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Case Number 224,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEAMSTER MEMBERS RETIREMENT PLAN, individually and on behalf of all others similarly situated, Appellant, Plaintiff-Below, v. RANDALL S. DEARTH, ROBERT M. FORTWANGLER, STEVAN R. SCHOTT, JAMES A. COCCAGNO, CHAD WHALEN, J. RICH ALEXANDER, WILLIAM J. LYONS, LOUIS S. MASSIMO, WILLIAM R. NEWLIN, JOHN J. PARO, JULIE S. ROBERTS, TIMOTHY G. RUPERT, and DONALD C. TEMPLIN, Appellees, Defendants-Below.	No. 224, 2022 Court Below: COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 2020-0807-MTZ REDACTED PUBLIC VERSION E-filed: September 30, 2022

APPELLEES' ANSWERING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Federal Cases

State Cases

State Statutes

Other Authorities

NATURE OF PROCEEDINGS

This is an appeal from the well-reasoned opinion dismissing the breach of fiduciary duty claims brought by Plaintiff Teamster Members Retirement Plan ("Plaintiff") against former directors and officers of Calgon Carbon Corporation ("CCC"). The claims arise from the arms-length sale of CCC to Kuraray Co., Ltd. ("Kuraray") at a massive 63% premium over CCC's stock price before the sale was announced. Unsurprisingly, the merger with Kuraray (the "Merger")—valued at $1.1 billion—was overwhelmingly approved by 94% of the voting stockholders, including Plaintiff.

The Court of Chancery dismissed Plaintiff's claims after concluding that the Merger is subject to "cleansing" under *Corwin v. KKR Financial Holdings LLC* because CCC's stockholders were fully informed when they approved the Merger.[1] CCC issued a 115-page proxy statement (the "Proxy") detailing the background of the Merger. The Proxy also disclosed extensive information about CCC's business, financial performance, and future prospects, including the projections relied upon by CCC's board of directors (the "Board") and financial advisor, which were CCC's best estimate of its value. Because the Proxy told shareholders everything they needed to know, the Court of Chancery correctly held that the

[1] 125 A.3d 304 (Del. 2015).

Merger was approved by a fully informed, uncoerced majority of disinterested stockholders and Plaintiff's claims should be dismissed under *Corwin*.

On appeal, Plaintiff renews its arguments that the stockholder vote was not informed. But Plaintiff's nitpicking of the Proxy for failing to disclose more information about a seemingly random list of immaterial topics is unavailing. Even with the benefit of a sizable production from a books and records action and several years to investigate, Plaintiff's claims fail under basic principles of Delaware law. This Court should affirm the Court of Chancery's dismissal of Plaintiff's claims.

Plaintiff has failed to meet its burden to plead a disclosure violation.

Plaintiff first argues that the Proxy failed to disclose more details concerning a May 2017 financial analysis of one of CCC's many products, sold by a business division called "Hyde Marine." The Court of Chancery correctly rejected this claim because the November 2017 Proxy disclosed extensive details about Hyde Marine, the size and timing of its market opportunity, and that its value depended on the implementation of applicable regulations. Shortly after the May 2017 Hyde Marine analysis was prepared, CCC told investors that the applicable regulations were delayed by two years. CCC then updated, considered, and disclosed five-year company-wide projections that included CCC's best estimate of the value it

expected from all its divisions, including Hyde Marine accounting for the two-year delay of the applicable regulations. These company-wide projections and additional disclosures about Hyde Marine told investors all that they needed to know to decide how to vote on the Merger. Plaintiff's contention that CCC should have told investors more about Hyde Marine or disclosed the outdated May 2017 return-on-capital analysis reviewed by the Investment Committee, but not considered by the Board in connection with the Merger, fails to state a disclosure claim.

Plaintiff next argues that the Proxy failed to disclose details from a report prepared by Boston Consulting Group (the "BCG Report") in December 2016. Plaintiff claims the Proxy should have disclosed (i) projections for alternative business plans in the BCG Report that CCC did not pursue, (ii) the list and names of hypothetical acquirers identified in the BCG Report, and (iii) that Kuraray received certain information from the BCG Report during Merger negotiations. The Court of Chancery correctly rejected these claims. First, the Proxy disclosed the projections that were actually considered in connection with the Merger and that reflected the strategic business plan the Board adopted for 2017, so there was no need to disclose months-old projections from the BCG Report for the alternative business plans that the Board had decided in 2016 not to pursue.

