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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALGON CARBON CORPORATION, Defendant-Below, Appellant/Cross-Appellee, v. INTER-LOCAL PENSION FUND GCC/IBT, Plaintiff-Below, Appellee/Cross-Appellant.	No. 225, 2019 Court below: Court of Chancery C.A. No. 2017-0910-MTZ **REDACTED VERSION - AUGUST 20, 2019**

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

Plaintiff's counsel made this books-and-records demand to investigate the fairness of a transaction that its client believed was fair. Plaintiff-Appellee Inter-Local Pension Fund GCC/IBT ("Plaintiff") is a former stockholder of Defendant-Appellant Calgon Carbon Corporation ("Defendant" or "Calgon"). Plaintiff brought this action purportedly to investigate the fairness of the $21.50 per-share merger price paid in connection with the acquisition of Calgon (the "Merger") by Kuraray Co., Ltd. ("Kuraray"). Plaintiff's counsel's assertion that the Merger price, which represented a remarkable 62.9% premium, was unfair is belied by the fact that Plaintiff sold shares at or below the Merger price. Even worse, Plaintiff voted in favor of the Merger. Plaintiff's conduct demonstrates that it lacks a proper purpose for its inspection.

Aside from demonstrating its belief that the Merger price was fair by taking these actions, Plaintiff engaged in a series of misconduct that "threaten[ed] the legitimacy of this proceeding . . . ." (Ex. C ("MTD Report") 20.) Plaintiff violated the scheduling order in this case twice. Plaintiff also violated the court's order that it pay sanctions by May 9, 2019. The offending conduct did not end there. Plaintiff submitted an affidavit that was not based on personal knowledge, but was "a lawyer-driven backstop meant to put words in Mitchell's mouth[.]" (*Id.*) Finally, the

affidavit violated Illinois and Delaware law by swearing that the affiant appeared before the notary in Illinois when, in fact, he was hundreds of miles away in Arizona. According to Plaintiff's papers, the false notarization was "evident when the Affidavit was filed, given the fax stamp on the as-filed document . . . ." (A1114.) Based on this litany of egregious misconduct, the court below awarded Calgon $197,471.44 in costs, but allowed the case to go forward. The decision not to dismiss the case constituted legal error, as such abuses of the legal system by Plaintiff cannot be tolerated.

Putting this abuse aside, the judgment below should be reversed for several additional reasons. First, the real party in interest was Plaintiff's counsel and Plaintiff merely acted as a rubber stamp. Other than blindly signing documents, Plaintiff played no role in the litigation and its principal never verified anything he signed. Instead, the litigation was driven by counsel as part of its new business model to use Section 220 to investigate transactions post-closing.

Second, Plaintiff acquiesced in the Merger. It is undisputed Plaintiff sold shares at or below the Merger price and even voted in favor of the Merger. These actions eviscerate any purported purpose of investigating the fairness of the Merger.

Third, there is no evidence—credible or otherwise—of any wrongdoing in connection with the Merger. In fact, it is surprising Plaintiff is attacking this

transaction, given it resulted in a massive premium of 62.9%. Plaintiff's primary argument that the Board of Directors (the "Board") engaged in wrongdoing because it did not conduct an active bidding process was rejected by this Court in *C&J Energy*. The claimed conflicts of interest by Calgon's directors, management, and advisors cannot be squared with the undisputed fact that the directors received the same price for their shares as every other stockholder, management's involvement was under the direction of the Board, and the contingency fee granted to Calgon's financial advisor incentivized it to get the highest price. Finally, Plaintiff claimed that changes to Calgon's projections after the two-year delay of the Ballast Water Initiative were done to benefit Kuraray, but never offered any evidence or explanation how this was so. Indeed, Plaintiff cannot point to any action taken by anyone that lowered the Merger price.

Finally, Plaintiff should be deemed to have waived those requests for inspection that were discussed in its Opening Pre-Trial Brief, but omitted from its Reply Pre-Trial Brief to give the appearance the Demand was drafted with rifled precision.

SUMMARY OF ARGUMENT

1. The Lower Court Erred In Finding Plaintiff Had A Proper Purpose. First, the court below erred in finding Plaintiff's stated purpose was its actual purpose, not its lawyers' purposes. The trial record demonstrates Plaintiff's counsel was the real party in interest in connection with the inspection, which was pursued for the purpose of generating litigation. Plaintiff merely lent its name to the Demand and lawsuit.

Second, the court below erred in finding Plaintiff had a proper purpose despite selling shares at or below the Merger price and voting in favor of the Merger. Given Plaintiff's decisions, Plaintiff is precluded, under the doctrine of acquiescence, from bringing future litigation challenging the fairness of the Merger.

2. The Lower Court Erred And Abused Its Discretion In Denying Calgon's Motion To Dismiss The Complaint. Despite shifting fees on three separate occasions and finding Plaintiff "threaten[ed] the legitimately of this proceeding" by engaging in litigation misconduct, including the submission of a false affidavit, the court below declined to dismiss the action and allowed the case to proceed to trial. In doing so, the court below abused its discretion.

3. The Lower Court Erred In Finding There Was Credible Evidence Of Wrongdoing. The court below erred by finding credible evidence of wrongdoing

based on Plaintiff's allegations that Calgon's Board should have conducted an active solicitation of bids, Calgon's decision makers and advisors had conflicts of interest, and Calgon's financial advisor used five-year projections instead of the eight-year projections favored by Plaintiff's counsel. These claimed conflicts of interest are contrary to established Delaware law.

4. The Lower Court Erred By Finding That Plaintiff Had Not Waived Specific Requests For Books And Records. The lower court erred by ordering Calgon to produce categories of documents that were requested in the Demand but abandoned by Plaintiff in its reply brief.

STATEMENT OF FACTS

A. Calgon Carbon Corporation.

Calgon is a leading manufacturer of activated carbon, with principal executive offices in Moon Township, Pennsylvania. (A135.)

B. The Merger.

On June 14, 2017, Calgon received an unsolicited offer from Kuraray to acquire Calgon at $20.00 per share. (A167.)[1]

At that time, the Board was comprised of nine members. Eight of the nine directors were outside non-management directors. In connection with a potential sale of Calgon, the Board retained two independent advisors: Jones Day, as legal counsel, and Morgan Stanley, as financial advisor. (A165, A168.) Morgan Stanley was entitled to a contingent fee based on the transaction value and thus was financially incentivized to obtain the highest possible price. (Ex. A ("Opinion") 34.)

Calgon was put into play on July 26, 2017, when rumors of a potential acquisition appeared in the press. (A169.) The Board held at least twelve meetings to consider the potential acquisition. (A165-77.) The Board was successful in

[1] Kuraray is a global leader in the manufacture and sale of specialty chemicals and medical products. (A135.)

negotiating two increases in price, ultimately agreeing to an acquisition at $21.50 per share, a premium of approximately 62.9%. (A170-71.)

On September 21, 2017, Calgon announced the agreement and plan of merger with Kuraray, pursuant to which Calgon would become an indirect wholly-owned subsidiary of Kuraray (the "Merger Agreement"). (A38-45.) The Merger Agreement contained reasonable deal protections, including a standard no-solicitation provision, a termination fee of approximately 3.0%, and a matching rights provision. (A180.) Morgan Stanley advised the Board that Kuraray was most likely to offer the greatest value to stockholders and, if any other buyers were willing and capable of providing superior value, announcing a transaction with Kuraray would be the best way to flush out those buyers and elicit such an offer. (A177.) As predicted, no other buyers ever surfaced.

