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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ARON ENGLISH and RICHARD PEPPE, Individually and on Behalf of All Similarly Situated Individuals, Appellants, Plaintiffs-Below, vs. CHARLES K. NARANG, PAUL A. DILLAHAY, JAMES P. ALLEN, PAUL V. LOMBARDI, CINDY E. MORAN, AUSTIN J. YERKS, DANIEL R. YOUNG, CLOUD INTERMEDIATE HOLDINGS LLC, CLOUD MERGER SUB, INC., and H.I.G. CAPITAL, LLC, Appellees, Defendants-Below.	No. 168, 2019 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2018-0221-AGB

APPELLEES' ANSWERING BRIEF

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Nature of Proceedings

This post-closing damages action arises out of the August 2017 acquisition of NCI, Inc., by affiliates of the private equity firm H.I.G. Capital. Plaintiffs are two individuals who allege they were stockholders of NCI before the acquisition. Plaintiffs did not file suit before the acquisition closed, even though they now assert disclosure claims. Rather, they waited more than seven months after the acquisition was completed to bring this suit.

The Court of Chancery dismissed the action under *Corwin v. KKR Financial Holdings*, 125 A.3d 304 (Del. 2015), because a majority of NCI's disinterested shareholders tendered their shares in favor of the transaction. On appeal, Plaintiffs present two challenges to that judgment. First, Plaintiffs argue the court should not have applied *Corwin* because they alleged NCI's board chairman, Charles Narang, was a conflicted controlling shareholder, and so the entire fairness standard applied. Second, Plaintiffs argue the court should not have applied *Corwin* because they alleged the financial projections disclosed in NCI's recommendation statement were falsely pessimistic, and so the stockholder vote was not fully informed. Neither argument has merit, for the reasons the Court of Chancery's decision explains in detail.

First, Plaintiffs argue Narang was conflicted because he had a "need for liquidity" to diversify his investment portfolio. As an initial matter, this argument

fails for want of supporting factual allegations. Plaintiffs acknowledge that Narang received pro rata treatment with all other stockholders under the merger agreement, and so his incentive was to maximize the value of his shares, which directly aligned his interests with those of the other stockholders. Plaintiffs plead no allegations of fact that permit a reasonable inference that Narang had a pressing liquidity need and so sought to sell NCI *quickly* in a fire sale, rather than deliberately to maximize the Company's value. Indeed, Plaintiffs' own allegations indicate the sale process spanned *two years*, and the board engaged more than 35 potential acquirors. These facts are inconsistent with a rush to sell. Plaintiffs' argument also fails because wanting to diversify an investment portfolio is not the urgent need for liquidity that Delaware precedent indicates may cause a controlling shareholder to rush a sales process and sacrifice maximizing the company's value. Rather, Delaware precedent holds that a controlling shareholder may be conflicted where he faces a "crisis"—an "exigent" need for liquidity that might cause him to prefer quick cash to full value. Wanting to diversify an investment portfolio, even if true, does not present that type of urgent need.

Second, Plaintiffs argue the stockholders were not fully informed because the financial projections disclosed in NCI's recommendation statement were inconsistent with optimistic statements the CEO made about NCI's outlook. But, as the Court of Chancery correctly held, the CEO's statements were positive *and the*

projections were positive, forecasting healthy growth in revenue and profit. Moreover, the CEO's statements were not quantitative statements that could be compared with the projections; they were just general positive statements about various aspects of the Company's operations. Thus, Plaintiffs fail to allege any basis to compare the CEO's statements to the projections and to find them in conflict.

Finally, this Court should affirm the Court of Chancery's judgment dismissing this case for the independent reason that the complaint fails to state a claim for breach of the duty of loyalty against any director, which is the only claim available given NCI's charter provision exculpating its directors from liability for breaches of the duty of care.

Summary of Argument

1. **Denied.** The Court of Chancery correctly held that the complaint does not adequately plead facts supporting a reasonable inference that Narang had a disabling conflict that would block the application of *Corwin*. Plaintiffs argue Narang had a need for liquidity "as borne out by his own actions" (Pl. Br. 3), but the complaint alleges no such actions, other than the sale of "some" stock beginning in late 2015, which the Court of Chancery correctly held does not suggest an exigent need for cash.

2. **Denied.** The Court of Chancery correctly held that the complaint does not adequately plead facts permitting a reasonable inference that the projections disclosed in NCI's recommendation statement were false. NCI's financial projections forecast growth rates of 6.9%, 11.7%, and 8.9% for revenue, EBIT, and Adjusted EBITDA, respectively. Thus, both the CEO's statements *and* the financial projections conveyed to shareholders expected growth. The Court of Chancery correctly concluded that none of the CEO's statements "provide any quantitative support from which it is reasonably inferable that the Company Projections were misleading." (Opinion at 26)

Statement of Facts[1]

A. The Parties

NCI is a Delaware corporation. (A13 ¶ 4) Plaintiffs allege NCI was led by defendant Charles Narang at all times prior to its acquisition. Narang founded NCI and served as its CEO from 1989 until his retirement on October 1, 2015. (A19-20 ¶ 23) Narang also served as NCI's board chairman during that time, and continued in that position after his retirement as CEO, until the acquisition. (*Id.*) Narang was also NCI's largest stockholder. Plaintiffs allege Narang owned 34% of the total outstanding stock, which, because there were two different classes of stock, amounted to 83.5% of the voting power. (A29 ¶ 54) Although the complaint does not make this clear, that voting power did not affect the Company's acquisition, which was accomplished by tender offer, not shareholder vote. Further, although Plaintiffs assert that Narang controlled the sale process, they do not allege any action taken by Narang (rather than the board or the Company's officers) relating to the sale.

NCI's board included six other directors, each of whom is also named as a defendant. (A20-21 ¶¶ 24-29) Five of those defendants were outside directors

[1] For purposes of this appeal, Defendants accept as true the complaint's well-pled allegations.

who held no other positions with NCI. (*Id*. ¶¶ 25-29) The sixth was Paul Dillahay, who became a director and NCI's CEO in October 2016. (A20 ¶ 24)

Finally, Plaintiffs' complaint names three corporate entities as defendants: H.I.G. Capital, LLC; Cloud Intermediate Holdings, LLC; and Cloud Merger Sub, Inc.; purporting to state an aiding and abetting claim against them. (A22 ¶¶ 30-32, A69-70 ¶¶ 201-206) Plaintiffs do not appeal the Court of Chancery's dismissal of the claim against these defendants. (Pl. Br. 3)

B. The Sale Process

According to Plaintiffs' own complaint, NCI's board began the sale process in July 2015, *two years* before the July 2017 merger agreement. (A35 ¶ 76 (alleging the process "began in mid-2015")) In January 2016, the board retained two financial advisors, Wells Fargo and Stifel Nicolaus, "to begin the process of trying to sell NCI." (A36 ¶ 81) The board explained that it decided to explore a sale "in light of significant consolidation in the government services industry," which the board believed would create additional challenges in bidding for and winning large procurement contracts. (*Id*. ¶ 82; A142) In addition to exploring a sale, the board also considered other potential strategic transactions, including a combination with another government services company or the acquisition of smaller companies in the industry. (*Id*.)

