the record below, has Plaintiff alleged that these aspirational benchmarks somehow represented an all-important "third" material data point that would have been material to voting stockholders attempting to understand the valuation of the Company. Indeed, the "first" so-called data point—the June 2015 Investor Presentation—is mentioned but once in passing in the Amended Complaint (A108) and is not mentioned *at all* in Plaintiff's Opposition Brief before the Court of Chancery. (*See generally* A370-485).

value so as to required disclosure in a Proxy. *Cf. Smith v. Van Gorkom*, 488 A.2d 858, 891 (Del. 1985), *overruled on other grounds by Gantler v. Stephens*, 965 A.2d 695, 714 (Del. 2009) (observing that endorsement of unreliable valuation methodology in disclosure can, under some circumstances, constitute a material misrepresentation).

II. THE AMENDED COMPLAINT MAY BE DISMISSED FOR THE ADDITIONAL REASON THAT PLAINTIFF FAILED TO PLEAD A NON-EXCULPATED BREACH OF FIDUCIARY DUTY.

A. Question Presented

Whether Plaintiff's claims sounding in breach of the duty of care are barred by the exculpatory provision in Blount's charter absent allegations sufficient to support a breach of the duty of loyalty. This issue was presented to the Court of Chancery. (B155-58).

B. Standard of Review

This Court reviews questions of law *de novo*. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).

C. Merits of the Argument

Even if *Corwin* did not apply, which it does, the Amended Complaint must also be dismissed because Plaintiff has not pleaded a non-exculpated breach of fiduciary duty. (B157-77). As discussed in our briefing for the Court of Chancery, Blount's certificate of incorporation contained a Section 102(b)(7) exculpatory provision. (*See* B021-105). "[E]ven if the plaintiff[] had stated a claim for gross negligence, such a well-pleaded claim is unavailing because defendants have brought forth the Section 102(b)(7) charter provision that bars such claims. This is the end of the case." *Malpiede*, 780 A.2d at 1094-95. To survive a motion to dismiss, then, Plaintiff must plead a breach of the duty of loyalty. *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239-40 (Del. 2009). Plaintiff has failed.

1. Plaintiff Failed to Plead That a Majority of the Board Suffered From a Disabling Conflict

To adequately plead a breach of the duty of loyalty, Plaintiff must put forward allegations showing that a majority of Blount's Board was interested in the challenged transaction or was dominated by a materially interested director. *In re Alloy, Inc.*, 2011 WL 4863716, at *7 (Del. Ch. Oct. 13, 2011). As set forth in the Special Committee's papers before the Court of Chancery, the Amended Complaint is devoid of any allegation that six of the eight directors who voted to approve the Merger (Lukens, Obringer, Clarke, Connors, Layman, and James) stood on "both sides of a transaction," derived a "personal financial benefit from" the Merger, or were effectively controlled by another person or entity.[17] (B158-61;

[17] Although Plaintiff identifies certain connections that James had with Collins and Willmott, it does not allege that James suffered from a conflict. (A081-83). Any such assertion would be without merit. Plaintiff notes that "James was a long time business colleague of Collins and Willmott and part of the team at Lehman that took Blount private in 1999." (Opening Br. at 8). However, as acknowledged in the Amended Complaint, James ceased working with Collins and Willmott in 2008. (A053-54). This relationship is too stale and tenuous to have compromised his independence, particularly

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A31-50; B198); *see Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Plaintiff also failed to allege facts sufficient to support a reasonable inference that any of Cami's and Beasley's stale alleged prior business relationships were material to them. (B145-47, B227-36; *see, e.g.*, *Orman*, 794 A.2d at 25 n.50) (stating that a director may lack independence if the director is beholden to the controlling entity, including where the controller has unilateral power to determine whether director receives a benefit upon which the director is dependent).

2. Plaintiff Cannot Show Bad Faith

To plead bad faith, Plaintiff must allege that the directors each "intentionally fail[ed] to act in the face of a known duty to act, demonstrating a conscious disregard for his [or her] duties," or that "the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *In re Alloy, Inc.*, 2011 WL 4863716, at *7. Successfully pleading that directors have acted in bad faith requires an "extreme set

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given the absence of any allegation about the nature of their relationship at the time or any current personal or financial connections. *See Orman*, 794 A.2d at 27.

of facts." *Lyondell*, 970 A.2d at 243 (quoting *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 654 (Del. Ch. 2008)).

Here, no such showing has been made. Among other things, the Special Committee (i) met 28 times to consider proposals from the Buyers, the Merger, and other alternatives (B166); (ii) received multiple financial analyses from Greenhill, as well as analyses from Goldman Sachs, Blount's longtime financial advisor (B166); and (iii) engaged in a very broad go-shop process involving 91 potential alternative acquirers (13 of which entered into confidentiality agreements and received access to material non-public information) from which no alternative transaction emerged. (B167; B238). There can be no finding of bad faith where, as here, "the Board did undertake some process aimed at achieving the best price for stockholders." *Houseman v. Sagerman*, 2014 WL 1600724, at *7 (Del. Ch. Apr. 16, 2014).

The Amended Complaint may be dismissed on appeal for the additional reason that Plaintiff has failed to plead a non-exculpated breach of fiduciary duty.[18]

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[18] Plaintiff does not challenge dismissal of the Amended Complaint as against Blount, and therefore any such challenge is waived. Even if it were not waived, Blount, as a corporation, owes no fiduciary duty to its owners. *In re Riverstone Nat'l, Inc. S'holder Litig.*, 2016 WL 4045411, at *16 (Del. Ch.
(Continued . . .)

CONCLUSION

For each of the reasons explained above, this Court should affirm the decision of the Court of Chancery granting the Defendants' Motion to Dismiss.

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July 28, 2016) ("Under Delaware law, fiduciary duties are owed by the directors and officers of a corporation and not by the corporation itself."); *Buttonwood Tree Value Partners, L.P., v. R.L. Polk & Co., Inc.*, 2014 WL 3954987, at *1, *4 (Del. Ch. Aug. 7, 2014).

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, the foregoing document was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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