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Case Number 202,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE GGP INC. STOCKHOLDER LITIGATION	)	No. 202, 2021
	)	
	)	Court Below:
	)	
	)	Court of Chancery of the State of Delaware, Consolidated C.A. No. 2018-0267-JRS

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NATURE OF PROCEEDINGS

This appeal raises a narrow challenge to the Court of Chancery's dismissal of Plaintiffs' post-closing breach of fiduciary duty claims arising out of the August 2018 acquisition of GGP Inc. ("GGP" or the "Company") by Brookfield Property Partners L.P. ("BPY," and together with its affiliates, "Brookfield"). The challenged transaction entailed the payment of a substantial pre-closing dividend consisting of cash and stock (the "Pre-Closing Dividend"), followed by a merger in which cash consideration was paid to former GGP stockholders (the "Transaction").

As relevant to the limited focus of this appeal, the Transaction triggered the availability of appraisal rights for GGP stockholders under 8 *Del. C.* § 262 ("Section 262"), which GGP disclosed in the definitive Transaction proxy statement (the "Proxy"). Plaintiffs assert that (i) the Transaction structure—specifically the payment of the Pre-Closing Dividend—violated Section 262 and deprived stockholders of their ability to exercise appraisal rights and seek a court determination concerning the "fair value" of their shares; and (ii) the Proxy failed to provide adequate disclosure about the potential implications of the Transaction structure for any hypothetical appraisal proceeding. The Court of Chancery

correctly dismissed these claims pursuant to Court of Chancery Rule 12(b)(6),[1] and its well-reasoned decision should be affirmed.

First, the Court of Chancery properly determined that nothing about the structure of the Transaction interfered with or undermined the appraisal rights of GGP stockholders in connection with the Transaction. Nothing in Section 262 (or any other provision of the Delaware General Corporation Law (the "DGCL")) prohibited the Transaction structure employed. Furthermore, Section 262(h) expressly permits the Court of Chancery to determine the "fair value" of shares in an appraisal proceeding by "tak[ing] into account all relevant factors." As the Court of Chancery correctly recognized, the Pre-Closing Dividend could be a "relevant factor" for the court to consider in an appraisal proceeding. Thus, for example, if the fair value of a GGP share prior to the Transaction was hypothetically $25 per share and a GGP stockholder received only $23 per share between the Pre-Closing Dividend and the merger consideration, the Court of Chancery would have the authority under Section 262 to take into consideration the Pre-Closing Dividend (by, among other things, looking at the business as a going concern before payment of the Pre-Closing Dividend) and award a dissenting stockholder an additional $2 per share in an appraisal proceeding.

[1] *In re GGP Inc., S'holder Litig.*, 2021 WL 2102326 (Del. Ch. May 25, 2021).

In short, any GGP stockholder who sought appraisal would have received the Pre-Closing Dividend (as required by Delaware law), and would thereafter be entitled to pursue a recovery equal to the "fair value" of her shares in a post-closing appraisal proceeding, advancing whatever arguments she wished regarding the impact of the dividend payment on the "fair value" of her shares. Accordingly, Plaintiffs' lengthy discussion in their Opening Brief as to why the Pre-Closing Dividend should be considered part of the merger of GGP and Brookfield (the "Merger") for appraisal purposes under the step-transaction doctrine is beside the point.

Second, the Court of Chancery correctly held—and, indeed, Plaintiffs conceded below—that the Proxy "makes clear that the [Transaction] did, in fact, trigger appraisal rights under Delaware law."[2] At its core, Plaintiffs' complaint about the Proxy disclosure is that GGP did not inform stockholders how the Pre-Closing Dividend might be treated in any contested appraisal proceeding. Such disclosure, however, is not required under Delaware law. Delaware corporations are not required to give stockholders legal advice regarding proceedings in the Court of Chancery or the implications of a particular transaction structure on individual stockholder rights, much less speculate about how a court might decide hypothetical

[2] B118.

legal issues. Any holding to the contrary would open a Pandora's box for Delaware corporations and create significant uncertainty about disclosure obligations under Delaware law.

Accordingly, the dismissal of Plaintiffs' claims was proper as a matter of law, and the Court of Chancery's well-reasoned decision should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held "that the Transaction's structure did not violate Section 262."[3] Section 262 grants dissenting stockholders the right "to an appraisal by the Court of Chancery of the fair value of the stockholder's *shares* of stock" at the effective time of the Merger.[4] As the Court of Chancery correctly held, nothing in Section 262—or any other provision of the DGCL—prohibited the Transaction structure here. On appeal, Plaintiffs do not (because they cannot) point to any such provision. Indeed, as the Court of Chancery noted, a transaction structure involving the payment of a pre-closing dividend is not unique, and it would have been impermissible under Delaware law to deny the Pre-Closing Dividend to any GGP stockholder, including those who demanded appraisal.