Second, the Proxy disclosed that the Board considered a list of potential alternative acquirers, and so disclosing the specific identities of the hypothetical acquirers from the BCG Report would not have added anything to the Proxy disclosures. Third, the Proxy disclosed that CCC had shared "limited other nonpublic information" with Kuraray "for purposes of enabling Kuraray to increase its proposed price."[2] The Court of Chancery correctly held that CCC did not need to disclose minutiae concerning that information—such as the name of the report, its author, or various nascent business opportunities it described.

Lastly, Plaintiff argues that the Proxy failed to disclose the circumstances of one particular update to a financial model for a business called "CECA" that was shown only to Kuraray. This claim fails because the Proxy disclosed that the projections involved assumptions and underwent frequent revisions. The Court of Chancery correctly held that CCC's disclosure of the fact of the revisions, but not the specific details of each such revision, told stockholders all that they needed to know. Plaintiff contends that this update to the CECA model should have been disclosed because it was part of a purported scheme by management to deceive the Board and stockholders. The Court of Chancery correctly rejected this speculative and unsupported theory. Plaintiff's theory is not only unsupported by any factual

[2] A97.

allegations suggesting a scheme by management, it also fails as a matter of simple logic because the revision at issue was proposed by CCC's financial advisor, not management, and the line-item revision had no impact on CCC's projections of consolidated revenues and income.

Even if the Merger is not cleansed under *Corwin*, the Court of Chancery's opinion should be affirmed on either of two independent, alternative grounds presented to the Court of Chancery but not ruled upon.

First, even under *Revlon* enhanced scrutiny, Plaintiff has failed to state a claim against CCC's directors or officers. CCC's Board actively oversaw the sale process, secured two higher bids from Kuraray, rejected Kuraray's requests for exclusivity prior to execution of the Merger Agreement, and made CCC open to receive a competing bid by negotiating reasonable deal protections, including a low termination fee. No other potential acquirers expressed interest. Plaintiff has failed to plead any facts demonstrating that the directors or officers breached their fiduciary duty to maximize stockholder value.

Second, all claims against CCC's directors should be dismissed because Plaintiff has failed to plead a non-exculpated claim. CCC's governing documents bar any personal liability for monetary damages for breach of fiduciary duty,

except for claims based on disloyalty or bad faith, which Plaintiff has not come close to pleading.

For these reasons too, this Court should affirm the Court of Chancery's dismissal of the Complaint.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery applied the correct legal standard and dismissed this action under *Corwin*. The challenged acquisition was ratified by a fully informed majority of CCC's disinterested stockholders. Plaintiff asserts that CCC failed to disclose material information about three principal topics: Hyde Marine, the BCG Report, and a single line-item adjustment to a financial model. An omitted fact is material only if it would have been viewed by the reasonable investor as having significantly altered the total mix of available information. Plaintiff's allegations do not establish any material disclosure deficiencies. CCC incorporated expected earnings from Hyde Marine into its disclosed projections and provided detailed information about the timing and scope of that business opportunity to investors. CCC was not obligated to disclose a separate outdated return-on-capital analysis never considered by the Board in connection with the Merger and covering a different period and focusing on a single product. The Proxy disclosed all material facts relating to the BCG Report, and it was not necessary to disclose further details concerning the BCG Report's outdated financial projections, hypothetical acquirers, or general descriptions of undeveloped business opportunities. And lastly, it was not necessary to disclose details concerning an update to the CECA model that is not alleged to have had

any impact on CCC's disclosed projections. Because the Merger was approved by a fully informed and uncoerced majority of CCC's disinterested stockholders, the Opinion of the Court of Chancery should be affirmed.

2. The Court of Chancery's decision should be affirmed for the independent reason that the Complaint fails to allege breach of fiduciary duty by any Defendant. Under *Revlon*, the Board met its duty to secure the best value reasonably attainable for its stockholders. The deal protections adopted here were reasonable and in line with measures that are routinely upheld. As this Court has held, the use of a single-bidder process is reasonable. CCC's officers kept the Board fully and promptly informed and are not alleged to have deviated from the Board's instructions. There are no well-pled allegations that management's receptiveness to the Merger was attributable to anything but the substantial premium Kuraray offered to CCC stockholders.

