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Case Number 603,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHESTER COUNTY RETIREMENT SYSTEM, individually, and on behalf of all those similarly situated, Plaintiff-Below, Appellant, v. JOSHUA L. COLLINS, DAVID A. WILLMOTT, ROBERT E. BEASLEY, JR., RONALD CAMI, ANDREW C. CLARKE, NELDA J. CONNORS, E. DANIEL JAMES, HAROLD E. LAYMAN, MAX L. LUKENS, DANIEL J. OBRINGER, BLOUNT INTERNATIONAL, INC., AMERICAN SECURITIES LLC, P2 CAPITAL PARTNERS, LLC, P2 CAPITAL MASTER FUND I, L.P., ASP BLADE INTERMEDIATE HOLDINGS, INC., ASP BLADE MERGER SUB, INC. and GOLDMAN SACHS & CO., Defendants-Below, Appellees.	No. 603, 2016 Court Below: Court of Chancery of the State of Delaware C.A. No. 12072-VCL

APPELLANT'S REPLY BRIEF

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I. The Applicable Standards Require Reversal

Defendants repeatedly and, without support, accuse Plaintiff of attempting to warp the standards applicable to disclosure claims. (Blount Br. at 2, 26-27; GS Br. at 14-15, 17-18).[1] That is not so. Rather, Plaintiff's position is consistent with the law requiring that disclosure issues be viewed under all the circumstances, which circumstances necessarily include the nature of the transaction at issue here, and further requiring that the additional information would have affected the total mix of information available to the stockholders.[2]

Defendants seek a "one size fits all" version of materiality without regard to circumstances, context or the extent of the disclosure, if any. Defendants remain duty-bound by the true meaning of materiality, which concerns itself with the

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[1] References to "Appellant's Opening Brief" are cited herein as "Op. Br. at __." References to the "Blount Defendants-Appellees' Corrected Answering Brief" are cited herein as "Blount Br. at __." References to the "Appendix to Blount Defendants-Appellees' Answering Brief" are cited herein as "BLT-B___." References to Appellee Goldman, Sachs & Co.'s Corrected Answering Brief" are cited herein as "GS Br. at __." References to the "Appendix to Appellee Goldman, Sachs & Co.'s Answering Brief" are cited herein as "GS-B___." References to the "Appellees P2 Capital Partners, LLC, P2 Capital Master Fund I, L.P., American Securities LLC, ASP Blade Intermediate Holdings, Inc. and ASP Blade Merger Sub, Inc.'s Corrected Answering Brief" are cited herein as "Buyers Br. at __." All other defined terms shall have the meanings ascribed in Appellant's Opening Brief.

[2] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279 (Del. 1989), cited by Defendants, is consistent with Plaintiff's position. (*See* Blount Br. at 29; GS Br. at 15).

potential to affect a reasonable stockholder's vote. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). The standard explicitly contemplates the evaluation of materiality "under all the circumstances." *Id*. The circumstances here involve the interests and motivations of Defendants in the LBO, the relationships between and among Defendants in the LBO, and the inconsistent and incomplete data and information provided to stockholders regarding the Company's growth and value prospects. (Op. Br. at 27-40). In effect, Defendants ask the Court to ignore the materiality standard long-established by *TSC* and adopted by this Court in favor of a standard for materiality above and beyond the current law.

Along those same lines, Defendants accuse Plaintiff of attempting to alter the standards applicable to this action by citing appraisal and controlling stockholder cases. (Blount Br. at 26-27; GS Br. at 14-15). Defendants' arguments are off-base. Plaintiff cites these cases to illustrate the conflict issues inherent in LBOs and to demonstrate why such issues are relevant to the assessment of materiality. (*See* Op. Br. at 27-31). The standard of review focuses on the "total mix," but the "total mix" is necessarily a contextually specific question. *See TSC*, 426 U.S. at 449.