In their Summary of Argument, and subsequently throughout their Opening Brief, Plaintiffs purport to appeal the Court of Chancery's "holding that the Dividend was separate from the Merger."[5] But the Court of Chancery never so held; the question of whether the Pre-Closing Dividend should be considered part of the Transaction would only potentially be relevant in a hypothetical appraisal proceeding. It has no bearing on whether GGP stockholders had appraisal rights in

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[3] *GGP*, 2021 WL 2102326, at *31.

[4] 8 *Del. C.* § 262(a) (emphasis added).

[5] Op. Br. at 11; *see also id.* at 2, 4, 5, 6, 12, 23.

the first instance—it is *undisputed* that GGP stockholders had appraisal rights in the Transaction. Thus, as the Court of Chancery correctly held, Plaintiffs' reliance upon *Louisiana Municipal Police Employees' Retirement System v. Crawford*, 918 A.2d 1172 (Del. Ch. 2007), and the step-transaction doctrine is misplaced.

2. Denied. The Court of Chancery correctly held that "the Proxy's disclosures concerning appraisal rights were sufficient."[6] The Proxy disclosure complied in all respects with Section 262(d)(1)'s requirement that the Company "notify" stockholders that "appraisal rights are available," tracked the statutory language, and included an up-to-date copy of the statute. Plaintiffs' contention that GGP stockholders were nevertheless misled because "[t]he Proxy repeatedly indicated that appraisal rights were only available as to the Merger and cash merger consideration received in the Merger and would not include the Dividend"[7] is without merit. As the Court of Chancery correctly held, Section 262 requires Delaware corporations to disclose to stockholders their right to seek an appraisal of their *shares* and does not reference—much less provide—a right to an appraisal of "merger consideration." To that end, GGP disclosed in the Proxy that GGP stockholders had the right to seek appraisal for the "fair value" of their GGP shares

[6] *GGP*, 2021 WL 2102326, at *33.

[7] Op. Br. at 12.

in connection with the Transaction and that by doing so, consistent with Section 262, they would forego the cash merger consideration.[8] As a matter of law, no further disclosure was required or necessary.

[8] *GGP*, 2021 WL 2102326, at *32.

STATEMENT OF FACTS[9]

A. The Parties

Plaintiffs purport to be former GGP stockholders.[10] Non-party GGP, formerly a Delaware corporation, was a publicly-traded real estate investment trust and the second largest mall and shopping center owner and operator in the United States.[11] Defendant Brookfield owned approximately 35.3% of GGP's common stock at the time of the Transaction.[12]

The individual defendants are the nine members of GGP's board of directors (the "Board") at the time of the Transaction:

- Mary Lou Fiala, Janice R. Fukakusa, John K. Haley, Daniel B. Hurwitz, and Christina M. Lofgren, who were outside, non-management directors of GGP who constituted a special

[9] This Statement of Facts draws from the Consolidated Verified Third Amended Stockholder Class Action Complaint (the "Complaint") (B4-B171) and documents referenced and relied upon therein, including the Proxy (A10-A757). *See Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013) ("Having premised [their] factual allegations squarely on" these documents, Plaintiffs "cannot fairly, even at the pleading stage, ask a court to draw inferences contradicting [these documents] unless [they] plead[] nonconclusory contradictory facts.").

[10] B24-B25.

[11] B9, B31, B37.

[12] *GGP*, 2021 WL 2102326, at *3.

committee (the "Special Committee") that considered and negotiated the Transaction on behalf of GGP;[13]

- Sandeep Mathrani, who had been GGP's CEO since 2010; and[14]
- Richard B. Clark, J. Bruce Flatt, and Brian W. Kingston, who were senior Brookfield executives.[15]

B. The Transaction

On November 11, 2017, Brookfield delivered a written proposal to GGP to acquire all GGP stock it did not already own.[16] The next day, the Board created a Special Committee of five directors, all unaffiliated with Brookfield or GGP management.[17] The Special Committee hired independent legal and financial advisors.[18] It is undisputed that the Brookfield-designated directors did not participate in any aspect of GGP's consideration of the proposal, and recused themselves from the process entirely.[19]

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[13] *Id.* at *4, *7.

[14] *Id.* at *5.

[15] *Id.* at *4. Brookfield and the directors are referred to collectively as "Defendants."

[16] *Id.* at *6.

[17] *Id.* at *7.

[18] *Id.*

[19] *Id.* at *7, *14.

The Special Committee held over thirty meetings over a more than four-month period to consider the proposal and GGP's strategic options.[20] During this period, the Special Committee negotiated improved terms in Brookfield's offer, including changes in the form of consideration.[21] On March 26, 2018, GGP and Brookfield executed a merger agreement, which provided, among other things, that if the Transaction was approved by a majority of GGP shares unaffiliated with Brookfield, (i) GGP would pay the Pre-Closing Dividend to all stockholders unaffiliated with Brookfield, and (ii) all stockholders would receive additional cash to be paid at closing.[22] For the Pre-Closing Dividend, stockholders could elect to receive, subject to proration and other adjustments, cash, BPY units, or BPR stock (a new U.S. REIT security designed to mirror the economics of a BPY unit).[23]

On June 27, 2018, GGP filed the Proxy.[24] There is no dispute that the Proxy expressly disclosed that GGP stockholders were entitled to seek appraisal of their shares in connection with the Transaction and described the requisite mechanics for electing appraisal:

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[20] *Id.* at *7

[21] *Id.* at *7-8.

