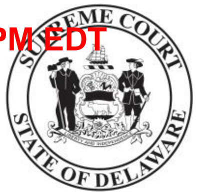
EFiled: Sep 28 2016 02:06PM EDT
Filing ID 59622914
Case Number 372, 2016 D



IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE VOLCANO CORPORATION STOCKHOLDER LITIGATION MELVIN LAX, MELISSA GORDON and MOHAMMED MUNAWAR, Plaintiffs Below, Appellants, vs. GOLDMAN, SACHS & CO., KIERAN T. GALLAHUE, LESLEY H. HOWE, R. SCOTT HUENNEKENS, SIDDHARTHA KADIA, ALEXIS V. LUKIANOV, RONALD A. MATRICARIA, LESLIE V. NORWALK, DANIEL J. WOLTERMAN, AND VOLCANO CORPORATION. Defendants Below, Appellees.	No. 372, 2016 On Appeal from C.A. No. 10485-VCMR in the Court of Chancery of the State of Delaware

APPELLANTS' CORRECTED OPENING BRIEF

FARUQI & FARUQI, LLP
Derrick B. Farrell (No. 5747)
James R. Banko (No. 4518)
20 Montchanin Road, Suite 145
Wilmington, DE 19807
Tel.: (302) 482-3182
Email: dfarrell@faruqilaw.com
Email: jbanko@faruqilaw.com

Dated: September 28, 2016

Counsel for Appellants/ Plaintiffs Below

TABLE OF CONTENTS

Summary of Argument 1

Nature Of Proceedings 2

Statement of Facts 3

I. Facts Underlying Plaintiffs' Claims 3

A. Volcano Issues Convertible Notes and Enters into Hedge Transactions with Goldman, which Allows Goldman to Earn Up to $24.6 Million in the Transaction 3

B. Despite Goldman's Obvious Conflicts, the Board Retained the Heavily Conflicted Advisor Without a Second Thought and Goldman Foreseeably Led an Inherently Flawed Sales Process 7

1. The Board Rejected an Offer Thirty-Three Percent Above the Merger Consideration as Inadequate 8

2. The Board Rejected a Second Offer Equivalent to the Merger Consideration as Inadequate 10

3. In Response to Stockholder Activism, the Board Quickly Accepted a Third Offer Despite Previously Rejecting Two Better or Equivalent Offers as Inadequate 11

C. Because of Its Obvious Conflicts, Goldman Improperly Advised the Board to Approve the Transaction and Secures at Least A $24.6 Million Pay-Day 14

Argument 16

I. The Court of Chancery Erred in Finding that the Business Judgment Rule Irrebutably Applied to the Merger 16

A. Question Presented 16

B. Standard of Review 16

C. Merits of Argument 17

Argument..28

II. The Court of Chancery Erred in Finding that the Holding in *Corwin* Should be Applied to Tender Offers…………………………..………………..28

A. Question Presented 28

B. Standard of Review 28

C. Merits of Argument 28

Argument..37

III. The Court of Chancery Erred in Dismissing Plaintiffs' Aiding and Abetting Claim Against Goldman……………………………………………..37

A. Question Presented 37

B. Standard of Review 37

C. Merits of Argument 37

Conclusion…………………………………………..…………………………44

<u>EXHIBIT</u>

Memorandum Opinion of the Delaware Court of Chancery on Defendants' Motion to Dismiss dated June 30, 2016 ………………………………..…Exhibit A

TABLE OF CITATIONS

Cases **Page(s)**

In re Answers Corp. S'holders Litig.,
2012 Del. Ch. LEXIS 76 (Del. Ch. Apr. 11, 2012) 42

Brown v. Perrette,
1999 Del. Ch. LEXIS 92 (Del. Ch. May 14, 1999) 42

In re Cablevision/Rainbow Media Tracking S'holder Litig.,
C.A. No. 19819-VCN (Del. Ch. Sept. 3, 2008) 17

Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs., LLC,
27 A.3d 531 (Del. 2011) 16

Chavous v. State,
953 A.2d 282 (Del. 2008) 16

City of Miami Gen. Employees' & Sanitation Employees' Ret. Trust v. Comstock,
2016 Del. Ch. LEXIS 133 (Del. Ch. Aug. 24, 2016) 35, 36

In re CNX Gas Corp. S'holders Litig.,
4 A. 3d 397 (Del. Ch. 2010) 29

In re Compellent Techs., Inc.,
2011 Del. Ch. LEXIS 190 (Del. Ch. Dec. 9, 2011) 31

Corwin v. KKR Financial Holdings LLC,
125 A.3d 304 (Del. 2015) ....*passim*

Crescent/Mach I Partners, LP v. Turner,
846 A.2d 963 (Del. Ch. 2000) 42

Cypress Assocs., LLC v. Sunnyside Cogeneration Assocs. Project,
2007 Del. Ch. LEXIS 10 (Del. Ch. Jan. 17, 2007) 36

In re Dole Food Co.,
2015 Del. Ch. LEXIS 223 (Del. Ch. Aug. 27, 2015) 38

Dubroff v. Wren Holdings, LLC,
2011 Del. Ch. LEXIS 164 (Del. Ch. Oct. 28, 2011)..42

In re Emerging Communs., Inc. S'Holders Litig.,
2004 Del. Ch. LEXIS 70 (Del. Ch. May 3, 2004).......................................33, 35

Espinoza v. Zuckerberg,
124 A.3d 47 (Del. Ch. 2015) 29, 33, 34, 35

Forgo v. Health Grades, Inc.,
5716-VCS (Del. Ch. Sept. 3, 2010)..31, 32

Gantler v. Stephens
965 A.2d 695 (Del. 2009)..17, 21, 26, 34

In re Gardner Denver, Inc. S'holder Litig.,
C.A. No. 8505-VCN (Del. Ch. Sept. 3, 2014)...17

Gatz Props., LLC v. Auriga Capital Corp.,
59 A.3d 1206 (Del. 2012)..22, 43, 44

Gatz v. Ponsoldt,
925 A.2d 1265 (Del. 2007)..39, 42, 44

In re GM Class H Shareholders Litig.,
734 A.2d 611 (Del. Ch. 1999) 20

Haney v. Blackhawk Network Holdings, Inc.,
2016 Del. Ch. LEXIS 40 (Del. Ch. Feb. 26, 2016) 39

Harbor Finance Partners v. Huizenga,
751 A.2d 879 (Del. Ch. 1999) 19, 20, 24

Khanna v. McMinn,
2006 Del. Ch. LEXIS 86 (Del. Ch. May 9, 2006)...38

In re KKR Financial Holdings LLC S'holder Litig.,
101 A.3d 980 (Del. Ch. 2014) 18

Larkin v. Shah,
2016 Del. Ch. LEXIS 134 (Del. Ch. Aug. 25, 2016) 35, 36

In re LNR Prop. Corp. S'holders Litig.,
C.A. No. 674-VCL (Del. Ch. July 16, 2008)..17

Malone v. Brincat,
722 A.2d 5 (Del. 1998)..16

Malpiede v. Townson,
780 A.2d 1075 (Del. 2001)..38

Marciano v. Nakash,
535 A.2d 400 (Del. 1987)...20, 24

Matador Capital Mgmt. Corp. v. BRC Hldgs., Inc.,
729 A.2d 280 (Del. Ch. 1998)..30

In re MFW S'holders Litig.,
67 A.3d 496 (Del. Ch. 2013)..22

Michelson v. Duncan,
407 A.2d 211 (Del. 1979)..24

In re Morton's Rest. Grp., Inc. S'holders Litig.,
74 A.3d 656 (Del. Ch. 2013)..33

O'Malley v. Boris,
2002 Del. Ch. LEXIS 33 (Del. Ch. Mar. 18, 2002)...42

Orman v. Cullman,
794 A.2d 5 (Del. Ch. 2002)..36

In re Primedia, Inc. S'holders Litig.,
C.A. No. 6511-VCL (Del. Ch. May 26, 2015)...17, 19

In re Pure Res. S'Holders Litig.,
808 A.2d 421 (Del. Ch. 2002)..30

RBC Capital Markets, LLC v. Education Loan Trust IV,
87 A.3d 632 (Del. 2014)..39, 41

In re Santa Fe Pacific Corp., S'holders Litig.,
669 A.2d 59 (Del. 1995)..19, 21

Savor, Inc. v. FMR Corp.,
812 A.2d 894 (Del. 2002) 40

In re Shoe-Town, Inc. S'holders Litig.,
1990 Del. Ch. LEXIS 14 (Del. Ch. Feb. 12, 1990) 38, 42

Singh v. Attenborough,
137 A.3d 151 (Del. May 6, 2016).......... *passim*

Solomon vs. Armstrong,
747 A.2d 1098 (Del. Ch. 1999) 20

Stifel Fin. Corp. v. Cochran,
809 A.2d 555 (Del. 2002) 16

Stroud v. Grace,
606 A.2d 75 (Del. 1992) 19

In re TIBCO Software Inc. S'holders Litig.,
2015 Del. Ch. LEXIS 265 (Del. Ch. Oct. 20, 2015)..........18, 40, 43, 44

Unocal Corp. v. Mesa Petroleum Co.,
493 A.2d 946 (Del. 1985) 21, 26, 36

In re Volcano Corp. Stockholder Litig.,
2016 Del. Ch. LEXIS 99 (Del. Ch. June 30, 2016) 28, 36, 41

In re Wheelabrator Tech., Inc. S'holders Litig.,
663 A.2d 1194 (Del. 1995) .... *passim*

Williams v. Geier,
671 A.2d 1368 (Del. 1996) 19, 21

In re Zale Corp. Stockholders Litigation ("*Zale I*"),
2015 Del. Ch. LEXIS 249 (Del. Ch. Oct. 1, 2015).......... *passim*

In re Zale Corp. Stockholders Litigation ("*Zale II*"),
2015 Del. Ch. LEXIS 274 (Del. Ch. Oct. 29, 2015).......... *passim*

Zirn v. VLI Corp.,
621 A.2d 773 (Del. 1993) 30

Zutrau v. Jansing,
C.A. No. 7457-VCP, 2014 Del. Ch. LEXIS 156
(Del. Ch. July 31, 2014) 20

Statutes

Delaware General Corporation Law .... *passim*

Other Authorities

Delaware Court of Chancery Rule 9(b) 1, 38, 39

Delaware Court of Chancery Rule 12(b)(6) .... *passim*

Recent Amendments to Delaware Corporation and LLC Statutes: Adoption of Section 251(h) Facilitates Tender and Exchange Offers; Fiduciary Duties Obtain in LLC Absent Elimination; Public Benefit Corporations Authorized,
Sullivan & Cromwell LLP (Sept. 17, 2013) 30

Top-Up Option, We Hardly Knew Ye, Law360 (April 26, 2013) 30

SUMMARY OF ARGUMENT

Plaintiffs-appellants ("Plaintiffs") were stockholders of Volcano Corporation ("Volcano") before affiliates of Koninklijke Philips N.V. ("Philips") acquired it through an all-cash tender offer for $18.00 per share (the "Transaction"). Plaintiffs filed suit in the Delaware Court of Chancery, alleging breaches of fiduciary duty against Volcano's board (the "Board") and aiding and abetting against, Volcano's financial advisor, Goldman Sachs, who received a windfall in the Transaction as a result of certain hedge transactions it entered into with Volcano.

Through this appeal, Plaintiffs seek to overturn three radical rulings by the Court of Chancery, which are unprecedented and represent a major sea change in Delaware law. First, the Court of Chancery improperly held for the first time that the business judgment rule is irrebuttable where stockholders ratify a transaction through a fully-informed vote. Second, the Court of Chancery's ruling is the first ever to erroneously hold that tendering shares has the exact same ratifying effect as a vote on a long-form merger. Finally, the Court of Chancery, for the first time, held that a plaintiff faces a "high" burden to plead knowing-participation and essentially required the knowledge element of a knowing participation claim to be plead with particularly at the pleadings stage, which directly contradicts the express language of Court of Chancery Rule 9(b), which permits a plaintiff to aver knowledge "generally."

NATURE OF PROCEEDINGS

On December 22, 2014 and January 9, 2015, before the Transaction closed, each of the three Plaintiffs filed class action complaints. On January 16, the Delaware Court of Chancery consolidated the three actions into this single action.

On March 2, 2015, after the Transaction closed, Plaintiffs filed the "CAC." [1] Defendants filed motions to dismiss the CAC under Rule 12(b)(6) on May 8, 2015 (the "Motions"). By August 2015, the parties had completed their initial round of briefing on the Motions. In December 2015, however, the parties stipulated to a supplemental round of briefing on the Motions to account for relevant Delaware Supreme Court decisions that had been published in the interim. The parties completed supplemental briefing in February 2016, and oral argument was held on the Motions on March 15, 2016. On June 30, 2016, the Court of Chancery issued a written opinion dismissing the CAC in its entirety. This appeal followed.

[1] Unless otherwise indicated, capitalized terms have the same meaning as those used in the Verified Consolidated Amended Class Action Complaint ("CAC" or "Complaint"), filed on March 9, 2015. Citations to the paragraphs of the CAC are cited as "CAC ¶ __."

STATEMENT OF FACTS

I. FACTS UNDERLYING PLAINTIFFS' CLAIMS

A. Volcano Issues Convertible Notes and Enters into Hedge Transactions with Goldman, which Allows Goldman to Earn Up to $24.6 Million in the Transaction

On December 4, 2012, the Company entered into an underwriting agreement (the "Underwriting Agreement") with Goldman and J.P. Morgan Securities LLC ("JPM," together with Goldman, the "Underwriters"). CAC ¶ 56. Pursuant to the Underwriting Agreement, on December 5, 2012, the Company issued $460 million aggregate principal amount 1.75% Convertible Senior Notes (including the Underwriters' $60 million over-allotment option) due December 1, 2017 (the "2017 Notes"). CAC ¶ 56. The 2017 Notes were offered and sold in a public offering between December 5 and 10, 2012.

Pursuant to the 2017 Notes' indenture, on or after August 7, 2017 until the close of business on the second scheduled trading day immediately preceding December 1, 2017, the $460 million of 2017 Notes were convertible into approximately 14.01 million shares of Volcano common stock at $32.83 per share. Prior to August 7, 2017, the 2017 Notes could be convertible only under limited circumstances, including, *inter alia*, the consummation of a cash merger. In the event of a cash merger, such as the Transaction, holders of the 2017 Notes would

be expected to exchange their notes at par in accordance with the terms of the 2017 Notes instead of exercising them.

Given the potential dilutive effect on Volcano's common stock upon future conversion of the 2017 Notes, the Company simultaneously entered into a series of hedging transactions with the Underwriters (the "Call Spread Transactions"). CAC ¶ 57. The Call Spread Transactions consisted of two separate transactions between Volcano and the Underwriters. In the first transaction, Volcano purchased $78,085,344 in call options from the Underwriters for 14.01 million shares of Volcano common stock at an initial strike price of $32.83 (the "Options Transaction"). *Id*. Pursuant to the Options Transaction, the Company specifically paid Goldman $58,364,800 and in return, Goldman was obligated to cover sixty-five percent of the number of shares that Volcano would be required to deliver under the terms of the 2017 Notes (i.e., 9,107,899 shares of Volcano common stock). *Id*. In the second transaction, the Underwriters purchased $46,683,206 in warrants from Volcano for 14.01 million shares of Volcano common stock at an initial strike price of $37.59 (the "Warrant Transaction"). CAC ¶ 58. Goldman specifically purchased warrants relating to 9,107,899 shares of Volcano common stock and paid Volcano $34,893,300. CAC ¶¶ 58-59. Altogether, the Underwriters immediately received a total of $31,402,138 from the Call Spread Transactions, with Goldman making a total profit of $23,471,500, excluding the

fees that it received for its advisory and underwriting services related to the issuance of the 2017 Notes. CAC ¶ 60. However, since the warrants were intended only to hedge the Underwriters' losses in the event Volcano stock traded above $37.59 per share, Goldman never expected to actually make money from the Warrant Transaction. *Id.*[2]

Collectively, the Call Spread Transactions sought to ensure that the 2017 Notes would not have any dilutive effect until Volcano's common stock reached a price of $37.59 per share. Put simply, the interplay between the 2017 Notes, the Options Transaction, and the Warrant Transaction functioned as follows: (i) because the Options Transaction gave Volcano the ability to repurchase the same number of shares that the 2017 Notes could be converted into, and at a strike price equal to the conversion price of the 2017 Notes, Volcano could ensure that the total number of its shares outstanding would remain static; (ii) simultaneously however, the Warrant Transaction effectively raised the conversion price on the 2017 Notes to $37.59 per share, and allowed Volcano to partially offset the cost of the Options Transaction.

---

[2] More specifically, the warrants were likely to expire deeply under water in light of their high strike price. Absent a change in control transaction, such as the Transaction with Philips, wherein an acquirer paid cash for Volcano, Goldman Sachs would not experience any gain - or would even take a significant loss - associated with Call Spread Transactions unless Volcano's stock traded above $32.83 per share. For example, if Goldman purchased 9,100,000 shares on the open market at $32.83 per share and had to sell them back to the Company when Volcano's stock price was $37.59, it would lose $43,316,000. CAC ¶¶ 60-61.

Corresponding with the terms of the 2017 Notes, the call options expired on December 1, 2017, while the warrants were set to expire over a 120 business- day period beginning in March 2018. Alternatively, however, pursuant to the change in control provisions of the Call Spread Transactions, upon the consummation of a cash merger, the options and warrants would be terminated, entitling the respective holders to certain termination payments. CAC ¶ 62. Specifically, in the event of a cash merger, such as the Transaction, the Underwriters would pay Volcano the options' fair value capped at an in-the-money value of the 2017 Notes, while Volcano would pay the Underwriters the warrants' fair value. Given that the Transaction provided stockholders with a meager $18.00 in cash for each Volcano share, Volcano received nothing upon its consummation. See Schedule 14D-9 at 31.