3. Separate from *Corwin* and *Revlon*, the dismissal of claims against CCC's directors should be affirmed because Plaintiff has failed to allege facts establishing a non-exculpated claim. CCC's governing documents eliminate any personal liability for monetary damages for breach of fiduciary duty, except for disloyalty or bad faith. The Complaint contains no allegations suggesting bad faith or disloyalty by CCC's directors.

STATEMENT OF FACTS

A. CCC

CCC, a Delaware corporation, is a "leading manufacturer of activated carbon" and sells products, services, and equipment that purify water and air.[3] At all relevant times, CCC's Board comprised nine directors (the "Director Defendants"), each with substantial relevant business experience.[4] Eight of the nine were outside independent directors.[5] Randall Dearth was the Board's chairman and CCC's CEO.[6]

In December 2016, Boston Consulting Group ("BCG") presented to the Board concerning strategic alternatives for CCC (the "BCG Report").[7] The BCG Report confirmed that [redacted][8] It identified five possible long-term standalone strategies for CCC and projected five-year revenues for each.[9] BCG also identified

[3] A194–195 ¶¶27–29.

[4] A185–193 ¶¶15–23.

[5] *Id.*; *see also* B126.

[6] A180 ¶9. Four other officers (together with Mr. Dearth, the "Officer Defendants," and with the Director Defendants, the "Individual Defendants") are also named as defendants. A181–185 ¶¶10–14.

[7] A195–196 ¶32.

[8] B41.

[9] A196 ¶¶33–34.

a list of hypothetical acquirers (including Kuraray) and suggested that [redacted][redacted][10]

B. The Potential Ballast Water Treatment Opportunity

One potential new business opportunity for CCC in 2017 was the nascent International Maritime Organization ("IMO") ballast water initiative (the "Ballast Water Initiative").[11] Large ships that travel in international waters must take water into, or discharge water from, onboard "ballast" tanks to balance during sea travel.[12] Ships sometimes take in water from one location and later release it into another, which contributes to the spread of invasive aquatic species and pathogens.[13] To address these problems, the IMO and the U.S. Coast Guard ("USCG") enacted regulations (the IMO regulations are the "IMO Convention") requiring existing ships to be retrofitted with ballast water treatment systems ("BWTS") that purify the water held in ballast water tanks.[14]

[10] B69; B43.

[11] Op. 5.

[12] *Id.*

[13] *Id.*

[14] A178–179 ¶5; A197 ¶35; A206–207 ¶¶56–59; *see also* B106; B280.

In 2010, CCC acquired a BWTS business called "Hyde Marine" to prepare for the enactment of the IMO Convention[15] But, ratification of the IMO Convention was repeatedly delayed.[16] And before Hyde Marine's BWTS could be sold, it had to be approved by the IMO and USCG.[17] By 2017, Hyde Marine's BWTS was one of more than 60 systems approved by the IMO, but ship owners were not yet required to install BWTS because the IMO Convention still had not been ratified.[18] Hyde Marine's BWTS was not yet approved by the USCG at that time.[19]

In May 2017, in response to a request from the Investment Committee, management prepared a "return on capital" analysis of Hyde Marine's performance over an unidentified ten-year period.[20] The analysis was not part of CCC's ordinary five-year projection process, was not presented to or approved by the

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[15] A197 ¶36.

[16] B150; B157 ([redacted]); *see* A198 ¶39.

[17] *See* B280–281.

[18] B281; A206 ¶56.

[19] B281.

[20] Plaintiff mistakenly alleges that this presentation was made March 20, 2017. *Compare* A198 ¶39, *with* B166.

Board, and contained no information about CCC's other business segments.[21] Management cautioned that [redacted][22]

That warning proved prescient. In August 2017, CCC notified its stockholders that the IMO Convention had once again been delayed, this time until September 2019.[23] CCC further advised that lingering uncertainty surrounding the IMO Convention compliance schedule would "dampen the pace of near-term market development and demand growth" for BWTS and affect the "pace of change in [CCC's] sales beyond September 2019[.]"[24]

Also in August 2017, CCC announced that the USCG approval process for the Hyde Marine BWTS had been delayed. While CCC had previously reported that it expected approval in "late 2017," CCC's August 2017 disclosure reported that approval was not expected until "the second quarter of 2018."[25]

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[21] *Id.*

[22] B150; B165.