[22] *Id.* at *8.

[23] *Id.*

[24] *Id.* at *9.

> GGP common stockholders who comply exactly with the applicable requirements and procedures of Section 262 of the DGCL will be entitled to demand appraisal of their shares of GGP common stock (i.e., the dissenting shares) and receive in lieu of the per share merger consideration a cash payment equal to the "fair value" of their GGP common stock, as determined by the Delaware Court of Chancery, which we refer to as the Court of Chancery, in accordance with Section 262 of the DGCL, plus interest, if any, on the amount determined to be the fair value, subject to the provisions of Section 262 of the DGCL.
>
> [. . .]
>
> If a GGP stockholder elects to exercise appraisal rights under Section 262 of the DGCL, such GGP stockholder must do ALL of the following: NOT vote such GGP common stock "FOR" the merger proposal; deliver a written demand for appraisal of such GGP common stock that complies exactly with Section 262 of the DGCL before the vote is taken on the proposal to adopt the merger agreement at the special meeting . . .; and continuously hold of record such GGP common stock through the effective time of the merger.[25]

The GGP stockholders approved the Transaction on July 26, 2018, with holders of approximately 94% of the GGP shares unaffiliated with Brookfield voting in favor.[26] The Transaction closed on August 28, 2018.[27] No competing offers emerged between public announcement of the Transaction and closing.[28]

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[25] A60, A363-A364; *GGP*, 2021 WL 2102326, at *30; *see also* Op. Br. at 17 ("[T]he GGP Proxy disclosed there were appraisal rights.").

[26] *GGP*, 2021 WL 2102326, at *9.

[27] *Id.* at *10.

[28] *Id.* at *9.

C. Procedural History

The Complaint, filed with the benefit of materials from a books and records demand, asserted six causes of action. Count I alleged breach of fiduciary duty against Brookfield in its alleged capacity as GGP's controlling stockholder. Count II alleged breach of fiduciary duty against the Board for approving the Transaction. Count III alleged breach of fiduciary duty against all Defendants for failing to provide GGP stockholders with a fair summary of their appraisal rights and failing to disclose all material information relevant to GGP stockholders when deciding whether to vote in favor of the Transaction or pursue appraisal. Count IV alleged breach of fiduciary duty against Mr. Mathrani, Brookfield, and the GGP directors affiliated with Brookfield for each party's role in the negotiation of a post-Transaction employment contract for Mr. Mathrani with the surviving entity. Count V alleged unjust enrichment against Brookfield. Count VI, pled in the alternative, alleged an aiding and abetting claim against Brookfield in the event that Brookfield was deemed not to be GGP's controlling stockholder.[29]

All Defendants moved to dismiss on July 6, 2020.[30] The Court of Chancery heard oral argument on November 16, 2020,[31] and thereafter requested

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[29] *Id.* at *11.

[30] *Id.*

[31] A951-A1092.

supplemental briefing concerning Plaintiffs' appraisal-related claims, which are the subject of this appeal. On May 25, 2021, the Court of Chancery issued its Memorandum Opinion dismissing the Complaint in its entirety. The Court held that the Complaint did not plead facts to support a reasonable inference that Brookfield controlled GGP.[32] The Court then held that the GGP stockholder vote on the Transaction was fully informed and uncoerced, and thus, under *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), the business judgment rule was the applicable standard of review; the Transaction therefore was insulated from all attacks other than on grounds of waste, which Plaintiffs had not pled.[33] Finally, the Court dismissed: (i) the aiding and abetting claim against Brookfield for failure to plead a predicate breach of fiduciary duty; (ii) the claims against Mr. Mathrani under *Corwin* and Section 141(e) of the DGCL; and (iii) the unjust enrichment claim against Brookfield because it was based on the same allegations that Plaintiffs asserted to challenge the GGP stockholder vote.[34]

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[32] *GGP*, 2021 WL 2102326, at *11-24.

[33] *Id.* at *24-35.

[34] *Id.* at *14, *35.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT THE STRUCTURE OF THE TRANSACTION DID NOT VIOLATE 8 *DEL. C.* § 262

A. Question Presented

Did the Court of Chancery correctly hold that nothing in Section 262 (or any other provision of the DGCL) prohibited the Transaction structure employed here—*i.e.*, the declaration and payment of a substantial pre-closing dividend consisting of cash and stock, followed by the payment of additional cash consideration through a merger?[35] This question was presented below at A1012-A1017, A1079-A1080, A1086, B214-B219, B270-B272, B281-B282, B284-B287.

B. Standard Of Review

The "interpretation and application of the mandates in Section 262 . . . present[] question[s] of law," which this Court reviews "*de novo* on appeal."[36]

C. Merits Of The Argument

The Court of Chancery correctly held that "the Transaction's two-step structure—the payment of the Pre-Closing Dividend followed by a post-closing payout"—"did not violate Section 262."[37] Section 262 grants dissenting

[35] *See id.* at *31-32.