After the Merger announcement, Plaintiff began selling shares at or below the Merger price, at prices ranging from $21.25 to $21.50. (A587; A46-87.) In fact, Plaintiff sold more Calgon stock in the days after the Merger announcement than it had in the previous nine months combined, and then unloaded nearly two-thirds of its total holdings before the Merger closed. (A587.) Such sales are inconsistent with any claim the Merger price was unfair.

C. The Preliminary Proxy Statement Is Issued And Putative Class Action Lawsuits Follow.

On October 27, 2017, Calgon filed a preliminary proxy statement for the Merger. Shortly thereafter, the seemingly obligatory putative securities class actions were filed in federal court. The lawsuits alleged the 112-page preliminary proxy omitted material information regarding Calgon's financial projections and the financial analyses conducted by Morgan Stanley in connection with its fairness opinion.

Calgon voluntarily supplemented certain preliminary disclosures in the Definitive Proxy Statement (the "Proxy"). (A126-340.) Following this, the federal plaintiffs dismissed their actions. Plaintiff did not join these lawsuits or file its own action.

D. Plaintiff Belatedly Seeks Books And Records.

On December 14, 2017, twelve weeks after the announcement of the Merger Agreement, six weeks after the federal plaintiffs sued, and more than two weeks after the filing of the Proxy, Plaintiff sent the Demand. (A588-98.) The Demand sought inspection of thirteen broad categories of Calgon's documents for the alleged purposes of "determin[ing] whether wrongdoing or mismanagement has taken place" in connection with the Merger and "investigat[ing] the independence and

disinterestedness of the directors generally and with respect to the [Merger]." (A590, A595.)

On December 21, 2017, Calgon rejected the Demand because Plaintiff had not satisfied the form and manner requirements of Section 220, Plaintiff had not established credible evidence of wrongdoing, and the Demand's requests were overbroad and not necessary and essential to Plaintiff's stated purposes. (A599-605.) Calgon asserted the Demand did not satisfy the form and manner requirements because Plaintiff verified the Demand before it was final. Plaintiff sued the next day, on December 22, 2017.

E. The Merger Is Approved By A Majority Of Stockholders, Including Plaintiff.

On December 28, 2017, Calgon held a special meeting of stockholders to consider the Merger Agreement and the compensation to be paid to Calgon's executives in connection with the Merger. (A376-80.) At the meeting, 81.54% of the voting power was represented. Of those shares, approximately 94.3% voted in favor of the Merger (76% of shares outstanding), and approximately 66.3% voted in favor of the advisory proposal on executive compensation (54% of shares outstanding). (*Id.*) Notably, Plaintiff voted in favor of the Merger despite its counsel's newly minted contention the price was unfair. (A520-22.)

F. No Topping Bids Emerge And The Merger Closes.

On March 9, 2018, the Merger closed. (A579-85.) In the nearly six-month period between the announcement and consummation of the Merger, no competing bidders emerged. This passive market check confirmed the advice from Morgan Stanley that no one was likely to bid more than Kuraray. (A168, A179.) At the effective time of the Merger, each share of Calgon common stock was automatically converted into the right to receive cash in an amount equal to $21.50. (A212.) In addition, as is the case in every merger, equity awards held by the directors were converted into the right to receive the same consideration as the public stockholders—$21.50 per share. (A214.) This aligned the directors' interests with those of the stockholders, as every additional penny paid inured equally to the benefit of all stockholders.

G. Plaintiff Is Sanctioned For Blatant Discovery Violations.

On February 2, 2018, Calgon served Document Requests and Interrogatories seeking to discern the basis for the alleged wrongdoing. (*See* A494-505 & A506-19.) In its responses, Plaintiff raised boilerplate objections, refused to produce documents, and talismanically invoked privilege. (A435-56 & A523-42.) For example, Document Request No. 1 sought "[a]ll documents upon which [Plaintiff] rel[ies] or relied in asserting [its] purported demand . . . ." (*See* A502.) In response,

Plaintiff raised a host of baseless objections, including that Calgon was seeking documents "at least equally available to [Calgon] as to Plaintiff, including the Proxy, other [Calgon] SEC Filings, [Calgon] investor presentations, and transcripts of conference calls involving [Calgon] officers." (A439-40.) Plaintiff also improperly objected "to the extent it seeks information that is protected by the attorney-client privilege or the work product doctrine[.]" (A439.)

On March 23, 2018, Calgon filed a motion to compel, seeking production of the improperly withheld documents.

On April 13, 2018, Plaintiff filed its Opening Pre-Trial Brief. In connection with its brief, Plaintiff produced, for the first time, the documents its counsel refused to produce in response to document requests, but was now relying upon as evidence of wrongdoing. The ploy violated the scheduling order requiring document production to be completed by March 9, 2018.

On April 19, 2018, the court ruled that Plaintiff's tactics "seemed to be an exercise in schedule manipulation rather than a good faith objection on equal availability and expenses grounds" and "not an appropriate use of the privilege objection." (A683.) In light of Plaintiff's gamesmanship, the court awarded fees under Court of Chancery Rule 37 for the motion and for rescheduling the Mitchell deposition. (A681.)

H. Plaintiff's "Person Most Knowledgeable" Knows Nothing.

On May 11, 2018, Calgon took the deposition of Mitchell, designated by Plaintiff as the person most knowledgeable under Court of Chancery Rule 30(b)(6). Despite this designation and despite being prepared on three separate occasions, Mitchell was unable to provide any evidence that would support Plaintiff's requested inspection. This was a surprising turnabout, given Mitchell's verification of interrogatory answers just weeks earlier, unequivocally stating that he was aware of facts and documents evidencing potential wrongdoing in connection with the Merger. (A529-33, A534.) In his deposition, Mitchell confirmed that counsel orchestrated the Demand;[2] Plaintiff provided no input and took no steps to verify the truthfulness of the statements in the Demand;[3] Plaintiff had no suspicions of wrongdoing, let alone credible evidence;[4] and, other than blindly signing forms sent to it by Plaintiff's counsel, Plaintiff played no role in the litigation.[5] Despite serving

[2] A831-32 ("Q. [W]ho is the person who has the most knowledge, it could be you, your counsel or anybody else in the entire world, who has knowledge about the purposes of the demand? . . . A. I would think that's my legal counsel, sir.").

[3] *See, e.g.*, A747.

[4] *See, e.g.*, A857-58 ("Q. Did you have suspicions about the board's motivations? A. I don't know, sir. Q. Did you have suspicions about management's motivations? A. I don't know, sir.").

[5] *See, e.g.*, A791-94.

as Plaintiff's 30(b)(6) witness, Mitchell answered "I don't know" well over 100 times.