Defendants also suggest Plaintiff's argument – that disclosure claims must be considered in context – merely recasts process claims. (Blount Br. at 2). Again,

they are off-base. In *In re Freeport-McMoRan Sulphur, Inc. S'holder Litig*., the Court of Chancery recognized the importance of considering disclosure claims against the circumstances in which they arise. 2005 Del. Ch. Lexis 96, *53-*54 (June 30, 2005), citing *Solomon v. Armstrong*, 747 A.2d 1098, 1116 (Del. Ch. 1999). In a summary judgment opinion analyzing disclosure claims – including regarding special committee independence, management interference with the special committee, and banker interestedness – the Court of Chancery found the alleged omissions related to the underlying facts raised about the fiduciary duty claims. *Id*. Similarly here, the disclosure claims relate to the underlying facts raised about the breaches of fiduciary duty claims targeting the process leading to the Buyout.

II. Defendants Mischaracterize the Disclosure Claims Presented Below

A review of the disclosure claims subject to this appeal demonstrates that the dismissal of Plaintiff's claims under Rule 12(b)(6) was in error. (Op. Br. at 24-40). Nevertheless, Defendants seek affirmation of the Court of Chancery's application of the business judgment rule based on the stockholder vote. (Blount Br. at 25, GS Br. at 10; Buyers Br. at 1). Conversely, Plaintiff has set forth allegations that Defendants, despite every opportunity to make complete disclosures, withheld material information regarding certain Defendants' lack of independence and interestedness and the value of the Company from stockholders solicited to vote on the Buyout. (Op. Br. at 31-40). Defendants have not met their burden to show that the stockholder vote was "fully informed."[3]

A. Defendants Hid Cami's Motivations and Soon-To-Be Realized Expectations from Stockholders

Defendants failed to disclose material information regarding Defendant

[3] Defendants argue that the Court may take judicial notice of the clear language of the Proxy. (Blount Br. at 6 n.1; *see* GS Br. at 9-10). That argument is irrelevant here. Defendants have not – nor could they – show how the Complaint contradicts the Proxy. Further, Defendants are not entitled to any inferences drawn from the language of the Proxy; all reasonable inferences must still be drawn in Plaintiff's favor. *See RBC Capital Mkts., LLC v. Educ. Loan Tr. IV*, 87 A.3d 632, 639 (Del. 2014). The Court may only assume the truth of matters reported in the Proxy to the extent that Plaintiff asks the Court to draw inferences actively contradicting the Proxy. *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1026 (Del. Ch. 2012) ("[P]laintiff[] cannot ... have the court draw inferences in their favor that contradict [these] document[s], unless they plead non-conclusory facts contradicting [them].").

Cami's past and expectant future relationships. (Op. Br. at 20-21, 32-34; A595-A600). There is no dispute that Defendant Cami had substantial commercial relationships with Blount, the Management Directors and American Securities in the past. (Op. Br. at 8-10; Blount Br. at 7, 31). Defendants and the Court of Chancery brush these prior relationships aside as "old and stale." (Blount Br. at 31-32; ¶6). The circumstances here do not allow for that conclusion.

Cami, as he was acting as the *de facto* chairman of the Special Committee, had an undisclosed plan to re-enter private legal practice as a private equity transaction specialist immediately after consummation of the Buyout.[4] Almost immediately after the Buyout closed, he advertised those services at his new firm, Davis Polk,[5] touting his previous representations of Lehman (and, thus, Blount and the Management Directors) and American Securities. (Op. Br. at 9-10, 32-34). While he acted as the supposed independent representative of Blount stockholders, Cami was considering, and motivated by, the rebuilding of his book of business and clients. (Op. Br. at 9, 32-33). Plaintiff is entitled to the inference that Cami planned to re-enter private practice and actively viewed the Buyers and the

[4] In April 2015, Cami stated that he left private equity firm TPG "to pursue new opportunities that I've been approached about." (A085).

[5] Davis Polk was retained by Cami to represent the Special Committee formed by the Board, with a charge to establish a process for, negotiate, evaluate and provide a recommendation on the Buyout or other potential proposals. (Op. Br. at 10 n.5 (citing A085)).

Management Directors as potential future clients.[6]

Nevertheless, Cami's imminent re-entry to private practice was undisclosed. (Op. Br. at 33-34). The materiality of this withheld information is punctuated by the reasonable expectation that stockholders, facing the inherently conflicted Buyout, were entitled to rely upon a Special Committee unfettered by conflicted interests.[7] (*Id.*). Further, the public disclosure of Cami's new private practice, mere days after the close of the Buyout, supports a strong inference that the information was intentionally withheld from Blount stockholders. (*See id.* at 34).