From January 2016 to July 2017, the NCI board, Wells Fargo, and Stifel communicated with 36 potential partners. (A142-153) Although Plaintiffs contend that H.I.G. was the "preferred" bidder to which the board rushed to complete a sale (*e.g.*, A45-46 ¶ 115), H.I.G. was not even one of the 33 companies that NCI initially contacted. (A142) Rather, as Plaintiffs allege, H.I.G. did not enter the discussions until November 2016, and then only because H.I.G. initiated talks with NCI, not the other way around. (A37 ¶ 86)

The initial November 2016 discussions with H.I.G. did not progress because, in January 2017, NCI announced that a former employee had embezzled nearly $20 million from the Company. (A38 ¶ 88; A142) In February 2017, "H.I.G. re-initiated contact with NCI"—again, NCI did not contact H.I.G.—and discussions restarted. (A38 ¶ 89) On July 2, 2017, the parties reached an agreement. (A49 ¶ 129)

While the NCI board negotiated with H.I.G., it continued to negotiate with other potential acquirors, and also explored the possibility of NCI itself acquiring another company. (A40 ¶ 97) By this time, the pool of potential acquirors was significantly narrower than the original list the board had started with more than a year earlier, but, on Plaintiffs' own telling, NCI's board had discussions with five other potential partners during 2017, in addition to H.I.G. (A39-44 ¶¶ 92, 95, 97-98, 104, 107, 110) Although Plaintiffs *assert* that the board gave H.I.G. preferen-

tial treatment by providing it non-public information the board did not provide to others, Plaintiffs allege no *facts* supporting this assertion. Rather, Plaintiffs allege NCI hosted presentations for H.I.G. and three of the five other potential partners in May 2017. (A44-45 ¶ 111)[2] Shortly thereafter, the three other parties dropped out of the bidding. (*Id.*) The parties' stated reasons for withdrawing varied. One bidder stated that NCI's shares were "fully and fairly valued at $18.25." (A148) The other two parties expressed that NCI's "recompete" risk was too high. (A45 ¶¶ 112-113)[3] It was after these other parties withdrew, leaving only H.I.G., that NCI granted H.I.G. exclusivity and provided the additional due diligence that Plaintiffs criticize. (A45-46 ¶¶ 115-117)

C. The Merger Agreement

On July 2, 2017, the parties signed the agreement for affiliates of H.I.G. Capital to acquire NCI for a purchase price of $20 per share, approximately $283 million in total. (A49 ¶ 130) Not only was this up from H.I.G.'s initial offer of $18 per share—an 11% increase in the purchase price over months of negotia-

[2] By that time, discussions with the fourth other party, referred to as Party B in the recommendation statement, had already been terminated because of a potential conflict. (A44 ¶ 109) And the fifth party, referred to as Party D, had dropped out of the process because it could not make a revised offer competitive with the existing offers. (A146) Thus, NCI hosted presentations for all the potential bidders remaining at the time.

[3] "Recompete" refers to a company's ability to win the next contract on a particular project after completing the first contract.

tion and due diligence (A39 ¶ 91)—but it was also the highest binding offer that NCI received during the two-year sale process.

Although Plaintiffs note that $20 per share was below NCI's trading price at the time, they essentially ignore other metrics by which the board and stockholders could evaluate the offer. For instance, the price represented a 17.9% premium to the volume-weighted average trading price over the 90-day period ending the day before NCI's board approved the merger agreement. (A154) Additionally, NCI's board had two reputable financial advisors that separately analyzed the proposed transaction. Both concluded the $20 per share price fell within a range of valuations that were fair to NCI's stockholders. (A164-172)

Finally, Plaintiffs allege that Charles Narang committed to tendering approximately 35% of NCI's outstanding shares to support the deal, "essentially blocking any other potential buyers." (A57 ¶ 157) Plaintiffs omit that, under Narang's tender and support agreement, his commitment would be canceled if the merger agreement were terminated or if NCI's board changed its recommendation in favor of the transaction—for instance, if it received a superior offer. (A131)

D. The Stockholders' Support For The Transaction

The acquisition was accomplished by tender offer. (A50 ¶ 133); 8 *Del. C.* § 251(h). NCI filed its recommendation statement on Schedule 14D-9, and the tender offer commenced on July 17, 2017. (A50 ¶ 133) The tender offer expired

on August 11, 2017. (*Id*.) The transaction was subject to the condition that a majority of shares be tendered in support of the transaction. (A177-178) The number of shares tendered far exceeded that condition, with NCI's stockholders tendering 11,924,366 shares, or 82% of the total shares outstanding. (A202)[4] Plaintiffs allege Narang owned 4,617,659 shares—4.5 million shares of Class B stock and 117,659 shares of Class A stock. (A29 ¶ 55) Even excluding Narang's shares, 7,306,707 shares were tendered, meaning that 73.6% of the 9,924,250 shares not owned by Narang were tendered in support of the transaction. The acquisition was completed on August 15, 2017. (A50 ¶ 133)

E. The Instant Action And The Court Of Chancery's Decision Dismissing It

Plaintiffs did not file any challenge to the transaction, or to the disclosures in the recommendation statement, before the transaction closed. Rather, they waited until March 28, 2018—more than seven months after the transaction closed—to file suit.[5]

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[4] Thus, there were 14,541,909 total shares outstanding—11,924,366 is 82% of 14,541,909.

[5] Three other stockholders filed federal claims before the transaction closed challenging the recommendation statement's disclosures. *See Schwartz v. NCI*, No. 17-816 (E.D. Va.); *Witmer v. NCI*, No. 17-838 (E.D. Va.); *Nichols v. NCI*, No. 17-839 (E.D. Va.). NCI made additional disclosures in amendments to the recommendation statement, and all three lawsuits were voluntarily dismissed as moot with no payment to the plaintiffs.

The Court of Chancery dismissed the action for failure to state a claim. Chancellor Bouchard held that the transaction was subject to business judgment review under *Corwin v. KKR Financial Holding*, 125 A.3d 304 (Del. 2015), rejecting Plaintiffs' two arguments why *Corwin* should not apply.