[36] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 524 (Del. 1999), *as modified on denial of reargument* (May 27, 1999).

[37] *GGP*, 2021 WL 2102326, at *30-31.

stockholders the right "to an appraisal by the Court of Chancery of the fair value of the stockholder's *shares* of stock" at the effective time of the merger.[38] Section 262 does not address how parties may or may not structure a merger. As the Court of Chancery held—and which Plaintiffs do not dispute on appeal—"Plaintiffs cannot identify any statutory text" in Section 262 or elsewhere in the DGCL that would "restrict[ ] a buyer's use of a pre-closing dividend in advance of a merger as a means to move consideration from the transacting parties to stockholders."[39]

Mergers structured to include pre-closing dividends are not unique, as the Court of Chancery recognized,[40] and Delaware law required GGP to pay the Pre-Closing Dividend to any GGP stockholders who demanded appraisal. Indeed, it is black-letter law that "directors may not discriminate among stockholders of the same class or series in the payment of a dividend,"[41] which required GGP to pay the Pre-Closing Dividend to all eligible stockholders whether or not they sought appraisal. Importantly, Section 262 explicitly recognizes this principle and provides that

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[38] 8 *Del. C.* § 262(a) (emphasis added).

[39] *GGP*, 2021 WL 2102326, at *31.

[40] *Id.*

[41] R. Franklin Balotti & Jesse A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 5.28 at 5-81 (4th ed. & 2021-1 Supp.).

stockholders who seek appraisal are entitled to receive dividends payable before a merger's effective date.[42]

Thus, as the Court of Chancery correctly held, nothing in the Transaction's structure—the payment of a pre-closing dividend, followed by a second payment at closing—thwarted or interfered with GGP stockholders' appraisal rights. Every GGP stockholder who sought appraisal was entitled to receive the Pre-Closing Dividend (as required by Delaware law) and then pursue a recovery equal to the "fair value" of her shares in a post-closing appraisal proceeding pursuant to Section 262.[43] An appraisal petitioner would have been free to make any argument and submit any evidence she (and her experts) wished as to how the court should treat the Pre-Closing Dividend in the appraisal proceeding. And, contrary to Plaintiffs' contention, neither the existence of the Pre-Closing Dividend, nor its size as compared to the merger consideration, would have prevented the court in the appraisal proceeding from exercising its authority under Section 262 to ensure that

[42] *See* 8 *Del. C.* § 262(k) ("From and after the effective date of the merger or consolidation, no stockholder who has demanded appraisal rights . . . shall be entitled to . . . receive payment of dividends or other distributions on the stock *(except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation*" (emphasis added)).

[43] *GGP*, 2021 WL 2102326, at *32.

a stockholder would be made whole with respect to the "fair value" of her GGP shares.

Indeed, as the Court of Chancery observed, if an appraisal proceeding of GGP stock had been litigated, Section 262(h) would allow the court presiding over that proceeding to "'take into account all relevant factors,'" and "[t]hus, a GGP shareholder seeking appraisal could argue, and the Court could determine under Section 262, that the Pre-Closing Dividend plus the closing consideration undervalued the dissenting stockholder's shares."[44] In short, had a stockholder commenced an appraisal proceeding, it would have proceeded like any other appraisal proceeding following a merger—the stockholder and Company would have made arguments and offered evidence (including as to the effect of the dividend), the court would have considered those submissions, and then, taking "into account all relevant factors," arrived at the fair value of GGP shares, treating the dividend as the evidence dictated.

Plaintiffs contend throughout their Opening Brief that the Court of Chancery held "that the Dividend was not part of the Merger,"[45] and therefore could not be considered in an appraisal proceeding since GGP's operative reality at the

[44] *Id.* at *31-32.

[45] Op. Br. at 17; *see also id.* at 2, 4, 5, 6, 11, 12, 23.

effective time of the Merger excluded the value of the Company attributable to the Pre-Closing Dividend. But the Court of Chancery never reached that issue, let alone so held. And rightly so: the effect of the Pre-Closing Dividend on GGP's "fair value" would only be potentially relevant in a hypothetical appraisal proceeding that never occurred. For the same reasons, the Court of Chancery properly declined to decide whether the Pre-Closing Dividend and the Merger were one transaction under the step-transaction doctrine.

Plaintiffs' reliance on *Crawford* is misplaced. Indeed, it is Plaintiffs—not the Court of Chancery—who "simply misread *Crawford* and fail[] to interpret that precedent correctly."[46] Plaintiffs repeatedly mischaracterize *Crawford*, arguing that the court there held "that a large special dividend conditioned on approval of a merger is part of the merger for purposes of an appraisal action."[47] To the contrary, and as the Court of Chancery correctly explained below, *Crawford* held only that a transaction in which stockholders receive a pre-merger cash dividend that is contingent on the approval of the transaction triggers appraisal rights:

> [*Crawford*] dealt with a situation where no appraisal rights were granted to dissenting stockholders after an all-cash pre-merger dividend was conditioned on a cashless stock-for-stock merger that would not otherwise have triggered appraisal rights under Section 262. Chancellor Chandler looked past the form of the

[46] *Id.* at 18.