[23] A206 ¶56; *see* B281.

[24] B281.

[25] *Id.*

C. Kuraray Proposed to Acquire CCC for $20.00 Per Share.

Kuraray is a chemical manufacturer incorporated and headquartered in Japan.[26] In May 2017, following months of discussion between Kuraray and CCC concerning potential collaboration, Kuraray informed management that it would likely send CCC an indication of interest.[27] Management promptly informed the Board, which formed a "Working Group" consisting of Mr. Dearth and four independent directors.[28] The full Board retained decisional authority.[29]

On June 14, 2017, Kuraray sent a non-binding proposal to acquire CCC for $20.00 per share in cash—30% higher than the closing price of CCC stock that day—subject to a 60-day exclusivity period.[30] The Board discussed Kuraray's proposal and engaged Morgan Stanley and Jones Day as independent financial and legal advisors, respectively.[31]

Two weeks later, Morgan Stanley presented its preliminary financial analysis, which showed [redacted][32] Morgan

[26] A193 ¶25; *see* A64.

[27] A201 ¶46; *see* A96.

[28] A201 ¶47; *see* B183.

[29] A201 ¶47; *see* B184; A96.

[30] A202 ¶48; *see* A96; B663.

[31] A202 ¶49; *see* A96.

[32] A202–203 ¶50; B187.

Stanley [redacted] advised there were few other potentially interested parties, and none were likely to have [redacted][33] After discussion, the Board agreed to allow limited and focused due diligence to encourage Kuraray to increase its offer price.[34]

D. CCC Updates Five-Year Financial Projections and Negotiates Aggressively to Secure Increased Price.

On July 17, 2017, the Investment Committee met to discuss financial information to present to Kuraray to secure a higher price.[35] Management presented to the Investment Committee (and later the Board) five-year financial projections.[36] The projections were based on five-year financial projections from a strategic plan prepared and adopted, in the ordinary course, in the fourth quarter of 2016, but with targeted adjustments to reflect, *inter alia*, recent regulatory delays affecting the BWTS business.[37] They represented CCC's best estimate of its future cash flows and were provided to Kuraray and Morgan Stanley.

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[33] B187.

[34] A203 ¶51; *see* B187; A97.

[35] A209–210 ¶64; *see* B201; B204; B182.

[36] A209–210 ¶64; B141.

[37] A206 ¶ 58 (referring to B196 by alleging "an email exchange with Defendant Roberts" explaining that "[t]he financial information included in this plan simply

Management presented the projections and other information to Kuraray on July 31, 2017.[38] Kuraray submitted a revised proposal with an increased bid of $21.00 per share and a reduced exclusivity period of 30 days.[39] The Board twice discussed the revised offer and strategies for eliciting an even higher offer.[40] Following further negotiation, Kuraray increased its offer to $21.50 per share.[41]

On August 23, the Board met to discuss Kuraray's $21.50 per share offer.[42] Morgan Stanley advised that the proposal "compared favorably" to its "preliminary financial analysis of [CCC's] standalone valuation" and "reflected the maximum amount that Kuraray would be willing to pay to acquire Calgon Carbon" because "the due diligence information provided to Kuraray to date did not, in Kuraray's view, support a valuation meaningfully higher than $20.00."[43]

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delayed the earnings growth projected by BCG by [two] years."); B196; *see also* A197 ¶36 (noting that the ballast water business was housed within the UV business).

[38] A207–209 ¶¶ 60–62; *see also* A98.

[39] A99.

[40] *Id.*

[41] *Id.*

[42] A99–100.

[43] A100.

The Board, together with Morgan Stanley and management, discussed "various strategic considerations at length, including the risks and potential upsides of continuing to operate [CCC's] business on a standalone basis."[44] The Board also discussed the "third parties that could potentially be interested in a strategic transaction" and the "low likelihood that any third party would be interested in and capable of acquiring [CCC] at a price superior to $21.50 per share in the near future."[45] Members of the senior management team advised the Board "that none were likely to compete with Kuraray's current proposal in the near future."[46] The Board further noted there had been no inbound acquisition interest despite market rumors concerning the sale of CCC since July 26, 2017.[47]

The Board unanimously determined that CCC should provide confirmatory due diligence material to Kuraray and directed its legal advisors to prepare transaction documents at the proposed $21.50 price.[48] The Board also decided to reject Kuraray's request for exclusivity.[49]

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* News about the Merger leaked to the public weeks earlier, including through a public report from a financial blog. A98–99.

