IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTOPHER MILLER, an individual, and CHRISTOPHER MILLER and LINDSAY MILLER as trustees of the C & L MILLER REVOCABLE TRUST, Plaintiffs Below, Appellants, v. HCP TRUMPET INVESTMENTS, LLC; HISPANIA PRIVATE EQUITY II L.P.; HISPANIA INVESTORS II LLC; CARLOS SIGNORET; JASON SHAFER; MARK RUSSELL, and VICTOR MARURI, Defendants Below, Appellees.	No. 107,2018 Court Below: Court of Chancery in the State of Delaware C.A. No. 2017-0291-SG

APPELLANTS' REPLY BRIEF

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INTRODUCTION

HCP and the Millers generally cite the same cases and law governing the implied covenant of good faith and fair dealing. But HCP misapprehends them and quotes them out of context. This reply brief analyzes these cases and revisits what the Agreement actually says, not what HCP says it says. Delaware law supports what the Millers have consistently asserted—this is one of the cases where the implied covenant must be applied to protect the parties' reasonable expectations and the fruit of their bargain.

More specifically, the case law—read in context and coupled with the Agreement's express language—confirms:

(i) the Agreement does not address the matter at issue here—*i.e.*, how the Board would market Trumpet if it decided to sell—thus leaving a "gap" to be filled by the implied covenant of good faith;

(ii) any discretion arising from the vacuum created by this gap must be exercised reasonably and not arbitrarily;

(iii) if HCP wanted the right to act unreasonably and arbitrarily, HCP should have insisted on language giving them "sole and unfettered" discretion to sell Trumpet for whatever price they wanted without recourse;

(iv) HCP's conduct throughout the sale process, as alleged in the complaint, was indeed unreasonable and arbitrary; and

(v) the Agreement's language and structure endowed the Millers with the reasonably-held expectation, at the time of contract, that HCP would not sabotage a higher proposal from a potential buyer.

Delaware law and the Agreement's language also refute the contention that a plaintiff who waives common law fiduciary duties surrenders the right to challenge a sale through the implied covenant of good faith and fair dealing. On the contrary, a careful reading of the cases (primarily *Gerber* and *Lonergan*) shows that the waiving fiduciary duties does not bar independently-arising claims under the implied covenant of good faith, even if the duties overlap.

For these reasons and others described more fully below, the Millers[1] respectfully request that the Court of Chancery's order be reversed.

[1] Plaintiffs, Christopher Miller, an individual, and Christopher Miller and Lindsay Miller as trustees of the C & L Miller Revocable Trust, are collectively referred to as "**the Millers**." All other capitalized terms have the same meaning designated in the opening brief.

ARGUMENT

I. The Agreement does not address how the Board would market Trumpet for sale and leaves a "gap" to be filled by the implied covenant.

When a contract fails to address a disputed subject matter, it creates a contractual "gap." A contractual "gap" appropriate for the implied covenant exists if it is shown that the parties would have specifically addressed the matter had they thought to do so at the time of contract. When such a "gap" exists, the party with discretion to act must do so reasonably and not arbitrarily.

The Millers showed that the Agreement does not address the relevant matter here. Appellant's Opening Br. 15-17 ("**Opening Br.**"). Although the Agreement contains specific language describing what happens after the Board "approves a sale . . . to any independent third party," it says nothing about the specific question presented—how the Board would market the company before the Board approved a sale. Therefore, a "gap" exists regarding this issue which is filled with HCP's un-waivable duty under the implied covenant to exercise its discretion reasonably and not arbitrarily. HCP seeks to avoid this result with several arguments, none of which work.

A. The Agreement's provisions about the sale of the company generally do not address the marketing of the company specifically.

HCP first tries to expansively define the "matter" at issue, arguing that if the Agreement addresses this "matter" at all, there is no contractual "gap." HCP defines the matter as the overall sale of the company. In HCP's view, because the Agreement addresses *some* aspect of a company sale, it has occupied the field relating to *all* aspects of a sale—filling any gaps and preventing application of the implied covenant. Appellee's Answering Br. 20, 24-25 ("**Answer Br.**")

HCP accuses the Millers of narrowly "pars[ing] contractual activities" to find a gap. Answer Br. 26. For support, HCP cites *Gerber v. Enterprise Products Holdings, LLC*, 67 A.3d 400, 418 (Del. 2013). But on careful review, *Gerber* supports the Millers' more precise identification of the matter left unaddressed in the Agreement. In fact, *Gerber* identified the "matter" for the implied covenant to fill there much more narrowly than the Millers argue here.