The court first rejected Plaintiffs' argument for application of entire fairness review. Addressing Plaintiffs' argument that they had pled Narang was a conflicted controlling shareholder because he had an urgent liquidity need, the court analyzed the two leading decisions on that topic: *New Jersey Carpenters Pension Fund v. infoGROUP*, 2011 WL 4825888 (Del. Ch. Sept. 30, 2011), and *In re Synthes Shareholder Litigation*, 50 A.3d 1022 (Del. Ch. 2012). (Opinion at 15-18) The court held that "the alleged facts here are similar to those pled in *Synthes* and bear no resemblance to those pled in *infoGROUP*." (*Id*. at 18) However, contrary to Plaintiffs' characterization that the Court of Chancery made a "binary" choice between those two decisions (Pl. Br. 32), the court proceeded to analyze Plaintiffs' allegations in their own right. And it concluded that "the Complaint contains no concrete facts from which it reasonably can be inferred that Narang had an exigent or immediate need for liquidity." (Opinion at 18)

The court correctly summarized that "[t]he crux of plaintiffs' case, as described in their brief, is that once Narang decided to retire in mid-2015 at seventy-three years of age, he 'needed to liquidate his position as part of his estate planning

and wealth management strategy' because 'his NCI holdings accounted for nearly all of his net worth." (Opinion at 18) However, the court held, "[a]ccepting as true plaintiffs' assertion that Narang's holdings in NCI accounted for nearly all of his net worth … plaintiffs have not identified any *allegations of fact* in the Complaint about Narang's estate planning or wealth management strategy to support the inference that he was seeking to liquidate his shares quickly." (*Id*. at 18-19, emphasis in original) The court continued: "To be more specific, the Complaint discusses what plaintiffs contend a 'prudent' or 'suitable' approach to investing and estate planning would be during retirement as a 'general matter,' but plaintiffs make no connection between their views on those subjects and Narang's *actual* investment strategy or objectives." (*Id*. at 19, emphasis in original)

Further, although Plaintiffs *asserted* Narang had tried to "unload" his NCI shares on the open market before selling the Company, the Court of Chancery concluded that the complaint is "devoid of factual support" on that point. (Opinion at 19) Rather, "[t]he only allegation in the Complaint about Narang's selling NCI shares in plaintiffs' non-specific assertion that 'Narang did, in fact, attempt to sell some of his shares on the open market beginning in late 2015.'" (*Id*. at 19-20) But, the court explained, "Narang's SEC filing for this transaction shows [] that Narang sold pursuant to a 10b5-1 plan only 9,610 shares of NCI, equating to less

than 0.2% of his NCI stock at the time—hardly an attempt to 'unload' his position." (*Id*. at 20)

As the court noted in its opinion, at oral argument Plaintiffs' counsel asserted the court could take judicial notice of SEC filings reflecting other sales by Narang. The court declined to do Plaintiffs' work for them by seeking out those unspecified filings. (Opinion at 19-20 n.43, citing A367) This Court need not do so either. Defendants have submitted herewith SEC Form 4s showing that in February, March, and April of 2016, Narang sold approximately 73,000 shares of NCI stock, all at a price of approximately $15 per share. (B1-4) These records *refute* Plaintiffs' assertions that Narang (1) could not sell shares without driving the price down, and (2) was desperate for liquidity (since these sales, including Narang's 2015 sale, generated roughly $1.2 million in proceeds).

The Court of Chancery reasoned that "there are no facts pled in the Complaint that 'support a basis for conceiving that [Narang] wanted or needed to get out of [NCI] at any price, as opposed to having [millions] of reasons to make sure that when he exited, he did so at full value.'" (Opinion at 20, quoting *Synthes*, 50 A.3d at 1037) "[T]he Complaint in this case is devoid of any facts suggesting, for example, that Narang had *any*—much less significant—debt obligations, needed to exit his position in NCI in order to pursue a new business venture, or had admitted

to others a need for liquidity." (*Id*. at 21, emphasis in original) To the contrary, the court held, the facts Plaintiffs allege suggest the sale was *not* rushed:

> [T]he Complaint acknowledges that the sale process extended over a period of more than eighteen months from late 2015 until the Merger Agreement was signed in July 2017; that the Board decided to initiate the process by engaging two financial advisors in January 2016, Wells Fargo and Stifel; that those advisors contacted numerous potential buyers; that at least five firms other than H.I.G.—both strategic and financial firms—expressed interest in the Company but none was prepared to pay more than H.I.G.; that H.I.G. initiated contact with the Company and not the other way around; and that the financial decision to enter into the Merger Agreement was made by a seven-person Board that included five directors other than Narang who are not alleged to have had any management positions with the Company and whose independence is not seriously questioned.

(*Id*. at 21-22, internal record citations omitted)

The Court of Chancery then held that Plaintiffs had not defeated *Corwin*'s application by alleging that the stockholder vote was not fully informed. Addressing Plaintiffs' allegations about the financial projections disclosed in NCI's recommendation statement, the court held that Plaintiffs "do not contend" the disclosure "was incomplete or missing any information, or that management had prepared a different set of projections before the tender offer commenced that should have been disclosed." (Opinion at 25) Rather, the court explained, Plaintiffs allege only that NCI's CEO "made statements during [earnings] calls that reflect optimism about NCI's prospects." (*Id*.) But "[t]he fundamental flaw in plaintiffs' argument that [the CEO's] statements do not reflect an inconsistency with the

Company Projections sufficient to support a reasonable inference that they were materially false or misleading." (*Id*. at 26) Indeed, the court noted, "the Company Projections were generally positive: they projected a compound annual growth in revenue of 6.9% and compound annual growth rates of 11.7% of EBIT and 8.9% of Adjusted EBITDA." (*Id*.) Thus, none of the CEO's statements identified by Plaintiffs "contradicts any aspect of the Company Projections sufficiently to support a reasonable inference that they were false or misleading." (*Id*. at 27)

As a result, the Court of Chancery dismissed the case with prejudice. (Opinion at 36) Although they disagree with the court's conclusions, Plaintiffs did not seek leave to amend the complaint and do not argue that dismissal should have been without prejudice.

Argument

I. The Court Of Chancery Correctly Accepted The Complaint's Allegations Of Fact As True.

A. Question Presented

Did the Court of Chancery appropriately defer to the complaint's well-pled allegations of fact, for purposes of Defendants' motion to dismiss?

B. Scope of Review

This Court's review of the Court of Chancery's decision is *de novo* and plenary. *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000).

C. Merits of Argument

Plaintiffs present this appeal as one about whether the Court of Chancery accepted as true the well-pled allegations of fact in the complaint. It is not. The issue plays no role in the substantive arguments that follow the first part of Plaintiffs' argument. (Pl. Br. 18-24)[6] Regardless, the Court of Chancery correctly accepted as true the allegations of fact in the complaint.

Plaintiffs concede that "the Chancellor did not expressly label any of Plaintiffs' allegations 'conclusory.'" (Pl. Br. 19) Nonetheless, Plaintiffs argue, "the

[6] Additionally, Plaintiffs conflate the issue of what allegations a court must defer to on a motion to dismiss with what is necessary to state a claim (that is, allegations that establish relief is reasonably conceivable). (Pl. Br. 23) Those are two separate questions. First, the court accepts well-pled allegations of fact and reasonable inference therefrom. Then, the court analyzes whether those allegations state a reasonably conceivable claim for relief.

Opinion *implies* that certain allegations were viewed as such." (*Id*., emphasis added) Plaintiffs provide three instances where they believe the court "implied" it was disregarding allegations.