The extent of Plaintiff's abdication was troubling. Mitchell swore under oath in Plaintiff's Interrogatory Responses that the following documents constituted evidence of wrongdoing: "Calgon SEC Filings, Calgon investor presentations and conference call transcripts, and the documents being produced in response to Defendant's First Set of Requests for the Production of Documents." (A529.) In his deposition, however, Mitchell told a different story:

> Q. And [Response to Interrogatory No. 3] refers to Calgon SEC filings. Do you know what that's referencing?
>
> A. I don't know, sir.
>
> Q. It also referenced Calgon investor presentations. Do you know what that's in reference to?
>
> A. I don't know, sir.
>
> Q. It also referenced conference call transcripts. Do you know what that's in reference to?
>
> A. I don't know, sir.
>
> Q. So when you verified these interrogatory responses you didn't know what these documents were?
>
> A. I don't know, sir.
>
> Q. Do you know how the Calgon SEC filings support the purposes in the demand?
>
> A. I don't, sir.

(A809-11.)

Similarly, in Plaintiff's Interrogatory Responses, Mitchell swore under oath he had knowledge of facts alleged in the Demand and Complaint. (A529-30.) In deposition, Mitchell conceded he knew of none:

> Q. What facts are you aware of which would constitute wrongdoing by Calgon's board of directors?
>
> A. I do not know, sir.
>
> Q. What facts are you aware of which would constitute mismanagement by Calgon's directors?
>
> A. I do not know, sir.
>
> Q. What facts are you aware of which would constitute a breach of fiduciary duty by Calgon's directors?
>
> A. I don't know, sir.

(A818-19.) Mitchell gave the same testimony with respect to Calgon's management. (*Id.*)

Mitchell also could not explain what documents Plaintiff was seeking or why it needed them. (A766-67.)

I. Plaintiff Submits A False, Lawyer-Drafted Affidavit That Violates The Law

On June 4, 2018, Plaintiff engaged in sandbagging by filing the Affidavit of Lawrence C. Mitchell in connection with its Reply Pre-Trial Brief.[6] The Affidavit, submitted in violation of the scheduling order, was drafted by Plaintiff's counsel

[6] A1006-10.

with no input from Mitchell.[7] In submitting the Affidavit, Plaintiff's counsel sought to negate the case-ending admissions made by Mitchell during his first deposition, on May 11, 2018.

On June 5, 2018, Calgon moved to strike the Affidavit because it contradicted Mitchell's prior testimony and supplemented it with new facts that Plaintiff's counsel hoped to inject into the record but failed to ask about during Mitchell's first deposition.[8] On June 6, 2018, the court provided Plaintiff with two choices: (1) withdraw the Affidavit or (2) postpone the June 7, 2018 trial and make Mitchell available again for deposition.[9] Plaintiff, desperate to change the record, chose to stand by the Affidavit and make Mitchell available for a second deposition.[10]

In advance of Mitchell's second deposition, Calgon requested Plaintiff produce all documents and communications concerning the Affidavit. On June 22 and 25, Plaintiff, after initially objecting, produced the requested documents. Those documents raised red flags regarding the truthfulness of the statements in the

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[7] A1036 ("Q. [W]hat information in the affidavit is based on your personal knowledge[?] A. My personal knowledge is what was relayed to me by my legal counsel.").

[8] A1011-24.

[9] A1107.

[10] A1025-26.

Affidavit and the circumstances under which the Affidavit was executed. Specifically, the documents immediately raised a concern that the Affidavit had not been signed in the presence of a notary. Instead, as confirmed at Mitchell's deposition, a third party, at Mitchell's behest, fraudulently arranged to have a notarial seal affixed to the Affidavit while Mitchell was in Arizona, despite representations that it was "SWORN AND SUBSCRIBED before [the notary] in [DuPage County, Illinois] . . . ."[11]

As revealed in discovery, Mitchell, while in Arizona, first received a draft of the Affidavit in an email from Plaintiff's counsel on June 4, 2018, at 9:28 a.m. EDT, less than three hours before Plaintiff's reply brief was due.[12]

Mitchell spent, at most, 38 minutes reviewing the draft Affidavit.[13] During this brief period, Mitchell did not take any steps to verify the truthfulness of the statements in the Affidavit.[14] Mitchell likewise did not provide any input or ask any

[11] A1010.

[12] A1079 (Email time-stamped 1:28 p.m. UTC); A1035.

[13] *Compare* A1079 (Time-stamped 1:28 p.m. UTC) *with* A1087 (Fax header time-stamped 7:06 a.m./7:07 a.m. MST).

[14] A1033-34.

questions of his counsel.[15] Instead, he simply signed the document, falsely swearing that it was being executed in the State of Illinois in the presence of a notary.

At 10:06 a.m. EDT, Mitchell faxed the signed Affidavit to Plaintiff's Illinois office.[16] An office employee, at Mitchell's direction, took the fax to a notary.[17] The notary then attested that Mitchell's signature was "that of the person appearing before the notary and named therein."[18] This was a common practice utilized by Plaintiff.[19] The notary's representation was false.[20] After obtaining the notarial seal on the Affidavit, it was forwarded to Plaintiff's counsel by email at 10:46 a.m. EDT.[21] At 11:22 a.m. EDT, the Affidavit was filed with the court, even though "the basic facts of [the Affidavit's fraudulent notarization] were evident when the Affidavit was filed, given the fax stamp on the as-filed document . . . ." (A1114.)

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[15] *Id*., A1034-35.

[16] A1087 (Fax header time-stamped 7:06 a.m./7:07 a.m. MST); A1035.

[17] A1035.

[18] 5 ILCS 312/6-102(c).

[19] A1035.

[20] *Id*. ("Q. And [the notary] doesn't see you sign this document; correct? A. [The notary] was not in Arizona, no.").

[21] *See* A1086 (Time-stamped 2:46 p.m. UTC); A1093 (Resending dated version of Affidavit).

In addition to having been invalidly notarized, the Affidavit contains numerous false statements that Mitchell admitted in deposition. For example, Mitchell swore he met with Plaintiff's counsel in the afternoon before the deposition notice was filed.[22] When asked about this meeting in his deposition, however, Mitchell was unable to confirm the accuracy of this statement, which was given just weeks before his deposition.[23] Instead, Mitchell, even with prompting by his own counsel, testified that he had no idea when the meeting actually occurred.[24]

On July 22, 2018, the court issued a Draft Report on the Motion to Dismiss, concluding Plaintiff had engaged in litigation misconduct that threatened the legitimacy of the proceeding, shifting fees in favor of Calgon, but declining to dismiss the case. On July 24, 2018, the court held a trial based on a paper record.

J. Post-Trial Developments

On January 25, 2019, the court issued its post-trial Opinion. The Opinion found, *inter alia*, that Plaintiff had stated a proper purpose and was entitled to certain categories of documents requested in the Demand.

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[22] A1009.

[23] A1043 ("Q. What time about did that meeting conclude? A. I honestly don't know what time the meeting -- Q. What time did it start? A. I don't know if it was a morning meeting or an afternoon meeting, sir.").

[24] A1045.

Following the Opinion, the parties submitted briefing with respect to the appropriate form of implementing order. Calgon explained Plaintiff had abandoned certain of the requests originally set forth in the Demand by not addressing them in its reply brief. On February 18, 2019, the court entered the Order (the "Final Order") (Ex. B.) The Final Order requires Calgon to produce nine categories of documents within sixty days of entry, including those categories Plaintiff waived at trial.

On March 1, 2019, Calgon filed a motion for stay pending appeal, which the court granted on March 20, 2019.