Critically, on the other hand, the fair value of the warrants in a cash-out merger would be dependent on the merger consideration and the amount of time left before the expiration of the warrants. CAC ¶ 63. Indeed, in a year alone, the warrants would reduce in value by twenty percent or roughly $5,000,000. Accordingly, Volcano would have to secure a significantly higher cash merger consideration in the future in order for Goldman to receive the same profit it did in connection with the Transaction. Thus, it was in Goldman's direct financial interest that a change in control transaction, involving all or nearly all cash, be

consummated as soon as possible, regardless of whether the transaction maximized Volcano stockholder value.

As a result, and as detailed further herein, the Transaction presented an unexpected windfall for Goldman. CAC ¶ 62. Not only did the Transaction remove any risk of loss as a result of the Options Transaction, but Goldman stood to profit handsomely. Indeed, the Transaction ultimately enabled Goldman to realize an unexpected gain of approximately $24.6 million from the Call Spread Transactions, in addition to the $23.5 million that it had made in or around December 2012 (and in addition to Goldman's financial advisory fees of approximately $17 million that was conditioned on the consummation of the Transaction). CAC ¶¶ 16, 62.

B. Despite Goldman's Obvious Conflicts, the Board Retained the Heavily Conflicted Advisor Without a Second Thought and Goldman Foreseeably Led an Inherently Flawed Sales Process

Beginning in January 2014, Huennekens had several meetings with two companies, referred to in the Recommendation Statement as "Company A" and "Company B," to discuss their respective interests in exploring a strategic transaction with Volcano. CAC ¶ 69. Afterwards, Volcano and the companies entered into confidentiality agreements, and Volcano's senior management gave presentations to each of the companies. *Id.*

After receiving preliminary feedback from Company A and Company B in April 2014, Volcano's Board retained Goldman to assist Volcano in conducting a limited market check. CAC ¶ 70. While the Board and Goldman considered a total of thirteen potential buyers for Volcano, consisting of six "tier 1 buyers," which included Philips, and seven "tier 2 buyers," the Board determined to reach out to only five of these companies, Companies A through E. *Id*. The Board's supposed "market check" was so narrow that neither Philips, a "tier 1 buyer," nor any of the seven "tier 2 buyers" were contacted. CAC ¶ 71. For various reasons, each of Companies A through E declined to pursue a strategic transaction with Volcano, and the Board ended its market check process.

1. The Board Rejected an Offer Thirty-Three Percent Above the Merger Consideration as Inadequate

Arising from a long-standing commercial partnership between Philips and Volcano, Philips contacted Goldman in June 2014 to express its interest in exploring an acquisition of Volcano. CAC ¶ 72. The companies executed a confidentiality agreement and, on July 3, held a call discussing financial projections and potential synergies. CAC ¶¶ 73-74. During June and July 2014, Goldman and Philips' financial advisor held a number of meetings and telephone calls regarding a potential transaction and Volcano's financial performance.

On July 25, Philips delivered a nonbinding indication of interest to acquire Volcano for $24 per share. CAC ¶ 75. In reaction to Philips' offer, Goldman

made a presentation on July 29, 2014 to Volcano's senior management concerning the potential effects that a change in control transaction might have on the Call Spread Transactions and in particular, the Volcano warrants that Goldman held. CAC ¶ 76. Notably, this presentation did not address the fact that the warrants likely had no value absent a change in control transaction, nor did it discuss the fact that the warrants' termination value in a change in control transaction exponentially decreased over time. *Id*.

On July 30, 2014, the Board and Volcano's senior management met to discuss Philips' offer. At the July 30 meeting, the Board determined that the $24 offer, thirty-three percent above the eventual Merger consideration, was inadequate and determined not to grant exclusivity to Philips unless Philips offered more than $24 per share. CAC ¶¶ 75, 78. The Board then formally retained Goldman without considering any other investment banking firms, despite Goldman's substantial conflicts of interest. CAC ¶ 79. As the Board's financial advisor, Goldman stood to earn a $17 million advisor fee, contingent on the consummation of Volcano's sale. The Board also authorized the creation of a transaction committee to oversee the merger process, on which Defendant Ronald Matricaria ("Matricaria") served as Chairman (the "Transaction Committee").

2. The Board Rejected a Second Offer Equivalent to the Merger Consideration as Inadequate

Following the rejection of the $24 offer, the Transaction Committee met with Goldman on August 2, 2014 to determine whether to contact any other potential acquirers. CAC ¶ 81. Rather than contact all thirteen of the potential acquirers that had been identified earlier that year, the Transaction Committee elected solely to contact Companies A and D, even though these two companies had indicated only months earlier that they were not interested in pursuing a transaction with Volcano. *Id.* Neither the Transaction Committee nor Goldman identified a single additional potential purchaser beyond those identified in April 2014. *Id.* Shortly thereafter, Companies A and D, neither of which received any Volcano projections, again indicated they were not interested in engaging in discussions with Volcano. CAC ¶ 82.

In August 2014, the Board reviewed with Goldman an updated set of management-prepared five-year financial projections that reflected Volcano's decision to sell its subsidiary, Axsun, and the change in revenue guidance for 2014. CAC ¶ 83. The Company's announcement of the revised guidance figures caused a temporary drop in the Company's stock. CAC ¶ 84. Capitalizing on the short-term stock price dip, Philips, on September 12, indicated a revised offer in the range of $17-$18 per share. CAC ¶¶ 83-84, 86. That same day, the Transaction

Committee instructed that the revised offer range was insufficient and closed Philips' access to its data room. CAC ¶ 87.

3. In Response to Stockholder Activism, the Board Quickly Accepted a Third Offer Despite Previously Rejecting Two Better or Equivalent Offers as Inadequate

On September 29, 2014, Engaged Capital, an investment management firm and large stockholder of Volcano publicly released a letter to the Volcano Board calling for the replacement of certain members of management, including the replacement of Huennekens as CEO, and requested that the Board start a process to sell the Company. CAC ¶ 88. In response, the Board reopened negotiations with its then only known bidder, Philips, and rather than further canvassing the market, worked swiftly to complete a deal before calls for Board and management removal further intensified. CAC ¶¶ 88-94.

On October 28, 2014, Philips sent Volcano a non-binding indication of interest at $16 per share. The Transaction Committee met to discuss that offer, and Goldman, at Matricaria's direction, reiterated to Lazard Freres & Co. LLC ("Lazard") that Volcano would not consider any offer below $18 per share. Notably, this direction came despite that the Board had now twice rejected offers at or above $18.00 per share.

On November 6, 2014, Volcano announced better-than-expected financial results for the third quarter of 2014 and the Company's turnaround plan. On

November 17, Philips' CEO, Frans van Houten, called Matricaria to express Philips' continuing interest in acquiring Volcano at $16 per share. Matricaria responded that he expected Volcano's stock price to increase from its current price of $11.59 per share in the near future. As such, the Board would not consider a price less than $18 per share.

On November 21, 2014, van Houten again called Matricaria and expressed Philips' willingness to increase its offer to $18 per share, subject to the negotiation of a merger agreement and completion of its due diligence.

On December 12, 2014, the Transaction Committee held a meeting to discuss the progress of the Transaction. At that meeting, Goldman made a presentation regarding its financial interest in the Call Spread Transactions. Notably, however, Goldman failed to inform the Transaction Committee at this meeting that the termination value of the warrants decreased exponentially over time and that the bank had a direct financial interest in seeing the consummation of an all-cash acquisition of Volcano as soon as possible. CAC ¶¶ 18, 65. Goldman then left the meeting, and the Transaction Committee ultimately determined that Goldman was not conflicted from serving as Volcano's financial advisor for the proposed transaction with Philips as a result of the Call Spread Transactions.

On December 15, 2014, Philips informed Volcano that its board of directors had approved a cash-out merger with the Company at a price of $18 per share. The

Board met the next day along with its legal counsel, Goldman, and Volcano's senior management to consider the Transaction. There, the Board further discussed the Transaction and unanimously approved the Transaction and the Merger agreement.

> As a result of the Merger, the 2017 Notes and, correspondingly, the Call Spread Transactions were terminated. Because neither the Options nor the Warrants had expired as of the date of the Merger, the Underwriters had to pay Volcano the Options' fair value, and Volcano had to pay the Underwriters the Warrants' fair value. The net result of the termination of the Call Spread Transactions, as between Volcano and Goldman, was a $24.6 million payment from Volcano to Goldman.
> **Before the Merger Agreement is Executed Huennekens Negotiated His Lucrative Consulting Arrangement.**

As early as November 2014, well before the Merger agreement was executed, Philips expressed its desire to retain Huennekens for a period post-merger to assist with the transition. As such, on December 11, 2014, Philips sent a draft consulting agreement to be signed by Huennekens before the companies' boards signed the merger agreement. Huennekens negotiated that consulting agreement (the "Consulting Agreement") with Philips from December 11 until December 15. CAC ¶¶ 96-97. Thus, rather than focusing on obtaining the best price reasonably available for Volcano's stockholders, in the final days leading up to entering into the Transaction, Huennekens spent precious time negotiating the

Consulting Agreement with Philips wherein he would earn a lucrative salary in addition to his "golden parachute" benefits. *Id*.

Under the Consulting Agreement, Philips would pay Huennekens up to $500,000 for five months of consulting services to the surviving company in the merger between Philips and Volcano. *Id*. Further, upon consummation of such a merger, the Consulting Agreement provided that Huennekens would be terminated without cause from Volcano and, therefore, receive benefits totaling $7.8 million, including $3.1 million in cash. *Id*. The Consulting Agreement was approved and executed on the same day as the Merger agreement.

C. Because of Its Obvious Conflicts, Goldman Improperly Advised the Board to Approve the Transaction and Secures at Least a $24.6 Million Pay-Day

In retaining Goldman in April 2014, the Board never even considered Goldman's conflicts of interests, particularly with regard to its sizeable financial stake as a result of the Call Spread Transactions. CAC ¶¶ 17, 64. During the sale process that led to the Transaction, Goldman never disclosed to the Board that the termination value of its warrants plunged over time and that it had a strong interest in seeing the consummation of an all-cash acquisition of Volcano as soon as possible. CAC ¶ 65. The Board also never considered that the Call Spread Transactions either had no or negative prospective value absent a change in control. *Id*.

In fact, Goldman failed to substantively discuss its financial interests with the Board until December 12, 2014, months after the parties to the Transaction had agreed to the $18.00 per share price term and only four days before the Board approved the Transaction. *Id.* On July 29, 2014, Goldman made a presentation concerning the potential effects of a change in control transaction on the Call Spread Transactions only to Volcano's senior management, and not the Board. *Id.* To make matters worse, Goldman's July 29, 2014 presentation to Volcano's senior management and its December 12, 2014 presentation to the Board's Transaction Committee both failed to apprise Volcano's senior management and the Board that the termination value of the warrants decreased exponentially over time and that the bank had a direct financial interest in seeing the consummation of an all-cash acquisition of Volcano as soon as possible. CAC ¶¶ 18, 65. Instead, Goldman chose to highlight only that the termination value of the warrants would supposedly increase along with an increase in the Merger consideration, making it appear as if the banker's interests were 100 percent aligned with the interests of Volcano's stockholders, when in fact, they were not.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN FINDING THAT THE BUSINESS JUDGEMENT RULE IRREBUTABLY APPLIED TO THE MERGER

A. Question Presented

Whether the approval of a merger (through a tender offer) by a majority of a corporation's outstanding shares on a fully informed, uncoerced, and disinterested basis renders the business judgment rule irrebuttable. *See* Appellant's Op. Br. App. at A191-96; A435-62.

B. Standard of Review

"A motion to dismiss a complaint presents the trial court with a question of law and is subject to de novo review by this Court on appeal."[3] Further, when reviewing a ruling on a motion to dismiss, this Court, like the trial court, "(1) accept[s] all well pleaded factual allegations as true, (2) accept[s] even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw[s] all reasonable inferences in favor of the non-moving party, and (4) do[es] not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances."[4]

---

[3] *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 557 (Del. 2002) (citing *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998)); *Chavous v. State*, 953 A.2d 282, 286 n.15 (Del. 2008) ("[W]e review the trial judge's determinations *de novo* for errors in formulating or applying legal precepts.").

[4] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs., LLC*, 27 A.3d 531, 535 (Del. 2011) (citations omitted).

C. Merits of Argument

At the hearing on the Motions, Defendants urged, and the Delaware Court of Chancery ultimately agreed, that the fully informed, uncoerced, disinterested approval of a merger by a majority of a corporation's outstanding shares rendered the business judgment rule irrebuttable. Prior to the Court's holding here, no Delaware Court – Chancery or otherwise – had ever specifically held that stockholder ratification[5] rendered the business judgment rule irrebuttable. And indeed, there is a long linage of case law which emphasizes that a fully informed, uncoerced, and disinterested stockholder vote in favor of a merger simply shifts the burden of proof to plaintiffs to then rebut the business judgment rule. Accordingly, an irrebuttable business judgment rule is inconsistent with the historical effect of ratification,[6] and for additional public policy reasons, should not be sustained.

---

[5] For linguistic ease, Plaintiffs' herein use the term ratification to reference a fully informed, uncoerced, disinterested approval of a merger by a majority of a corporation's outstanding shares, whether through a voluntary stockholder vote, a statutorily mandated stockholder vote, or a tender offer. However, Plaintiffs' acknowledge that this nomenclature is less precise than the clarified and narrow description that was given to that term in the *Gantler* opinion. *See Gantler v. Stephens* 965 A.2d 695 (Del. 2009) ("*Gantler*").

[6] In fact, there are at least four cases within the last 10 years where a company was sold to a third party that did not have a controlling stake in the Company and stockholders ratified the transaction despite in a fully informed vote despite serious alleged misconduct. *In re Primedia, Inc. S'holders Litig.*, C.A. No. 6511-VCL (settlement for $39 million (33% over the transaction consideration) approved on May 26, 2015); *In re Gardner Denver, Inc. S'holder Litig.*, C.A. No. 8505-VCN (September 3, 2014 settlement for $29 million ratified by 97% of stockholders); *In re Cablevision/Rainbow Media Tracking S'holder Litig.*, C.A. No. 19819-VCN ($8.25 million settlement approved on September 3, 2008); *In re LNR Prop. Corp. S'holders Litig.*, C.A. no. 674-VCL ($4.9 million settlement approved on July 16, 2008).

In its written opinion, the Delaware Court of Chancery interpreted a recent line of Delaware decisions as confirming that ratification renders the business judgment rule irrebuttable. In particular, the Delaware Court of Chancery narrowly focused on five recent Delaware decisions: (1) the Court of Chancery's October 14, 2014 *In re KKR Financial Holdings LLC Shareholder Litigation* ("*KKR*") decision,[7] (2) the Court Chancery's October 1, 2015 *In re Zale Corp. Stockholders Litigation* ("*Zale I*") decision,[8] (3) this Court's October 2, 2015 *Corwin v. KKR Financial Holdings LLC* ("*Corwin*") decision,[9] (4) the Court of Chancery's October 20, 2015 *In re TIBCO Software, Inc. Stockholders Litigation* ("*TIBCO*") decision,[10] and (5) this Court's October 29, 2015, *In re Zale Corp. Stockholders Litigation* ("*Zale II*") decision.[11]

Significantly, none of these opinions specifically held that ratification rendered the business judgment rule irrebuttable, and in Plaintiffs' view, they actually further reinforce the historical view that ratification is simply burden-shifting rather than burden-deletive. Moreover, the interpretation of these cases

---

7 101 A.3d 980 (Del. Ch. 2014).

8 2015 Del. Ch. LEXIS 249 (Del. Ch. Oct. 1, 2015) ("*Zale I*").

9 125 A.3d 304 (Del. 2015).

10 2015 Del. Ch. LEXIS 265 (Del. Ch. Oct. 20, 2015).

11 2015 Del. Ch. LEXIS 274 (Del. Ch. Oct. 29, 2015) ("*Zale II*").

offered by the Court of Chancery is at odds with several earlier opinions by this Court in *Stroud v. Grace,*[12] *Williams v. Geier,*[13] *In re Santa Fe Pacific Corp., S'holders Litig.,*[14] and *In re Wheelabrator Tech., Inc. S'holders Litig.,*[15] each of which remain good law, and is thus contrary to this Court's repeated policy to " disturb the settled understanding of the Supreme Court's decision[s]." *Zale I* at 35.

In *KKR*, Chancellor Bouchard determined, without input on the issue from plaintiffs, that after "a fully-informed stockholder vote of a transaction with a non-controlling stockholder … the business judgment rule applies and insulates the transaction from all attacks other than on the grounds of waste, even if a majority of the board approving the transaction was not disinterested or independent." *KKR* 101 A.3d at 1001. Below, the Court of Chancery noted that *KKR* "cited a number of cases" in support of this proposition. Opinion. at 23. Importantly however, in *KKR*, the defendants and the Court relied upon various cases which are inapplicable here. For instance, the Court cited *Harbor Finance Partners v. Huizenga*, 751 A.2d 879 (Del. Ch. 1999), for the proposition that stockholder ratification insulates a transaction from all attacks other than on the grounds of

[12] 606 A.2d 75 (Del. 1992)

.

[13] 671 A.2d 1368 (Del. 1996).

[14] 669 A.2d 59 (Del. 1995).