First, Plaintiffs argue the court disregarded their allegation that "Narang's 'NCI holdings accounted for nearly all of his net worth.'" (Pl. Br. 19) This argument fails for two reasons. Most importantly, the Court of Chancery *expressly credited* the allegation. Although it explained that the allegation "is lean on factual support," it said so in the middle of a sentence "[a]ccepting *as true* plaintiffs' assertion that Narang's holdings in NCI accounted for nearly all of his net worth…." (Opinion at 18-19, emphasis added) Moreover, the court was not required to credit the assertion that Narang's wealth was nearly all in NCI stock because it is *not* a factual allegation; it is an inference Plaintiffs proposed *from* factual allegations. Specifically, the complaint alleges Narang "had no other discernible significant business interests, and Plaintiffs' counsel's public records searches did not reveal any extensive real estate holdings." (A32 ¶ 64) It is from these allegations that Plaintiffs assert "nearly all of Narang's wealth derived from his equity interest in NCI." (*Id*.) Thus, the court's point in finding that the allegation "is lean on factual support" was not that Plaintiffs made a conclusory assertion, but that they proposed an inference that does not follow from the facts they alleged. As the court explained, it does not follow that nearly all Narang's wealth was in NCI stock from

the allegation that Narang had no other "discernible" "significant" business interests and no "extensive" real estate holdings that came up in Plaintiffs' counsel's searches. People keep their assets in all types of forms, many of which—for instance, brokerage accounts or deeds in trust—are not disclosed publicly. (Opinion at 19 n.40)

Thus, Plaintiffs' proposed inference was not reasonable. *Feldman v. Cutaia*, 951 A.2d 727, 731 (Del. 2008) (courts should not draw inferences "unless they truly are reasonable"). This is not an argument about the distinction between factual allegations and conclusory assertions; it is an instance where the facts alleged did not support the inference proposed. Even so, although the Court of Chancery did not need to credit Plaintiffs' inference that Narang's wealth was almost entirely in NCI stock, the court *did* credit the inference. As a result, Plaintiffs have no cause to complain.

Plaintiffs' second example of a supposed factual allegation the Court of Chancery refused to credit is that "Narang 'attempted to unload his shares on the open market.'" (Pl. Br. 19) The court held that the assertion was "devoid of factual support in the Complaint." (Opinion at 19) That is not because the allegation is conclusory, but because it is an assertion from Plaintiffs' *legal briefs* that the complaint's allegations do not support. Specifically, the assertion that Narang tried to unload his stock came from Plaintiffs' brief opposing Defendants' motion to dis-

miss. (A251) The brief, in turn, cited paragraphs 72 through 75 of the complaint. (A34-35 ¶¶ 72-75) But those paragraphs contain only the allegation that Narang attempted to sell "some" of his NCI stock beginning in late 2015. The court did not refuse to accept that Narang attempted to sell some stock in late 2015—indeed, it expressly credited that allegation. *See supra* at 17. But that allegation told the court nothing about Narang's intent because it told the court nothing about how much stock Narang tried to sell. The court was not required to accept Plaintiffs' characterization of the complaint's allegation, rather than just the allegation itself.

Plaintiffs' final example of an allegation of fact they argue the Court of Chancery refused to credit is the allegation just discussed: that "Narang did, in fact, attempt to sell some of his shares on the open market beginning in late 2015." (Pl. Br. 19) But, again, the court did not refuse to accept this allegation. Rather, it held that this "non-specific" assertion provided no indication of how much stock Narang sold. (Opinion at 20) And although at oral argument Plaintiffs suggested the court could fill in the blanks itself by researching public SEC filings, the court was within its discretion to decline to search public records itself. (*Id*.) Regardless, if it had, the facts it found would have *undermined*, rather than supported, Plaintiffs' assertion. *See supra* at 13. Thus, this is not an example of the court refusing to credit Plaintiffs' allegation; the court accepted that Narang sold "some" shares be-

ginning in late 2015, as Plaintiffs allege. But that allegation itself did not tell the Court anything about how much Narang sold.

Thus, Plaintiffs' attempt to make this case about the distinction between factual allegations and conclusory assertions is faulty. Plaintiffs do not identify any allegations of fact the court did not credit.

II. The Court Of Chancery Correctly Declined To Apply The Entire Fairness Standard.

A. Question Presented

Did the Court of Chancery correctly conclude that Plaintiffs have not pled a claim subject to entire fairness review?

B. Scope of Review

This Court's review of the decision dismissing the complaint is *de novo* and plenary. *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000).

C. Merits of Argument

Plaintiffs do not contest that a majority of NCI's disinterested stockholders tendered their shares in favor of NCI's sale. (Opinion at 11) Nor do Plaintiffs contest that the stockholders' "vote" means *Corwin v. KKR Financial Holdings*, 125 A.3d 304 (Del. 2015), defeats their claim unless they plead facts that block *Corwin*'s application. *See also In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 741-47 (Del. Ch. 2016) (applying *Corwin* to tender offers).

The entire fairness standard applies, and blocks *Corwin*'s application, where there is "a looming conflicted controller." *Larkin v. Shah*, 2016 WL 4485447, *8 (Del. Ch. Aug. 25, 2016). However, "the mere presence of a controller does not trigger entire fairness per se." *In re Merge Healthcare S'holders Litig.*, 2017 WL

395981, *6 (Del. Ch. Jan. 30, 2017).[7] Rather, entire fairness review applies only where the controller engages in a conflicted transaction. *Id*. "Conflicted transactions include those in which the controller stands on both sides of the deal," as well as "those in which the controller stands on only one side of the deal but 'competes with the common stockholders for consideration." *Larkin*, 2016 WL 4485447 at *8; *see also Synthes*, 50 A.3d at 1034 (holding that the controller must have "derived a personal financial benefit 'to the exclusion of, and detriment to, the minority stockholders'" to trigger entire fairness review).

Narang did not stand on both sides of NCI's sale; rather, he received cash for his shares just like every other stockholder, as Plaintiffs concede. (A19-20 ¶ 23) Thus, Narang's ownership of NCI stock *aligned* his interests with other stockholders: "When a large stockholder supports a sales process and receives the same per share consideration as every other stockholder, that is ordinarily evidence of fairness, not of the opposite, especially because the support of a large stockholder for the sale helps assure buyers that it can get the support needed to close the deal."

[7] Although the Court need not address the issue because it is clear that Narang was not conflicted, Narang also was not controlling in the context of the acquisition. Plaintiffs allege no facts showing that Narang controlled the board so that the directors' approval of the tender offer was not an independent decision. Further, although Narang had a majority of NCI's voting power because of different classes of stock, the acquisition was achieved by tender offer, not shareholder vote, so Narang's preferred stock counted the same as common stock, meaning his shares were only 34% of the total outstanding shares. *See supra* at 5.

Iroquois Master Fund v. Answers Corp., 2014 WL 7010777, *1 n.1 (Del. Dec. 4, 2014); *see also Synthes*, 50 A.3d at 1035 ("[W]hen a stockholder who is also a fiduciary receives the same consideration for her shares as the rest of the shareholders, their interests are aligned."); *In re CompuCom Sys. S'holders Litig.*, 2005 WL 2481325, *6 (Del. Ch. Sept. 29, 2005) ("[A]s the owner of a majority share, the controlling shareholder's interest in maximizing value is directly aligned with that of the minority.").