[47] *Id.* at 17; *see also id.* at 4, 11.

> payment to its substance, holding that the pre-merger dividend required appraisal rights and enjoining the merger until the target disclosed that stockholders had the right to dissent and seek appraisal.[48]

The Court of Chancery correctly concluded that "Plaintiffs' analogy to *Crawford* is . . . inapt" because "[h]ere, there is no dispute that the Proxy disclosed that GGP stockholders had the right to seek appraisal and further disclosed how they should go about exercising that right."[49] The court in *Crawford*, like the Court of Chancery here, properly declined to provide an advisory opinion on how a transaction involving a pre-closing dividend would affect a hypothetical appraisal proceeding. *See, e.g.*, *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1217 (Del. 2014) ("Delaware courts do not render advisory or hypothetical opinions . . . to conserve limited judicial resources and to avoid rendering a legally binding decision that could result in premature and possibly unsound lawmaking."); *Cirillo Fam. Tr. v. Moezinia*, 2019 WL 5107461, at *2 (Del. Oct. 14, 2019) (ORDER) ("We find no error with the trial court's refusal to render what would have been a purely advisory opinion.").

Plaintiffs further contend that it was "legal error" for the Court of Chancery to state that "an appraisal proceeding could determine whether the combined Pre-

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[48] *GGP*, 2021 WL 2102326, at *31.

[49] *Id.*

Closing Dividend and per share merger consideration represented the fair value of GGP Stock," and that "[t]his holding is inconsistent with the lower court's prior holding that the Dividend is not part of the Merger."[50] As explained above, however, the Court of Chancery never held that "the Dividend is not part of the Merger."[51] And, in any event, there is no internal inconsistency in observing that Section 262(h) "empowers the court to 'take into account all relevant factors'" in an appraisal proceeding, and further observing that a pre-closing dividend could be a relevant factor that a court could take into account in that proceeding.[52]

Plaintiffs next argue that the Transaction structure "effectively eliminated" appraisal rights because "most GGP stockholders would fall within the *de minimis* exception of 262(g)."[53] This argument, however, was not made below, and is accordingly waived.[54]

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[50] Op. Br. at 5, 29.

[51] *See supra* at 17-18.

[52] *GGP*, 2021 WL 2102326, at *31.

[53] Op. Br. at 25.

[54] Supr. Ct. R. 8; *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017) (argument "waived for failure to raise [it] first in the Court of Chancery"); *see also Del. Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997), *reh'g denied* (Dec. 12, 1997) ("Parties are not free to advance arguments for the first time on appeal."). Plaintiffs offer no justification for raising this issue for the first time on appeal, particularly in light of the extensive briefing and argument below, which included supplemental letters on the appraisal issue.

In any event, Plaintiffs' newly-minted Second 262 argument is entirely speculative and does not support a finding that GGP stockholders were denied appraisal rights. Section 262(g) provides that the Court of Chancery shall dismiss an appraisal proceeding "unless (1) the total number of shares entitled to appraisal exceeds 1% of the outstanding shares of the class or series eligible for appraisal, (2) the value of the consideration provided in the merger or consolidation for such total number of shares exceeds $1 million, or (3) the merger was approved pursuant to § 253 or § 267 of this title."

Whether a sufficient number of GGP shares would seek appraisal to meet the 1% statutory requirement is a question common to all transactions in which appraisal rights are triggered and says nothing about whether GGP stockholders were denied appraisal rights in connection with the Transaction. In addition, Plaintiffs' contention that, because of the Pre-Closing Dividend, the Transaction only provided GGP stockholders with $0.312 per share and thus it is "reasonably conceivable" that "only a handful of GGP stockholders could meet [the $1 million threshold]"[55] is inherently speculative. It also ignores that the value of all appraisal shares is aggregated under Section 262(g) for purposes of determining whether the

[55] Op. Br. at 26.

threshold is satisfied.[56] Accordingly, no individual stockholder was required to own shares sufficient to exceed the thresholds in Section 262(g) on her own, and nothing would have prevented Plaintiffs or any other stockholder from exercising their franchise rights to oppose the Transaction and seek to persuade other stockholders to perfect their appraisal rights to satisfy the requirements. Indeed, even by Plaintiffs' own argument that approximately 3.2 million shares would be needed to surmount the *de minimis* requirement in Section 262(g) by measuring the $1 million threshold against the $0.312 per share merger consideration, there were more than 631 million GGP shares unaffiliated with Brookfield at the time of the Transaction.[57] Only *0.5%* of GGP's outstanding unaffiliated shares would be required to reach 3.2 million shares.[58]

Finally, Plaintiffs speculate that potential GGP appraisal petitioners may have been dissuaded from pursuing appraisal because "[t]he costs in counsel

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[56] *See* 8 *Del. C.* § 262(g) (setting threshold based on "total number of shares entitled to appraisal").