[15] 663 A.2d 1194 (Del. 1995).

waste. But *Harbor Finance* was a derivative action where the plaintiff stockholder alleged overpayment in an acquisition where several directors held stock in both companies. *Id*. at 881-86. Thus, waste was the germane issue there after the court found that the stockholder vote was not tainted, as alleged. Comparatively, here it has no application.[16]

Harbor Finance, in turn, also cited authorities for this point, all of which are easily distinguishable. *Id*. at 890 n.37 (citations omitted). In *Solomon vs. Armstrong*, 747 A.2d 1098 (Del. Ch. 1999), for example, the *Harbor Finance* court stated that the business judgment rule would apply upon an informed and uncoerced vote but that plaintiffs could rebut that presumption by alleging a breach of the fiduciary duty of loyalty. *See id*. at 1116. In *Marciano v. Nakash*, 535 A.2d 400 (Del. 1987), which involved essentially derivative concerns in a closely-held corporation, there was no allegation of breach of fiduciary duty. *Id*. at 401-407 (addressing voidability of a loan). Further, in *In re GM Class H Shareholders Litig*., 734 A.2d 611 (Del. Ch. 1999), the court discussed waste but erroneously relied on *Wheelabrator* (which expressly stated loyalty claims would survive an informed and uncoerced vote), and *In re Santa Fe* ("Permitting the vote of a majority of stockholders on a merger to remove from judicial scrutiny unilateral

---

[16] The decision in *KKR* also cited *Zutrau v. Jansing*, C.A. No. 7457-VCP, 2014 Del. Ch. LEXIS 156 (Del. Ch. July 31, 2014), which expressly stated that a plaintiff can rebut the business judgment presumption "by showing a breach of the duties of care or loyalty." *Id*. at 55.

Board action in a contest for corporate control would frustrate the purposes underlying *Revlon* and *Unocal*."), and *Williams v. Geier* ("We express no opinion on the question whether a 'duty of loyalty claim' may or may not be ratified.").

In *Zale I*, Vice Chancellor Parsons declined to follow Chancellor Bouchard's holding in *KKR*. Despite the presence of a fully informed, uncoerced vote in favor of the merger at issue by a majority of the target corporation's disinterested stockholders, Vice Chancellor Parsons applied the *Revlon* standard of review and stated that "[u]ntil the Supreme Court signals otherwise, I interpret *Gantler* as holding that an enhanced standard of review cannot be pared down to the business judgment rule as a result of a statutorily required vote." *Zale I* at 35. Vice Chancellor Parsons cited *In re Santa Fe* for the proposition that "[p]ermitting the vote of a majority of stockholders on a merger to remove from judicial scrutiny unilateral Board action in a contest for corporate control would frustrate the purposes underlying *Revlon*," 669 A.2d at 68, but also indicated that he "would follow the reasoning articulated in *KKR* if it permitted a review of the Merger under" the rebuttable, as opposed to an irrebuttable, business judgment rule presumption. Zale I at 34.

On October 2, 2015, the day after *Zale I* was published, the Delaware Supreme Court issued *Corwin*. In *Corwin*, the Supreme Court held that the business judgment standard of review applies when there has been a fully informed

and uncoerced stockholder vote. *Corwin* at 1-2, 10, 23. The Court did not discuss, nor did it hold, that the business judgment rule applied irrebuttably or that all claims would be extinguished and that waste would be a plaintiff's only remedy. In a footnote, the Court did quote part of the underlying decision in *KKR* (referencing waste), but simply referencing what another court said does not make new law, particularly when the parties below did not address (much less dispute) the issue. *Corwin* at n.19; *see also In re MFW S'holders Litig*., 67 A.3d 496, 521 (Del. Ch. 2013) ("If an issue is not presented to a court with the benefit of full argument and record, any statement on that issue by that court is not a holding with binding force."); *Gatz Props., LLC v. Auriga Capital Corp*., 59 A.3d 1206, 1218 (Del. 2012) (explaining that statements on issues "no[t] contested by the parties" are dictum) (internal quotation marks omitted).

After this Court issued *Corwin*, the *Zale I* defendants moved for reargument. In *Zale II*, Vice Chancellor Parsons granted the defendants' motion for reargument, holding that under *Corwin*, he should have applied the business judgment rule standard of review rather than the *Revlon* standard of review. *Zale II* at 2. Vice Chancellor Parsons interpreted *Corwin*, however, as diverging from *KKR* in that it allowed for application of the rebuttable business judgment rule presumption. *Id*. at 3, 6 ("I must ascertain whether … Plaintiffs may rebut the BJR presumption as to the Director Defendants' duty of care."). And indeed, Vice Chancellor Parsons'

reasoning in *Zale II* is consistent with the position advocated by Plaintiffs' here, namely that Delaware precedent simply does not support the proposition that an informed, uncoerced stockholder approval of a merger renders the business judgment rule irrebuttable:

> [A]lthough the Supreme Court generally affirmed *KKR,* the Court also suggested that "the gross negligence standard for director due care liability under *Van Gorkom*" is the proper standard for evaluating "post-closing money damages claims." While the Court in *Corwin* quotes *KKR* and a law review article for the proposition that a fully informed majority vote of disinterested stockholders insulates directors from all claims except waste in the explanatory parentheticals of two footnotes, the Court itself does not hold that anywhere in its opinion. And, in *In re TIBCO Software, Inc. Stockholders Litigation*, which was issued after *Corwin,* Chancellor Bouchard, the author of *KKR*, denied a motion to dismiss after finding it reasonably conceivable that the directors had breached their duty of care by acting in a grossly negligent manner, despite the absence of any indication that the merger was not approved by a majority of disinterested stockholders in a fully informed vote.

Zale II at *7-8.

Thus, although he eventually concluded in *Zale II* that the plaintiffs' duty of care claims should be dismissed, Vice Chancellor Parsons examined the substance of those claims to determine whether they sufficiently pled that the defendant-board was grossly negligent during the merger process, as opposed to evaluating simply whether the plaintiffs' had stated a waste claim. *Id*. at 45.

Most recently, in *Singh v. Attenborough,*[17] this Court affirmed *Zale I*, as modified by *Zale II*, and held that "[w]hen the business judgment rule standard of review is invoked because of a [fully informed, uncoerced] vote, dismissal is typically the result." *Singh* at 151-152. Similar to *KKR*, this opinion relied upon *Harbor Finance* and *Marciano v. Nakash*, which were both effectively derivative actions not analogous to the instant case.[18]

Moreover, *Singh* did not overrule this Court's earlier opinions in *Stroud*, *Williams*, *Santa Fe*, and *Wheelabrator*. For instance, in the oft-cited *Wheelabrator* decision, while discussing stockholder "ratification," this Court stated, "[e]ven if the ratified transaction does not involve a controlling stockholder, ***the result would not be to extinguish a duty of loyalty claim***." *See,* 663 A.2d at 1204 ("None of these authorities holds that shareholder ratification operates automatically to extinguish a duty of loyalty claim.") (emphasis added). And in both *Stroud* and *Williams*, this Court explicitly and repeatedly determined that: (1) the business judgment rule was rebuttable even following stockholder ratification; and (2) stockholder ratification would not extinguish all claims except waste:

---

[17] 137 A.3d 151 (Del. 2016).

[18] The direct-derivative distinction is important because a claim for waste is usually derivative in nature. *Cf. Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979) (explaining in a derivative action, "The essence of a claim of gift is lack of consideration. The essence of a claim of waste of corporate assets is the diversion of corporate assets for improper or unnecessary purposes").

- *Stroud* at 82: "Under Delaware law a fully informed shareholder vote in favor of a disputed transaction ratifies board action ***in the absence of fraud.***" (emphasis added);

- *Id*. at 83: "[T]he Court of Chancery properly analyzed the board's decision … under the presumption of the business judgment rule. Under such circumstances ***the burden is on the plaintiff to overcome the presumption of the rule***." (internal citation omitted) (emphasis added);

- *Id*. at 83: "***In the absence of fraud***, a fully informed shareholder vote in favor of even a 'voidable' transaction ratified board action and ***places the burden of proof on the challenger***." (emphasis added);

- *Id*. at 90: "[A] fully informed majority of the shareholders adopted the Amendments and effectively ratified the board's action. ***This shifts the burden of proof to the Strouds to prove that the transaction was unfair***." (emphasis added);

- *Id*. at 92: "In sum, after finding that the shareholder vote was fully informed, ***and in the absence of any fraud, waste, manipulative or other inequitable conduct***, that should have ended the matter on basic principles of ratification." (emphasis added);

- Id. at 93: "Under our analysis, ***the burden falls on the Strouds to prove*** that the Amendments were not properly adopted or that their adoption was ***the product of fraud, manipulation, or other inequitable conduct***. Plaintiffs have not sustained that burden." (emphasis added);

- *Geier* at 1380: Endorsing *Stroud* and noting "the stockholder vote, ***being both fully informed and devoid of any fraud, waste, manipulative or other inequitable conduct***, effectively implemented the board recommendations adopting amendments." (emphasis added);

- *Id*. at 1384 ("There is no basis for a finding here that the Amendment and Recapitalization involved ***waste, fraud, or manipulative or other inequitable conduct***. Likewise, there is no showing either that the Recapitalization lacked a rational business purpose or that its sole or

> primary purpose was entrenchment. ***The burden is on the plaintiff to prove these outer limits on corporate behavior***.") (emphasis added).

These earlier cases are further supported by a long linage of Delaware case law finding that the "cleansing" effect of stockholder ratification is to subject the challenged director action to business judgment review (thus, shifting the burden to the plaintiff), as opposed to extinguishing the claim altogether (i.e. obviating all judicial review of the challenged action). Indeed this was the explicit holding of *Gantler v. Stephens,*[19] which has not been overruled by *Singh* (nor any other Delaware opinion): "the 'cleansing' effect of such a ratifying shareholder vote is to subject the challenged director action to business judgment review, as opposed to "extinguishing" the claim altogether (i.e., obviating all judicial review of the challenged action)." *See also*, *In re Santa Fe* at 68 ("Permitting the vote of a majority of stockholders on a merger to remove from judicial scrutiny unilateral Board action in a contest for corporate control would frustrate the purposes underlying *Revlon* and *Unocal*.").

Consistent with the foregoing, stockholder approval, even where informed and uncoerced, cannot: (1) render the business judgment rule irrebuttable; or (2) summarily extinguish all claims and insulate the transaction from all attacks other than on the grounds of waste. Rather, historical opinions by the Delaware

---

[19] 965 A.2d 695 at 713 (Del. 2009).

Supreme Court – which have not been explicitly overruled by any subsequent decision – support a broader principle that the business judgment rule is rebuttable and more than just claims of waste may survive stockholder ratification.[20] Respectfully, the Delaware Chancery Court erred in not concluding the same.

[20] This position is further supported by public policy because, absent a rebuttable presumption of the business judgment rule and the ability to pursue claims other than waste post-close, stockholders will be left in the unfortunate position of choosing whether to seek redress pre-close to secure an informed vote in a change-of-control transaction, or vote their shares on an uninformed basis to merely preserve their rightful claims for damages post-close.

ARGUMENT

II. THE COURT OF CHANCERY ERRED IN FINDING THAT THE HOLDING IN *CORWIN* SHOULD BE APPLIED TO TENDER OFFERS.

A. Question Presented

Whether the holding in *Corwin* – to shift the standard of review as a result of a fully-informed, disinterested, uncoerced stockholder **vote** – should be applied to tender offers? *See* Appellant's Op. Br. App. at A336-58; A456.

B. Standard of Review

The Court reviews *de novo* a decision on a motion to dismiss. *See* Section I (B).

C. Merits of Argument

In the June 30, 2016 Court of Chancery Opinion,[21] the lower court held that there are no policy or structural reasons to preclude *Corwin*-style cleansing effect, formerly attributed only to a fully informed, disinterested, uncoerced shareholder vote, from applying to tender offers.[22] The lower court justified this position by citing to the protections provided by the revised Delaware General Corporation Law ("DGCL") § 251(h) (hereinafter referred to as "251(h)") along with analyzing *Corwin* and the cases it relies upon. Lastly, the lower court distinguished

---

[21] *In re Volcano Corp. Stockholder Litig.*, 2016 Del. Ch. LEXIS 99 (Del. Ch. June 30, 2016), hereinafter referred to as the "Opinion."

[22] *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), hereinafter referred to as "*Corwin*."

Zuckerberg from the Plaintiffs' case and held that the weight Plaintiffs placed upon Chancellor Bouchard's opinion is limited by its narrow relevant discussion pertaining to the question of whether tender offers trigger *Gantler*-style ratification.[23] The lower court, however, ignored certain issues that this Court should consider if it is to apply, for the first time, *Corwin*-style cleansing to tender offers. The Opinion also unduly relied upon *Corwin* and improperly undercut the relevance of *Zuckerberg* to the Plaintiffs' position.

Zuckerberg identified that there is a "lack of any explicit role in the (DGCL) for a target board of directors in responding to a tender offer."[24] Conversely, the lower court proposed that the role of the target company director is identical in either the case of a merger, involving a shareholder vote, or a tender offer. While it's true that in either case the target board has fiduciary duties, the universe that each scenario exists in is quite different. And in pressing that the risks to minority shareholders are mitigated by 251(h) and common law fiduciary duties, the Opinion ignored the distinct pressures that tender offers pose to target company directors. For instance, the Opinion does not consider the inherent reduction in target board bargaining power resulting from 251(h) lowering of the tender offer

---

[23] *Espinoza v. Zuckerberg,* 124 A.3d 47 (Del. Ch. 2015), hereinafter referred to as "*Zuckerberg*."

[24] *See Zuckerberg*, at 61 (quoting *In re CNX Gas Corp. S'holders Litig*., 4 A. 3d 397, 407 (Del. Ch. 2010)).

approval threshold from 90% to 50%.[25] In addition to reduced approval threshold, wherein the acquirer no longer needs to persuade 90% of shareholders to tender their shares, tender offers also require only a "limited amount of disclosure," further putting minority shareholder interests at risk.[26]

Furthermore, tender offers are completed at a significantly faster rate than mergers involving a shareholder vote – a condition that puts minority shareholders at additional disadvantages.[27] One such disadvantage is that the quicker process

---

[25] The lower court briefly mentioned the widespread use of "top-up options" prior to the current revisions to 251(h) "which gave acquirors—after completing a first-step tender offer—the ability to purchase up to 90% of the target corporation's stock and consummate a second-step, short-form merger without a stockholder vote." *See* Opinion at *34-35. Such top-up options benefitted acquirers when a tender offer failed to garner 90% of the shares outstanding, the minimum amount necessary to avoid a back-end merger, requiring a shareholder vote. In exercising a top-up option, the target company would simply issue enough shares to allow the acquirer to meet the 90% threshold. Top-up options, however, were limited by the target company's total pool of authorized shares. In other words, "a company with 100 shares, for example, would have to issue 400 new shares — four times its entire outstanding stock — to get a buyer from 50 percent to 90 percent." *See* "Top-Up Option, We Hardly Knew Ye," Law360 (April 26, 2013). Thus, as often happened, even a tender offer that received well over 50% of shares tendered may require a shareholder vote to complete the back-end merger. The current revision to the 251(h) removed that basic shareholder protection. As Justice Strine once noted, "whether or not one views tender offers as more coercive of shareholder choice than negotiated mergers…, it is difficult to argue that tender offers are materially freer and more reliable measures of stockholder sentiment." *In re Pure Res. S'Holders Litig.*, 808 A.2d 421, 442 (Del. Ch. 2002).

[26] *Matador Capital Mgmt. Corp. v. BRC Hldgs., Inc.*, 729 A.2d 280, 294-95 (Del. Ch. 1998) (citing *Zirn v. VLI Corp.*, 621 A.2d 773, 778 (Del. 1993)) ("Schedules 14D-9 are reactive documents requiring, by federal law, only a limited amount of disclosure.").

[27] *See Recent Amendments to Delaware Corporation and LLC Statutes: Adoption of Section 251(h) Facilitates Tender and Exchange Offers; Fiduciary Duties Obtain in LLC Absent Elimination; Public Benefit Corporations Authorized*, Sullivan & Cromwell LLP (September 17, 2013) ("Tender offer document preparation generally takes five to ten days and the offer is required to be open 20 business days; by contrast, a one step merger involves submission of a preliminary proxy statement to the SEC for comment, generally revisions to respond to SEC

substantially lowers the chance that a competitor company will enter with a topping bid.[28] In this case, the Board, in the interest of speed, agreed to a tender offer only after the Company stock price dipped due to the release of revised guidance figures. Instead of demanding a one-step merger, which would maximize the potential of the go-shop period, the Board acceded to the proposed tender offer structure and quickly moved to finalize the deal. *See* CAC ¶¶ 7-10, 83-90.

Relatedly, the shorter timeframe could also lessen the effectiveness of a shareholder activist group to gain traction in expressing concerns about a deal, thereby further decreasing the opportunity for subsequent price increases. Such shareholder collectives can serve as an antidote to the problem of the typically disaggregated and, thus, vulnerable minority shareholder.[29] Plaintiffs here allege that once activist investor, Engaged Capital, began clamoring for an ouster of

---

comments, the mailing of the proxy statement and the holding of the stockholder meeting, a process that generally takes no less than 10 weeks.").

[28] *See In re Compellent Techs., Inc.*, 2011 Del. Ch. LEXIS 190, *9 (Del. Ch. Dec. 9, 2011), wherein Vice Chancellor Laster remarked that the speed of a two-step merger helps "avoid[] any topping bids and achiev[e] certainty of closure" and continued that "(defendants) therefore proposed a two-step tender offer that would enable the transaction to close faster than a one-step merger." *See also*, *Forgo v. Health Grades, Inc.*, 5716-VCS (Del. Ch. Sept. 3, 2010) (Transcript), wherein then-Vice Chancellor Strine, recounting the mental state mind of a target board in the context of a tender offer: "([b]ut the board decided, as I understand it, "We wanted to get the 8.20 in the hands of the stockholders a couple weeks before" — "three or four weeks" or "six weeks before. That's why we" — "We knew that it would actually limit the effectiveness of the passive market check, but we assented to the demand to do the tender offer." Then-Vice Chancellor Strine continued "[b]ut the board, even between transactional alternatives, didn't really press for the one that lengthened the period of time."

[29] *See Pure Resources* at 443, (referencing the "vulnerability of disaggregated stockholders absent important help and protection from their directors").

underperforming directors, the Board hastened its negotiations with Philips to the detriment of its shareholders. *See* CAC ¶¶ 29, 88-89.