Nor did Narang compete with other stockholders for consideration. As Plaintiffs allege, the only consideration Narang received from the transaction other than the per-share consideration was a $3,500 special bonus that each director received for the extra time the board spent on the transaction. (A52 ¶ 141, A48 ¶ 126) Plaintiffs do not allege $3,500 was material to Narang.

Plaintiffs rely instead on Court of Chancery decisions holding that in certain circumstances a need for liquidity may create a conflict for a controlling stockholder. However, "[b]y asserting this theory, Plaintiffs ask the Court to make an extraordinary inference: that rational economic actors have chosen to short-change themselves." *Larkin*, 2016 WL 4485447 at *16. As a result, to successfully plead such a theory, the circumstance "would have to involve a crisis, fire sale where the controller, in order to satisfy an exigent need (such as a margin call or default in a larger investment) agreed to a sale of the corporation without any effort to make

logical buyers aware of the chance to sell, give them a chance to do due diligence, and to raise the financing necessary to make a bid that would reflect the genuine fair market value of the corporation." *Synthes*, 50 A.3d at 1036; *see also Merge Healthcare*, 2017 WL 395981 at *8 (similar).

This Court should affirm the Court of Chancery's decision that Plaintiffs' allegations do not establish Narang was conflicted because he was personally motivated to push a fire sale. First, Plaintiffs do not allege facts that suggest Narang was seeking to diversify his holdings. Second, even if Plaintiffs had made such an allegation, that does not constitute an urgent need to sell—a "crisis"—that would satisfy the Court of Chancery's precedent for when a controller is conflicted.

1. Plaintiffs Do Not Allege Facts Establishing That Narang Was Seeking To Diversify His Investments.

Plaintiffs argue that they allege "Narang was conflicted due to his need for liquidity and diversification stemming from his age, decision to retire, and extraordinary concentration of his wealth in a volatile, small-cap company." (Pl. Br. 27-28) But Plaintiffs' allegations do not bear out their argument.

First, Plaintiffs allege no facts about Narang needing liquidity. They do not allege anything he needed money for, "such as a margin call or default in a larger investment." *Synthes*, 50 A.3d at 1036. Plaintiffs' brief cites nineteen paragraphs of the complaint that supposedly support their assertion that they pled a liquidity need. (Pl. Br. 28, citing A19-20 ¶ 23; A32-35 ¶¶ 63-76; A50 ¶¶ 134-137) None

contains any mention of Narang needing money. To be sure, Plaintiffs do allege Narang's holdings in NCI were illiquid. (*E.g.*, A32 ¶ 65) However, just because his stake in NCI was illiquid does not mean Narang had an urgent need to convert it to cash such that he might have rushed the sales process in a way that failed to maximize the Company's value. That is not a reasonable inference.

Second, Plaintiffs do not allege Narang wanted to diversify his assets. They do not allege anything about Narang's investment strategy, how that strategy changed after he retired from the CEO position, or any action he took that suggests he wanted to diversify his holdings. Rather, Plaintiffs allege that "[i]n accordance with a prudent approach to retirement, Narang needed to secure and diversify his assets." (A33 ¶ 66) They further allege "it would have been unsuitable for Narang to have left the bulk of his net worth tied up in NCI stock." (*Id*. ¶ 69) Plaintiffs' brief repeats the assertion, arguing that "prudent, reasonable, and widely accepted norms dictated that Narang would not keep his entire net worth locked up in the relatively illiquid securities of a volatile small-cap company." (Pl. Br. 6)

These allegations about what is generally prudent or normal say nothing about what Narang thought or what actions he took. Plaintiffs' views on "suitable" investment strategies are not relevant to how Narang thought about, or acted concerning, his own portfolio. Indeed, if Narang was following Plaintiffs' view of prudent investing, it would have applied to him the entire time he was CEO of

NCI. Narang's NCI holdings were worth nearly $100 million by the time of the Company's sale. (A52 ¶ 141) Plainly, by Plaintiffs' own allegations, Narang was not following whatever approach Plaintiffs believe would have been suitable for him.[8]

Nor do Plaintiffs allege anything that suggests Narang changed his investment strategy once he was only a director of NCI and no longer an officer. Plaintiffs do not allege any statement Narang made or action he took that suggests he was changing the investment approach he had taken during the entirety of his tenure at NCI. Rather, Plaintiffs allege only that Narang wanted to sell the Company. But wanting to sell the Company is not the same as wanting to sell it quickly such that Narang may have been willing to accept a fire-sale price in order to do it.

To the contrary, Narang retired as CEO in October 2015 (A19-20 ¶ 23), yet NCI's board—dominated, according to Plaintiffs, by Narang—still took nearly two years to sell the Company, and conducted an extensive process before doing so. *See supra* at 6-8. Indeed, the board took *six months* from when it announced its intention to explore a sale before it even retained financial advisors to "begin" the

[8] Attempting to excuse their lack of factual allegations regarding Narang, Plaintiffs argue that the complaint in *In re LNR Property Corp.*, 896 A.2d 169 (Del. Ch. 2005), was "bare boned" and yet the motion to dismiss was denied. (Pl. Br. 31) However, the plaintiffs in *LNR* alleged specific facts showing that the controlling stockholder acted "as a buyer and seller in the transaction," and "negotiated a one-sided deal" through a "sham" special committee. *LNR*, 896 A.2d at 176. There are no such allegations here.

process. (A36 ¶ 81) Thus, Plaintiffs' allegations *conflict* with any inference that Narang rushed the sale. *See Larkin*, 2016 WL 4485447 at *17 (rejecting a liquidity allegation in part because the recommendation statement "describe[d] a robust shopping period that ultimately secured stockholders the highest available offer").[9]

Plaintiffs argue they also allege Narang knew that selling any significant portion of his NCI stock on the open market could cause a "massive blockage discount." (Pl. Br. 29) This is no great revelation: NCI had long disclosed as a risk factor that the stock price "could drop significantly if Mr. Narang sells his interests in the Company or is perceived by the market as intending to sell them." (A34 ¶ 73) This allegation may permit a reasonable inference that if Narang wanted to sell his NCI stock, he knew his best path to doing so—indeed, the best path for *all* shareholders—was a sale of the Company. But it does not permit a reasonable inference that Narang had any reason (or intention) to sell the Company *quickly*. Nothing about Plaintiffs' allegation supports that inference.

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[9] Plaintiffs argue that "[h]ow long the negotiations ultimately took should not be dispositive, especially at the pleading stage, once Narang has already set in motion the plan to sell NCI." (Pl. Br. 34) But it was not the "negotiations" that took two years, it was the process of identifying potential buyers and developing the best offer among the 36 potential suitors with which NCI communicated. *See supra* at 6-8. The length of the sale process is undeniably an important factor Delaware courts consider when evaluating whether the plaintiff has adequately alleged a rushed sale process. *See Synthes*, 50 A.3d at 1037 (holding insufficient the plaintiffs' allegations of a liquidity need because "the pled facts indicate that it was a patient sale process"); *Larkin*, 2016 WL 4485447 at *17 (similar).