In *Gerber*, the plaintiff held limited partnership interests in Enterprise GP Holdings, LLP ("**EPE**"). *Id.* at 404. The plaintiff alleged EPE sold a valuable subsidiary ("**Teppco**") for below market value to an affiliate of EPE's general partner ("**EPE GP**"). *Id.* at 408-09. The plaintiff also alleged the EPE GP orchestrated an unfair merger of EPE into another affiliate. *Id.* The EPE limited partnership agreement contained an express waiver of all common law fiduciary duties (more on that later), and two detailed provisions that described, step-by-step, how the EPE GP could insulate itself from any common law or contractual liability, express or implied. *Id.* at 409-10.

For both the Teppco sale and the EPE merger, the EPE GP sought to follow the agreement's step-by-step instructions in the two layers of insulation from liability. *Id.* at 411-14. To satisfy the second layer of insulation, the EPE GP obtained and relied upon a professional fairness opinion from Morgan Stanley. *Id.* at 411-13. The Court of Chancery ruled that the fiduciary-duty waiver, coupled with the EPE GP's compliance with the agreement's safe-harbor instructions eliminated any contractual "gap" and prevented application of the implied covenant. *Id.* at 411.

On appeal, this Court disagreed. *Id.* at 425. It found that the Morgan Stanley fairness opinion omitted information about the transactions necessary for EPE GP to reasonably rely on the opinion under the safe harbor provisions. *Id.* at 422-24. Notwithstanding the contract's detailed liability-insulation provisions, this Court narrowly defined the "matter" at issue and identified a "gap" for the implied covenant to fill. *Id.* On the Teppco sale, it found that, "[a]t the time of contracting . . . Gerber could hardly have anticipated that [EPE GP] would rely upon a fairness opinion that did not fulfill its basic function—evaluating the consideration the LP unitholders received for purposes of opining whether the transaction was financially fair." *Id.* at 422. On the merger, the Court found that "Gerber could not fairly be charged with having anticipated that EPE GP would merge EPE for the purpose of eliminating EPE's derivative claims, but then rely on a fairness opinion that did not even consider those claims' value." *Id.* at 423.

Gerber demonstrates that the relevant "matter" for an implied covenant analysis may be quite narrow (or broad) depending on the contract language and the alleged conduct in question. *See also Wilmington Leasing v. Parrish Leasing Co., L.P.*, 1996 Del. Ch. LEXIS 123, at *5-6 (Del. Ch. September 25, 1996) (applying the implied covenant and explaining: "[A]lthough the [removal of the general partner] is generally addressed [by the partnership agreement], the specific question presented here—the scope of discretion allowed to the limited partners in effecting the general partner's removal—is not.").

The Millers identified the "matter" at issue here—how the Board would market and obtain a fair price for the company before a sale is "approved" under Section 8.06(a). This matter, much broader than the matter *Gerber* defined, is not addressed in the Agreement and its absence creates a contractual gap for purposes of the implied covenant of good faith. HCP cannot eliminate this gap by redefining the matter's scope.

B. Section 8.06(a) grants "sole discretion" over the form of transaction, not how the Board would market Trumpet.

Instead of quoting Section 8.06(a) in its entirety, HCP dismembers Section 8.06(a)'s language in an effort to expand the discretion vested in the Board. HCP applies select phrases out of context, ignores clear definitions, and adds words the Agreement does not contain. Reading Section 8.06(a) as a whole reveals that the Board was not vested "sole discretion" over any conduct before approving a company sale.

For example, HCP argues that because the Board had power to "approve[] a sale" in Section 8.06(a), the Board necessarily had discretion to choose whether and how to market the company beforehand. Answer Br. 30-31. HCP misses the point. Almost always, a contractual "gap" creates a vacuum in which one of the parties is left exercising discretion about something the parties did not negotiate at the time of contracting. True, "if the scope of discretion is specified" in the contract, there is no contractual gap as to the discretion's scope and no need to apply the implied covenant. *See Policemen's Annuity & Benefit Fund of Chi. v. DVRealty Advisors LLC*, 2012 Del. Ch. LEXIS 188, at *43 (Del. Ch. August 16, 2012).