Each of these above concerns, when considered along with the presence of a board tainted by conflicts of interest such as those alleged here, present issues unique to tender offers which could open the door for a target board to abandon its duties to its shareholders.[30] For these reasons, a minority shareholder is significantly less protected in a tender offer than in a merger involving a shareholder vote. If this Court agrees with the lower court's holding, minority shareholders will lose their *Revlon* enhanced scrutiny at a time when they are most in need of increased judicial oversight.

Moreover, *Corwin*, as relied on to support the Opinion's holding that a tender offer should be equated to a shareholder vote and thus receive *Corwin*-style cleansing, should be given limited weight. *Corwin* never even hinted at extending its holding to tender offers, nor did any of the cases cited in an extensive footnote directly address the question of whether a similar standard of review shift should

---

[30] Courts in the past have considered the question of whether a target board, without a defined role in the DGCL in the context of tender offers, may be more passive in its negotiations with the acquirer. *See Pure Resources* at 443 (an "obvious concern is that subsidiary directors might use the absence of a statutory role for them in the tender offer process to be ***less than aggressive in protecting minority interests***." (emphasis added)). *See also*, *supra*, *Forgo v. Health Grades*.

occur in a tender offer.[31] Whether to apply this *Corwin*-style cleansing to tender offers is a distinct issue from the holding in *Corwin* because, as presented above, tender offers bring a collection of risks and considerations different from those present in a long-form merger. Moreover, each of the cases cited by the lower court in an attempt to equate tender offers to shareholder votes occurred prior to the current revisions to 251(h), which lowered the approval threshold for tender offers from 90% to 50%, thereby raising the issues Plaintiffs articulated above.

The lower court also held that Plaintiffs cannot look to *Zuckerberg* for support because its relevant discussion of tender offers concerned only whether tender offers give rise to *Gantler*-style ratification. In *Zuckerberg*, Chancellor Bouchard held that a tender offer cannot constitute ratification because "tendering a sufficient number of shares in a tender offer is a functional requirement for completing such a transaction….so stockholders are not ratifying the transaction, but effectuating it in the first instance."[32] However, whether or not the tender offer

---

[31] Moreover, the lone case cited to which involved a tender offer, *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656 (Del. Ch. 2013), specifically noted in *dicta* that defendants had not even raised the question of shifting the standard of review for the Court to decide. *See In re Morton's*, 74 A.3d at 663 n.34 ("The defendants…have not made this particular argument. Therefore, I address the pleading viability of the plaintiffs' Complaint, without giving any standard of review effect to the disinterested, fully informed stockholder approval."). *See* also, *In re Emerging Communs., Inc. S'Holders Litig.*, 2004 Del. Ch. LEXIS 70, *1 (Del. Ch. May 3, 2004) ("no Delaware case has held that burden-shifting in a fairness inquiry can be accomplished by a tender of shares rather than by an actual vote. Nor should a tender be treated as the equivalent of an informed vote.").

[32] *Zuckerberg* at 61.

here constituted *Gantler*-style ratification is not Plaintiffs' chief concern. Instead, the lesson Plaintiffs take from *Zuckerberg* is the emphasis it gives to the importance of adhering to DGCL formality, precision, and the avoidance of ambiguity (albeit in the context of ratification).[33] Moreover, ratification and *Corwin*-style cleansing share many similarities: both involve a fully-informed, disinterested, uncoerced stockholder action in furtherance of the sale of a company and a subsequent shifting of the standard of review.[34] Therefore, it stands to reason that – given the import of stockholder assent in a change of control proceeding – achieving the clarity called for in *Zuckerberg* would be a paramount concern facing the Court here.

---

[33] *See Zuckerberg* at 57-58: "[t]he provisions of the DGCL governing the ability of stockholders to take action, whether by voting at a meeting or by written consent, demonstrate the importance of ensuring precision, both in defining the exact nature of the corporate action to be authorized, and in verifying that the requirements for taking such an action are met, including that the transaction received enough votes to be effective. They also demonstrate the importance of providing transparency to stockholders, whose rights are affected by the actions of the majority (footnote omitted)." *See* also *Zuckerberg* at 64: "the policies underlying the DGCL provisions governing the taking of stockholder action further support the conclusion that stockholders…must observe statutory formalities when seeking to ratify director action. Doing so will avoid ambiguity and misinterpretation by ensuring that actions taken by stockholders are defined with precision and—where a single controlling stockholder is not present—that the requisite level of approval was obtained, and will promote transparency for the benefit of all stockholders. As the Delaware Supreme Court recently stated, "[c]ertainty and efficiency are critical values when determining how stockholder voting rights have been exercised." (citation omitted).

[34] *See Corwin* at 304, n. 19 ("many [cases] used the term "ratification" in a looser sense than the clarified and narrow description that was given to that term in the scholarly *Gantler* opinion. Although the nomenclature was less precise, the critical reasoning of these opinions was centered on giving standard of review-invoking effect to a fully informed vote of the disinterested stockholders.).

Furthermore, given the current strain of cases involving the question of the effect of a fully-informed, disinterested, uncoerced stockholder vote, if *Corwin*-style cleansing were meant to apply to tender offers, why doesn't *Corwin* say so? *Corwin* references throughout the opinion the effect of a fully-informed, disinterested, uncoerced shareholder **vote**, but never once mentions tender offers.[35] As stated by the lower court, "no Delaware case has held that burden-shifting in a fairness inquiry can be accomplished by a tender of shares rather than by an actual vote. Nor should a tender be treated as the equivalent of an informed vote."[36] Accordingly, Plaintiffs defer to the pragmatism propounded in *Corwin*: if it were the intention of the Court to "unsettle a long-standing body of case law, the decision would likely have said so."[37] As such, Plaintiffs find that the crux of *Zuckerberg* – the importance of adhering to formality and avoiding ambiguity – is helpful in considering the question of whether *Corwin*-style cleansing should be extended to tender offers.[38]

---

[35] Moreover, footnote 42 at page *42 of the Opinion regarding the Court's use of "approve" and "vote" interchangeably in *Corwin* should not be given much weight because it appears to misapprehend the contextual usage of each term. In the excerpt cited in the footnote the words are not being used interchangeably; rather, "vote" is the subject to which "approve," the predicate, applies.

[36] *Emerging Communs* at *1.

[37] *Corwin* at 311.

[38] Two recent Court of Chancery Opinions have applied *Corwin*, shifting the standard of review as a result of a fully-informed, disinterested, uncoerced stockholder vote. *Larkin v. Shah*, 2016 Del. Ch. LEXIS 134 (Del. Ch. Aug. 25, 2016) ("*Larkin*") and *City of Miami Gen.*

Lastly, Plaintiffs ask this Court to fully consider the risks to shareholder interests in deciding whether to apply *Corwin*-style cleansing to tenders offers.[39] In this rapidly developing area of the law, Plaintiffs have articulated several concerns impacting minority shareholders which are unique to tender offers. As this Court has explained, "our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs."[40] Accordingly, in deciding this matter of first impression, Plaintiffs respectfully submit that this Court should err on the side of protecting the interests of minority shareholders and reject the application of *Corwin*-style cleansing to the tender offers, thus evaluating the merits of Plaintiffs' case through the lens of *Revlon* enhanced scrutiny.

Employees' & Sanitation Employees' Ret. Trust v. Comstock, 2016 Del. Ch. LEXIS 133 (Del. Ch. Aug. 24, 2016) ("*City of Miami*"). However, neither of these cases has any effect on Plaintiffs' analysis. While *City of Miami* does not involve a tender offer, and thus does not present significant overlap, *Larkin* defers to Vice Chancellor Montgomery-Reeves's earlier decision. In so doing, *Larkin* does not alter the Court's analysis here. *See Larkin* at *68 ("This precise argument was considered and rejected by Vice Chancellor Montgomery-Reeves in her recent *Volcano* opinion….(I) apply it now to dispense with Plaintiffs' last attempt to avoid business judgment review.").

[39] The Court's recent decision in *Singh v. Attenborough* referenced "real-world relevance" and reality-based assumptions concerning stockholder behavior. *Singh v. Attenborough*, 137 A.3d 151, 152 (Del. May 6, 2016); *see also Orman v. Cullman*, 794 A.2d 5, 20 n.36 (Del. Ch. 2002) (explaining that the Delaware Supreme Court has rendered certain decisions in light of "practical implications"); *Cypress Assocs., LLC v. Sunnyside Cogeneration Assocs. Project*, 2007 Del. Ch. LEXIS 10 at *35 (Del. Ch. Jan. 17, 2007) ("In coming to that conclusion, I am confessedly influenced by the practical implications . . . .").

[40] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 957 (Del. 1985).

ARGUMENT

III. THE COURT OF CHANCERY ERRED IN DISMISSING PLAINTIFFS' AIDING AND ABETTING CLAIM AGAINST GOLDMAN

A. Question Presented

Did Plaintiffs adequately allege an underlying breach of fiduciary duty and knowing participation, for purposes of its aiding and abetting claim? *See* Appellant's Op. Br. App. at A212-24; A463-64.

B. Standard of Review

The Court reviews *de novo* a decision on a motion to dismiss. *See* Section I (B).

C. Merits of Argument

The Court of Chancery improperly dismissed Plaintiffs' aiding and abetting claims on two grounds. First, for the reasons stated above the Court of Chancery improperly dismissed Plaintiffs' underlying breach of fiduciary duty claim because stockholders did not ratify the Transaction. As a result, this Court should overturn the Court of Chancery's ruling that Plaintiffs did not state an underlying claim for breach of the fiduciary duty of care or loyalty. Second, the Court of Chancery erred in dismissing Plaintiffs' aiding and abetting claim by improperly imposing on Plaintiffs a "high burden" at the pleading stage to plead the "knowing participation" element of an aiding and abetting claim.

In *RBC Capital Markets, LLC v. Jervis*, this Court recently held that to satisfy the knowing participation element of an aiding and abetting claim the "aider and abettor must act with scienter." 129 A.3d 816, 862 (Del. 2015). Thus, the "aider and abetter must act 'knowingly, intentionally, or with reckless indifference . . .' that is, with an 'illicit state of mind.' To establish *scienter*, the plaintiff must demonstrate that the aider and abetter had 'actual or constructive knowledge that their conduct was legally improper.' Accordingly, the question of whether a defendant acted with *scienter* is a **factual determination**." *Id.* (emphasis added).[41] It is well established that factual determinations cannot be resolved on a motion to dismiss.[42] Moreover, Delaware law is clear that scienter allegations for purposes of an aiding and abetting claim do not need to be plead with particularity.[43] This is because Rule 9(b) does not apply its specificity requirement to averments of

---

[41] *In re Dole Food Co.*, 2015 Del. Ch. LEXIS 223, at *139 (Del. Ch. Aug. 27, 2015) ("A court's analysis of whether a secondary actor 'knowingly' provided 'substantial assistance' is necessarily fact intensive. Illustrative factors include the following: The nature of the tortious act that the secondary actor participated in or encouraged, including its severity, the clarity of the violation, the extent of the consequences, and the secondary actor's knowledge of these aspects. The amount, kind, and duration of assistance given, including how directly involved the secondary actor was in the primary actor's conduct. The nature of the relationship between the secondary and primary actors; and. The secondary actor's state of mind.").

[42] *See, e.g., Malpiede v.* Townson, 780 A.2d 1075, 1082-83 (Del. 2001) ("Because a motion to dismiss under Chancery Rule 12(b)(6) must be decided without the benefit of a factual record, the Court of Chancery may not resolve material factual disputes; instead the court is required to assume as true the well-pleaded allegations in the complaint.").

[43] *See, e.g., Khanna v. McMinn*, 2006 Del. Ch. LEXIS 86, at *113-14 (Del. Ch. May 9, 2006) ("a claim of knowing participation need not be pled with particularity"); *In re Shoe-Town, Inc. S'holders Litig.*, 1990 Del. Ch. LEXIS 14, at *23 (Del. Ch. Feb. 12, 1990) (same).

knowledge and expressly states that "[m]alice, intent, knowledge and other condition of mind of a person may be averred generally."[44] Accordingly, the Court of Chancery should have evaluated Plaintiffs' knowing participation allegations under "Delaware's liberal notice pleading standard." *RBC Capital Markets, LLC v. Education Loan Trust IV*, 87 A.3d 632, 639 (Del. 2014). Indeed, this Court has explained that "[i]n some circumstances, 'the terms of the negotiated transaction themselves may be so suspect as to permit, if proven, an inference of knowledge of an intended breach of trust.'" *Gatz v. Ponsoldt,* 925 A.2d 1265, 1276 (Del. 2007). Thus, the Court of Chancery should have correctly applied a low burden on Plaintiffs at the pleading stage.

Even though Plaintiffs did not yet have full blown discovery, the Court of Chancery held that Plaintiffs faced a "high burden" to plead "that a financial advisor acted with the requisite scienter for an aiding and abetting claim." Opinion at 60. It then went on to hold that Plaintiffs had not stated a claim because "nothing in this **record** comes close to approaching the sort of financial advisor misconduct at issue in *RBC Capital Markets." Id*. (emphasis added). This quote exemplifies the precise reason why the Court of Chancery's ruling flies in the face of longstanding Delaware law. There is no "record." Plaintiffs were forced to

---

[44] Court of Chancery Rule 9(b); *Haney v. Blackhawk Network Holdings, Inc.*, 2016 Del. Ch. LEXIS 40 at *20 n.49 (Del. Ch. Feb. 26, 2016) ("[T]he Court of Chancery Rule 9(b) heightened pleading requirement in fraud cases 'takes into account whether 'the facts lie more in the knowledge of the opposing party than of the pleading party.'").

plead their complaint based on publicly available documents and very limited discovery. For this reason, Delaware does not impose a "high" burden at the pleading stage. Rather the Court of Chancery was required to apply the "minimal standards governing notice pleading." *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 895 (Del. 2002). Because the Court of Chancery did not apply the appropriate plaintiff-friendly motion to dismiss standard the Court's knowing participation ruling must be overturned for this reason alone.

The Court of Chancery likewise misreads *Singh*. In *Singh*, this Court did not change the pleading standard for aiding and abetting claims. Rather, it simply held that "the late disclosure of a business pitch that was then considered by the board, determined to be immaterial, and fully disclosed in the proxy" did not provide a sufficient basis at the pleading stage from which the Court could "infer scienter." *Id.* at 152.[45]

In fact, if the Court of Chancery's ruling is the law of Delaware then it would "grant immunity to an advisor" when "its own clients were duped by it" which this Court explained would be "unprincipled and would allow corporate advisors a level of unaccountability afforded to no other professionals in our

---

[45] *See In re TIBCO Software Inc. S'holders Litig.*, 2015 Del. Ch. LEXIS 265, at *80-82 (Del. Ch. Oct. 20, 2015) (Denying motion to dismiss financial advisor as an aider and abettor where it could be inferred from the financial advisor's "involvement in the October 11 meeting, during which the Board allegedly failed to press Goldman for basic information concerning the circumstances of the share count error . . . that Goldman, a highly sophisticated investment bank, knew the Board was not fulfilling its duty of care to gather all material information reasonably available about the share count error.").

society." *Id.* By way of example, the Court of Chancery's reliance on *RBC* as an example of the "high" pleading burden for alleging knowing participation is curious because no motion to dismiss was ever filed in that case. In fact, the latest complaint filed prior to discovery did not even assert aiding and abetting claims. Rather, as the plaintiff in *RBC* explained in its August 17, 2012 motion to amend (which was filed over a year and four months after the case was initiated), during discovery plaintiff identified additional facts which led its proposed amended complaint to include "Moelis and Company, LLC . . . and RBC Capital markets, LLC . . . as defendants and asserts against them a claim for aiding and abetting breaches of fiduciary duty by the individual defendants." Accordingly, if the Court of Chancery's pleading burden in *Volcano* were employed in *RBC*, that case would have been dismissed at the pleading stage, despite the existence of serious misconduct. Such a result is completely unfair to stockholders of Delaware corporations. In fact, if the Court of Chancery's standard is the law a plaintiff would be forced to uncover facts at the pleading stage ***hidden*** from the board. As a practical matter such facts would rarely, if ever, be able to be discovered at the pleading stage because facts hidden from a board obviously are not readily available, especially to the public.

Directly contrary to the Court of Chancery's ruling in *Volcano* and in recognition of the fact that plaintiffs do not have a full evidentiary record before

them at the pleading stage, this Court has held that knowing participation can be inferred.[46] Although not binding on this Court, several Court of Chancery decisions that appropriately applied the law demonstrate how low the burden is to plead knowing participation.[47] For example, in *Wells Fargo & Co. v. First Interstate Bancorp,* the Court of Chancery explained that:

---

[46] *Gatz v. Ponsoldt*, 925 A.2d 1265, 1276 (Del. 2007) ("In summary, the complaint pleads facts from which it can be inferred that at all relevant times Ponsoldt and Statesman controlled Regency, and that the Levy defendants aided and abetted a breach or breaches of duty by the Ponsoldt defendants and Statesman in conceiving and carrying out the Recapitalization.").