On April 25, 2019, following an application by Calgon and briefing by the parties, the court issued an Order Regarding Application for Fees and Expenses, which required Plaintiff to reimburse Calgon for $197,471.44 in attorneys' fees and expenses incurred by Calgon as a result of Plaintiff's repeated litigation misconduct. Plaintiff's counsel opposed the fee application, claiming Calgon was entitled to recover at most $23,294.05. Plaintiff violated that Order, as Plaintiff failed to pay the fee award by the May 9, 2019 deadline imposed by the Order. Instead, Plaintiff unilaterally granted itself a stay of the Order while it sought a stay from the court. In response, Calgon filed a motion to enforce the Order and for sanctions.

On May 23, 2019, Calgon appealed. Plaintiff has cross-appealed the award of fees and expenses.

On June 7, 2019, the court denied Plaintiff's motion to stay pending appeal.

ARGUMENT

I. THE LOWER COURT ERRED IN FINDING PLAINTIFF HAD A PROPER PURPOSE.

A. Question Presented

Whether the lower court erred in finding Plaintiff had a proper purpose for inspection. This issue was preserved for appeal. (A896-966, A1125-298.)

B. Standard of Review

A trial court's proper purpose ruling is a question of law that is reviewed *de novo*. *Compaq Computer Corp. v. Horton*, 631 A.2d 1, 3 (Del. 1993) ("The question of a 'proper purpose' under Section 220(b) . . . is an issue of law and equity which this Court reviews *de novo.*").

C. Merits of Argument

The lower court erred in two respects by determining Plaintiff had established a proper purpose for inspection. First, the court erred in finding the stated purpose of the inspection was Plaintiff's actual purpose, rather than that of its counsel. Second, the court erred by finding that the stated purpose—pursuing class litigation relating to the Merger—was viable despite the fact Plaintiff had acquiesced by selling shares at or below the Merger price and voting its remaining shares in favor of the Merger.

1. The Lower Court Erred In Finding Plaintiff's Stated Purpose Was Its Actual Purpose, Not Its Lawyers' Purposes.

The lower court erred in finding Plaintiff had a "proper purpose" because the record demonstrated Plaintiff was only a nominal plaintiff and the real party in interest was its counsel.

Under Section 220, a corporation may reject a demand by showing that the stockholder's stated purpose, even if arguably a valid one, is not the actual purpose, but simply a pretext. *Sutherland v. Dardanelle Timber Co.*, 2006 WL 1451531, at *8 (Del. Ch. May 16, 2006). "In other words, the defendant may try to show that the plaintiff has pursued its claim under false pretenses." *Id.*; *see also Highland Select Equity Fund, L.P. v. Motient Corp.*, 2007 WL 907650, at *1 (Del. Ch. Mar. 14, 2007) (denying inspection where "[plaintiff's] stated purposes were pretextual and that its actual purpose was improper"), *aff'd*, 922 A.2d 415 (Del. 2007) (TABLE). The true purpose controls whether a demand is valid. *See Golden Cycle LLC v. Global Motorsport Grp., Inc.*, 1998 WL 326680, at *1 (Del. Ch. June 18, 1998) ("[p]roper purpose has been construed to mean that a shareholder's *primary* purpose must be proper, irrespective of whether any secondary purpose is proper") (emphasis in original).

Delaware law requires that the stockholder who makes a demand be more than a rubber stamp. *Wilkinson v. A. Schulman, Inc.*, 2017 WL 5289553 (Del. Ch. Nov. 13, 2017). Under Section 220, the stockholder must have a proper purpose and any demand must relate to the stockholder's interest as a stockholder. *See* 8 *Del. C.* § 220(c) ("the *stockholder* may apply to the Court of Chancery for an order to compel such inspection") (emphasis added). Thus, Delaware courts will find the actual purpose is to benefit counsel where the stockholder is disengaged from the process. For example, the Court of Chancery has found the stated purpose belongs not to the stockholder, but to its counsel, where the law firm "initiate[d] the process, draft[ed] a demand to investigate different issues than what motivated the stockholder to respond to the law firm's solicitation, and then pursue[d] the inspection and litigate[d] with only minor and non-substantive involvement from the ostensible stockholder principal." *Schulman*, 2017 WL 5289553, at *3.

As in *Schulman*, Plaintiff played no role in this litigation except to blindly sign whatever documents were provided by counsel and to show up for deposition. It is undisputed that:

- Plaintiff's counsel wants to investigate a transaction that its client believes was fair.

- Plaintiff was presented with a demand letter in need of only a signature.[25]
- The purposes set out in the Demand and the categories of documents were devised solely by Plaintiff's counsel.[26]
- Mitchell reluctantly testified that Plaintiff's counsel was the person most knowledgeable about the purposes of the Demand, which counsel admitted is "a really scary thing" after *Schulman*.[27]
- Mitchell had no knowledge of facts supporting the Demand, and had not reviewed the Proxy upon which the Demand was based.[28]
- Mitchell made no effort to review the Demand before it was sent to Calgon.[29]

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[25] A754 ("Q. And who came up with the thirteen categories of documents? A. My legal counsel, sir. Q. Did you play any role in determining the categories of documents to request? A. No, sir.").

[26] A756-57 ("Q. What did you mean by 'books and records' in this request? A. I didn't prepare this, sir. Q. So you don't know what it means? A. Just from reading this, it's stating that they're asking for all the correspondence. So I would assume all the correspondence related to the proxy.").

[27] A831-32; A1168.

[28] A789.

[29] A747 (Q. To answer the question, you didn't do anything to verify the allegations [in the Demand], correct? A. No, sir.").

- Mitchell was not provided with a copy of Calgon's response to the Demand.[30]
- Mitchell did not review Calgon's Answer to the Complaint until his deposition preparation.[31]
- Mitchell did not know whether Plaintiff voted in favor of the Merger.[32]
- Mitchell's ignorance about how the Fund voted was intentional, as Mitchell was only asked to provide counsel with contact information so that counsel could reach out to Plaintiff's agents under the cloak of privilege.[33]
- Plaintiff did not search for or produce a single document from its files.[34]

[30] A789.

[31] A792.

[32] A825 ("Q. You don't know whether they voted the shares in favor? A. I don't recall.").

[33] A797-98; A801-02.

[34] A793-94 ("Q. Did you search for documents that are responsive to this request? A. Did I search? No, sir. Q. Did you look at your e-mails to see if any documents are responsive to this request? A. I don't believe so, sir.").

- Mitchell did nothing to verify the truthfulness of Plaintiff's responses to Calgon's interrogatories.[35]
- Plaintiff's counsel changed the documents upon which it was relying as evidence of alleged wrongdoing, but never advised Plaintiff of the change or supplemented Plaintiff's sworn interrogatory responses to include the new documents.[36]
- Plaintiff's failure to adhere to its discovery obligations is a reflection of its counsel's view that interrogatories and a 30(b)(6) deposition in Section 220 actions are "ridiculous."[37]
- Plaintiff's counsel revised the categories of documents it was seeking during litigation, without consulting Mitchell.[38]

[35] A799 ("Q. What did you do independently to verify the facts set forth in the responses [to the interrogatories]? A. I read the form, sir. Q. Did you do anything else besides read the form? A. No, sir.").

[36] A850 (testifying he had never seen analyst reports that were attached to Opening Pre-Trial Brief but not mentioned in interrogatory responses he verified).

[37] A1199-1200.

[38] A1041-42.