But there is a difference between the discretion existing in the vacuum of a contractual gap, and "sole discretion" or "sole and unfettered discretion" specifically granted a by express contract language. When discretion is specified as "sole and unfettered," the other party ordinarily relinquishes any expectations about how that discretion is exercised. But when discretion is not specified, the implied covenant fills the vacuum and requires that the party exercise its discretion reasonably and not arbitrarily, consistent with the reasonable expectations at the time of contracting. *Gerber*, 67 A.3d at 418-19; *see also Policemen's Annuity & Benefit Fund*, 2012 Del. Ch. LEXIS 188, at *38-40 (distinguishing unspecified discretion created from a contractual gap from *sole* discretion and *sole and unfettered* discretion specifically granted by contract language). If there is a gap, the unspecified discretion must be exercised reasonably and not arbitrarily. If HCP wanted the right to act unreasonably and arbitrarily, HCP should have insisted on language giving them "sole and unfettered" discretion to sell Trumpet for whatever price they wanted without recourse. Obviously, the Millers would have rejected such language.

HCP also argues that Section 8.06(a)'s grant of "sole discretion" over the form of the sale applies to the Board's marketing and pricing of Trumpet beforehand. Answer Br. 26-27. But that is not what Section 8.06(a) says. When viewed in its entirety, giving words their plain meaning, Section 8.06(a) unambiguously limits the Board's "sole discretion" to the form of the sale, not how the company is marketed before the Board "approves a sale":

> If the Board approves a sale of all of the Membership Interests or equity interests in the LLC to any independent third party (each such transaction referred to as an "Approved Sale"), the Board shall notify the Members in writing of such Approved Sale and provide a description of the Approved Sale setting forth the reasonable details, terms, and conditions thereof. *Subject to the remainder of this Section 8.06, the Board shall determine in its sole discretion the manner in which such an Approved Sale shall occur, whether as a sale of assets, merger, transfer of Membership Interests or otherwise*.

(App. at A-80, § 8.06(a) (emphasis added).)

This language clarifies that the Board's "sole discretion" extends only to "the manner in which such Approved Sale shall occur, whether as a sale of assets, merger, transfer of Membership Interests or otherwise." Opening Br. 17. The language cannot reasonably be interpreted to give the Board "sole discretion" over any other aspect of a company sale transaction.

HCP nonetheless contends that the term "or otherwise" adds "sole discretion" to other conduct not relating to the sale's form. Answer Br. 28. But this contention reverses the Court's interpretive maxims. The term "or otherwise" allows for the inclusion of other *forms* of sale not specifically listed in the preceding portion of that specific sentence. It does not add "sole discretion" to the Board's pre-approval conduct or any other conduct. Opening Br. 17-18. In fact, the only way to support HCP's argument is to add words like "marketing," or "pricing" to Section 8.06(a). No such words exist there.

C. Requiring that an "Approved Sale" be to an "independent third party" does not fill the contractual gap relating to marketing the company.

Next, HCP argues that Section 8.06(a)'s requirement that a sale be made to an "independent third party" means the parties must have negotiated all aspects of the sale process and decided, on purpose, to eliminate any requirement that the Board market check the company or obtain a reasonable price. Answer Br. 27

n.10. This is akin to HCP's above-referenced argument about the relevant "matter" at issue, and it suffers from the same flaws. Just because the parties addressed one part of a process does not mean they discussed and intentionally omitted reference to other parts. Just because the Agreement requires that a sale be to an independent third party, does not mean that the parties discussed how Trumpet would be marketed for sale.

In this same discussion, HCP appears to concede that it would have been inappropriate for the Board to sell Trumpet to a stranger on the street for $10.00. *Id.* But this underscores the problem with HCP's analysis, especially at the Rule 12(b)(6) stage. If it is agreed that a sale to an independent third party for $10.00 would be inappropriate under the implied covenant of good faith, then finding a price that would be appropriate is a question of disputed fact, which falls beyond Rule 12(b)(6)'s scope.

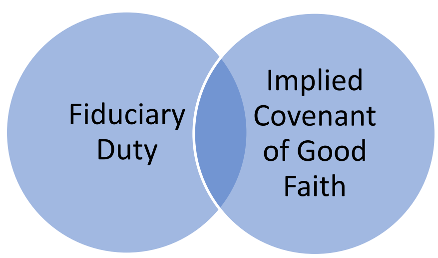
D. Section 8.06(a)'s notice requirements do not support the Court of Chancery's finding that the parties contemplated a closed-market sale.