2. No Delaware Precedent Supports Plaintiffs' Argument They Have Sufficiently Alleged Narang Was Motivated By An Urgent Need For Liquidity.

Plaintiffs are in essence arguing that any time an alleged controlling stockholder retires, he has an urgent liquidity need. No precedent supports this view, and it ignores the reason precedent considers an urgent liquidity need to be significant: because it can suggest the controlling stockholder "agreed to a sale of the corporation without any effort to make logical buyers aware of the chance to sell, give them a chance to do due diligence, and to raise the financing necessary to make a bid that would reflect the genuine fair market value of the corporation." *Synthes*, 50 A.3d at 1036. A stockholder's retirement as an executive does not support the inference that he had such a need to diversify his investments that he would have taken less than fair value for his stock in order to achieve that goal.

Indeed, *Synthes* rejected nearly identical allegations to Plaintiffs' here. There, the plaintiffs alleged that Hansjoerg Wyss, the board chair of Synthes, who was also Synthes's controlling stockholder, "was a really rich dude who wanted to turn the substantial wealth he had tied up in Synthes into liquid form—and fast." *Synthes*, 50 A.3d at 1034. The plaintiffs further alleged that, "[b]ecause he had such an enormous investment in Synthes, Wyss could not easily wind out of his position without a sizeable transaction," and thus needed a sale. *Id*. The Court of Chancery rejected the claim. It reasoned that "there are no well-pled facts to sug-

gest that Wyss forced a crisis sale of Synthes to J&J in order to satisfy some urgent need for cash." *Id*. at 1036. The plaintiffs pled "no facts suggesting that [Wyss] faced a solvency issue, or even the need to buy something other than a Ferrari or Lamborghini when he purchased his next vehicle." *Id*. The court also noted that (like Narang here) Wyss had been CEO for decades and then remained on as board chairman after retiring as CEO, yet showed no impatience during any of that time: "No pled facts in the complaint support a basis for conceiving that Wyss wanted or needed to get out of Synthes at any price, as opposed to having billions of reasons to make sure that when he exited, he did so at full value." *Id*. at 1037.

So too here. Plaintiffs' claim that it was prudent for Narang to diversify his investment portfolio is not an exigency. Even if it provided some reason to sell, Plaintiffs allege no facts to suggest Narang perceived it as a reason to do anything other than patiently maximize the value of his holdings. And the chronology of NCI's sale process reinforces the lack of urgency. As a result, Plaintiffs' assertion that Narang wanted to diversify his holdings, even if credited, does not establish he was a conflicted controller acting at odds with other stockholders' desire to maximize the value of their shares.

Plaintiffs argue that *Synthes* is distinguishable because, there, "several years passed from when the founder stepped down as CEO to when the company began exploring strategic alternatives," and because "the board in *Synthes* also appointed

an independent director to serve as lead director and oversee the process." (Pl. Br. 33) Plaintiffs fail to note that the *Synthes* court did not even mention, let alone rely on, either of those allegations in reaching its conclusion. Instead, the court relied on allegations about the nature of the sale process that are remarkably similar to the allegations here: that the 7-month sale process was "patient," and that Synthes "took its time, gave bidders access to non-public information, and the chance to consider the risks of making a bid," and that there was outreach to both strategic and financial buyers. *Synthes*, 50 A.3d at 1037. Further, and most fundamentally, the court found what the plaintiffs had *not* pled to be dispositive: The plaintiffs had not pled any facts "suggesting that [the controlling stockholder] faced a solvency issue" or supporting an inference that the stockholder "wanted or needed to get out of Synthes at any price." *Id*. That is precisely Plaintiffs' failing here.

Plaintiffs also try to distinguish *Synthes* on the ground that the controlling stockholder there held only a 37% stake. (Pl. Br. 33) Again, Plaintiffs ignore that *Synthes* assumed for purposes of its analysis that the stockholder was, in fact, a controlling shareholder. *Synthes*, 50 A.3d at 1034. Plaintiffs cite no precedent holding that how much control a stockholder has affects the analysis of whether the stockholder was conflicted. Plaintiffs also argue there was no allegation in *Synthes* that the controlling stockholder had previously attempted to sell his stock. (Pl. Br. 33) But the single line of *Synthes* into which Plaintiffs try to wedge their allega-

tion states that the plaintiffs there had not pled that the controlling stockholder had "tried to sell his stock *in whole or in substantial part*." 50 A.3d at 1036 (emphasis added). The complaint here similarly contains no allegation that Narang had previously tried to sell a sizeable part of his stake in NCI. *See supra* at 18-19.[10]

In sum, contrary to Plaintiffs' characterization, *Synthes* clearly articulated the "very narrow circumstances" when a controlling stockholder's urgent need for liquidity could constitute a disabling conflict:

> Those circumstances would have to involve a crisis, fire sale where the controller, in order to satisfy an exigent need (such as a margin call or default in larger investment) agreed to a sale of the corporation without any effort to make logical buyers aware of the change to sell, give them a chance to do due diligence, and to raise the financing necessary to make a bid that would reflect the genuine fair value of the corporation. In those circumstances, I suppose it could be said that the controller forced a sale of the entity at below fair market in order to meet its own idiosyncratic need for immediate cash.

Synthes, 50 A.3d at 1036. None of those circumstances is alleged here, *even if* the Court credits Plaintiffs' assertion that Narang wanted to sell NCI to diversify his investment portfolio.

The decisions Plaintiffs cite are not to the contrary. Plaintiffs first cite *New Jersey Carpenters Pension Fund v. infoGROUP*, 2011 WL 4825888 (Del. Ch. Oct.

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[10] Plaintiffs also argue that the *Synthes* plaintiffs did not allege the controlling stockholder (rather than the board) had made the decision to sell the company. (Pl. Br. 33) But the complaint here does not allege Narang made the decision to sell, rather than NCI's board. (A15 ¶ 10 (alleging the board made the decision); *see also* A142)

6, 2011) (discussed at Pl. Br. 28, 32). There, the plaintiff alleged specific facts regarding the controlling stockholder's urgent need for liquidity. The plaintiff alleged the controlling stockholder (1) "owed over $12 million as a result of [prior] derivative and SEC settlements" (*id*. at *2); (2) "also had debt exceeding $13 million related to several loans taken out to buy *infoGROUP* stock" (*id*.); (3) "had not received a salary since leaving his job as CEO under the terms of the derivative settlement" (*id*.); and (4) "did not hold investments that provided him 'meaningful cash'" (*id*.). The plaintiff also alleged an immediate need for liquidity: the controlling stockholder planned to launch a new business that he would fund "entirely with his own money." *Id*. at *3. Finally, the stockholder's liquidity need was so apparent that the company's board "repeatedly discussed" his "liquidity problems." *Id*. Plaintiffs' complaint here contains nothing like these allegations.