[47] *See e.g., In re Answers Corp. S'holders Litig.*, 2012 Del. Ch. LEXIS 76, at *37 (Del. Ch. Apr. 11, 2012) ("Here, the Plaintiffs are able to present a claim for aiding and abetting because they allege that (1) the Buyout Group received confidential information showing that the market price for Answers' stock would likely be rising, and (2) the Buyout Group used that information to push the Board to end the sales process quickly to assure the Merger Agreement would be executed before Answers' shareholders learned of the Company's favorable prospects."); *Dubroff v. Wren Holdings, LLC*, 2011 Del. Ch. LEXIS 164, at *37-38 (Del. Ch. Oct. 28, 2011) ("Throughout a series of meetings leading up to the execution of the [Recapitalization] in or around August 2002, the Defendants worked together to prepare agendas for the meetings, to establish the framework, terms, and timing of the [Recapitalization], and to keep [the Fuchs] Plaintiffs and other minority shareholders from obtaining material information about the [Recapitalization]. Therefore, the 'allegations of the Complaint with respect to aiding and abetting the conduct . . . , however marginal, do, nonetheless, survive under the standards of Court of Chancery Rule 12(b)(6).'"); *Crescent/Mach I Partners, LP v. Turner*, 846 A.2d 963, 990 (Del. Ch. 2000) ("Did plaintiffs' Complaint adequately plead specific facts that Cadbury Schweppes and Carlyle knowingly participated? Here, in my view, they did. The claim is adequately pleaded. The question of whether it is fair to impute knowledge that Turner's 'side-deals' were unfair to other stockholders because of their value in relation to the total merger consideration will be resolved by the trier of fact. Accordingly, defendants' motion to dismiss this claim is denied."); *Brown v. Perrette*, 1999 Del. Ch. LEXIS 92, at *43-44 (Del. Ch. May 14, 1999) ("If the transaction was tainted at the time that Worth agreed to the lock up and if the Mr. Coffee board knew it, then it is within the realm of reasonable possibility that the Worth board, sharing Perrette as chairman, knew it too. Thus, in this instance, Brown may prevail on the elements of conduct and knowledge. That possible outcome precludes dismissal of the claim."); *In re Shoe-Town, Inc. S'holders Litig.*, 1990 Del. Ch. LEXIS 14, at *24-25 (Del. Ch. Feb. 12, 1990) ("Shearson's knowing participation in the directors' breaches of fiduciary duty can be reasonably inferred from the complaint's allegations. In general these allegations lead me to believe that Shearson was closely involved with the management group, the special committee and the Shoe-Town board."); *See also O'Malley v. Boris*, 2002 Del. Ch. LEXIS 33, at *36-37

> [t]he question on this point comes down to pleading "knowing" participation, and on the question of pleading knowledge, however, Rules 12(b)(6) and Rule 9(b) are very sympathetic to plaintiffs. We have here more than simply signing a merger agreement, which alone I could not sustain as stating a claim for knowing participation; the additional element--the alleged stock market activity--is however sufficient in my opinion under the liberal pleading rules generally followed to conclude that a valid claim has been stated against First Bank.

1996 Del. Ch. LEXIS 3, at *34 (Del. Ch. Jan. 18, 1996). Due to the fact intensive nature of the knowing participation element of aiding and abetting some Court of Chancery decisions have even permitted aiding and abetting claims to proceed simply because plaintiff stated an underlying claim for breach of fiduciary duty.

Here, Plaintiffs' allegations easily satisfy the minimal notice pleading standard. Not only have Plaintiffs stated an underlying claim, but the CAC contains allegations similar to those this Court found sufficient in *Gatz* and the Court of Chancery found sufficient in *TIBCO*. Namely, the CAC alleges that Goldman was motivated to support the Transaction in order to receive a windfall under the Call Spread Transaction and to receive its contingent investment banking fee. CAC ¶¶ 13-16, 21, 56-63, 67, 81, 91, 110. Goldman then hid from the Board

(Del. Ch. Mar. 18, 2002) ("I cannot say with certainty that the other defendants did not aid and abet Everen's breaches of its fiduciary duties. I note that it seems unlikely that the other defendants, particularly those not affiliated with Everen, were involved in Everen's breach of the duty of disclosure. . . . In any case, although the plaintiffs' burden going forward with these claims will likely be heavy, they must nevertheless be afforded the opportunity to bear that burden.").

that the termination value of the warrants decreased exponentially over time and that the bank had a direct financial interest in seeing the consummation of an all-cash acquisition of Volcano over no transaction and was economically motivated to ensure a change in control transaction occurred as soon as possible. CAC ¶¶ 18, 76, 80. The CAC goes even further and alleges that as a result of its conflicts of interest, Goldman issued a fairness opinion based on a flawed discounted cash flow analysis. CAC ¶¶ 20-21. Thus, like the aider and abetter in *Gatz*, it is "reasonably inferable" that Goldman knew the transaction undervalued Volcano, which standing alone is sufficient at the pleading stage. 925 A.2d at 1276. In addition, as in *TIBCO*, Goldman knew the Board had failed to fully inform itself about Goldman's conflict of interest, which is yet another basis for this Court to infer knowing participation at the pleading stage. 2015 Del. Ch. LEXIS 265, at *80-81. Thus, this Court should overturn the Court of Chancery's ruling that Plaintiffs have not adequately alleged a claim for aiding and abetting.

CONCLUSION

For the reasons set forth above, the Court should reverse the trial court's dismissal of the Verified Consolidated Amended Class Action Complaint and remand this matter to the trial court with instructions to reinstate the claims.

Dated: September 28, 2016

FARUQI & FARUQI, LLP

By: */s/ Derrick B. Farrell*
Derrick B. Farrell (No. 5747)
James R. Banko (No. 4518)
20 Montchanin Road, Suite 145
Wilmington, DE 19807
Tel.: (302) 482-3182
Email: dfarrell@faruqilaw.com
Email: jbanko@faruqilaw.com

Counsel for Appellants/ Plaintiffs Below

OF COUNSEL:

FARUQI & FARUQI, LLP
Nadeem Faruqi
685 Third Avenue, 26th Floor
New York, NY 10017
Tel.: (212) 983-9330

MONTEVERDE & ASSOCIATES PC
Juan E. Monteverde
The Empire State Building
350 Fifth Avenue, 59th Floor
New York, NY 10118
Tel: (212) 971-1341
Fax: (212) 601-2610

Counsel for Appellants/Plaintiffs Below

LEVI & KORSINSKY LLP
Shannon L. Hopkins
733 Summer Street, Suite 304
Stamford, CT 06903
(203) 992-4523

MILBERG LLP
Kent A. Bronson
Christopher Schuyler
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

Counsel for Appellants/Plaintiffs Below

RIGRODSKY & LONG, P.A.
Seth D. Rigrodsky (#3147)
Brian D. Long (#4347)
Gina M. Serra (#5387)
Jeremy J. Riley (#5791)
2 Righter Parkway, Suite 120
Wilmington, DE 19803
(302) 295-5310
Email: BDL@rl-legal.com

Counsel for Appellants/ Plaintiffs Below

EXHIBIT A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE VOLCANO CORPORATION STOCKHOLDER LITIGATION	)))	CONSOLIDATED C.A. NO. 10485-VCMR

OPINION

Date Submitted: March 15, 2016
Date Decided: June 30, 2016

Derrick B. Farrell and James R. Banko, FARUQI & FARUQI LLP, Wilmington, Delaware; Seth D. Rigrodsky, Brian D. Long, Gina M. Serra, and Jeremy J. Riley, RIGRODSKY & LONG, P.A., Wilmington, Delaware; Kent A. Bronson, Roy Shimon, and Christopher Schuyler, MILBERG LLP, New York, New York; Julia J. Sun, LEVI & KORSINSKY LLP, New York, New York; Juan E. Monteverde, FARUQI & FARUQI LLP, New York, New York; *Attorneys for Plaintiffs Melvin Lax, Melissa Gordon, and Mohammed Munawar*.

William M. Lafferty, D. McKinley Measley, and Richard Li, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; Koji Fukumura and Peter Adams, COOLEY LLP, San Diego, California; *Attorneys for Defendants Kieran T. Gallahue, Lesley H. Howe, R. Scott Huennekens, Siddhartha Kadia, Alexis V. Lukianov, Ronald A. Matricaria, Leslie V. Norwalk, and Daniel J. Wolterman*.

Kevin G. Abrams, J. Peter Shindel, Jr., and Daniel R. Ciarrocki, ABRAMS & BAYLISS LLP, Wilmington, Delaware; Mitchell A. Lowenthal and Meredith Kotler, CLEARY GOTTLIEB STEEN & HAMILTON LLP, New York, New York; *Attorneys for Defendant Goldman, Sachs & Co.*

Raymond J. DiCamillo, J. Scott Pritchard, and Rachel E. Horn, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Michael H. Steinberg and Edward E. Johnson, SULLIVAN & CROMWELL LLP, Los Angeles, California; *Attorneys for Nominal Defendant Volcano Corporation.*

MONTGOMERY-REEVES, Vice Chancellor.

The plaintiffs in this action are former public stockholders of a company that was acquired for $18 per share in an all-cash merger. Just five months prior, the target company had declined an offer of $24 per share from the same acquiror. After the companies announced the merger, the plaintiffs brought this action against the target company's board of directors and its financial advisor. The gist of the plaintiffs' complaint is that the board breached its fiduciary duties in approving the merger and the financial advisor, motivated by its own conflicts of interest, aided and abetted those breaches. Both the board and the financial advisor moved to dismiss the complaint under Court of Chancery Rule 12(b)(6).

The defendants argue, among other things, that stockholders representing a majority of the target company's outstanding shares expressed their fully informed, uncoerced, disinterested approval of the merger. As such, according to the defendants, the business judgment rule standard of review irrebuttably applies to the plaintiffs' allegations and insulates the merger from a challenge on any ground other than waste, which the plaintiffs fail to allege. As further explained in this Opinion, I agree with the defendants and, therefore, grant their motions to dismiss under Rule 12(b)(6).

I. BACKGROUND[1]

A. Parties

Plaintiffs Melvin Lax, Melissa Gordon, and Mohammed Munawar ("Plaintiffs") were common stockholders of Volcano Corporation ("Volcano" or the "Company") at all relevant times.

Defendants R. Scott Huennekens, Kieran T. Gallahue, Lesley H. Howe, Siddhartha Kadia, Alexis V. Lukianov, Ronald A. Matricaria, Leslie V. Norwalk, and Daniel J. Wolterman were members of Volcano's board of directors (the "Board") at the time of the complained-of merger. Huennekens also served as the Company's President and Chief Executive Officer ("CEO").

Defendant Goldman, Sachs & Co. ("Goldman") is a New York-based investment banking firm. Goldman served as Volcano's financial advisor in

---

[1] The facts are drawn from the well-pled allegations of the plaintiffs' Verified Consolidated Amended Class Action Complaint (the "Complaint"). Further, on a motion to dismiss under Rule 12(b)(6), the Court "draw[s] all reasonable inferences in the plaintiff's favor." *Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 360 (Del. 2013). Those allegations and inferences, as well as the facts drawn from the documents incorporated into the Complaint by reference, are assumed true for purposes of the defendants' motions to dismiss. *In re Morton's Rest. Gp., Inc. S'holders Litig.*, 74 A.3d 656, 659 n.3 (Del. Ch. 2013) ("To be incorporated by reference, the complaint must make a clear, definite and substantial reference to the documents." (quoting *DeLuca v. AccessIT Gp., Inc.*, 659 F. Supp. 2d 54, 60 (S.D.N.Y. 2010))). Notably, the documents incorporated by reference include Volcano's Schedule 14D-9 Solicitation/Recommendation Statement filed with the U.S. Securities and Exchange Commission (the "SEC") on December 30, 2014 (the "Recommendation Statement"). *See* Trans. Aff. of Richard Li ("Li Aff."), Ex. A ("Recommendation Statement").

connection with the merger. The Board and Goldman, together, are referred to as "Defendants."

Nominal Defendant Volcano was a San Diego-based Delaware corporation and "the global leader in intravascular imaging for coronary and peripheral applications[] and physiology."[2] Volcano's shares were listed on the NASDAQ under the symbol "VOLC."[3]

Non-party Philips Holding USA Inc. is a Delaware corporation and a wholly-owned subsidiary of Koninklijke Philips, N.V. (together with Philips Holding USA Inc., "Philips").[4] Philips is an Amsterdam-based Dutch technology company that focuses on healthcare, consumer lifestyle, and lighting products. Philips's stock is listed on the New York Stock Exchange under the symbol PHG.

---

[2] Compl. ¶ 34.

[3] I note that, in one paragraph of the Complaint, Plaintiffs also allege that Volcano's stock was traded on the New York Stock Exchange rather than on the NASDAQ. Compl. ¶ 34. Because the press release announcing the merger, which is excerpted in the Complaint, only describes Volcano as being listed on NASDAQ, I assume that the reference to the New York Stock Exchange is an error. *See* Compl. ¶ 99.

[4] The Complaint originally named Philips and Clearwater Merger Sub, Inc. ("Merger Sub"), a wholly-owned subsidiary of Philips's that was created to effectuate the merger, as defendants. Philips and Merger Sub moved to dismiss the Complaint, and, in response to that motion, Plaintiffs voluntarily dismissed them from this action pursuant to Court of Chancery Rules 41(a)(1)(i) and 23. *See* Notice and Order of Voluntary Dismissal, Docket Item No. 49.

B. Facts

1. Volcano issues convertible notes and enters into hedge transactions with Goldman

In 2012, Volcano sought to raise funds through a convertible note offering. To that end, the Company entered into an underwriting agreement (the "Underwriting Agreement") with Goldman and J.P. Morgan Securities LLC ("J.P. Morgan" and, together with Goldman, the "Underwriters") on December 4, 2012. Pursuant to the Underwriting Agreement, Volcano agreed to sell $400 million of 1.75% Convertible Senior Notes due in 2017 (the "Convertible Notes") and, at the option of the Underwriters, up to an additional $60 million of those Convertible Notes. The Underwriters exercised that option on December 5, 2012 and issued the full $460 million of Convertible Notes (the "Convertible Note Issuance"). The Convertible Note Issuance closed on December 10, 2012.

The $460 million of Convertible Notes was convertible into approximately 14.01 million shares of Volcano common stock at $32.83 per share under the circumstances described in the Convertible Notes' indenture. Because the Board was concerned about the potentially dilutive effect on Volcano's common stockholders if the Convertible Notes' holders sought to exercise their conversion rights, the Company also entered into a series of hedging transactions with the

Underwriters[5] (the "Call Spread Transactions"). To mitigate that equity dilution risk, the Call Spread Transactions were intended to (1) increase the effective conversion premium and (2) reduce the effective dilution of the Convertible Note Issuance.

The Call Spread Transactions addressed these dual objectives through the two separate transactions between Volcano and the Underwriters that comprised the Call Spread Transactions. In the first transaction, Volcano paid $78,085,344 to purchase from the Underwriters call options (the "Options") for 14.01 million shares of Volcano common stock at an initial strike price of $32.83 (the "Option Transaction"). Because the Option Transaction gave Volcano the ability to repurchase the same number of shares that the Convertible Notes could be converted into at a strike price equal to the conversion price of the Convertible Notes, Volcano could ensure that the total number of its shares outstanding would remain static.

In the second transaction, the Underwriters paid $46,683,206 to purchase from Volcano warrants (the "Warrants") for 14.01 million shares of Volcano common stock at an initial strike price of $37.59 (the "Warrant Transaction"). The

---

[5] Volcano actually entered into the Call Spread Transactions with an affiliate of J.P. Morgan's—JP Morgan Chase Bank, National Association, London Branch. That distinction, however, is immaterial for purposes of this decision.

Warrant Transaction partially offset the cost to Volcano of the Option Transaction and effectively raised the conversion price of the Convertible Notes from $32.83 to $37.59. As a result of the Call Spread Transactions, therefore, the Convertible Notes likely would not have had any dilutive effect until Volcano's common stock reached a price of $37.59 per share.

Goldman sold 65% of the Options under the Option Transaction and purchased 65% of the Warrants under the Warrant Transaction. J.P. Morgan sold and purchased the other 35%. The Options were set to expire on December 1, 2017, the same day that the Convertible Notes matured. The Warrants were set to expire over a 120-business day period beginning in March 2018. Alternatively, both the Options and the Warrants would terminate immediately upon the consummation of certain change in control transactions that required redemption of the Convertible Notes, including a cash-out merger. In the event of such a transaction, the Underwriters would pay Volcano the Options' fair value, and Volcano would pay the Underwriters the Warrants' fair value.

2. The Board explores merger options

In January 2014, as part of the Company's general business development outreach, Huennekens had meetings with two companies ("Company A" and "Company B") regarding their respective interests in a strategic transaction with Volcano. Afterwards, Volcano and the companies entered into confidentiality

agreements, and Volcano's senior management gave presentations to each of the companies.

In April 2014, as discussions with Company A and Company B progressed, Volcano retained Goldman to help perform a market check to gauge other companies' interest in a transaction. The Board and Goldman considered a total of thirteen potential buyers for Volcano, separated into six "tier 1 buyers"—including Philips—and seven "tier two buyers." The Board decided to narrow the scope of their market check by excluding (1) counterparties that would face significant regulatory approval issues and (2) financial buyers, based on Goldman's advice that Volcano's negative cash flow likely would not support a leveraged acquisition.

Ultimately, Volcano contacted five strategic buyers. In addition to Company A and Company B, the Board directed Goldman to contact two companies ("Company C" and "Company D") with whom Volcano's senior management had prior confidential discussions and authorized Huennekens to contact another company ("Company E"). In April 2014, Huennekens led a management presentation to Company E regarding a strategic transaction with Volcano. For various reasons, each of Companies A through E declined to pursue a strategic transaction with Volcano, and the Board ended its market check process.

3. Volcano and Philips enter into merger discussions, which end after Philips proposes an insufficient offer price

In June 2014, Philips, with which Volcano had a commercial relationship since 2007, expressed to Goldman that it was interested in exploring a strategic acquisition of the Company. Goldman relayed that information to Huennekens, who then consulted with Matricaria, the Chairman of the Board.

On June 23, 2014, Volcano and Philips entered into a confidentiality agreement, and merger discussions between the companies began in earnest. During the remainder of June and July 2014, Goldman and Lazard Ltd. ("Lazard")—Philips's financial advisor—held a number of meetings and telephone calls regarding a potential transaction and Volcano's financial performance. Members of Philips's and Volcano's management also communicated with one another and attended those financial advisor meetings during that time period.