- Plaintiff's counsel sought to rehabilitate Mitchell's deposition testimony by drafting an affidavit containing statements about which Mitchell had no knowledge.[39]
- Mitchell did nothing to verify the truthfulness of the statements in the lawyer-drafted Affidavit before signing it.[40]
- Mitchell signed the Affidavit outside the presence of a notary.[41]

The court below tried to distinguish *Schulman* based on the artificial distinction about who approached whom first. (Opinion 28.) It does not matter, however, how the process began. What matters is that, after the initial approach by counsel, Plaintiff was completely disengaged from the process. Thus, the only purpose being served by the Demand was counsel's desire, under its new business model, to "[t]ry to get the cases that we need."[42] That does not constitute a proper purpose.

Finally, the court expressed concern that rejecting the Demand "would largely leave Section 220 open only to sophisticated stockholders." (Opinion 29.) This

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[39] MTD Report 20.

[40] A1034.

[41] MTD Report 17.

[42] A1141.

concern is unfounded. Plaintiff's abdication from the litigation had nothing to do with a lack of sophistication. In fact, Mitchell has an M.B.A. in finance. (A699.) Rather, this was an intentional choice made by counsel to run the litigation without any involvement by Plaintiff. This is plainly demonstrated by Mitchell's inability, notwithstanding his role as a 30(b)(6) witness, to answer basic questions about the Demand, the nature of the alleged wrongdoing, and why the documents are being sought. Indeed, Plaintiff's total absence here contrasts with the approach Plaintiff's counsel took in a later books-and-records case, in which the stockholder purportedly spent 40-50 hours working on the demand. *Donnelly v. Keryx Biopharmaceuticals, Inc.*, C.A. No. 2018-0892-SG (Del. Ch. July 10, 2019), Tr. 22-24.

Under these circumstances, the lower court erred in finding Plaintiff had a proper purpose for the inspection.

2. The Lower Court Erred In Finding Plaintiff Had A Proper Purpose Despite Acquiescing To The Merger.

The lower court also erred by finding that Plaintiff's stated purpose of investigating potential claims relating to the Merger was not foreclosed by Plaintiff's decision to sell shares below the Merger price and to vote in favor of the Merger. (Opinion 42-43.)

Under Delaware law, acquiescence occurs if a stockholder sells shares and accepts the benefits of a transaction or votes in favor of a challenged transaction. *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 848 (Del. 1987) (holding "when an informed minority shareholder either votes in favor the merger or . . . accepts the benefits of the transaction, he or she cannot thereafter attack its fairness."). It was undisputed Plaintiff did both. It was also undisputed that the only end use for Plaintiff's requested inspection is potential class litigation relating to the Merger.

Despite these undisputed facts, the lower court refused to apply the doctrine of acquiescence based on its determination "*Bershad* applies only to informed stockholders" and, in this case, "*Bershad*'s application would require a premature merits ruling on that claim." (Opinion 43.) Neither of these grounds is valid.

First, any alleged non-disclosure in the Proxy has no bearing on Plaintiff's decision to sell shares and accept the benefits of the Merger. Plaintiff did not bring litigation, but instead decided to sell shares immediately upon disclosure of the Merger. On at least six separate occasions during that period, Plaintiff sold shares at or below the Merger price and by doing so obtained the benefit of the premium offered by the Merger. (A46-87, A88-125, A341-75, A381-84, A385-434, A457-93, A543-78; A587.) Thus, the doctrine of acquiescence is fully applicable here.

Second, Plaintiff was fully informed when it voted in favor of the Merger. Indeed, Plaintiff abandoned its disclosure claims at trial.[43] (Opinion 35.) Notwithstanding the abandonment of the claims,[44] the court found Plaintiff had not "point[ed] to any potentially missing or suspect information beyond length of Calgon's projections" (*id.* at 35-36)—but this is different from what Plaintiff's counsel argued at the hearing.[45] It is undisputed the projections prepared by Calgon and relied upon by Morgan Stanley for its fairness opinion were disclosed in the Proxy. Nothing more was required by Delaware law. *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997) ("[A] board is not required to engage in 'self-flagellation' and draw legal conclusions implicating itself in a breach of fiduciary duty from surrounding facts and circumstances prior to a formal adjudication of the matter.") (citations omitted). Calgon is not required to engage in

[43] This was confirmed by Mitchell's testimony he was unaware of any disclosure claims. A778-79.

[44] Plaintiff argued *Bershad*'s application was premature but did not point to a single disclosure claim that would bar its application. A982-83.

[45] At the hearing, Plaintiff's counsel argued Calgon did not disclose the "illicit reasons" behind the modifications of projections, "Morgan Stanley had a conflict," and "the officers did the flip-flop for financial reasons." A1287. Aside from the fact these disclosure allegations were dropped, the first and third call for self-flagellation, and Morgan Stanley's compensation was fully disclosed.

self-flagellation by accepting counsel's view that Calgon should have deviated from the standard five years of projections and used longer, unreliable projections.

Third, contrary to the court's conclusion, *Bershad*'s application would not require a premature merits ruling. Delaware courts require that the stockholder have an end use for the information and will deny an inspection where subsequent litigation would be barred. For example, courts have refused inspection where subsequent litigation would be precluded. *See, e.g.*, *Se. Pa. Transp. Auth. v. AbbVie Inc.*, 2015 WL 1753033, at *13 (Del. Ch. Apr. 15, 2015), *aff'd*, 132 A.3d 1 (Del. 2016) ("[I]f a stockholder seeks inspection solely to evaluate whether to bring derivative litigation, the corporate wrongdoing which he seeks to investigate must necessarily be justiciable."); *Graulich v. Dell Inc.*, 2011 WL 1843813, at *7 (Del. Ch. May 16, 2011) (denying demand where stockholder lacked standing because of the statute of limitations and claim preclusion).

Here, Plaintiff has no end use for the demanded books and records because the undisputed facts confirm that the doctrine of acquiescence precludes Plaintiff from challenging the fairness of the deal. Accordingly, Plaintiff lacked a proper purpose.

II. THE LOWER COURT ERRED IN DENYING CALGON'S MOTION TO DISMISS UNDER RULE 41(b).

A. Question Presented

Whether the lower court erred and abused its discretion in denying Calgon's Motion to Dismiss the Complaint pursuant to Court of Chancery Rule 41(b). This issue was preserved for appeal. (A1063-77.)

B. Standard of Review

The Court reviews a trial court's denial of a motion to dismiss under an abuse of discretion standard. *Gebhart v. Ernest DiSabatino & Sons, Inc.*, 264 A.2d 157, 159 (Del. 1970) (affirming Superior Court's dismissal under Rule 41(b)).

C. Merits of Argument

The lower court abused its discretion in denying Calgon's Motion to Dismiss the action pursuant to Rule 41(b), given the court's conclusion that Plaintiff's decision to violate the law and sign an affidavit for which he lacked personal knowledge was "untruthful[]," "rises to the level of misconduct," and "threatens the legitimacy of this proceeding." (MTD Report 17, 19, 20.)

Rule 41(b) provides that "a defendant may move for dismissal of an action or of any claim against the defendant . . . [f]or failure of the plaintiff to . . . comply with [the Court of Chancery] Rules or any order of court." Ct. Ch. R. 41(b). Delaware courts recognize that dismissal is proper "when a party knowingly

misleads a court of equity in order to secure an unfair tactical advantage." *Parfi Holding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 915, 933 (Del. Ch. 2008). Furthermore, dismissal is appropriate when "the tradition of civility and candor that has characterized litigation in" the Court of Chancery is threatened because "the integrity of the litigation process is fundamentally undermined if parties are not candid with the court." *Id.* at 915, 933.