Defendants argue that by virtue of Cami's prior employment with private equity firm TPG (which was disclosed) and his prior representations of American

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[6] As a result, Defendants' attempt to distinguish *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 Del. Ch. LEXIS 174, *55 (Oct. 2, 2009), fails. (*See* Blount Br. at 34-35). And, Defendants' citation to *Loudon v. Archer-Daniels-Midland Co.*, is inapposite. 700 A.2d 135, 145 (Del. 1997) (rejecting a "disclosure requirement [that] would oblige the Committee to speculate about its future plans"). Additionally, Defendants attempt to sidestep Plaintiff's citation of *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1173 (Del. 1994) and *Paramount Communications, Inc. v. QVC Networks*, 637 A.2d 34 (Del. 1994), as unrelated to the materiality of conflicts. (*See* Blount Br. at 33 n.10). However, Plaintiff cited these cases for the principles of law set forth therein regarding the importance of the independence of a special committee, especially in the face of management conflict, which informs the issue of the materiality of Cami's conflicts. (*See* Op. Br. at 33 & n.13).

[7] For this reason, Defendants' reliance on *Orman v. Cullman*, 79 A.2d 5, 27 (Del. Ch. 2002) and their attempt to distinguish *In re The Limited, Inc. S'holders Litig.*, 2002 WL 537692, at *7 (Del. Ch. Mar. 27, 2002) and *Skeen v. Wadsworth*, 2003 WL 21448617 (Del. Ch. June 18, 2003), regarding the materiality of the prior relationships alleged therein (Blount Br. at 31-32, 35-36 n.11), fall short.

Securities and the Management Directors (which were not disclosed), Cami was a known private equity specialist. (Blount Br. at 33-34). Plaintiff's point is not that Defendants failed to disclose Cami's private equity expertise, but rather that Defendants failed to disclose Cami's then-present expectation to return immediately to private practice by leveraging past and current relationships with American Securities and the Management Directors for future business. (*See* Op. Br. at 33-34). By looking backward without looking forward, Defendants have told only half of the story. (*See* A596-A598).

Defendants and the Court of Chancery conflate Plaintiff's allegations regarding Defendant Cami with an attack on Davis Polk's independence. (*See* Blount Br. at 32-33; Ex. A ¶6). That is wrong. The allegations surrounding Cami's past commercial relationships and expectations regarding those commercial relationships in the immediate future raise reasonable inferences that Cami was impaired in his ability to act as the effective independent negotiator on behalf of Blount stockholders. The disclosure of these facts would inform stockholders of Cami's ability to serve as an independent negotiator, which bears on the fairness of the deal. Disclosure of these facts and conflicts would alter the total mix available to stockholders. (Op. Br. at 34).

B. Goldman Had a Material Relationship With the Buyers Coinciding With Its Relationship With Blount

Defendants insist that disclosure of an arbitrary two-year window of banker

relationships is all Delaware law requires. (GS Br. at 12; GS-B026, GS-B059-GS-B060; A591, A653). That arbitrary cut-off ignores the contextual importance of disclosures and the need for full, rather than partial, disclosures where multiple conflicting interests infect a sale process.[8] Defendants now argue on appeal that because the yearly average transaction value for Goldman's representations of American Securities was consistent whether looking at the disclosed two years ($1.3 billion per year) or the six years of information Plaintiff was able to unearth ($1.8 billion per year), additional disclosure would not shed light on the significance of Goldman's relationships with the Buyers. (Blount Br. at 37-38).