On July 25, 2014, when Volcano's common stock closed at a price of $16.18 per share, Philips delivered a non-binding indication of interest to acquire Volcano for $24 per share, subject to an eight week period of exclusivity during which it would perform due diligence. On July 29, 2014, Goldman discussed with Volcano's senior management the potential effects that a change in control transaction would have on the Call Spread Transactions and proposed that Volcano consider the matter further. On July 30, 2014, the Board, members of Volcano's senior management, Goldman, and Volcano's legal counsel met to discuss

Philips's $24 per share indication of interest. At that meeting, the Board decided to allow Philips to proceed with due diligence, but without any commitment as to the $24 per share price or eight week exclusivity period. After Goldman's representatives left the meeting, the Board authorized the retention of Goldman as its financial advisor for the potential merger with Philips. As the Board's financial advisor, Goldman stood to earn a $17 million advisor fee, contingent on the consummation of Volcano's sale. The Board also authorized the creation of a transaction committee comprised of independent Board members to oversee the merger process and appointed Gallahue, Howe, Lukianov, and Matricaria to that committee (the "Transaction Committee"). Matricaria served as the Chairman of the Transaction Committee.

After the Board's July 30, 2014 meeting, Goldman conveyed to Lazard the Board's position that Philips could proceed with due diligence, but that the price would have to be increased above $24 per share for Volcano to consider exclusivity. On August 2, 2014, the Transaction Committee held a meeting with Volcano's senior management, Goldman, and the Board's legal advisor. Goldman informed the attendees that Philips had declined to increase its price above $24 per share and that it simply would proceed through due diligence without exclusivity. To accommodate Philips's due diligence requests, Volcano gave Philips access to a data room that contained the relevant documents. The Transaction Committee then

directed Goldman to reach out to Company A and Company D to gauge their respective interests in renewing talks regarding a potential transaction. Once again, the Transaction Committee declined to contact direct competitors with significant regulatory approval risks. Goldman followed up with both Company A and Company D, but neither was interested in renewing discussions regarding a potential acquisition of Volcano. At no point did either Volcano or Goldman receive any unsolicited expressions of interest from other potential suitors.

On August 7, 2014, while Philips was proceeding with due diligence, Volcano issued its earnings press release for the second quarter and shared with Philips that it was lowering its revenue guidance for the remainder of 2014 and reducing its projected long term growth rate. On August 8, 2014, Volcano's common stock closed at $12.56 per share. Philips continued its due diligence process, and the parties and their advisors began drafting a merger agreement. In connection with their ongoing discussions, Goldman told Lazard that the Board was meeting on September 12, 2014 and stated that if Volcano and Philips had not reached a firm agreement by that point, then the Board would halt negotiations and focus on running Volcano as a standalone company.

On September 12, 2014, Philips indicated to Huennekens that it had not completed its due diligence, but if Philips had to make a firm offer then it would be in the range of $17 to $18 per share. Huennekens relayed that message to the

Board, and Matricaria, on behalf of the Transaction Committee, instructed Goldman to inform Philips that the proposed price was insufficient. Volcano then closed the data room and directed its advisors to stop working on the transaction.

4. Volcano and Philips rekindle their merger discussions, but cannot agree on a price

On September 15, 2014, Huennekens met with Bert van Meurs, Senior Vice President of Philips Healthcare, at van Meurs's request. At their meeting, van Meurs indicated that Philips still was interested in a transaction with Volcano and wanted to complete due diligence. Huennekens reiterated that Philips's proposed price range was inadequate, but indicated that he and Matricaria would be willing to meet with members of Philips's senior management.

On September 29, 2014, Engaged Capital, an investment management firm and large stockholder of Volcano's, released a public letter to the Board calling for it to replace both Huennekens and Volcano's Chief Financial Officer and pressing for a sale of the Company. On October 1, 2014, Philips requested an October 10 meeting with Huennekens and Matricaria, to which they agreed. Before that meeting, Volcano agreed to reopen the data room to allow Philips to continue with its due diligence. Ten days later, on October 20, 2014, Philips presented another non-binding indication of interest to acquire Volcano for $17.25 per share and requested a response by October 22.

After receiving Philips's updated offer, the Transaction Committee met with its advisors. Goldman updated the Transaction Committee on its discussions with Lazard, and Matricaria described his discussions with Volcano's stockholders. The Transaction Committee reviewed the financial aspects of the revised indication of interest and discussed strategic alternatives. Ultimately, the Transaction Committee decided to recommend that the Board schedule another meeting to review strategic alternatives before responding to the offer. Subsequently, Goldman called Lazard and indicated that Volcano would not enter into any transaction at a price of less than $18 per share. On October 23, 2014, Philips withdrew its $17.25 per share indication of interest. Volcano once again closed access to the data room, and Goldman told Lazard that the Board had decided to cease merger discussions and instead focus on running Volcano as a standalone company.

5. Volcano and Philips enter into merger discussions for a third and final time

On October 28, 2014, Philips sent Volcano another non-binding indication of interest at $16 per share. The Transaction Committee met to discuss that offer, and Goldman, at Matricaria's direction, reiterated to Lazard that Volcano would not consider any offer below $18 per share. On November 6, 2014, Volcano announced better-than-expected financial results for the third quarter of 2014 and the Company's turnaround plan. On November 17, Philips's CEO, Frans van

Houten, called Matricaria to express Philips's continuing interest in acquiring Volcano at $16 per share. Matricaria responded that he expected Volcano's stock price to increase from its current price of $11.59 per share to $13 or $14 per share in the near future. As such, the Board would not consider a price less than $18 per share.

On November 21, 2014, van Houten again called Matricaria and expressed Philips's willingness to increase its offer to $18 per share, subject to the negotiation of a merger agreement and completion of its due diligence. Matricaria said that he would take the $18 per share price to the Board for approval if the parties could complete the merger agreement and announce the transaction by the week of December 1, 2014. Due diligence and negotiations over the merger agreement continued beyond December 1.

Philips also desired to retain Huennekens for a short period post-merger to assist with the transition. As such, on December 11, 2014, Philips sent a draft consulting agreement to be signed by Huennekens before the companies' boards signed the merger agreement. Huennekens, with the assistance of separate counsel, negotiated that consulting agreement (the "Consulting Agreement") with Philips from December 11 until December 15. Under the Consulting Agreement, Philips would pay Huennekens up to $500,000 for five months of consulting services for the surviving company in the merger between Philips and Volcano.

Further, upon consummation of such a merger, the Consulting Agreement provided that Huennekens would be terminated without cause from Volcano and, therefore, receive benefits totaling $7.8 million, including $3.1 million in cash.

On December 12, 2014, the Transaction Committee held a meeting to discuss the progress of the transaction. At that meeting, Goldman made a presentation regarding its financial interest in the Call Spread Transactions. Goldman then left the meeting, and the Transaction Committee consulted with its legal counsel and senior management about Goldman's interest in the Call Spread Transactions. Volcano's legal counsel and Goldman's legal counsel had discussed the Call Spread Transactions in both August and September 2014. Ultimately, the Transaction Committee decided that Goldman was not conflicted from serving as Volcano's financial advisor for the proposed transaction with Philips as a result of the Call Spread Transactions.

6. Volcano and Philips enter into a two-step merger under Section 251(h) of the Delaware General Corporation Law

On December 15, 2014, Philips informed Volcano that its board of directors had approved a cash-out merger with the Company at a price of $18 per share (the "Merger"). The Board met the next day along with its legal counsel, Goldman, and Volcano's senior management to consider the Merger. During that meeting, the Board's legal counsel reviewed the key provisions of the merger agreement (the "Merger Agreement"), including each of the agreed-to deal protection devices;

Huennekens reviewed the terms of the Consulting Agreement with the rest of the Board; and Goldman reviewed its financial analysis of the offer price and rendered an oral fairness opinion—which Goldman subsequently confirmed in a written opinion—in favor of Philips's $18 per share all-cash offer.

After Goldman left the meeting, the Board further discussed the Merger and unanimously approved the Merger and the Merger Agreement. The Merger Agreement provided that the Merger was to be consummated as a two-step transaction under Section 251(h) ("Section 251(h)") of the Delaware General Corporation Law (the "DGCL").[6] As such, the Board also resolved to recommend that Volcano's stockholders tender their shares into the first-step tender offer (the "Tender Offer") of that two-step transaction. Volcano and Philips then signed the Merger Agreement, and, on December 17, 2014, they issued a joint press release announcing the Merger.

Philips, through Merger Sub, commenced the Tender Offer to purchase all of Volcano's outstanding common stock for $18 per share in cash on December 30, 2014. That same day, Volcano filed the Recommendation Statement with the SEC recommending that Volcano's stockholders accept the Tender Offer. On February

---

[6] 8 *Del. C.* § 251(h) (allowing an acquiring company to consummate a merger without a target company stockholder vote after acquiring a majority of the target's shares pursuant to a tender or exchange offer for all of the target company's outstanding shares, subject to certain conditions).

17, 2015, the Tender Offer closed, with 89.1% of Volcano's outstanding shares having tendered. In addition, notices of guaranteed delivery were provided with respect to 5.7% of Volcano's outstanding shares. On February 17, 2015, following the Tender Offer's expiration, Volcano and Philips consummated the Merger without a stockholder vote under Section 251(h). Merger Sub merged into Volcano, and Volcano survived as a wholly-owned subsidiary of Philips's. As required by Section 251(h), non-tendering Volcano stockholders who were cashed out in the second-step merger received the same consideration—$18 per share in cash—as the stockholders that had accepted the Tender Offer. The Merger was valued at $1.2 billion, and Philips financed it with a combination of cash-on-hand and a debt issuance.

As a result of the Merger, the Convertible Notes and, correspondingly, the Call Spread Transactions were terminated. Because neither the Options nor the Warrants had expired as of the date of the Merger, the Underwriters had to pay Volcano the Options' fair value, and Volcano had to pay the Underwriters the Warrants' fair value. The net result of the termination of the Call Spread Transactions, as between Volcano and Goldman, was a $24.6 million payment from Volcano to Goldman. Further, the Board and Volcano's senior management, collectively, received approximately $8.9 million in Volcano stock options and restricted stock units that were accelerated as a result of the Merger. Finally,

Huennekens received the $7.8 million in severance benefits that he had negotiated as part of the Consulting Agreement.

C. Procedural History

On December 22, 2014 and January 9, 2015, before the Merger closed, each of the three Plaintiffs filed their individual class action complaints seeking to enjoin the Merger. On January 12, 2015, Plaintiffs each filed separate motions for expedited proceedings. On January 16, the Court consolidated the three actions into this single action. A hearing on Plaintiffs' motion for a preliminary injunction was scheduled for January 27, but, after Volcano made supplemental disclosures on January 22,[7] Plaintiffs withdrew that motion and the hearing was cancelled.

On March 2, 2015, after the Merger closed, Plaintiffs filed the amended Complaint. Defendants filed motions to dismiss the Complaint under Rule 12(b)(6) on May 8, 2015 (the "Motions"). By August 2015, the parties had completed their initial round of briefing on the Motions. In December 2015, however, the parties stipulated to a supplemental round of briefing on the Motions to account for relevant Delaware Supreme Court decisions that had been published in the interim. The parties completed that supplemental round of briefing in

---

[7] *See* Li Aff., Ex. K ("Recommendation Statement Supplement").

February 2016, and I held an oral argument on the Motions on March 15, 2016. This Opinion contains my rulings on Defendants' Motions.

D. Parties' Contentions

Plaintiffs' Complaint alleges three causes of action against Defendants. Count I claims that the Board breached its duties of care and loyalty in connection with the Merger. Count II—which Plaintiffs withdrew when they dismissed Philips and Merger Sub from this action[8]—claims that Philips and Merger Sub aided and abetted the Board's alleged fiduciary duty breaches. Count III claims that Goldman aided and abetted the Board's alleged fiduciary duty breaches.

As to Counts I and III, Plaintiffs contend that the Board (1) acted in an uninformed manner in approving the Merger and (2) was motivated by certain benefits—including Huennekens's Consulting Agreement and the other Board members' accelerated vesting of stock options and restricted stock units—that its members stood to receive as a result of the Merger. Further, Plaintiffs posit that the Board relied on "flawed advice" rendered by its "highly conflicted financial advisor," Goldman.[9] Goldman's alleged conflicts resulted from the fact that it, along with J.P. Morgan, served as Volcano's counterparty in the Call Spread Transactions and profited at Volcano's expense when the Options and Warrants

---

[8] *See supra* note 4.

[9] Pl.'s Answering Br. 1.

were terminated upon consummation of the Merger. Plaintiffs also allege that Goldman hid its conflicts from the Board and Volcano's stockholders.

Defendants deny that the Board was uninformed as to the Merger and maintain that any benefits the Board stood to receive from the Merger were routine and aligned the Board's interests with Volcano's stockholders' interests. Defendants also dispute whether Goldman's position in the Call Spread Transactions rendered Goldman conflicted and contend that, to the extent any such conflicts existed, the Board and Volcano's stockholders were fully informed regarding the impact of the Merger on the Options and Warrants. Finally, Defendants argue that the Complaint should be dismissed because Volcano's stockholders approved the Merger by overwhelmingly tendering into the Tender Offer.

II. ANALYSIS

A. Legal Standard for a Motion to Dismiss Under Rule 12(b)(6)

This Court may grant a motion to dismiss under Rule 12(b)(6) for failure to state a claim if a complaint does not allege facts that, if proven, would entitle the plaintiff to relief. "[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[10] When considering such a

---

[10] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011) (footnote omitted).

motion, the Court must "accept all well-pleaded factual allegations in the Complaint as true . . . , draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[11] This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[12] The Court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[13] Failure to plead an element of a claim precludes entitlement to relief, and, therefore, is grounds to dismiss that claim.[14]

B. The Business Judgment Rule Irrebuttably Applies to the Merger

As an initial matter, I must determine what standard of review to apply in evaluating Defendants' alleged fiduciary duty breaches. Because Volcano's stockholders received cash for their shares, the *Revlon* standard of review presumptively applies.[15] Defendants contend, however, that because Volcano's fully informed, uncoerced, disinterested stockholders approved the Merger by

---

11 *Id.* at 536 (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

12 *Id.* at 537 & n.13.

13 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

14 *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000).

15 *See TW Servs., Inc. v. SWT Acq. Corp.*, 1989 WL 20290, at *7 (Del. Ch. 1989).

tendering a majority of the Company's outstanding shares into the Tender Offer, the business judgment rule standard of review irrebuttably applies.[16] According to Defendants, the stockholders' approval of the Merger had that cleansing effect despite the fact that (1) the Merger otherwise would have been subject to the *Revlon* standard of review and (2) the Tender Offer was statutorily required to consummate the Merger. Defendants, therefore, assert that Plaintiffs can challenge the Merger solely on the basis that it constituted waste.

Plaintiffs disagree. Plaintiffs counter that because a tender offer does not have the same cleansing effect as a stockholder vote, the Court should not shift its standard of review from *Revlon* to the business judgment rule. Alternatively, Plaintiffs maintain that even if a tender offer has the same cleansing effect as a

---

[16] In this context, if the business judgment rule is "irrebuttable," then a plaintiff only can challenge a transaction on the basis of waste—*i.e.*, that it "cannot be 'attributed to any rational business purpose.'" *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) ("The business judgment rule posits a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be 'attributed to any rational business purpose.'" (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971))). If, by contrast, the business judgment rule is "rebuttable," then a board's violation of either the duty of care or duty of loyalty—even based on facts that were disclosed to stockholders before they approved a transaction—would render the business judgment rule inapplicable. *See id.* ("To rebut the [business judgment] rule, a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decision, breached [the duties of] loyalty or due care. If a shareholder plaintiff fails to meet this evidentiary burden, the business judgment rule attaches to protect corporate officers and directors and the decisions they make, and our courts will not second-guess these business judgments." (citations omitted)).

stockholder vote and the business judgment rule presumption applies, that presumption is rebuttable. Finally, Plaintiffs argue that regardless of the theoretical cleansing effect of Volcano's stockholders' approval of the Merger by tendering their shares, no such cleansing effect should be accorded here because those stockholders were not, in fact, fully informed.

I resolve the parties' disputes in the following manner. First, recent Supreme Court decisions confirm that the approval of a merger by a majority of a corporation's outstanding shares pursuant to a statutorily required vote of the corporation's fully informed, uncoerced, disinterested stockholders renders the business judgment rule irrebuttable. Second, I conclude that stockholder approval of a merger under Section 251(h) by accepting a tender offer has the same cleansing effect as a vote in favor of that merger. Third, I find that the business judgment rule irrebuttably applies to the Merger because Volcano's disinterested, uncoerced, fully informed stockholders tendered a majority of the Company's outstanding shares into the Tender Offer.

1. The fully informed, uncoerced, disinterested approval of a merger by a majority of a corporation's outstanding shares pursuant to a statutorily required vote renders the business judgment rule irrebuttable

The parties' disagreement regarding the applicable standard of review stems from a recent line of decisions issued by this Court and the Supreme Court, including (1) this Court's October 14, 2014 *In re KKR Financial Holdings LLC*

Shareholder Litigation ("*KKR*") decision,[17] (2) this Court's October 1, 2015 *In re Zale Corp. Stockholders Litigation* ("*Zale I*") decision,[18] (3) the Supreme Court's October 2, 2015 *Corwin v. KKR Financial Holdings LLC* ("*Corwin*") decision,[19] (4) this Court's October 20, 2015 *In re TIBCO Software, Inc. Stockholders Litigation* decision,[20] and (5) this Court's October 29, 2015 *In re Zale Corp. Stockholders Litigation* ("*Zale II*") decision.[21]

In *KKR*, Chancellor Bouchard cited a number of cases that support the proposition that after "a fully-informed stockholder vote of a transaction with a non-controlling stockholder . . . the business judgment rule applies and insulates the transaction from all attacks other than on the grounds of waste, even if a majority of the board approving the transaction was not disinterested or independent."[22] The Chancellor then noted that "[i]n light of the Delaware Supreme Court's 2009 decision in *Gantler v. Stephens*, there has been some debate

---

17 101 A.3d 980 (Del. Ch. 2014).

18 2015 WL 5853693 (Del. Ch. Oct. 1, 2015) ("*Zale I*").

19 125 A.3d 304 (Del. 2015).