Judged against this standard, Plaintiff's misconduct required dismissal. As the lower court concluded, Mitchell signed an affidavit that was drafted by his counsel and about which he lacked personal knowledge. (MTD Report 20.) The Affidavit was nothing more than "a lawyer-driven backstop meant to put words in Mitchell's mouth" and "threatens the legitimacy of this proceeding." (*Id*.) Furthermore, not only was the substance of the Affidavit false and not within Mitchell's knowledge, but because Mitchell executed the Affidavit in Arizona and then faxed it to an employee in Illinois, the "Affidavit's notarization is invalid under Illinois law, and therefore invalid in this case." (*Id*. at 15.) "The untruthfulness of the representation regarding notarization infects the rest of the Affidavit." (*Id*. at 17.)

By submitting an improperly notarized affidavit, Plaintiff violated the law and compromised the integrity of the judicial process.[46] In *Bessenyei v. Vermillion, Inc.*, the Court of Chancery dismissed an action under nearly identical circumstances:

> Plaintiffs achieved short-term tactical benefits by avoiding compliance with the notary laws. With some thought and some patience, the entire problem addressed in this memorandum opinion could have been circumvented. Dishonesty in the course of litigation is a tempting marker of bad faith. Yet, here, there is no question that Bessenyei, in fact, signed the documents. The ethical failure arose in the context of not complying with a rule designed to assure that the party did sign his pleading and did stand behind its accuracy.

2012 WL 5830214, at *9 (Del. Ch. Nov. 16, 2012), *aff'd*, 67 A.3d 1022 (Del. 2013) (TABLE). *See also OptimisCorp v. Waite*, 2015 WL 5147038, at *7 (Del. Ch. Aug. 26, 2015), *aff'd*, 137 A.3d 970 (Del. 2016) (TABLE) ("From *Bessenyei*, one can draw the principle that actions that undercut the truthfulness of the proceeding are ones that threaten the legitimacy of the judicial process because they impede, and potentially undermine, the Court's ability to find facts accurately, which in turn prevents the Court from equitably dispensing justice.") (citations omitted); *James v. Nat'l Fin. LLC*, 2014 WL 6845560, at *11 (Del. Ch. Dec. 5, 2014) ("The failure to

[46] Indeed, the false swearing of an affidavit is a serious offense under Delaware law. *See* 29 *Del. C.* § 4307(f) (characterizing as perjury "knowingly or wilfully mak[ing] any false or fraudulent statement or misrepresentation in or with reference to any application for a notary commission or any other document required by this chapter").

meet the requirements for a valid notarization is a serious issue."); *Parfi*, 954 A.2d at 932 (dismissing claims as a result of decision to mislead the court in effort to gain tactical advantage).

The lower court declined to dismiss the case on the grounds that, in *Bessenyei*, "lawyers integrally and knowingly facilitated the false notarization" and that, in this case, "there is no evidence [Plaintiff's] counsel encouraged Mitchell to avoid an Arizona notary or even that they noticed [the fax] header before the motion to dismiss." (MTD Report 20-21.) In so ruling, the court misapplied *Bessenyei*.

The *Bessenyei* Court's dismissal decision did not turn on any encouragement by the plaintiffs' litigation counsel to violate the law or avoid a notary. In fact, the *Bessenyei* Court found that plaintiffs' litigation counsel was not aware of the false notarization:

> Plaintiffs' counsel should have conducted further inquiries given the initial "notarization problem" on May 25. Plaintiffs' counsel should also have paid more attention to the notarizations, given Bessenyei's frequent travel. Plaintiffs' counsel could have suggested, for instance, that Bessenyei use the services of a local notary where he happened to be present, or that Bessenyei avail himself of the Declarations Act. With the benefit of hindsight, there are steps that Delaware counsel, perhaps, should have or could have taken. The lack of record knowledge precludes the imposition of the sanction of dismissal on their account.

Bessenyei, 2012 WL 5830214, at *8. The lower court's focus here on the false notarization ignores that Mitchell swore to facts which he later admitted he had no personal knowledge of—conduct that should not be countenanced by a court of equity. Thus, given the false notarization, the false statements, and Plaintiff's other misconduct, dismissal is warranted.

In any event, it appears that Plaintiff's counsel was on notice of the false affidavit, but has never corrected it. Plaintiff represented to the court below that "the basic facts of [the Affidavit's fraudulent notarization] were evident when the Affidavit was filed, given the fax stamp on the as-filed document . . . ." (A1114.) If that representation is true, then Plaintiff's counsel certainly would have been on notice of the false notarization at the time of filing.

Accordingly, the lower court abused its discretion by not dismissing this action under Rule 41(b).

III. THE LOWER COURT ERRED IN FINDING PLAINTIFF HAD SATISFIED THE CREDIBLE BASIS STANDARD.

A. Question Presented

Whether the lower court erred in finding Plaintiff had established a credible basis from which possible wrongdoing could be inferred. This issue was preserved for appeal. (A896-966, A1125-298.)

B. Standard of Review

The Court's review of a trial court's proper purpose ruling is a question of law that is reviewed *de novo*. *Compaq*, 631 A.2d at 3. "As the decision below was based solely upon a documentary record, if the findings of the trial court are clearly in error and justice so requires, this Court must review the entire record and reach its own conclusions with respect to the facts." *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1278 (Del. 1989).

C. Merits of Argument

The lower court erroneously concluded Plaintiff satisfied its evidentiary burden under Section 220. This Court has explained that the burden of a Section 220 plaintiff is "not insubstantial." *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997). Plaintiff can satisfy its burden only by making "a credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing." *Id.* Thus, even though Plaintiff is "'not required

to prove by a preponderance of the evidence' that the wrongdoing 'actually occur[red],'" (*Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. 1996)), its burden is no mere formality. *See City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 287-88 (Del. 2010) ("[A]ny reduction of that burden would be tantamount to permitting inspection based on the plaintiff-stockholder's mere suspicion of wrongdoing.").

The lower court erred by concluding three theories advanced by Plaintiff were supported by credible evidence of wrongdoing: (1) the use of a single-bidder process was improper; (2) Calgon's directors, officers, and advisors, were "infected and spurred by self-interest and conflicts" in violation of their duty of loyalty; and (3) Morgan Stanley should have used longer, less reliable projections for its fairness opinion and Calgon's management should not have adjusted projections "in July 2017 while the Acquisition was being negotiated." (Opinion 31-32.) Unfortunately, the court below, like Plaintiff, did not specifically identify the alleged credible evidence of wrongdoing in its analysis, but only cited to the Complaint and the Demand. (*Id.*) These theories are not backed by credible evidence of wrongdoing, rely on counsel's positions about what should have happened, and are contrary to bedrock Delaware law.