The Proxy undermines that thesis. The Proxy states that "Goldman Sachs also has provided certain financial advisory and/or underwriting services to American Securities and/or its affiliates and portfolio companies *from time to time*." (GS Br. at 6 (citing A205) (emphasis added)). The phrase "from time to

[8] Defendants' citation of cases, where disclosure claims did not seek additional information outside of the period included in the disclosure document, and no significant pre-existing and continuous relationship between the financial advisor and the acquirer was alleged, are inapposite. *See In re OM Grp., Inc. S'holders Litig.*, 2016 Del. Ch. 155, at *53 (Oct. 12, 2016) (plaintiffs only requested addition information regarding fees paid to financial advisor within – and not beyond – the three-year period disclosed); *In re Micromet, Inc. S'holders Litig.*, 2012 Del. Ch. LEXIS 41 (Feb. 29, 2012) (plaintiffs only requested additional information regarding fees paid to Goldman within – and not beyond – the two-year period disclosed).

time" is defined as "sometimes, but not regularly"[9] or "once in a while: occasionally."[10] Thus, while the Proxy misleadingly indicates that prior to the two years disclosed, Goldman represented American Securities occasionally, disclosure of this additional time period (and substantial fees over an additional 4 years) demonstrates the true "longstanding and thick" nature of Goldman's relationship with American Securities during the term of its 7.5-year engagement to sell Blount. (Op. Br. at 21, 34-37; A457-A459, A600-A607).

Plaintiff received no specific ruling from the Court of Chancery regarding the disclosures pertinent to Goldman's partnership with P2 in Interline. The ever-shifting, incomplete disclosures on the topic create a strong inference that Defendants failed in their obligation to disclose material facts.

The Preliminary Proxy misleadingly disclosed the Goldman/P2 relationship, leading Plaintiff to challenge the disclosure. (AR002; *see* AR010). Thereafter, Defendants continued to evade the truth of Goldman's interest, alongside P2, in

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[9] "From Time to Time," The Cambridge Academic Content Dictionary, *available at*: http://dictionary.cambridge.org/us/dictionary/english/from-time-to-time (last visited March 30, 2017). "[C]ourts apply[ing] the plain meaning of words, [ ] have taken judicial notice of dictionary definitions to aid in ascertaining such meaning." *Serv. Corp. v. Guzzetta*, 2007 Del. Ch. LEXIS 84, *11 (June 13, 2007).

[10] "Time," Merriam-Webster.com, *available at*: https://www.merriam-webster.com/dictionary/time (last visited March 30, 2017).

Interline (*i.e.*, in the Definitive Proxy[11] and at the motion to dismiss stage[12]), always re-characterizing the relationship. (A605). Now, on appeal,[13] Goldman offers a new version, contradictory to prior disclosures that "Interline was indisputably co-owned" by P2 and Goldman's private equity arm. This new version only makes Plaintiff's point that this very disclosure should have been made in the Proxy.

Defendants' assertion that the relationship was publicly discernable also fails. (*See* Blount Br. at 38; BLT-B150; GS-B019, GS-B060-61, GS-B074; A589). "[M]isrepresentations or omissions are not 'cured by reason that [they] could be uncovered by an energetic shareholder reading an SEC filing.'" *Doppelt v.*

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[11] (A205 (characterizing P2 and Goldman's private equity arm as each being an "affiliate" of Interline)). Defendants also mischaracterize Plaintiff's allegation that Goldman represented its private equity arm and P2 in its sale of Interline to Home Depot. (Blount Br. at 39 n.14; GS Br. at 14). The Proxy states only that Goldman represented Interline in connection with its sale to Home Depot without clarifying the truth of the relationship. (A205).

[12] (GS-B022 (stating Goldman's private equity arm "owned Interline along with P2"), GS-B019 (characterizing relationship as having "co-invested"), GS-B060 (characterizing relationship as "co-ownership"); BLT-B223 (characterizing relationship as "a shared interest in Interline"); A589 (stating that Goldman's private equity arm and P2 "co-invested")).

[13] (Blount Br. at 38 ("corporate relationship"); GS Br. at 14 ("indisputably co-owned"); *see also* GS Br. at 8, 13-14 (attempting to re-write the Proxy now to match the latest version of the Goldman/P2 relationship)). This creative editing is contrary to Goldman's position below that "Goldman Sachs' work with Interline ended on June 22, 2015, before the Buyer Parties … made their first informal proposal." (GS-B020).

Windstream Holdings, Inc., 2016 Del. Ch. LEXIS 27, *18, *19 n.62 (Feb. 5, 2016) ("allegedly omitted or misrepresented information [] otherwise available on a government website is not a valid substitute for including such information in the Proxy Statement").