The Court of Chancery reasoned that Trumpet's members would not need notification of the deal terms under Section 8.06(a) if the Board presented Trumpet to the open market. So, it concluded that the Millers' implied terms would render the notice requirements superfluous. Opinion 31. Not surprisingly, HCP agrees with that conclusion. Answer Br. 29. But the conclusion makes no sense.

Presenting a sale opportunity to the open market and soliciting competitive bids does not mean that such solicitation or the bids received are front-page news. On the contrary, the Board could have reasonably presented Trumpet to the market in a variety of ways without all of the details becoming readily available to the members. Regardless of whether the Board sold Trumpet to MTS or presented the opportunity to the marketplace, the Trumpet members still would require notification of the sale details once the Board "approved" a "sale." Either way, Section 8.06(a)'s notice requirements would not be superfluous.

II. The Agreement's waiver of fiduciary duties did not waive HCP's overlapping duties under the implied covenant.

Trying to support the opinion of the Court of Chancery, HCP accuses the Millers of reintroducing waived common law fiduciary duty claims through the implied covenant of good faith. The Court of Chancery and HCP are incorrect. Even though fiduciary duty and the implied covenant of good faith are distinct legal concepts, with distinct temporal focuses and elements, they can overlap in cases like this to proscribe some of the same misconduct. *See* Opening Br. 25-26. Put another way, conduct relating to a sale transaction may be proscribed by application of the implied covenant and may also be proscribed by common law fiduciary duties. This concept of overlapping liabilities is depicted in the following diagram:



A waiver of common-law fiduciary duties does not affect whether the implied covenant independently proscribes the misconduct at hand. As reflected in Section 3.09 of the Agreement, the waiver of fiduciary liability here was limited in that it did not waive liability for conduct that *also* would be prohibited by the implied covenant:

> No Managers shall be personally liable to the LLC or to its Members . . . for breach of any fiduciary or other duty *that does not involve a breach of the duty to act in accordance with the implied contractual obligation of good faith and fair dealing*.

(App. at A-65, § 3.09 (emphasis added).) HCP knew this when the Agreement was signed.

A. In *Gerber*, this Court applied the implied covenant notwithstanding a waiver of common-law fiduciary duties.

HCP's and the Chancery Court's reliance on *Lonergan v. EPE Holdings, LLC,* 5 A.3d 1008, 1019 (Del. Ch. 2010) is misplaced. *Lonergan* involved the exact same entity (EPE) and the exact same transaction (the EPE merger) that were at issue in *Gerber*. *Lonergan*, 5 A.3d at 1011; *see* Point I.A., above. Mr. Lonergan and Mr. Gerber both were limited partners in EPE. *See Lonergan*, 5 A.3d at 1011. Although the respective case settings were different—*Lonergan* involved a request for an expedited injunction hearing while *Gerber* involved a motion to dismiss—both cases addressed the EPE merger, both involved the waiver of common law fiduciary duties, and both addressed whether the implied covenant of good faith could be applied to fill contractual gaps. *Lonergan*, 5 A.3d at 1016. In both cases, the Court of Chancery ruled that the waiver of fiduciary duty removed any effective protection against self-serving conduct and that no such protection could be obtained from the implied covenant of good faith. *See Id.*, at 1018 ("[T]he elimination of fiduciary duties implies an agreement that losses should remain where they fall."); *Gerber*, 67 A.3d at 413 n.32 (explaining that the implied covenant and other contractual protections "were minimal and did not provide EPE's public investors with anything resembling the protections available at common law.").

While it is true that the protections under the implied covenant of good faith are less than those available under theories of fiduciary duty, those protections are nevertheless recognized and enforced where elements for breach of the implied covenant are satisfied. This was borne out by this Court in *Gerber*. Even though Mr. Gerber (like Mr. Lonergan) had waived claims for breach of fiduciary duty, and even though the conduct at issue involved a merger transaction, this Court found that the implied covenant of good faith applied and provided protection from unreasonable and arbitrary conduct relating to the merger. *Gerber*, 67 A.3d 417-25. *Gerber* reached this conclusion fully recognizing the waiver of common law fiduciary duties. To the extent *Lonergan* stands for the proposition that the implied covenant of good faith cannot apply to sale transactions if fiduciary duties have been waived, that proposition, respectfully, was overturned by *Gerber*. Put plainly, fiduciary duty analysis does not have exclusive dominion over sale transactions.