1. A Single-Bidder Sale Process Is Not Evidence Of Wrongdoing.

The lower court erred in concluding there was credible evidence the directors lacked reliable information upon which to approve the Merger because they did not conduct an active bidding process. (Opinion 31.) According to Plaintiff, the Board should not have followed the advice of Morgan Stanley and not accepted the bird in hand (and the corresponding 62.9% premium), but should have required competing bids regardless of the consequences. (A638.) Under Delaware law, however, there is "no single blueprint" for selling a company. *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 44 (Del. 1994). Consistent with this principle, this Court rejected in *C&J Energy Services, Inc. v. City of Miami General Employees' & Sanitation Employees' Retirement Trust*, 107 A.3d 1049 (Del. 2014), the very argument made by Plaintiff and adopted by the court below, that directors must run an active sale process in order to fulfill their fiduciary duties. In *C&J Energy*, which Plaintiff failed to mention in its Opening Pre-Trial Brief,[47] this Court held "a market check does not have to involve an active solicitation, so long as interested bidders

[47] From the very beginning, Plaintiff's counsel demonstrated their misunderstanding of directors' duties in the context of a sale, as exemplified by the Demand's reliance on *In re OPENLANE, Inc.*, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011) (A592), which is no longer good law. *See In re Zale Corp. S'holders Litig.*, 2015 WL 5853693, at *15 n.76 (Del. Ch. Oct. 1, 2015).

have a fair opportunity to present a higher-value alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal." *C&J Energy*, 107 A.3d at 1067-68. Here, there is no dispute that interested bidders had a fair opportunity to bid as the Board had the right to accept a superior proposal as required by Delaware law.[48] Calgon was in play for more than seven months and not a single bidder came forward to make a topping bid, which is not surprising given the massive 62.9% premium.[49] Indeed, Plaintiff was unable to testify that $21.50 was unfair. (A717.)

When confronted with the controlling *C&J Energy* decision, Plaintiff, in its Reply Pre-Trial Brief, was forced to retreat and argue that the sale process did not provide interested bidders with a fair opportunity to bid. (A979.) Plaintiff, however, did not provide any evidence that the deal protections were unreasonable or precluded any interested bidders from offering a higher-value alternative. Nor could it. The Merger Agreement contained typical deal-protection provisions that Delaware courts have routinely upheld as non-preclusive. *See In re BioClinica, Inc.*

[48] *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 725 (Del. Ch. 1999), *aff'd sub nom., Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000).

[49] Average historical deal premiums have ranged from 19%-35% in different decades. *In re Dole Food Co., Inc. Stockholder Litig.*, 2015 WL 5052214, at *46 n.41 (Del. Ch. Aug. 27, 2015).

S'holder Litig., 2013 WL 5631233, at *8 (Del. Ch. Oct. 16, 2013) (holding that "the allegedly unreasonable deal-protection devices—a no-solicitation provision, a poison pill, a reasonable termination fee, information rights, and a top-up option—have been routinely upheld by this Court."). Plaintiff cited no evidence (and the court found none) suggesting that the typical deal protections contained in the Merger Agreement precluded competing bids.

The most Plaintiff could say was "the deal protection provisions were 'likely to deter any potentially interested parties in a context where none have had any discussions with Calgon or received any of the information that would be crucial to the ability to consider a proposal.'" (A979 (quoting A606-63).) Plaintiff's conclusory statement finds no support in Delaware law and would require reversal of the *C&J Energy* decision as those facts are present in every passive market check. Because Plaintiff offered no evidence that interested bidders did not have a fair opportunity to bid, the absence of an active bidding process cannot constitute wrongdoing by the Board. In short, this is nothing more than a disagreement with the business decision of an independent board, which "does not create a credible basis from which the Court can infer mismanagement." *Hoeller v. Tempur Sealy Int'l, Inc.*, 2019 WL 551318, at *10 (Del. Ch. Feb. 12, 2019) (citations omitted).

2. There Was No Credible Evidence That Calgon's Decision Makers And Advisors Had Conflicts Of Interest.

The lower court erred in determining there was credible evidence of wrongdoing in connection with Calgon's decision to agree to Kuraray's proposal to acquire Calgon at a 62.9% premium. (Opinion 31.) In reaching its conclusion, the lower court accepted, as credible evidence, Plaintiff's assertions that Calgon's directors, officers, and advisors suffered from a conflict of interest. (A615-16.) There, however, is no evidence—credible or otherwise—of a conflict of interest. It is not enough to say, in knee-jerk fashion,[50] that conflicts of interest exist.

The Court appears to base its decision on the following grounds, which were fully disclosed in the Proxy: (1) the vesting of the Calgon directors' equity awards was accelerated in connection with the Merger; (2) Morgan Stanley received a contingency fee based on the transaction value; and (3) Kuraray expressed an interest in retaining Calgon management post-closing. (Opinion 31.) Delaware courts, however, have long recognized that, under similar circumstances, these scenarios do not give rise to an inference of wrongdoing.

[50] At trial, Plaintiff's counsel acknowledged that "in investigating wrongdoing, what we have learned to say is there is a conflict of interest." (A1282.)

First, it is well established that the acceleration of a director's existing equity awards does not create a conflict of interest. To the contrary, it aligns the directors' interests with those of the stockholders by motivating directors to get the highest possible price. *See, e.g.*, *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *8 (Del. Ch. Nov. 30, 2007) ("[A]ccelerated vesting of options does not create a conflict of interest because the interests of the shareholders and directors are aligned in obtaining the highest price. The value of the accelerated option increased incrementally with the acquisition price-each additional penny [the acquiror] had to pay . . . raised the value of the accelerated option and share equally."). Not surprisingly, Mitchell conceded the directors would have no conflict if they received the same consideration as the stockholders. (A1040 ("Q. And would you agree that they would have incentive to get the highest price if they got the same price the stockholders got? . . . A: I would believe so, yes.).") Thus, as Plaintiff admitted, the directors had no credible conflict of interest.[51]

Second, the court's finding that Calgon's advisors were conflicted is contradicted by its own ruling. Plaintiff alleged Morgan Stanley had a conflict

[51] In addition, the Opinion ignores the undisputed evidence that the directors would have been better off financially had they voted against any merger, given they would lose their jobs post-Merger. *See* A626.

because of the contingency fee pursuant to which Morgan Stanley would be paid 1.44% of the transaction value.[52] But that fee aligned Morgan Stanley's interests with those of the stockholders, as it provided Morgan Stanley with a powerful incentive to get the highest price possible. For that very reason, the court found this claim to lack a credible basis, concluding "Morgan Stanley's compensation structure, standing alone, does not support a credible basis from which to infer wrongdoing." (Opinion 35.) Thus, there is no basis to find that any advisor had a conflict of interest.

Third, the officers did not suffer from a conflict of interest. There is no evidence management did anything to favor Kuraray over any other bidders. The sale process was conducted by the Board, which was comprised of eight of nine outside directors, with the assistance of outside advisors. Indeed, where officers' jobs were never in danger, continued employment post-acquisition does not give rise to an inference of wrongdoing. *See, e.g.*, *Wayne Cnty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *11 (Del. Ch. July 24, 2009) (officers who obtained new employment agreements with acquiror were not conflicted because there was no allegation the officers controlled or dominated the outside directors or the officers'

[52] Opinion 34. No claim was made that Jones Day was conflicted.

jobs were ever in danger), *aff'd*, 996 A2d 795 (Del. 2010). Indeed, Plaintiff did not dispute this case law below. Consistent with this, Plaintiff presented no evidence, and the court cited none, suggesting that any member of Calgon's management believed his or her job was in danger or that Kuraray's offer in any way influenced management in the sale process. Thus, there is no credible evidence that management favored Kuraray.[53]

3. The Court Erred In Finding There Was Credible Evidence Of Wrongdoing In Connection With Calgon's Financial Projections.