The Court of Chancery found that Goldman had a "longstanding and thick" relationship with the Buyers, albeit with no specific reference to P2. (Ex. A ¶7). Importantly, that finding was made with the benefit of the "total mix" of information presented by the Complaint, not in the Proxy. The Complaint provides a materially more detailed picture of Goldman's relationships with American Securities and P2 and how those relationships ran co-extensively with Goldman's unusual, open-ended engagement with Blount for nearly eight years.[14] Limiting the disclosure of banker conflicts is indefensible in any context, but is all the worse

[14] Plaintiff's disclosure claims are far from the "extraneous details" and "trivial information" discussed in the cases cited by Defendants. *See In re Merge Healthcare Inc.*, 2017 Del. Ch. LEXIS 17, at *29-40 (Jan. 30, 2017) (disclosure claims involved failure to include: (1) small details of financial advisor's analysis when a fair summary was disclosed and (2) Chairman's subjective motivation and views regarding waiver of a consulting agreement when underlying facts were disclosed); *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 901 (Del. Ch. 2016) (disclosure claims involved failure to include specific multiples of individual companies (which was public information) when median multiples of three categories of companies was disclosed); *Dent v. Ramtron Int'l Corp.*, 2014 Del. Ch. LEXIS 110, *46-47 (June 30, 2014) (disclosure claim involved failure to disclose the identity of the Board members that authorized the financial advisor to deliver a counter-proposal and the process so authorizing them).

where the banker was employed by both sides for so long and on a regular basis.[15] (Op. Br. at 34-37; A457-A459; A606-A607).

C. The Management Directors' Option Terms Were Material to an Assessment of the Company's Value

Defendants continue to mischaracterize Plaintiff's disclosure claim regarding the Management Directors' options as solely focusing on those individuals' quantifiable interests in the post-Buyout entity. (Blount Br. at 40-41). Rather, the primary focus of the claim concerns the stockholders' right to information regarding the value of the Company in making their voting decision.[16] These metrics are material because they would contribute to the total mix of information available to a stockholder in determining the value and growth prospects for the Company. (Op. Br. at 21-22, 37-40).

To summarize, the Buyout, and the disclosures made in connection with the value of Blount, is a tale of competing projections and value propositions. On one

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[15] Goldman improperly criticizes Plaintiff's citations to *Atheros Communs., Inc. S'holder Litig.*, 2011 WL 864928, at *9 (Del. Ch. Mar. 4, 2011), *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 105-106 (Del. Ch. 2014), and *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *6-7 (Del. Ch. June 27, 2008), asserting the facts in those cases are unsupportive of Plaintiff's position. (GS Br. at 16-17). Plaintiff cited these cases to explain the importance of disclosure of conflicts facing financial advisors. (*See* Op. Br. at 35-36).

[16] For this reason, Defendants' attempt to support the Court of Chancery's holding that the Proxy included information sufficient to understand "the magnitude of Collins and Willmott's option-based, buy-side participation," by distinguishing the cases cited by Plaintiff, is misplaced. *See* Blount Br. at 40-41 & n.15.

hand, in June 2015, the Company, led by Management Directors made a public presentation including positive, growth oriented forecasts. That presentation was consistent with early 2015 stock-buybacks for amounts in excess of the Buyout price and the basic theory of LBOs, which requires growth in cash generation to provide returns and an exit strategy for the buyer. (Op. Br. at 13, 16, 39; A104-A105; *see* A413-A414, A421, A468-A469, A619-A620). On the other hand, after the Buyout proposal was made, the Management Directors ratcheted down the Company's projections and provided those to the Special Committee, the bankers, potential buyers and most importantly, Blount stockholders. (Op. Br. at 15-16, 38, 40; A403-A405, A420, A426-A427, A620).

The piece of information that remained hidden was what level of growth and performance, negotiated between the Management Directors and the Buyers, would trigger future vesting of options. That is a material piece of the story regarding the Management Directors' expectations for growth and the inconsistent disclosures made regarding growth and value. (Op. Br. at 39-40). And, contrary to Defendants' ongoing assertions (Blount Br. at 42-43), the metrics identified, but not disclosed, in the Proxy are Company level performance targets and thus comparable to the conflicting projections, despite the Company being private at the

time of measurement.[17] (A105, A620). In fact, the relevance and importance of these metrics is reinforced by the Company's statement that "[o]ther than no longer being a publicly traded company, we do not anticipate any fundamental change to the Company [after the Buyout] .... [T]he Company will simply have different owners." (A105).