B. This claim for arbitrarily and unreasonably marketing a company is not a fiduciary-duty *Revlon* claim.

HCP also contends that any time a plaintiff seeks protections under the implied covenant relating to the sale of a company, it seeks relief under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). *See* Answer Br. 31-33. HCP is incorrect. The Millers do not seek the enhanced scrutiny or burden-shifting available for a breach of fiduciary duty under *Revlon*. The Millers are seeking relief under the implied covenant for arbitrary and unreasonable marketing of Trumpet. Where (as here) the contract does not explicitly address how the Board would market the company for sale (because the parties did not negotiate that matter) and does not expressly empower the Board with "sole and unfettered discretion" over that marketing and pricing process (thus creating a "gap" in the express contractual obligations), the implied covenant of good faith fills that gap. It imposes on the Board the obligation to exercise its discretion over the marketing and pricing process reasonably and not arbitrarily, consistent with reasonable expectations held at the time of contract. And if, under the contract's language and the complaint's allegations, those reasonable expectations at the time of contract are that the Board would conduct a reasonable market-check and obtain the best price reasonably available for the company, the implied covenant imposes such terms. The implied covenant applies even if the same remedy would also be available in the fiduciary-duty context under *Revlon* (albeit without the enhanced scrutiny and burden-shifting *Revlon* would otherwise offer).

Under Section 3.09, the parties *knew* that even though certain conduct could not be challenged with a claim for breach of fiduciary duty, that conduct could be challenged if it also violated the implied covenant of good faith and fair dealing. HCP's attempts to frame the Millers' claim as a back-door claim for breach of fiduciary duty must be rejected. Neither fiduciary duty law nor *Revlon* preempts the field of a company sale. Conduct *independently* proscribed by the implied covenant can be challenged notwithstanding *Revlon*.

III. Under the proper Rule 12(b)(6) standard, the Millers adequately pleaded all elements of an implied covenant claim.

The complaint adequately alleges that the parties would have filled the "gap" with terms that proscribe HCP's misconduct in this case. HCP asserts that *Gerber* added to the standard of review, requiring a "clear" showing that the parties would have proscribed the conduct at hand. HCP contends that the Millers did not properly plead their reasonable expectations or that they did not anticipate the problem arising here. HCP also contends that it cannot understand what term the Millers ask to be implied here. Finally, HCP argues that the implied terms were not so fundamental that the parties saw no need to negotiate over them. All these contentions are unavailing.

A. Rule 12(b)(6)'s "reasonably conceivable" standard remains the law in Delaware.

HCP argues that this Court, in *Gerber*, changed Rule 12(b)(6)'s standard of "reasonably conceivable" in cases addressing the implied covenant of good faith. Instead, HCP argues that *Gerber* adopted a heightened standard of review requiring a showing that the implied covenant's application is "clear" from the contract's express terms alone. Answer Br. 18-21. The cited language from *Gerber* is as follows:

> Under Delaware law, a court confronting an implied covenant claim asks whether it is *clear* from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of

> as a breach of the implied covenant of good faith—had they though to negotiate with respect to that matter.

Gerber, 67 A.3d at 418 (emphasis added). This language was part of a block quote that *Gerber* adopted from the Court of Chancery in *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440 (Del. Ch. 2012). The quoted language, and the other components of the *Gerber* block quote addressed principles applicable to implied covenant cases in general, not in the motion to dismiss context. Indeed, the *ASB Allegiance* opinion addressed post-trial issues, not a motion to dismiss. *Id.* at 438-39. In turn, *ASB Allegiance* adopted the quote from a 1986 case, *Katz v. Oak Industries, Inc.*, 50 A.2d 873, 880 (Del. Ch. 1986). *Katz* dealt with a preliminary injunction motion, not a motion to dismiss.