20 2015 WL 6155894 (Del. Ch. Oct. 20, 2015).

21 2015 WL 6551418 (Del. Ch. Oct. 29, 2015) ("*Zale II*").

22 101 A.3d at 1001 (citing *Harbor Fin. P'rs v. Huizenga*, 751 A.2d 879, 890 (Del. Ch. 1999); *In re Wheelabrator Techs., Inc. S'holders Litig.*, 663 A.2d 1194, 1200 (Del. Ch. 1995)).

as to whether [that rule applies] when the stockholder vote is statutorily required as opposed to a purely voluntary stockholder vote."[23] Chancellor Bouchard disagreed with that interpretation of *Gantler*, however, and found that it simply clarified that the term "ratification" applies only to non-statutorily required stockholder votes rather than "alter[ing] the legal effect of a stockholder vote when it is statutorily required."[24] He then granted the defendants' motion to dismiss.

In *Zale I*, Vice Chancellor Parsons declined to follow Chancellor Bouchard's holding in *KKR*. Despite the presence of a fully informed, uncoerced vote in favor of the merger at issue by a majority of the target corporation's disinterested stockholders, Vice Chancellor Parsons applied the *Revlon* standard of review and stated that "[u]ntil the Supreme Court signals otherwise, I interpret *Gantler* as holding that an enhanced standard of review cannot be pared down to the business judgment rule as a result of" a statutorily required vote.[25] Vice Chancellor Parsons cited *In re Santa Fe Pacific Corp. Shareholder Litigation* for the proposition that "[p]ermitting the vote of a majority of stockholders on a merger to remove from judicial scrutiny unilateral Board action in a contest for corporate control would

---

[23] *Id.*

[24] *Id.*

[25] 2015 WL 5853693, at *10 (citing *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 68 (Del. 1995)).

frustrate the purposes underlying *Revlon*," but also indicated that he "would follow the reasoning articulated in *KKR* if it permitted a review of the Merger under" the rebuttable, as opposed to an irrebuttable, business judgment rule presumption.[26]

On October 2, 2015, the day after *Zale I* was published, the Supreme Court issued *Corwin*.[27] In *Corwin*, the Supreme Court affirmed *KKR* and held, in relevant part, that "when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies," even in a statutorily required vote on a transaction otherwise subject to the *Revlon* standard of review.[28]

After the Supreme Court issued *Corwin*, the *Zale I* defendants moved for reargument. In *Zale II*, Vice Chancellor Parsons granted the defendants' motion for reargument, finding that, under *Corwin*, he should have applied the business judgment rule standard of review rather than the *Revlon* standard of review.[29] Vice Chancellor Parsons interpreted *Corwin*, however, as diverging from *KKR* in that it allowed for application of the rebuttable business judgment rule presumption, on the following bases:

---

[26] *Id.*

[27] 125 A.3d 304.

[28] *Id.* at 308-09.

[29] 2015 WL 6551418, at *2.

> [A]lthough the Supreme Court generally affirmed *KKR,* the Court also suggested that "the gross negligence standard for director due care liability under *Van Gorkom*" is the proper standard for evaluating "post-closing money damages claims." While the Court in *Corwin* quotes *KKR* and a law review article for the proposition that a fully informed majority vote of disinterested stockholders insulates directors from all claims except waste in the explanatory parentheticals of two footnotes, the Court itself does not hold that anywhere in its opinion. And, in *In re TIBCO Software, Inc. Stockholders Litigation*, which was issued after *Corwin,* Chancellor Bouchard, the author of *KKR*, denied a motion to dismiss after finding it reasonably conceivable that the directors had breached their duty of care by acting in a grossly negligent manner, despite the absence of any indication that the merger was not approved by a majority of disinterested stockholders in a fully informed vote.[30]

Thus, although he eventually concluded in *Zale II* that the plaintiffs' duty of care claims should be dismissed, Vice Chancellor Parsons examined the substance of those claims to determine whether they sufficiently pled that the defendant-board was grossly negligent during the merger process, as opposed to evaluating simply whether the plaintiffs' had stated a waste claim.[31]

---

[30] *Id.* at *3 (citing *In re TIBCO Software Inc. S'holders Litig.*, 2015 WL 6155894 (Del. Ch. Oct. 20, 2015); *Corwin*, 125 A.3d at 308-09 nn.13 & 19) (quoting *Corwin*, 125 A.3d at 312).

[31] *Id.* at *4-5.

On May 6, 2016, after the parties here already had completed their briefing, the Supreme Court issued *Singh v. Attenborough*.[32] In *Attenborough*, the Supreme Court affirmed *Zale I*, as modified by *Zale II*, but clarified the standard of review that the Court of Chancery should have applied to the plaintiffs' duty of care claims in *Zale II*:

> [T]he reargument opinion's decision to consider post-closing whether the plaintiffs stated a claim for the breach of the duty of care after invoking the business judgment rule was erroneous. Absent a stockholder vote and absent an exculpatory charter provision, the damages liability standard for an independent director or other disinterested fiduciary for breach of the duty of care is gross negligence, even if the transaction was a change-of-control transaction. Therefore, employing this same standard after an informed, uncoerced vote of the disinterested stockholders would give no standard-of-review-shifting effect to the vote. When the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result. That is because 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.[33]

In *Attenborough*, therefore, the Supreme Court held that upon a fully informed vote by a majority of a company's disinterested, uncoerced stockholders, the business judgment rule irrebuttably applies to a court's review of the approved

---

[32] 2016 WL 2765312 (Del. May 6, 2016) (ORDER).

[33] *Id.* at *1.

transaction, even when that vote is statutorily required and the transaction otherwise would be subject to the *Revlon* standard of review. Thus, such an approved transaction only can be challenged on the basis that it constituted waste. I now examine whether that same reasoning applies to a merger approved through stockholder acceptance of a tender offer.

2. Stockholder acceptance of a tender offer pursuant to a Section 251(h) merger has the same cleansing effect as a stockholder vote in favor of a transaction

The Delaware General Assembly adopted Section 251(h) in 2013 and amended it in 2014 and 2016.[34] Section 251(h) "permit[s] a merger agreement to include a provision eliminating the requirement of a stockholder vote to approve certain mergers"[35] if, among other requirements, the acquiror consummates a tender or exchange offer that results in the acquiror owning "at least such percentage of the shares of stock of [the target] corporation . . . that, absent

---

[34] *See* 79 Del. Laws ch. 72, § 6 (2013), *as amended by* 79 Del. Laws ch. 327, § 7 (2014), 80 Del. Laws ch. 265, § 7 (2016). Because the parties entered into the Merger Agreement in December of 2014, the General Assembly had not yet adopted the 2016 amendments to Section 251(h). Those 2016 amendments, therefore, are inapplicable to the Merger. *See* 80 Del. Laws ch. 265, § 17 (2016) ("Section 7 shall be effective only with respect to merger agreements entered into on or after August 1, 2016."). For the sake contemporaneousness, however, I quote the most updated version of Section 251(h) in this Opinion. The differences between the 2014 version and the 2016 version of Section 251(h) are immaterial to this Opinion.

[35] Del. H.B. 127 syn., 147th Gen. Assem. (2013).

[Section 251(h)], would be required to adopt the agreement of merger by [the DGCL] and by the certificate of incorporation of [the target] corporation."[36] Similar two-step mergers were consummated with some regularity before Section 251(h)'s enactment, largely through "top-up options,"[37] which gave acquirors—after completing a first-step tender offer—the ability to purchase up to 90% of the target corporation's stock and consummate a second-step, short-form merger without a stockholder vote.[38] Through Section 251(h), therefore, "the Delaware General Assembly essentially . . . approved [the two-step merger] transactional structure . . . [and] facilitate[d] the ability of the acquirer in a two-step acquisition . . . to use a short-form back-end merger without resorting to a top-up option."[39]

Two concerns have been raised to support the argument that stockholder acceptance of a tender offer and a stockholder vote differ in a manner that should preclude the cleansing effect articulated by the Supreme Court in *Corwin* from applying to tender offers. Section 251(h) addresses each of those concerns. The

---

[36] 8 *Del. C.* § 251(h)(3).

[37] *See, e.g.*, *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 504-08 & n.56 (Del. Ch. 2010) (describing top-up options and noting that the vast majority of two-step mergers included those options).

[38] 8 *Del. C.* § 253 (permitting a parent company that owns 90% of a subsidiary corporation's outstanding stock to merge with that subsidiary without the approval of the subsidiary's minority stockholders).

[39] *In re Comverge, Inc.*, 2014 WL 6686570, at *14 (Del. Ch. Nov. 25, 2014).

first concern suggests that tender offers may differ from statutorily required stockholder votes based on "the lack of any explicit role in the [DGCL] for a target board of directors responding to a tender offer."[40] A target board's role in negotiating a two-step merger subject to a first-step tender offer under Section 251(h), however, is substantially similar to its role in a merger subject to a stockholder vote under Section 251(c) of the DGCL.[41] Section 251(h) requires that the merging corporations enter into a merger agreement that expressly "[p]ermits or requires such merger be effected under [Section 251(h)]."[42] Because Section 251(h) requires a merger agreement, Sections 251(a) and (b) of the DGCL subject that agreement to the same obligations as a merger or consolidation consummated under any other section of the DGCL.[43] For example, the target corporation's board must "adopt a resolution approving" that agreement "and declaring its advisability," and the merger agreement must provide "[t]he terms and conditions of the merger."[44] The first-step tender offer also must be made "on the terms

---

[40] *See, e.g.*, *Espinoza v. Zuckerberg*, 124 A.3d 47 (Del. Ch. 2015) (quoting *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 407 (Del. Ch. 2010)).

[41] *Compare* 8 *Del. C.* § 251(h), *with id.* § 251(c).

[42] *Id.* § 251(h)(1)(a).

[43] *Id.* § 251(a)-(b).

[44] *Id.* § 251(b), (b)(1).

provided" in the negotiated merger agreement.[45] And, in recommending that its stockholders tender their shares in connection with a Section 251(h) merger, the target corporation's board has the same disclosure obligations as it would in any other communication with those stockholders.[46] Taken together, therefore, Sections 251(a), (b), and (h) of the DGCL mandate that a target corporation's board negotiate, agree to, and declare the advisability of the terms of both the first-step tender offer and the second-step merger in a Section 251(h) merger, just as a target corporation's board must negotiate, agree to, and declare the advisability of a merger involving a stockholder vote under Section 251(c). The target board also

---

[45] *Id.* § 251(h)(2).

[46] *See Matador Capital Mgmt. Corp. v. BRC Hldgs., Inc.*, 729 A.2d 280, 294-95 (Del. Ch. 1998) (citing *Zirn v. VLI Corp.*, 621 A.2d 773, 778 (Del. 1993)) ("At argument, counsel for [one of the defendants] suggested that I should construe the [target corporation's] directors' state law based fiduciary duty of disclosure more narrowly in the case of a Schedule 14D–9 [recommending that stockholders accept a first-step tender offer] than would be true in the case of a proxy statement [recommending that stockholders vote in favor of a one-step merger], because Schedules 14D–9 are reactive documents requiring, by federal law, only a limited amount of disclosure. The point is well taken, of course, that it is federal law, not state law, that prescribes the items of disclosure required by Schedule 14D–9 and that mandates the dissemination of that disclosure statement to the stockholders of the subject company. The actual recommendation itself, however, is the product of state law, in this case the requirement under Section 251 of the DGCL that the [target corporation's] directors approve and recommend the proposed Agreement. State law, not federal law, establishes the norms within which such approval and recommendation is given. Thus, it is hardly surprising that state fiduciary duty law has a role to play in regulating what directors actually say when recommending approval of a proposal or transaction to their stockholders, whether that recommendation is communicated in a Schedule 14D–9 or some other document.").

is subject to the same common law fiduciary duties, regardless of the subsection under which the merger is consummated.

The second concern suggests that a first-step tender offer in a two-step merger arguably is more coercive than a stockholder vote in a one-step merger.[47] Section 251(h), however, alleviates the coercion that stockholders might otherwise be subject to in a tender offer because (1) the first-step tender offer must be for all of the target company's outstanding stock,[48] (2) the second-step merger must "be effected as soon as practicable following the consummation of the" first-step tender offer,[49] (3) the consideration paid in the second-step merger must be of "the same amount and kind" as that paid in the first-step tender offer,[50] and (4) appraisal rights are available in all Section 251(h) mergers,[51] subject to the conditions and

---

47 *See, e.g.*, *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 441-42 (Del. Ch. 2002) ("Indeed, many commentators would argue that the tender offer form is more coercive than a merger vote. In a merger vote, stockholders can vote no and still receive the transactional consideration if the merger prevails. In a tender offer, however, a non-tendering shareholder individually faces an uncertain fate." (footnote omitted)).

48 8 *Del. C.* § 251(h)(2).

49 *Id.* § 251(h)(1)(b).

50 *Id.* § 251(h)(5).

51 *Id.* § 262(b)(3) ("In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under § 251(h) . . . is not owned by the parent immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.").

requirements of Section 262 of the DGCL. Thus, Section 251(h) appears to eliminate the policy bases on which a first-step tender offer in a two-step merger may be distinguished from a statutorily required stockholder vote, at least as it relates to the cleansing effect rendered therefrom.[52]

Further, the policy considerations underlying the holding in *Corwin* do not provide any basis for distinguishing between a stockholder vote and a tender offer. In *Corwin*, the Supreme Court justified its decision to afford a transaction approved pursuant to a statutorily required stockholder vote the benefit of the irrebuttable business judgment rule presumption as follows:

> [W]hen a transaction is not subject to the entire fairness standard, the long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves. . . . The reason for that is tied to the core rationale of the business judgment rule, which is that judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed,

---

[52] The parallels between Sections 251(c) and 251(h) of the DGCL are evidenced further by Section 251(h)(3), which requires that the first-step tender offer result in the acquiror holding as many shares of the target corporation's outstanding stock as would otherwise be required to vote in favor of a merger under Section 251(c). *See id.* § 251(h)(3). In other words, the same number of the target corporation's outstanding shares must approve a merger, regardless of whether it is consummated under Section 251(c) or Section 251(h).

> disinterested stockholders). In circumstances, therefore, where the stockholders have had the voluntary choice to accept or reject a transaction, the business judgment rule standard of review is the presumptively correct one and best facilitates wealth creation through the corporate form.[53]

Those justifications are equally applicable to a tender offer in a Section 251(h) merger. When a merger is consummated under Section 251(h), the first-step tender offer essentially replicates a statutorily required stockholder vote in favor of a merger in that both require approval—albeit pursuant to different corporate mechanisms—by stockholders representing at least a majority of a corporation's outstanding shares to effectuate the merger. A stockholder is no less exercising her "free and informed chance to decide on the economic merits of a transaction" simply by virtue of accepting a tender offer rather than casting a vote. And, judges are just as "poorly positioned to evaluate the wisdom of" stockholder-approved mergers under Section 251(h) as they are in the context of corporate transactions with statutorily required stockholder votes.

Additionally, although much of *Corwin* refers to a stockholder vote in favor of a transaction, the Supreme Court, at times, uses the terms "approve" and "vote" interchangeably.[54] The Supreme Court also included *In re Morton's Restaurant*

---

[53] *Corwin*, 125 A.3d at 312-13.

[54] *See, e.g.*, *id* at 306, 310 ("[W]e find that the Chancellor was correct in finding that the voluntary judgment of the disinterested stockholders to approve the merger

Group, Inc. Shareholders Litigation—a case involving a two-step merger with a first-step tender offer—among the cases it cited "for the proposition that the approval of the disinterested stockholders in a fully informed, uncoerced vote that was required to consummate a transaction has the effect of invoking the business judgment rule."[55] In addition, numerous other Delaware decisions have equated stockholder acceptance of a tender offer with a stockholder vote in favor of a merger,[56] especially where "the first-step tender offer in a two-step transaction is

---

invoked the business judgment rule standard of review and that the plaintiffs' complaint should be dismissed. . . . [T]he plaintiffs did not contest the defendants' argument below that if the merger was not subject to the entire fairness standard, the business judgment standard of review was invoked because the merger was approved by a disinterested stockholder majority. The Chancellor agreed with that argument below, and adhered to precedent supporting the proposition that when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies.").

[55] *See id.* at 310 n.19 (citing *Morton's*, 74 A.3d at 663 n.34).

[56] *See, e.g.*, *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 842 (Del. 1987) ("An informed minority stockholder . . . who either votes in favor of a merger or accepts the benefits of the transaction [by accepting a tender offer] cannot thereafter attack the fairness of the merger price."); *Morton's*, 74 A.3d at 663 n.34 (characterizing a tender offer as "approv[al] by 92% of the stockholders in a non-coerced, fully informed manner" and noting that "when disinterested approval of a sale to an arm's-length buyer is given by a majority of stockholders who have had the chance to consider whether or not to approve a transaction for themselves, there is a long and sensible tradition of giving deference to the stockholders' voluntary decision, invoking the business judgment rule standard of review, and limiting any challenges to the difficult argument that the transaction constituted waste"); *In re Orchid Cellmark Inc. S'holder Litig.*, 2011 WL 1938253, at *13 (Del. Ch. May 12, 2011) ("Tendering, of course, is a substitute for shareholder vote, and courts should be careful about depriving shareholders of their opportunity to make such a

conditioned on tenders of a majority of the outstanding shares."[57] As such, I am convinced that the Supreme Court did not intend that its holding in *Corwin* be limited to stockholder votes only.