Two other decisions Plaintiffs cite, *Answers Corp.* and *McMullin*, were not cases where the plaintiff attempted to establish a conflicted transaction by alleging an urgent need for liquidity. (Pl. Br. 28) Rather, they analyzed breach of fiduciary duty claims against directors who were not controlling stockholders. Thus, in *Answers Corp*., the plaintiffs argued they had stated a claim against the board because they had alleged a controlling stockholder had threatened to replace the entire management team if the company was not sold soon, after which the board agreed

to a *two-week* market check, which their financial advisor told the board "was not a 'real' market check." *In re Answers Corp. S'holder Litig*., 2012 WL 1253072, *2-3 (Del. Ch. Apr. 11, 2012) (cited at Pl. Br. 28). *Answers Corp*. analyzed the actions of the directors; it did not analyze whether the controlling stockholder's desire for liquidity caused the transaction to be conflicted. *Id*. at *7. Similarly, *McMullin* considered whether the plaintiff had pled a duty of care claim against the board for failing to adequately inform itself whether the acquisition was in the corporation's best interests. The board was alleged to have approved a sale after meeting only once to discuss it and relying exclusively on a presentation from the controlling stockholder's financial advisor. *McMullin v. Beran*, 765 A.2d 910, 922 (Del. 2000). Again, the court analyzed the board's actions, not whether the transaction was rendered conflicted by an urgent need for liquidity.

3. Plaintiffs Do Not Adequately Allege A Flawed Sales Process.

Finally, Plaintiffs argue for the first time on appeal that "alleged process flaws" in the board's process of selling NCI "support Appellants' position that Narang desperately sought the Acquisition." (Pl. Br. 30) Arguments not presented in the trial court are waived. S. Ct. R. 8; *RockTenn v. BE&K Eng'g*, 103 A.3d 512 (Del. 2014).

Regardless, Plaintiffs' argument is not supported by allegations: None of the supposed "process flaws" concerns any action taken by Narang, and none suggests

Narang was in a "crisis" for which he needed to sell NCI fast. First, Plaintiff argues "the Narang-led Board countered H.I.G.'s earlier offers without ever consulting with either of two financial advisors regarding price." (Pl. Br. 30) The paragraphs of the complaint Plaintiffs cite establish Plaintiffs are referring to negotiations in March and April 2017—fifteen months after NCI retained financial advisors. (A36 ¶ 81) Plaintiffs are apparently arguing that if the recommendation statement did not specifically disclose advice from the financial advisors, then it was not provided. That is simply not how the summary section of a recommendation statement works, and not how it is required to work. As the background section of the recommendation statement makes clear, NCI's financial advisors took a leading role in identifying and developing potential buyers. (A141-154) For instance, not only did the financial advisors periodically review and evaluate strategic alternatives with the board, but they specifically discussed the Company's financial condition with the board at the outset of the sale process. (A141-142) After the board received the first round of initial offers, it met with the financial advisors on March 17, 2017, and they briefed the board on "the financial terms of the proposals" and "potential process considerations relating to pursuing those proposals," and also presented "a brief review of the results of the strategic review process NCI conducted in 2016" and "an overview of recent mergers and acquisitions and other strategic transaction activity taking place in the government ser-

vices industry." (A144) Plaintiffs simply do not allege the board conducted the sale process without appropriate financial-advisor input.

Second, Plaintiffs argue "H.I.G. was given preferential and extraordinary access to NCI's customers" during the negotiation process. (Pl. Br. 30) Again, this assertion is unconnected to Narang or to any supposedly rushed sale process. Further, Plaintiffs' allegations *contradict* the claim. The "preferential" access NCI granted to H.I.G. took place after "the remaining parties withdrew from the process." (A44-45 ¶ 111) Only after that point did the board grant H.I.G. exclusivity and access to sensitive information. (A45-46 ¶ 115) Before that time, NCI hosted presentations for all the potential bidders still involved in the process. *See supra* at 7-8. Thus, Plaintiffs' argument that NCI gave H.I.G. preferential treatment ignores the facts pled in the complaint.

The same holds true for Plaintiffs' complaint that "the Board granted H.I.G. formal and then de facto exclusivity despite never being briefed on the adequacy of H.I.G.'s offer." (Pl. Br. 30) NCI granted H.I.G. exclusivity on May 27, 2017. (A46 ¶ 116) By that time, all the other potential bidders had withdrawn from the process. (A44-45 ¶ 111) Thus, exclusivity was the sleeves off NCI's vest. Further, by May 2017, NCI's board had been pursuing the sale of NCI for nearly two years. For Plaintiffs to argue the board had no idea of the adequacy of H.I.G.'s offers is baseless.

III. The Court Of Chancery Correctly Concluded That Plaintiffs Do Not Sufficiently Allege The Stockholder Vote Was Not Fully Informed.

A. Question Presented

Did the Court of Chancery correctly conclude that Plaintiffs do not plead facts establishing that the vote of NCI's stockholders was not fully informed?

B. Scope of Review

This Court's review of the Court of Chancery's decision is *de novo* and plenary. *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000).

C. Merits of Argument

Plaintiffs also try to block the application of *Corwin* by alleging NCI's stockholders were not fully informed during the tender process because the financial projections disclosed in the recommendation statement "grossly understated NCI's long-term prospects and overstated the Company's purported risks." (Pl. Br. 41, quoting A61 ¶ 167) But Plaintiffs identify no allegations of fact indicating any inconsistency between the projections and the Company's actual prospects—for, although Plaintiffs *assert* that NCI's projections were falsely pessimistic, they *allege* the projections reflected a compound annual growth in revenue of 6.9%. (A59 ¶ 163) They also allege the projections reflected a compound annual growth rate in EBIT of 11.7% and in Adjusted EBITDA of 8.9%. (*Id*. ¶ 162)

The question, then, is whether Plaintiffs allege facts sufficient to plead that the projections were false. Plaintiffs argue that they:

> premised their allegations on [1] the strength of NCI's customer relationships, [2] NCI's strong positioning, [3] the drastically improving market for NCI's products or services, [4] NCI's confidence in its strategic plan, [5] the timing of expected increases in revenue, [6] NCI's longstanding success in earning repeat business, [7] progress reports given during the second quarter of 2016, and [8] the growing size in the Company's pipeline.

(Pl. Br. 41-42, citing A61-64 ¶¶ 168-178) These are the same eight grounds Plaintiffs argued to the Court of Chancery, each of which supposedly corresponds to a paragraph of the complaint. (*Id.*) Plaintiffs' brief offers no specific analysis of the underlying allegations, and an examination reveals the lack of any factual allegations supporting the conclusion that NCI's projections were false. As the Court of Chancery correctly concluded, "none of them provide any quantitative support from which it is reasonably inferable that the Company Projections were misleading." (Opinion at 26)

1. The Strength of NCI's Customer Relationships: Plaintiffs allege NCI's CEO stated that NCI had "meaningful and enduring customer relationships." (A61-62 ¶ 169) This does not establish that 6.9% projected revenue growth or 11.7% EBIT growth "grossly understated" NCI's prospects. There is no way to translate "meaningful and enduring" customer relationships into particular growth numbers for the future. Nor is there any basis to assume that the existence of "meaningful" customer relationships would cause revenue to grow at more than

7% or profits at more than 11%. Therefore, this allegation does not support Plaintiffs' assertion that the projections were false.