It does not appear that *Gerber* adopted this "heightened" standard as a substitute for Rule 12(b)(6). Rather, at the end of its analysis of the implied covenant claim, this Court based its ruling on what was "reasonably inferable" at that the motion to dismiss stage:

> [I]t is reasonably inferable that, had the parties focused on that question at the time of contracting, they would have proscribed such conduct. At this stage, it cannot be concluded as a matter of law, that the LP unitholders would have agreed to allow the general partner to act in that manner.

Gerber, 67 A.3d at 425. HCP's arguments based on a higher standard of "clear" evidence, as opposed to the established Rule 12(b)(6) standard, should be rejected at this stage of the case.

But even if HCP's "clear" standard applied here, the Millers would satisfy it. As demonstrated above, the Agreement does not address—at all—how the Board will market and price the company for sale to an independent third party. *See* Point I.A., above. The Agreement endows the Board with "sole discretion" only over the form the sale will take— "whether as a sale of assets, merger, transfer of Membership Interests or otherwise." (App. at A-80, § 8.06(a).) Pursuant to Section 7.02's waterfall provision, the non-HCP members, including the Millers, agreed to provide HCP with a preferred 2x payout before remaining sale proceeds were distributed to others farther down the waterfall. (App. at A-11 to A-14, ¶ 24; Opening Br. 5-6.) And in Section 3.09, the Millers waived any claim for conduct that was not also proscribed by the implied covenant of good faith. (App. at A-65, § 3.09.)

Given this contractual structure, and the relationship between the parties it establishes, the only rational conclusion is that the Millers and the other members put their trust in Trumpet's market value reasonably expecting that sale proceeds would not only enrich HCP but also benefit those farther down the waterfall. Opening Br. 23-25. The only way to achieve that value would be for HCP to perform a reasonable market check designed to obtain the best price reasonably available. Certainly, the Millers did not reasonably expect that HCP would actively undermine efforts to market Trumpet more competitively or subversively attack the FFL proposal (for at least $20 million more than MTS offered). *Id.* These acts can only be viewed as unreasonable and arbitrary violations of the implied covenant of good faith.

Had the parties thought to negotiate how the company would be marketed and priced—instead of assuming such was so fundamental to the transaction to render such negotiation unnecessary[2]—they would have proscribed HCP's conduct. That is the only rational conclusion. *Id.* Otherwise, one would have to conclude that the Millers signed the Agreement knowing their membership interests were now worthless because HCP could sell the company for whatever price it wanted, with no market check. So, regardless of whether the Millers' claim is viewed under Rule 12(b)(6) or HCP's "heightened" standard, the Millers have adequately stated a claim for breach of the implied covenant.

B. The Millers sufficiently pleaded their implied covenant allegations.

According to HCP, because the Millers allege in the complaint that they *reasonably expected* at the time of contract that HCP would shop Trumpet to the marketplace, the Millers must have *anticipated* the potential dispute and cannot complain about it now. Answer Br. 21. Not so. A fundamental element of an implied covenant claim is that the plaintiff "reasonably expected" at the time of

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[2] *See Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017); *Katz*, 508 A.2d at 880 (quoting Corbin on Contracts § 570 (Kaufman Supp. 1984).

contract that the opposed conduct would not occur. *Gerber*, 67 A.3d at 421. These reasonable expectations, which are required to sustain the claim, do not suggest that the Millers anticipated the Board's misconduct.

Arguing the other side of the same coin, HCP argues that the complaint is deficient because it does not explicitly allege that neither party anticipated the disputed issue. Answer Br. 21. But the contract's terms and the facts alleged in the complaint give rise to a reasonable inference that the parties did not anticipate the Board's misconduct. The Millers allege that they reasonably expected HCP would conduct a market check and seek the best price reasonably available. That allegation is the same as saying that the Millers did not anticipate that HCP would *fail to* conduct a market check and seek the best price reasonably available. By alleging their reasonable expectations, the Millers necessarily expressed that neither party anticipated the dispute. The Millers have adequately pleaded their claim.

C. HCP has consistently described the nature of the terms that should be implied here.

HCP contends it cannot tell what term the Millers are seeking to imply into the Agreement, asserting the Millers have not been "clear or consistent" about what they want. Answer Br. 35-38. The Millers have used different words to describe the implied term they seek—for the sake of clarifying for this Court and the court below how the implied covenant applies to this case.