[57] *Id.* at 25-26.

[58] *Id*. Plaintiffs' argument also ignores the possibility that a stockholder could argue in a hypothetical appraisal proceeding that the Court of Chancery should consider the value of both a pre-closing dividend and cash merger consideration in determining whether "the value of the consideration provided in the merger" meets the statutory requirement. This Court does not need to reach that hypothetical issue, however, because it was not raised below and, more importantly, should be considered in the context of an actual case and controversy in an appraisal proceeding. *See supra* at 19.

fees, expert fees, filing fees and other expenses of an appraisal action could exceed $500,000 or even $1 million," and thus, they "would not rationally expend hundreds of thousands or even a million dollars when even a recovery of significantly more than the merger consideration might be a breakeven or even a losing proposition."[59] Once again, Plaintiffs disregard the plain words of Section 262, which provide for appraisal of shares, not "merger consideration." Accordingly, GGP stockholders had the same incentive, and faced the same costs, that any stockholder would face in considering whether to pursue appraisal in any merger.[60] If Plaintiffs believe that reforms are needed to rectify any perceived disincentives to seeking appraisal that stem from the costs and expenses to be incurred, that is a policy argument more properly directed to the Delaware General Assembly and not to this Court.[61]

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[59] Op. Br. at 27-28. Notably, as Defendants' counsel represented to the Court of Chancery (B288), GGP received *multiple* appraisal demands in connection with the Transaction—including by clients represented by signatories to Plaintiffs' Opening Brief in this appeal.

[60] *See Glob. GT LP v. Golden Telecom, Inc.*, 993 A.2d 497, 508 (Del. Ch. 2010) ("Investors may choose to forego appraisal for any number of reasons. Appraisal claims are expensive to pursue, and the petitioners get none of the merger consideration during the pendency of the case, making such claims beyond the means of some investors to fund."), *aff'd*, 11 A.3d 214 (Del. 2010); Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 9.11[e] (2020) ("With their often complex valuation methodologies and the necessary utilization of financial experts, appraisal proceedings tend to be expensive.").

[61] *Jones v. State Farm Mut. Auto. Ins. Co.*, 610 A.2d 1352, 1354 (Del. 1992) ("If such a result is undesirable as a matter of public policy, the General Assembly is the

Regardless, as the Court of Chancery correctly recognized, these inherent costs of an appraisal proceeding were mitigated here *because* stockholders received the Pre-Closing Dividend in advance of any appraisal proceeding. All GGP stockholders essentially received a "war chest" if they wished to pursue appraisal claims:

> [F]ar from a "bad faith" attempt to rob GGP stockholders of appraisal rights, as Plaintiffs put it, GGP stockholders seeking appraisal would appear to be better off with the Pre-Closing Dividend in hand than they would be in the typical case, where a dissenting stockholder must forego all merger consideration in order to perfect her appraisal challenge.[62]

Moreover, the payment of the Pre-Closing Dividend had the same economic effect as the appraisal pre-payment option in Section 262(h), which authorizes the appraisal respondent to pay petitioners any "amount in cash" "[a]t any time before the entry of judgment in the proceedings" to stop the accrual of pre-judgment interest.[63]

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proper forum to seek a change."); *Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLP*, 80 A.3d 155, 160 n.24 (Del. Ch. 2013) ("'If the policy of the statute is wrong, the Legislature is the only place where relief against it may be obtained.'").

[62] *GGP*, 2021 WL 2102326, at *32.

[63] B286.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT THE PROXY DISCLOSED ALL MATERIAL INFORMATION REGARDING APPRAISAL RIGHTS

A. Question Presented

Did the Court of Chancery correctly hold that the Proxy disclosed all material information regarding appraisal rights as required by Section 262 and Delaware law, such that the stockholder vote on the Transaction was fully informed?[64] This question was presented below at A1012-A1017, A1079-A1080, A1086, B214-B219, B270-B272, B282-B283, B287-B292.

B. Standard Of Review

As explained above, this Court reviews the interpretation and application of Section 262 *de novo*. *See supra* Section I.B. "Whether disclosures are adequate 'is a mixed question of law and fact, requiring an assessment of the inferences a reasonable shareholder would draw and the significance of those inferences to the individual shareholder.'"[65] Therefore, "'if the findings of the trial judge [regarding the adequacy of disclosures] are sufficiently supported by the record and are the product of an orderly and logical deductive process, [this Court]

[64] *See GGP*, 2021 WL 2102326, at *32-33.