Finally, Plaintiffs cite to Chancellor Bouchard's *Espinoza v. Zuckerberg* decision for the proposition that tender offers should not be given the same cleansing effect under *Corwin* as a statutorily required vote.[58] The plaintiff-stockholder's derivative action in *Zuckerberg* challenged a board's approval of a compensation plan for a majority of the board's directors.[59] The parties agreed that the board's approval of that compensation was a self-dealing transaction that

---

choice, especially with such a significant premium to prior market price."); *Matador Capital*, 729 A.2d at 294 (noting that, in a two-step transaction where the first-step was a cash tender offer for a majority of the corporation's outstanding common stock, the corporation's " stockholders are being asked to decide to approve the sale of their corporation as a part of their decision whether or not to tender shares in the first-step tender offer"); *see also* J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1459 n.57 (2014) ("This article discusses the concept of stockholder approval in terms of a stockholder vote, which is the typical context in which the issue arises. Stockholders also can consent to a transaction by tendering their shares. If the first-step tender offer in a two-step transaction is conditioned on tenders of a majority of the outstanding shares, and if sufficient stockholders tender to satisfy the condition, then it should have the same effect as an affirmative stockholder vote." (citation omitted)).

57 *See* Laster, *supra* note 56, at 1459 n.57.

58 Pls.' Supplemental Answering Br. 2-4 (citing *Zuckerberg*, 124 A.3d 47).

59 124 A.3d at 51-52.

would be subject to the entire fairness standard of review in the first instance.[60] After the plaintiff-stockholder filed his lawsuit, however, the company's 61% controlling stockholder expressed his approval of that compensation in a deposition and an affidavit.[61] According to the defendants, the controlling stockholder's post hoc approval constituted ratification, subjecting the board's decision to approve the director compensation to the business judgment rule standard of review rather than entire fairness.[62]

Chancellor Bouchard rejected the defendants' argument that the controlling stockholder's informal approval of the compensation constituted ratification and held "that stockholder ratification of an interested transaction, so as to shift the standard of review from entire fairness to the business judgment presumption, cannot be achieved without complying with the statutory formalities in the DGCL for taking stockholder action."[63] *Zuckerberg*, therefore, focuses on corporate formalities and emphasizes that stockholders must follow the DGCL's prescribed

---

60 *Id.* at 49.

61 *Id.* at 52-53.

62 *Id.* at 54-55.

63 *Id.* at 66.

methods for taking stockholder action to obtain the benefits of ratification.[64] Specifically, stockholders must either "vot[e] at a stockholder meeting or act[] by written consent in compliance with Section 228 of the [DGCL]."[65] The controlling stockholder's informal approval did not constitute ratification in *Zuckerberg* precisely because it diverged from the DGCL's required corporate formalities. In this case, there is no dispute that the Board complied with the DGCL's prescribed procedures for consummating a merger under Section 251(h). Thus, *Zuckerberg* largely is inapposite.

Nonetheless, Plaintiffs contend that Chancellor Bouchard recognized a substantive distinction between tender offers and stockholder votes that precludes this Court from affording a *Corwin*-based cleansing effect to mergers

---

[64] *See id.* at 57-58 ("In sum, the provisions of the DGCL governing the ability of stockholders to take action, whether by voting at a meeting or by written consent, demonstrate the importance of ensuring precision, both in defining the exact nature of the corporate action to be authorized, and in verifying that the requirements for taking such an action are met, including that the transaction received enough votes to be effective. They also demonstrate the importance of providing transparency to stockholders, whose rights are affected by the actions of the majority. In particular, stockholders have the right to participate in a meeting at which a vote is to be taken after receiving notice and all material information or, in the case of action taken by written consent, to receive prompt notice after the fact of the action taken." (footnote omitted)).

[65] *Id.* at 50.

accomplished through first-step tender offers.[66] To support that contention, Plaintiffs rely on the following excerpt from *Zuckerberg*:

> [D]efendants suggest that stockholder acts such as tendering shares serve as an example of less formal ratification. This suggestion is unpersuasive, because expressing approval of the sale of a company by tendering shares is not analogous to stockholder ratification. "Approving" a two-step transaction by tendering a sufficient number of shares in a tender offer is a functional requirement for completing such a transaction. Directors cannot tender stockholders' shares for them, so stockholders are not ratifying the transaction, but effectuating it in the first instance. . . . Thus tendering shares bears no meaningful resemblance to a post hoc ratification of directors' actions.[67]

I disagree with Plaintiffs' interpretations of both (1) Defendants' argument regarding the Tender Offer's cleansing effect and (2) Chancellor Bouchard's decision in *Zuckerberg*. First, Chancellor Bouchard distinguishes a post hoc stockholder vote or written consent from a first-step tender offer in the context of deciding what form stockholder assent must take to constitute ratification. But, Defendants do not argue that the Tender Offer constituted stockholder ratification. Instead, Defendants argue that the Tender Offer affords the Merger the same

---

[66] Pls.' Supplemental Answering Br. 2-4.

[67] *Id.* at 61 (footnotes omitted) (citing *Orchid Cellmark Inc.*, 2011 WL 1938253, at *13; *Matador Capital*, 729 A.2d at 294).

cleansing effect that *Corwin* affords to a statutorily required vote in favor of a merger.

Second, in *Gantler*, the Supreme Court differentiated between a statutorily required vote and stockholder "ratification."[68] It is consistent with *Gantler*, therefore, that just as a statutorily required vote does not constitute "ratification," stockholder acceptance of a tender offer also does not constitute "ratification."[69] Despite that distinction, the Supreme Court in *Corwin* held that a statutorily required vote by a stockholder majority—which, just as a first-step tender offer in a two-step merger, "effectuat[es a transaction] in the first instance"[70]—irrebuttably invokes the business judgment rule.[71] As such, the fact that a first-step tender offer in a two-step merger does not constitute "ratification" is not dispositive as to the cleansing effect of stockholder approval as expressed through acceptance of such a

---

[68] *KKR*, 101 A.3d at 1002-03 ("I read the Supreme Court's discussion of the doctrine of ratification in *Gantler* to have been intended simply to clarify that the term 'ratification' applies only to a voluntary stockholder vote. As the Supreme Court stated in a footnote at the end of its decision, '[t]his Opinion clarifies that "ratification" legally describes only corporate action where stockholder approval is not statutorily required for its effectuation.'" (footnote omitted) (quoting *Gantler*, 965 A.2d at 714 n.55)).

[69] *Zuckerberg*, 124 A.3d at 61.

[70] *Id.*

[71] *Corwin*, 125 A.3d at 308-09.

tender offer. Interpreting *Zuckerberg* differently would contradict *Corwin*'s holding.[72]

I conclude that the acceptance of a first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares in a two-step merger under Section 251(h) has the same cleansing effect under *Corwin* as a vote in favor of a merger by a fully informed, disinterested, uncoerced stockholder majority. As a result, I now examine whether the Volcano stockholders that accepted the Tender Offer were fully informed, disinterested, and uncoerced.

3. Volcano's stockholders were fully informed, disinterested, and uncoerced

Because stockholders representing a majority of Volcano's outstanding shares approved the Merger, Plaintiffs must plead facts from which it reasonably can be inferred that those stockholders were interested, coerced, or not fully

---

[72] In fact, in *Zuckerberg*, Chancellor Bouchard cited both *Gantler* and *Corwin* and recognized that although a statutorily required vote does not constitute ratification, it can have same cleansing effect. *Zuckerberg*, 124 A.3d at 62-63 ("In *Gantler*, the Supreme Court held that the scope of 'the shareholder ratification doctrine must be limited . . . to circumstances where a fully informed shareholder vote approves director action that does *not* legally require shareholder approval in order to become legally effective.' . . . *Corwin v. KKR* . . . confirmed that stockholder approval from a statutorily required vote can be used to invoke the business judgment rule the same way [stockholder ratification] can . . . ." (footnotes omitted) (quoting *Gantler*, 965 A.2d at 713)). That same principle applies to a first-step tender offer under Section 251(h).

informed in accepting the Tender Offer to avoid application of the business judgment rule. The Complaint does not allege—and Plaintiffs do not argue—that the Volcano stockholders that tendered 89.1% of the Company's outstanding shares into the Tender Offer were interested or coerced. Instead, Plaintiffs allege that "Defendants have failed to disclose all material information regarding the [Merger]."[73] Aside from that conclusory statement, the Complaint largely is devoid of allegations regarding Volcano's Merger-related disclosures to its stockholders. Many of those allegations were brought in Plaintiffs' original, pre-Merger complaints. Plaintiffs withdrew those claims after Defendants released supplemental disclosures, and the operative Complaint reflects those withdrawals. As a result, Defendants contend that Plaintiffs have conceded that Volcano's stockholders were fully informed as to the Merger.[74]

Plaintiffs point out, however, that the Complaint contains allegations that the Board was not fully informed regarding the Merger and Goldman's interest in the Call Spread Transactions. It follows, according to Plaintiffs, that if the Board was

---

[73] Compl. ¶ 153.

[74] Oral Arg. Tr. 16 ("The bottom line is after the supplemental disclosures were made, the plaintiffs voluntarily withdrew their application for preliminary injunction, later filed the amended complaint that has no disclosure claims in it. We submit that they've waived the opportunity to assert them at this point, and they're just not there. They can't amend their complaint by making arguments in their briefing or otherwise.").

not fully informed as to certain aspects of the Merger, Volcano's stockholders also were not fully informed, as they received their information regarding the Merger from the Board's Recommendation Statement.[75] Because I conclude that Volcano's stockholders were fully informed as to all material facts regarding the Merger, I need not decide whether Plaintiffs waived their disclosure-based arguments.

a. Legal standard for determining whether Volcano's stockholders were fully informed

"For stockholder approval of any corporate action to be valid, the [approval] of the stockholders must be fully informed."[76] Evaluating "[w]hether shareholders are 'fully-informed'" as to a particular transaction depends on whether those stockholders were apprised of "all material information" related to that transaction.[77] "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding [whether to

---

[75] Oral Arg. Tr. 63-64 ("I would submit that it's . . . fairly obvious that if the board wasn't fully informed, the stockholders weren't fully informed.").

[76] *KKR*, 101 A.3d at 999.

[77] *Solomon v. Armstrong*, 747 A.2d 1098, 1127-28 (Del. Ch. 1999) (quoting *Santa Fe*, 669 A.2d at 66).

approve the challenged transaction].”[78] “Stated another way, there must be ‘a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the “‘total mix’ of information made available.”[79] Although a plaintiff generally bears the burden of proving a material deficiency when asserting a duty of disclosure claim,[80] a defendant bears the burden of demonstrating that the stockholders were fully informed when relying on stockholder approval to cleanse a challenged transaction.[81]

---

[78] *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) and adopting *TSC*’s materiality standard as Delaware law).

[79] *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000) (quoting *Louden v. Archer–Daniels–Midland Co.*, 700 A.2d 135, 142 (Del. 1997)).

[80] *In re Siliconix Inc. S’holders Litig.*, 2001 WL 716787, at *9 (Del. Ch. June 21, 2001).

[81] *KKR*, 101 A.3d at 999 (citing *Bershad*, 535 A.2d at 846); *see also Solomon*, 747 A.2d at 1128 (“In their analyses of Delaware’s disclosure jurisprudence, there appears to be some dispute among the litigants over who bears the burden of proof on disclosure issues. The answer is that it depends on which type of disclosure claim is made by whom. As far as claims of material misstatements, omissions and coercion go, the law is clear that plaintiff bears the burden of proof that disclosure was inadequate, misleading, or coercive. On the other hand, when it comes to claiming the sufficiency of disclosure and the concomitant legal effect of shareholder ratification after full disclosure (*e.g.,* claim extinguishment, the retention of the business judgment rule presumptions, or the shift of the burden of proof of entire fairness from the defendant to the plaintiff) it is the defendant who bears the burden.”).

b. Defendants have carried their burden of demonstrating that Volcano's stockholders were fully informed in approving the Merger

At oral argument, Plaintiffs agreed that the allegation in their Complaint regarding Volcano's deficient disclosure is based solely on their contention "that neither Volcano's board nor its stockholders were fully informed because Goldman failed to disclose sufficiently detailed information regarding the extent of the deterioration of the value of the [W]arrants over time."[82] More specifically, Plaintiffs claim that although the Board and Volcano's stockholders were apprised of the fact that the Warrants' value decreased over time, Goldman never disclosed that the Warrants' value decreased "exponentially."[83] According to Plaintiffs, this information is material because it indicates a possible conflict of interest between Volcano's stockholders and Goldman, as "it was in Goldman Sachs' direct financial interest that a change in control transaction, involving all or nearly all cash, be consummated as soon as possible, regardless of whether the transaction maximizes Volcano stockholder value."[84] In other words, Plaintiffs allege that Volcano's stockholders were not fully informed that the exponential decrease in the Warrants' value over time may have given Goldman an incentive to seek a sale

---

[82] Oral Arg. Tr. 63, 67.

[83] *See* Compl. ¶¶ 15, 63, 65, 76.

[84] *Id.* ¶ 15.

as soon as possible when waiting for a better offer or deciding not to sell the Company at all may have been in Volcano's stockholders' interests.

The Board, however, disclosed that "[i]f the [Merger was] announced at a later date, assuming other inputs remain the same, the value of the [Warrants] would decrease over time as the result of option time decay until the [W]arrants' expiration."[85] Based on that disclosure, Volcano's stockholders were aware that Goldman's payout under the Warrants would have decreased if the Merger was consummated at a later date. Volcano's stockholders also were aware that the Warrants eventually would expire. Plaintiffs' argument that the Merger-related disclosures were materially deficient, therefore, boils down to the fact that the Board did not describe the decline in the Warrants' value as "exponential."

Assessing materiality is a difficult practice that requires balancing the benefits of additional disclosures against the risk that insignificant information may dilute potentially valuable information.[86] Here, Volcano announced that Goldman had an interest in the Warrants and that their value would decline until

---

[85] Recommendation Statement Supplement.

[86] *See Solomon*, 747 A.2d at 1128 ("The determination of the materiality of an alleged omission or misstatement 'requires a careful balancing of the potential benefits of disclosure against the resultant harm.' The theory goes that there is a risk of information overload such that shareholders' interests are best served by an economy of words rather than an overflow of adjectives and adverbs in solicitation statements." (footnote omitted) (quoting *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1279 (Del. 1994))).

they expired "over a series of expiration dates in 2018."[87] A reasonable stockholder could infer from this information that, all else held equal, Goldman would have preferred to consummate a deal sooner rather than later. Assuming the Warrants truly did decay at an exponential—rather than "linear" or "gradual"—rate, the Board's disclosure of this information only would change the degree of Goldman's interest. Thus, although a more exhaustive disclosure of the Warrants' value decay over time may have been "somewhat more informative,"[88] a reasonable stockholder would not have viewed that fact as significantly altering the total mix of available information regarding the relationship between Goldman's interests in the Call Spread Transactions and the Merger.[89]

C. The Complaint Fails to State a Claim for Waste

Because Volcano's fully informed, uncoerced, disinterested stockholders approved the Merger by tendering a majority of the Company's outstanding shares into the Tender Offer, the business judgment rule irrebuttably applies. The Merger, therefore, only can be challenged on the basis that it constituted waste. In other words, the Complaint must plead that the Merger "cannot be attributed to any

---

87 Recommendation Statement at 31.

88 *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 89 (Del. 1995).

89 *Siliconix*, 2001 WL 716787, at *9.

rational business purpose."[90] The Complaint fails to plead that the Merger constituted waste. And, even if it did, I note that "it [is] logically difficult to conceptualize how a plaintiff can ultimately prove a waste or gift claim in the face of a decision by fully informed, uncoerced, independent stockholders to ratify the transaction," given that "[t]he test for waste is whether any person of ordinary sound business judgment could view the transaction as fair."[91] Because the Merger did not constitute waste, the Complaint fails to state a valid breach of fiduciary duty claim against the Board.

D. The Complaint Fails to State a Claim for Aiding and Abetting

Finally, Plaintiffs assert that Goldman aided and abetted the Board's fiduciary duty breaches. To state a valid aiding and abetting claim, Plaintiffs must allege "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, . . . (3) knowing participation in that breach by the defendants,' and (4) damages proximately caused by the breach."[92] "An aiding and abetting claim[, however,] 'may be summarily dismissed based upon the failure of the breach of

---

[90] *Cede & Co.*, 634 A.2d at 361 (internal quotation marks omitted).

[91] *Harbor Fin.*, 751 A.2d at 901 (citing *Michelson*, 407 A.2d at 224); *see also Attenborough*, 2016 WL 2765312, at *1.

[92] *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001) (quoting *Penn Mart Realty Co. v. Becker*, 298 A.2d 349, 351 (Del. Ch. 1972)).

fiduciary duty claims against the director defendants.'"[93] Further, in *Attenborough*, the Supreme Court reiterated the high burden that a plaintiff faces in attempting to plead facts from which a court could reasonably infer that a financial advisor acted with the requisite scienter for an aiding and abetting claim.[94] Just as in that case, "[n]othing in this record comes close to approaching the sort of [financial advisor misconduct] at issue in *RBC Capital Markets*."[95] The Complaint, therefore, fails to state a valid aiding and abetting claim against Goldman.

III. CONCLUSION

For the foregoing reasons, Defendants' Motions are granted, and the Complaint is dismissed.

IT IS SO ORDERED.

---

[93] *KKR*, 101 A.3d at 1003 (quoting *Meyer v. Alco Health Servs. Corp.*, 1991 WL 5000, at *4 (Del. Ch. Jan. 17, 1991)); *see also Attenborough*, 2016 WL 2765312, at *2 ("Having correctly decided, however, that the stockholder vote was fully informed and voluntary, the Court of Chancery properly dismissed the plaintiffs' claims against all parties.").

[94] *Attenborough*, 2016 WL 2765312, at *2.

[95] *Id.* (citing *RBC Capital Mkts. v. Jervis*, 129 A.3d 816, 865 (Del. 2015) (finding, in the context of a change-of-control transaction, that "[t]he claim for aiding and abetting was premised on [the financial advisor]'s 'fraud on the Board,' and that RBC aided and abetted the Board's breach of duty where, for [the financial advisor]'s own motives, it 'intentionally duped' the directors into breaching their duty of care. The record evidence amply supports the trial court's conclusion that [the financial advisor] purposely misled the Board so as to proximately cause the Board to breach its duty of care.")).