2. The Company's Strong Positioning: This phrase appears to refer to the alleged statement by NCI's CEO that the Company's "IDIQ and GWAC contracts are an untapped potential for future growth." (A61-62 ¶ 169) Plaintiffs do not allege any facts that would permit that "potential" to be translated into specific estimates for future revenue or profit growth that could be compared to NCI's disclosed projections. Nor do Plaintiffs allege the published projections were prepared without considering IDIQ and GWAC contracts. Consequently, this allegation does not support Plaintiffs' assertion that NCI's projections were false.

3. The Drastically Improving Market for NCI's Products or Services: Plaintiffs allege NCI's CEO stated that the federal government's budgets for 2016 through 2018 "were planned to show 3% growth before supplementals," but that "[t]he Trump administration's focus on expanding the size of the military and modernization should create a positive market environment." (A62 ¶ 170) Again, there is no way to translate a "positive market environment" into projected growth numbers either higher or lower than the growth estimates disclosed in NCI's projections. Nor do Plaintiffs allege that this estimated growth in federal spending was not incorporated into NCI's projections.

4. The Company's Confidence in its Strategic Plan: Plaintiffs allege NCI's CEO stated "I am confident that NCI will deliver market-leading growth for shareholders, provide rewarding careers for our employees and deliver mission excellence to our customers." (A62 ¶ 171) This, too, is not an allegation that translates to specific growth figures that can be compared to what NCI disclosed. Nor would it be reasonable for Plaintiffs to suggest that a new CEO's vague optimistic vision for the Company's future should be compared to a specific estimate for a specified period of years.

5. The Timing of Expected Increases in Revenue: Plaintiffs allege NCI's CEO stated that "[w]ith the government under continuing resolution for almost half of fiscal year '17 and the natural lag between budget appropriations and the actual flow of cash on projects, the market growth should be more viable in fiscal year '18 and beyond." (A63 ¶ 172) Nothing about a statement that the market "should be" better in future years suggests that NCI's projections for those years—which showed growth—were false.

6. NCI's Longstanding Success in Earning Repeat Business: Plaintiffs allege NCI's CEO stated that "NCI's win rates and recompetes have been 90-plus percent." (A63 ¶ 174) Plaintiffs allege no facts supporting a conclusion that a 90-plus percent win rate on bids translates to more than a 7% revenue growth rate or 11%

profit growth rate. Thus, Plaintiffs' allegation does not support their assertion that NCI's projections were false.

7. Progress Reports Given During the Second Quarter of 2017: Plaintiffs allege that, during an earnings call in May 2017, NCI's CEO noted "the progress we're making in implementing the strategic turnaround plan." (A64 ¶ 176)[11] Plaintiffs allege no facts that enable any comparison of that statement to the growth estimates disclosed in the projections.

8. The Growing Size in the Company's Pipeline: Plaintiffs allege NCI's CEO stated that the Company's "3-year pipeline increased from $4 billion to $4.3 billion and our qualified portion has grown from $2 billion to $2.4 billion." (A64 ¶ 177) Plaintiffs do not allege any facts showing how these increased pipeline figures can be quantified into specific expectations for NCI's growth.

Thus, Plaintiffs' supposed "premise" of their assertion that NCI's projections "grossly understated" the Company's future prospects is exclusively a set of statements that, while suggestive of growth generally, does not support a reasonable inference that the growth estimates disclosed in NCI's projections were false. The CEO's statements suggest NCI would grow and the projections do the same. Plaintiffs do not allege any way to compare the statements to the projections and so

[11] Plaintiffs' brief describes this allegation as occurring during the second quarter of 2016. (Pl. Br. 42) This is an error. (A64 ¶ 176, describing the statement as made in May 2017)

do not allege facts demonstrating the statements are inconsistent with the projections.

Plaintiffs also argue they have pled that NCI's projections were false based on a statement by NCI's CEO in October 2017, months after the Company was acquired, stating that the post-acquisition company planned to triple earnings. (Pl. Br. 43, discussing A64-65 ¶ 180) Yet Plaintiffs offer no meaningful response to the Court of Chancery's reasoning that a statement about the Company's post-acquisition plans is not indicative of the Company's potential performance had it *not* been acquired. (Opinion at 28) The CEO's statement concerned a company in a different financial situation than the pre-acquisition company, because the post-acquisition company had a different funding source and capital structure. NCI had no obligation to disclose to investors what its performance might be post-acquisition, and that is not what the projections purported to disclose. Thus, even if NCI's management had a more optimistic view of the Company's prospects in October 2017, after it had been acquired, that would not have been relevant to the projections disclosed in the recommendation statement. (*Id*.)

Finally, Plaintiffs offer no response to the Court of Chancery's reasoning that "the Company Projections were completed 'prior to completing [the Company's] review of its first quarter financial results for 2017,' which means that they were prepared about *six months* before [the CEO] made his comments in October

2017." (Opinion at 28) Thus, Plaintiffs are asking the Court to infer that projections completed prior to the completion of first quarter 2017 financial results were false based on a statement made half a year later about a company with a different owner and capital structure. The facts alleged do not support such an inference.

IV. Plaintiffs Do Not Plead A Claim For Breach Of The Duty Of Loyalty Against Any Of NCI's Directors.

A. Question Presented

Does Plaintiffs' complaint fail to plead facts that, if true, would constitute a breach of the duty of loyalty?

B. Scope of Review

This Court of Chancery did not reach this issue because it dismissed the action based on its application of *Corwin*. Nonetheless, this Court can affirm on any ground adequately presented below, which this issue was. *RBC Capital Mkts. v. Jervis*, 129 A.3d 816, 849 (Del. 2015).

C. Merits of Argument

Independent of whether the stockholders' ratification of the transaction immunizes the board's decision under *Corwin*, Plaintiffs still must state a claim upon which relief can be granted. *See In re Cornerstone Therapeutics S'holder Litig.*, 115 A.3d 1173, 1179 (Del. 2015). Because NCI had adopted a provision exculpating its directors from breaches of the duty of care (A216, Art. 6.1), in accordance with 8 *Del. C.* § 102(b)(7), Plaintiffs "must allege a non-exculpated breach of the duty of loyalty" to state a claim. *van der Fluit v. Yates*, 2017 WL 5953514, *8 (Del. Ch. Nov. 30, 2017). A breach of the duty of loyalty is adequately alleged only where the plaintiff "plead[s] facts supporting a rational inference that the director harbored self-interest adverse to the stockholders' interests, acted to advance

the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith.'" *Cornerstone Therapeutics*, 115 A.3d at 1179-80 & n.27. Plaintiffs do not plead that any of NCI's directors were self-interested, acted to advance the interest of any interested party from whom they lacked independence, or acted in bad faith. Consequently, the complaint fails to state a claim against any of the director defendants.

Conclusion

For the foregoing reasons, this Court should affirm the Court of Chancery's dismissal for failure to state a claim.

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CERTIFICATE OF SERVICE

I, Daniel M. Kirshenbaum, Esquire, do hereby certify that on July 3, 2019, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

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