1. Defendants' Rule 8 Argument is Wrong

Plaintiff has, at every stage of the litigation, argued that the information withheld regarding the options was directly material to the stockholders' opportunity to assess the Company's value. (Op. Br. 37-40; A461, A609-A613). Defendants incorrectly assert that Plaintiff's argument below did not do so. (Blount Br. at 42-43). Plaintiff's argument below did not specifically use the phrase "material data point" prior to the Opening Brief (Blount Br. at 42 n.16), but the crux of the argument – that the future performance metrics (*i.e.*, the third material data point) were material vis-à-vis the Management Directors' conflicting views on the Company prior to the August 2015 Buyout offer (*i.e.*, the first

[17] Defendants' citation to *Smith v. Van Gorkom*, 88 A.2d 858, 891 (Del. 1985) (Blount Br. at 43), is unavailing. In *Van Gorkom*, the Court found materially misleading references to the following unreliable valuation methods: (1) a report providing a share price valuation range for the Company, which calculations were made in a "'search for ways to justify a price in connection with' a leveraged buy-out transaction 'rather than to say what the shares are worth'" and (2) the endorsement of the "substantial" premium offered over the depressed market price, when the Board did not disclose its failure to assess the premium offered in terms of other relevant valuation techniques. 88 A.2d at 891.

material data point) and after (*i.e.*, the second material data point) – was raised and argued below. (*See* A386-A387, A403-A405, A420-A421, A426-A427, A461, A609-A613).[18] In fact at oral argument Plaintiff's counsel specifically argued:

> Nevertheless, in June 2015, Collins and Willmott were publicly touting future EBITDA prospects. As well [as] the company's strategic opportunities to achieve the projected growth. And during an investor presentation in June 2015, using Blount's projections, management was projecting over a billion in revenue by 2018 and over 175 million in EBITDA.
>
> All that went out the window when P2 and American Securities emerged. Suddenly standalone operational growth plan -- again, plans and projections made with the recognition of the headwinds -- were gone, replaced by diminished projections and a drive towards an LBO.

(A618-A619). Plaintiff also argued:

> [T]he omitted terms of the options tie directly to the two primary conflict arguments plaintiff has raised. One, Collins and Willmott had an ongoing and long-term understanding with P2 and later with American Securities regarding the post-buyout company's value and prospects. And, two -- and this is the inherent LBO conflict. And that, [as] interested parties in the buyout, Collins and Willmott, had every incentive to depress company projections with an alternative growth theory hidden from stockholders.
>
> The undisclosed option terms, Your Honor, by their nature, will reflect the agreement between Collins and Willmott on the one hand,

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[18] Defendants incorrectly argue that the only time Plaintiff mentions the June 2015 Investor Presentation was "in passing" in the Amended Complaint and thus was not raised "squarely" in the trial court. (Blount Br. at 42 n.16). Paragraph 152 of the Amended Complaint specifically states that "the sale sharply conflicted with Blount's own documentation regarding the value of the Company: … using Blount's own financial projections offered in their June investor presentation, which called for $1.1 billion in revenues by 2018 and over $175 million in EBITDA, the Buyout calculated out to a 60% discount …." (A108).

> [and] P2 and American Securities on the other as to how the options will be priced and then vest based on performance and return -- returns targets. In other words, as plaintiff has alleged here, in a conflicted transaction like this one, the options terms will reveal the growth of the company and the corresponding belief by conflicted insiders and that likely divergence from what the management projections show.