The lower court likewise erred in finding credible evidence of wrongdoing relating to the "nature, length, and timing of Calgon's disclosed projections." The Court authorized an investigation into the projections based on Plaintiff's assertions that (1) "the projections may have been adjusted by the allegedly conflicted

[53] In its pre-trial briefing, Plaintiff used self-serving snippets of the Proxy, taken out of context, to concoct a "story" that management "flip-flopped" by opposing Kuraray until Kuraray indicated it wanted to keep management. The record does not support this fictional story. In early 2017, Calgon's management informed Kuraray the company was not for sale. A165-67. After Kuraray made an unsolicited bid of $20.00 per share and indicated Kuraray intended to retain management, Calgon continued to take the position it was not for sale. A168. However, in light of the approximately 30% premium to the stock's then-current trading price, Calgon's Board decided it was in the best interests of stockholders to permit Kuraray to conduct limited due diligence. *Id*. It was not until Kuraray offered $21.50 the Board decided to sell Calgon. A170-71. In his deposition, Mitchell agreed this very scenario would not constitute a "flip-flop." A1036.

management to encourage Kuraray's acquisition" and (2) "Calgon should have extended its projections beyond 2021 because the company expected a purportedly lucrative project, the so-called Ballast Water Treatment Initiative, to begin in 2019." (Opinion 32.) Neither assertion is supported by credible evidence.

First, there is not a shred of evidence the adjustments to the projections were done in order to "encourage Kuraray's acquisition." Plaintiff offers no evidence or rationale that explains how the revisions to the projections benefited Kuraray. Plaintiff is merely suspicious because "the projections got changed after the initial rejection of Kuraray, the buyer." (A1283.)[54] Indeed, this is not the typical claim made by stockholder plaintiffs who routinely allege that the projections were lowered to allegedly obtain a fairness opinion. *See, e.g.*, *In re PLX Tech. Inc. Stockholders Litig.*, 2018 WL 5018535, at *47 (Del. Ch. Oct. 16, 2018), *aff'd*, 2019 WL 2144476 (Del. May 16, 2019). After the projections were revised, Kuraray did not lower its bid, but increased it twice. (A170-71; A910.) Thus, Plaintiff has

[54] The timing also dispels any inference of wrongdoing. The initial rejection of Kuraray took place on January 10, 2017 (A165-66), but the projections were not revised until July 18, 2017 (A169).

presented no evidence, credible or otherwise, that the projections were adjusted to benefit a sale to Kuraray.[55]

Second, Plaintiff's challenge with respect to the length of the projections is nothing more than a disagreement with the work of the financial advisor over the length of projections used in the fairness opinion. Plaintiff had the opportunity, but provided no evidence that using longer but less reliable projections would have had *any* impact on the value of Calgon. The naked assertion of Plaintiff's counsel that Calgon should have deviated from established practice and used longer projections does not rise to the level of credible evidence of wrongdoing:

> At oral argument, neither party was aware of any Delaware case that requires management to prepare forecasts for a specific period of time. Instead, the Plaintiff argues that this is a special scenario, since Conceptus is in growth mode, and that I should determine an analysis based on cash flows beyond five years would be material. I note that DCFs using five-year forecasts are routine in fairness opinions supporting mergers. . . . There is simply no particularized allegation, beyond Plaintiff's naked assertion, that the methodology it champions would be superior to the five-year projection employed by Goldman.

[55] Indeed, Plaintiff's own evidence explains why the projections were modified in July 2017. The adjustments followed the International Maritime Organization's announcement of a two-year delay in the implementation of the Ballast Water Initiative—an initiative that counsel claims is "one of the most promising opportunities available to [Calgon]." A616; *see* A665. Certainly, Plaintiff would have attacked the Board for not revising the projections given this negative development.

> In fact, common sense indicates that estimates of future performance become less useful as the forecasts project further into the future.

Ehlen v. Conceptus, Inc., 2013 WL 2285577, at *3 (Del. Ch. May 24, 2013) (footnote omitted).

For the reasons discussed above, there is no credible evidence of wrongdoing or undisclosed conflicts of interest.

IV. THE LOWER COURT ERRED IN FINDING PLAINTIFF DID NOT WAIVE CERTAIN REQUESTS FOR BOOKS AND RECORDS.

A. Question Presented

Whether the lower court erred by finding that Plaintiff had not waived specific requests for books and records. This issue was preserved for appeal. (A1299-304.)

B. Standard of Review

The trial court's legal conclusions are reviewed *de novo*. *Nationwide Emerging Managers, LLC v. NorthPointe Holdings, LLC*, 112 A.3d 878, 889 (Del. 2015), *as revised* (Mar. 27, 2015).

C. Merits of Argument

The lower court erred by ordering Calgon to produce categories of documents that Plaintiff had abandoned in connection with pre-trial briefing.

Under Delaware law, Plaintiff's abandonment of the requests resulted in a waiver. *See In re Plains All Am. Pipeline, L.P.*, 2017 WL 6016570, at *2 (Del. Ch. Aug. 8, 2017) ("Plaintiffs fail to address standing at all in their post-trial reply brief and, thus, abandon any argument that they have standing . . . ."); *Dawson v. Pittco Cap. Partners, L.P.*, 2010 WL 692385, at *1 (Del. Ch. Feb. 15, 2010) ("I deem abandoned plaintiffs' initial document production requests . . . since plaintiffs dropped all three arguments from their reply brief."); *Emerald Partners v. Berlin*,

2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."), *aff'd*, 840 A.2d 641 (Del. 2003). This Court recently reaffirmed it is improper to rule on arguments that have been waived. *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 502 (Del. 2019).

In its pre-trial briefing, Plaintiff narrowed the perceived scope of the Demand by abandoning certain requests in the reply brief (*see, e.g.*, A1001-02). Consistent with this, Plaintiff's counsel only mentioned requests 2-6 and 10 at trial. (A1189.) Plaintiff did so to focus its arguments on a handful of categories that gave the impression its Demand was drafted with "rifled" precision.

The lower court's decision to include the waived requests rested on three grounds: (i) the reply brief focused on the "more complex disputed issues and otherwise generally relied on and incorporated the arguments from its opening brief"; (ii) the reply brief "gave no indication that it was waiving or abandoning any requests in its Demand"; and (iii) Plaintiff, at oral argument, "confirmed that it was not waiving or abandoning any requests in its Demand." (Final Order ¶1.)

The lower court's reasoning was flawed. First, as noted above, Delaware law is clear that arguments not made in a reply brief are waived. Abandoned arguments cannot be resurrected by vague references back to the opening brief. This result is

dictated by principles of fairness. Second, the law of waiver does not require a party expressly indicate it is waiving or abandoning a request. Instead, waiver is triggered where, as here, a party fails to include an argument in a reply brief. Third, any attempt by Plaintiff to resurrect claims at oral argument, after they were omitted from the reply brief, is legally insufficient.

CONCLUSION

For the reasons stated, the lower court's Opinion, Final Order, and ruling on the Motion to Dismiss should be reversed and the lower court should be instructed to enter an Order in favor of Calgon denying Plaintiff's inspection request.

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2019, the foregoing documents were served electronically by File&Serve*Xpress* on the following counsel of record:

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