[65] *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 857-58 (Del. 2015).

accept[s] them, even though independently [it] might have reached opposite conclusions.'"[66]

C. Merits Of The Argument

Section 262(d)(1) requires that a corporation "notify" stockholders "that appraisal rights are available" and provide them a copy of Section 262. Here, the Proxy complied with these requirements. The Proxy attached a current copy of the statute as Annex J and, in language that tracks Section 262, stated, among other things, that:

> GGP common stockholders who comply exactly with the applicable requirements and procedures of Section 262 of the DGCL will be entitled to demand appraisal of their shares of GGP common stock (i.e., the dissenting shares) and receive in lieu of the per share merger consideration a cash payment equal to the "fair value" of their GGP common stock, as determined by the Delaware Court of Chancery . . . in accordance with Section 262 of the DGCL . . . .[67]

In addition, the Proxy provided stockholders with ample *factual* information from which to determine whether to seek appraisal, including a 24-page description of the Background to the Transaction, a 14-page summary of the financial analyses performed by the Special Committee's bankers, and

[66] *Id.* at 858.

[67] A60, A363.

management's financial projections.[68] Notably, the Proxy "urged" stockholders to seek out legal advice in considering whether to exercise their appraisal rights.[69]

As the Court of Chancery held, this disclosure complied in all respects with Delaware law:

> Section 262 requires companies to disclose to shareholders their right to an appraisal of their shares. To that end, GGP disclosed via the Proxy the options available to its stockholders: either (a) accept the post-dividend payment to be made at closing, or (b) forfeit that payment and demand appraisal for a payment equal to the "fair value" of the stockholder's GGP shares. The Proxy then "urged" stockholders to seek out legal advice in considering whether to exercise their appraisal rights, which necessarily would have entailed evaluating the role of the Pre-Closing Dividend on a hypothetical appraisal proceeding. That is all our law requires, as "there is no obligation [under Delaware law] to supply investors with legal advice" or, relatedly, to engage with legal hypotheticals that are "inherently speculative."[70]

None of Plaintiffs' arguments demonstrate otherwise.

Plaintiffs first contend that the Proxy was misleading because it erroneously informed GGP stockholders (in Plaintiffs' words) "that appraisal rights were limited to the Merger (excluding the Dividend) and that an appraisal proceeding would only determine whether fair value post-Dividend was greater than,

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[68] A85-A109, A120-A134, A134-A137.

[69] A364; *see also* A60.

[70] *GGP*, 2021 WL 2102326, at *32 (alteration in original).

the same as or less than the $0.312 merger consideration."[71] The Proxy said no such thing. To the contrary, the Proxy correctly stated that GGP stockholders were entitled to seek appraisal of their *shares* in connection with the Transaction and to have the Court of Chancery determine the "fair value" of their shares.[72] Section 262 does not mention—much less provide a right to an appraisal of—"merger consideration." Thus, as the Court of Chancery correctly held, the Proxy clearly—and accurately—described a stockholder's options: (i) accept the cash payment to be made at closing, or (ii) forego that payment and demand appraisal for a payment equal to the "fair value" of the stockholder's GGP shares, which could result in a payment that could be "more than, less than, or the same as" the merger consideration payable to GGP stockholders in the Transaction.[73]

No further disclosure was required or necessary. Plaintiffs' argument that the Proxy misled GGP stockholders conflates the requirement to disclose the *right* to an appraisal of *shares*, which the Proxy accurately did, with a desire for disclosure of (or advice on) how the Pre-Closing Dividend might affect a hypothetical appraisal proceeding. This type of disclosure is not required by the DGCL, fiduciary duty law, or the federal securities laws. As the Court of Chancery

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[71] Op. Br. at 36.

[72] A60, A363-A364.

[73] *GGP*, 2021 WL 2102326, at *32.

correctly held, Delaware law does not require corporations to provide legal advice,[74] speculate about how a court might decide certain legal issues, or predict what might happen in any appraisal proceeding.[75] Plaintiffs' contention that GGP should have disclosed its subjective views on how the Court of Chancery would treat the dividend in determining "fair value" is simply not the law. Indeed, their *ipse dixit* assertion that "Delaware law does require Defendants to provide legal advice concerning the appraisal rights available to stockholders"[76] is baseless. Disclosing that appraisal rights are available and describing generally the statutory process for perfecting

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[74] *See Kahn v. Caporella*, 1994 WL 89016, at *7 (Del. Ch. Mar. 10, 1994) ("no obligation [exists] to supply investors with legal advice"); *In re MONY Gp., Inc. S'holder Litig.*, 853 A.2d 661, 682 (Del. Ch. 2004), *as revised* (Apr. 14, 2004) (proxy "not required to state 'opinions or possibilities, legal theories . . . .'"); *Fisher v. United Techs. Corp.*, 1981 WL 7615, at *2 (Del. Ch. May 12, 1981) ("It is not the purpose of a proxy statement to provide legal advice for those stockholders wishing to oppose the transaction.").

[75] *See In re Family Dollar Stores Inc. S'holder Litig.*, 2014 WL 7246436, at *21 (Del. Ch. Dec. 19, 2014) ("speculation . . . is not an appropriate subject for a proxy disclosure"); *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *17 (Del. Ch. Dec. 11, 2017) (finding plaintiffs' "scenario is a hypothetical that is inherently speculative and thus not required to be disclosed under Delaware law"); *see also Feldman v. AS Roma SPV GP, LLC*, 2021 WL 3087042, at *7 (Del. Ch. July 22, 2021) ("Plaintiffs essentially complain that they were entitled to a prediction of whether a sale would" occur by a specific date, but "I am not persuaded that AS Roma GP was required to be an oddsmaker for Plaintiffs concerning a potential sale…") (citing *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994) and *In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *10 (Del. Ch. Oct. 16, 2013)).