(A610-A611). Rule 8 is satisfied. *See* Supr. Ct. R. 8; *Watkins v. Beatrice Companies, Inc.*, 560 A.2d 1016, 1020 (Del. 1989) ("In determining whether an issue has been fairly presented to the trial court, this Court has held that the mere raising of the issue is sufficient to preserve it for appeal.").[19]

[19] Even if this Court determines that the argument was not specifically raised below, it is sufficiently encompassed by the broader arguments made below to warrant consideration at this stage. *See Robino-Bay Court Plaza, LLC v. West Willow-Bay Court LLC*, 985 A.2d 391 (Del. 2009) ("argument [was] merely an additional reason in support of a proposition that was urged below"); *Wit Capital Group, Inc. v. Benning*, 897 A.2d 172, 184 n.48 (Del. 2006) ("new" theory and arguments were "sufficiently related" to those plaintiffs raised below). In any event, Defendants' citation to *Russell v. State*, is inapposite. *See Russell*, 5 A.3d 622, 627 (Del. 2010) (concluding that defendant could not challenge admissibility of statement at trial for alternative and different bases for objection than what was argued at trial).

III. Defendants Raise Arguments Regarding Issues Not Addressed Below and Which Have No Merit

The Court of Chancery's summary Order erroneously dismissed each of the above disclosure claims and, under *Corwin*, determined the business judgment rule applied to the Buyout as a whole. (Ex. A ¶¶6-10). Acknowledging the Court of Chancery's Order determined a narrow set of issues, Defendants nevertheless seek to have this Court rule on issues not discussed or determined by the Court of Chancery. (*See* Blount Br. at 3, 44-47 (whether the Complaint states claims for breach of the duty of loyalty); Goldman Br. at 2-3, 19-24 (whether the Complaint demonstrates knowing participation and causation as to Goldman); Buyers Br. at 1-2, 7-11 (whether the Complaint demonstrates knowing participation as to the Buyers)).

While this Court has jurisdictional authority to decide issues not reached below, "that power is controlled by balancing considerations of judicial propriety, orderly procedure, the desirability of terminating litigation, and the position of the lower court as the primary trier of issues of fact." *Weinberg v. Baltimore Brick Company*, 112 A.2d 517, 518 (Del. 1955) (determining the issues not decided below "if and when reached, should be passed on first by the Vice Chancellor"); *Knox v. Georgia-Pacific Plywood Co.*, 130 A.2d 347 (Del. 1957) (recognizing that when a record is fully developed at trial and the only errors therein are errors in law, an appellate court may determine issues not decided below rather than direct a

new trial). In *Unitrin, Inc. v. Am. Gen. Corp.*, cited by Goldman and the Buyers (Goldman Br. at 19; Buyers Br. at 7), this Court declined to address issues not decided by the trial court, holding "[t]he Court of Chancery should have the opportunity to address those alternative breach of duty arguments in the first instance." 651 A.2d 1361, 1390 (Del. 1995).[20]

No discovery has occurred and the Court of Chancery has performed no analysis regarding the reasonable conceivability of the substance of Plaintiff's claims. Therefore, Plaintiff submits these issues are more appropriately evaluated by the Court of Chancery first after reversal and remand. *See Slawik v. Folsom*, 410 A.2d 512, 514 (Del. 1979) (limiting appeal to the question decided below when court below had only ruled on a threshold issue); *Delaware County Employees Ret. Fund v. Sanchez*, 124 A.3d 1017, 1023-24 (Del. 2015) (reversing motion to dismiss and remanding to lower court to adjudicate aiding and abetting claims).

[20] The additional cases cited by Goldman do not support a finding otherwise. *See RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 89 (Del. 2015) (appeal and cross-appeal arising out of a post-trial final judgment with a full factual record established at trial); *Pierre-Louis v. Bank of Am., N.A.*, 128 A.3d 993 (Del. 2015) (affirming dismissal of complaint on alternative threshold procedural ground that plaintiff failed to respond to the motion to dismiss and failed to appear for the hearing); *Rossdeutscher v. Viacom, Inc.*, 768 A.2d 8, 9-10, 23-24 (Del. 2001) (where trial court dismissed a complaint solely on threshold issue, this Court, noting the case involved an issue of first impression, reversed and remanded based on threshold issue and substantive review of breach of contract claim, but affirmed the dismissal of the duplicative unjust enrichment claim).