But the implied covenant can be described as a negative and affirmative duty. The implied covenant required the Board to refrain from arbitrarily and unreasonably marketing Trumpet for sale. In this case, the Board was required to conduct a reasonable market check and market the company competitively to obtain the best price reasonably available. It was not permitted to arbitrarily and unreasonably refuse to seek other offers, and more egregiously, actively undermine an unsolicited indication of interest that was much higher than the offer that the Board wanted to and did accept. The Millers have consistently argued this application of the implied covenant here. *See* App. at A-207 to A-208; Appellee's App. at B-33:5-10, B-34:7 to 35:2, B-61:1-16; Opening Br. 22-24.

IV. The Chancery Court and HCP incorrectly inferred alleged facts in HCP's favor.

Respectfully, the relevant facts for purposes of this Rule 12(b)(6) motion are not those contained in the Chancery Court's opinion or those set forth in HCP's briefing. The relevant facts here are those alleged in the complaint and the Millers' briefing along with all reasonable inferences logically flowing therefrom. *See* Opening Br. 5-12, 29-33. The Court of Chancery employed the wrong standard of review—it drew inferences in HCP's favor and against the Millers. *Id.* 32-33.

HCP makes the same mistake in its briefing. For example, HCP asserts that the board members "made efforts to increase the price for Trumpet." Answer Br. 42. That statement is an inference improperly drawn in HCP's favor. To say that HCP "made efforts to increase the price for Trumpet" turns the alleged facts on their head. HCP *impeded* efforts to increase the price at every turn. Opening Br. 29-32. The price increased solely because of the non-HCP board members' actions in the face of HCP's constant opposition and underhanded tactics. *Id.* HCP gave Trumpet's CEO five days (the week before Christmas), to contact two designated entities who already had expressed some interest in Trumpet. (*Id.* at A-19, ¶¶ 44-47.) And when Trumpet's CEO obtained a competing offer, MTS immediately increased its offer by nearly $10 million. (*Id.* at A-20, ¶ 50.) This was a clear indication to the Board that MTS's offer was below-market and that

MTS was trying to secure a bargain-basement purchase without competing on the open market. (*Id.*)

HCP also argues that Mr. Miller sought "only an indication of interest" from FFL. Answer Br. 42 (citing App. at A-22, ¶ 56). To the contrary, the FFL indication of interest came from an unsolicited inquiry by FFL. (App. at A- 21, ¶ 54.) Mr. Miller pushed for a full competitive bidding process with competing offers from numerous bidders in the industry. *See* Opening Br. 29-32. He demonstrated the probable benefits of that approach by obtaining an indication of interest from FFL stating that it valued Trumpet millions of dollars higher than the pending MTS bid. *Id.* HCP's reaction was to collude with MTS to threaten Mr. Miller and the other non-HCP Board members with a potential $100 million claim to quash the FFL proposal. *Id.*; *see also* App. at A-25, ¶ 68. HCP colluded with MTS instead of recognizing that MTS's statement that it expected to reap a $100 million profit from Trumpet showed how undervalued the proposed sale was. (App. at A-25, ¶ 68.) This admission by MTS should have signaled to HCP that MTS's offers were below the market price.

Also, according to HCP, the Millers point to no facts supporting the reasonable inference that HCP "actively undermined attempts to obtain competing offers." Answer Br. 42 (quoting Opening Br. 33). To the contrary, the Millers present multiple allegations explaining that the HCP Board Members (1) held secret phone calls with MTS against the agreement of the Board members not to communicate with MTS without Mr. Fritts on the line, (2) supported groundless MTS attacks on Mr. Miller and the FFL indication of interest, and (3) coerced and intimidated non-HCP Board Members to comply with HCP's demands. Opening Br. 31-32 (citing App at A-22, ¶ 59 to A-28, ¶ 77). This Court must take these facts as true, not follow HCP's contrary interpretation.

CONCLUSION

If this Court believes the implied covenant prohibits any kind of sale by HCP—such as selling this multi-million-dollar company to a stranger on the street for $10.00—then the implied covenant required the Board to reasonably and not arbitrarily sell Trumpet. And if that is true, then the sole remaining issue is what marketing process was reasonable here. That is an issue of fact not to be resolved by motion under Rule 12(b)(6). For that reason, and all the reasons stated in the opening brief and in this reply brief, the motion to dismiss the complaint fails. The Millers respectfully request that the Court reverse the Court of Chancery's judgment and remand for further proceedings.

Dated: June 14, 2018

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