[76] Op. Br. at 40.

appraisal rights does not constitute legal advice. The Proxy explicitly recommended that stockholders considering appraisal seek their own legal advice.[77]

Importantly, the disclosure rule that Plaintiffs seek is contrary to sound public policy. Mandating that corporations speculate about how an appraisal proceeding that *might* be brought *might* unfold would upend settled Delaware law and send corporations down a slippery slope of speculating about how a court could decide various issues. Not only would this rule lead to greater confusion and uncertainty due to the inclusion of various hypothetical outcomes, it could subject corporations to more disclosure claims if the appraisal court applied a different analysis or approach than the corporation predicted in the proxy statement, or if appraisal petitioners, for their own strategic reasons, elected to pursue their claims differently. For stockholders, there is little benefit from reading the corporation's subjective guesses about how theoretical legal arguments might play out.[78] The risks of the type of disclosure Plaintiffs demand are patent and far outweigh any possible benefit.

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[77] A60, A364.

[78] *See Goodwin v. Live Ent., Inc.*, 1999 WL 64265, at *12-13 (Del. Ch. Jan. 25, 1999) ("disclosure of a hypothetical" "may have made" the proxy "less, not more, reliable"), *aff'd*, 741 A.2d 16 (Del. 1999) (TABLE).

Plaintiffs' fallback arguments all fail as a matter of law. Plaintiffs argue that the Proxy's disclosure that the fair value of GGP shares could be "greater than, the same as or less than the per share merger consideration" was misleading.[79] As the Court of Chancery correctly held below, this language "merely reflects the unremarkable observation that Section 262 empowers [the] court to determine fair value and the outcome of the court's adjudicated valuation is difficult to predict *ex ante*."[80] Plaintiffs' argument concerning the Election Form[81] fails because, as the Court of Chancery again correctly determined, "the Election Form . . . could not have misled any stockholder into foregoing appraisal because it was disseminated *after* the stockholder vote when the time to seek appraisal had expired."[82] In any event, the Election Form simply referred back to—and was consistent with—the Proxy.

Given that the Transaction structure did not violate Section 262, and the Proxy disclosures complied in all respects with applicable disclosure law, the Court of Chancery correctly dismissed Plaintiffs' appraisal fiduciary duty claim.[83]

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[79] *See* Op. Br. at 37.

[80] *GGP*, 2021 WL 2102326, at *32.

[81] *See* Op. Br. at 39.

[82] *GGP*, 2021 WL 2102326, at *32 n.321 (emphasis in original).

[83] *See* Op. Br. at 31-33.

There is an additional and independent ground, not reached by the Court of Chancery, on which this Court could affirm the dismissal of Plaintiffs' breach of fiduciary duty claims concerning appraisal rights: Plaintiffs' failure to plead a non-exculpated claim for breach of fiduciary duty. Plaintiffs have alleged no specific facts supporting even a pleading-stage inference that the Board approved the structure and disclosures of the Transaction based on a disabling conflict or in bad faith.[84] Although the Court of Chancery did not need to reach this argument, this Court is free to affirm the decision below on this ground.[85]

Article VIII of GGP's Certificate of Incorporation exculpates directors from monetary damages for breaches of the duty of care.[86] No facts are alleged in the Complaint suggesting that the GGP directors' conduct concerning appraisal rights "was deliberate, intentional, unlawful and in bad faith," as Plaintiffs contend,[87]

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[84] Defendants explained below why GGP's exculpatory charter provision requires dismissal of all claims against GGP's directors. *See* B230-234, B247-253, B292-293.

[85] *See Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012) ("[T]his Court may rest its appellate decision on any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court. Accordingly, this Court may affirm the judgment of the Court of Chancery on the basis of a different rationale."); *see also Winshall v. Viacom Int'l, Inc.*, 237 A.3d 67, at *2 n.2 (Del. 2020) (ORDER) ("[T]his Court may affirm on the basis of a different rationale than that which was articulated by the trial court.").

[86] B3.

[87] Op. Br. at 32-33.

or that could support any reasonably conceivable inference that the directors acted with scienter in approving the Transaction or the Proxy disclosure.[88] Accordingly, Plaintiffs' allegations concerning appraisal rights, at most, amount to exculpated claims for breach of the duty of care.

[88] *See In re USG Corp. S'holder Litig.*, 2020 WL 5126671, at *26 (Del. Ch. Aug. 31, 2020) (a bad faith "pleading is subject to a finer-toothed comb—that of scienter—which is among our law's most straightened").

CONCLUSION

For all of these reasons, and those set forth in the Court of Chancery's well-reasoned decision below, this Court should affirm the dismissal of Plaintiffs' claims relating to appraisal rights.

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