A. No Exculpation Under Rule 102(b)(7) Exists at This Stage

Should this Court determine substantively to review the breach of fiduciary duty claims, the Complaint alleges the Individual Defendants breached their duty of loyalty, rendering Blount 102(b)(7) exculpation provision unavailable. *See* 8 Del. C. §102(b)(7). When a plaintiff, as here, alleges that a majority of "the board was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interests of its company and all of its shareholders," the entire fairness standard is applied and Rule 102(b)(7) is inapplicable. *Orman v. Cullman*, 794 A.2d 5, 22-23 (Del. Ch. 2002). The Complaint demonstrates that a majority of the Board suffered from a disabling conflict. (A049-A054, A058-A061, A064-A065, A068, A070-A075, A416-419, A422-425, A434, A595-A600, A621-A623, A626-A627).

Additionally, allegations that "the directors [] allow[ed] any improper influence to compromise their evaluation of whether the [transaction] would achieve maximum value for all [] shareholders" are allegations of disloyalty that rebut the presumption of the business judgment rule, making 102(b)(7) exculpation unavailable. *McMullin v. Beran*, 765 A.2d 910, 923 (Del. 2000). The Complaint alleges that, with the groundwork laid from P2's 2014 LBO approach (which Defendants continue to ignore (*see* A616-617)), the Management Directors acted disloyally and manipulated the sales process, while the outside directors acted

disloyally by engaging in an unreasonable process that permitted the selfish interests of Collins, Wilmott and the Buyers to prevail over the interest of Blount stockholders. (A062-A066, A068-A099, A104-A109, A116-A118, A418-450, A616-A634). Thus, Plaintiff has pleaded non-exculpated breaches of fiduciary duty.

B. Aiding and Abetting Liability Cannot Be Assessed

Should this Court determine substantively to review the aiding and abetting claims, the Complaint alleges that Goldman, as the Company's long-time, deeply conflicted advisor, possessed knowledge of its own conflicts and those faced by the Management Directors. Goldman nevertheless knowingly assisted the Management Directors in the subversion of the sale process.[21] (A046-A047,

[21] These allegations exceed the "routine professional services" provided by unconflicted professional advisors in the cases cited by Goldman. *See Lee v. Pincus*, 2014 Del. Ch. LEXIS 229, at *44-45 (Del. Ch. Nov. 14, 2014) (allegations boiled down to investment bank "acting as underwriters in the secondary offering" with no allegations of conflicts or ties to counter-party); *Zazzali v. Hirschler Fleischer, P.C.*, 482 B.R. 95, 515, 519 (D. Del. 2012) (allegations that law firm provided legal services that were common in the industry – drafting a Private Placement Memorandum, with no allegation that it was paid more than its customary fee or gained any improper benefit, did not support an inference of knowing participation); *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 215 (Del. Ch. 2006) ("[T]he complaint simply alleges that big-dog advisors were on the scene when Trenwick acquired Chartwell and LaSalle, that Trenwick ultimately failed, and that in the post-Enron era, big-dog advisors should pay when things go wrong with their clients."). *See also RBC Capital*, 129 A.3d at 865 n. 191 (holding that generally bankers are not financial gatekeepers, but noting that "[t]he banker is under an obligation not to act in a manner that is contrary to the interests of the board of directors").

A049-A051, A070, A076-A081, A086-A089, A091-A092, A095-A099, A119-A121, A474-A482, A634-A637). Further, the Complaint alleges Goldman's acts led to the Board's approval of the Buyout, Goldman had various incentives and interests it did not want to jeopardize, and Goldman's acts promoted an uninformed vote of the Blount stockholders. (A482-A483; A634-A637).[22]

The Complaint also adequately alleges that private equity sponsors American Securities and P2, each of which has significant business relationships with certain Individual Defendants and Goldman, exploited these relationships to benefit themselves at the public stockholders' expense. (A051-A052, A064-A066, A068-A069, A074-A085, A087, A090-A093, A095-A096, A104-A107, A119-A121**,** A467-A474, A637-A641).

[22] Goldman incorrectly argues that Plaintiff did not even try to argue below that Goldman's actions were a proximate cause of any breach. (GS Br. at 22-23).

CONCLUSION

For the reasons set forth herein and in Appellant's Opening Brief and argued below, Plaintiff respectfully requests this Court reverse the Order of the Court of Chancery and remand the matter for further proceedings.

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