[48] A100.

[49] *Id.*

On September 5, the Board met again to discuss, *inter alia*, whether to solicit acquisition interest from third parties.[50] Based on advice from Morgan Stanley, the Board concluded that it would be appropriate to include provisions in the merger agreement allowing CCC to accept a "superior proposal" after the public announcement of the transaction with Kuraray.[51]

E. Management Does Not Negotiate Personal Employment Until After All Materials Terms Are Agreed.

Early in the negotiations, the Board directed management not to engage in personal employment negotiations until after all material deal terms had been agreed.[52] By mid-September 2017, CCC's independent directors determined that all material terms had been settled and authorized Mr. Dearth to negotiate post-transaction employment.[53]

With this authorization, Mr. Dearth met with Kuraray on September 15.[54] Kuraray presented Mr. Dearth with term sheets for post-transaction employment

[50] B286–287; *see* A210–211 ¶¶66–67 (referring to the September 5, 2017 Board meeting and B286).

[51] *Id.*; A101.

[52] B288.

[53] A212–213 ¶71; *see* B296–297.

[54] A212–213 ¶¶71–72; *see* A103.

for him and also—unexpectedly—the other members of senior management.[55] Mr. Dearth promptly reported this to the Board and discontinued discussions as instructed by the Board.[56]

Two days later, Kuraray emailed Mr. Dearth that it was a critical priority for Kuraray to reach an agreement regarding his post-transaction employment.[57] After Morgan Stanley advised the Board that [redacted][58] The ensuing discussions between Kuraray and Mr. Dearth culminated in a letter from Mr. Dearth to Kuraray stating that Mr. Dearth "will be committed to remaining in [his] current role as CEO of [CCC] following its merger with a subsidiary of [Kuraray]," but that the terms of his retention were not final because

[55] *Id.*

[56] A103–104.

[57] A213–214 ¶74; *see* A104.

[58] B300.

"more work must be done to study the details and implications of [his] proposed retention."[59]

F. CCC's Stockholders Overwhelmingly Approve All-Cash Sale to Kuraray at Substantial Price Premium

At a Board meeting on September 20, 2017, Morgan Stanley provided its opinion that the Merger consideration of $21.50 per share in cash was fair from a financial perspective.[60] The Board reaffirmed its belief that the transaction with Kuraray was likely to offer the greatest value to CCC's stockholders and that if any other buyer were willing and capable of making a higher bid, announcing a transaction with Kuraray would be the best way to elicit such an offer.[61] Following further discussion, the Board unanimously adopted and approved the merger agreement.[62] The Merger equated to an equity value of approximately $1.1 billion and a ***62.9% premium*** over $13.20, the closing price per share of CCC's common stock on the last trading day before the announcement.[63]

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[59] A126; *see* A214–215 ¶76; A105.

[60] B305.

[61] *Id.*

[62] A215 ¶77; *see* B305.

[63] B315; B564 (incorporating B314 by reference); B663. *See Lee v. Pincus*, 2014 WL 6066108, at *4 n.11 (Del. Ch. Nov. 14, 2014) (taking judicial notice of public stock price on consideration of motion to dismiss).

In November 2017, CCC filed the 115-page Proxy containing information about the Merger and incorporating information from CCC's most recent SEC filings, which contained further information about CCC's business, performance, and prospects.[64] Among other things, the Proxy included a set of company-wide five-year projections for fiscal years 2017 through 2021 describing a "Management Case" and a "Street Case." The Proxy summarizes those projections with some detail—including year-by-year line items for several metrics—and indicates that the Calgon Carbon Projections were part of the information used by Morgan Stanley to render its fairness opinion and by the Board to evaluate CCC's financial and strategic alternatives, including the Merger. As to each "case," the Proxy did not include projections beyond 2021 and noted the forward-looking nature of the financial information and the inherent difficulties in forecasting future performance.[65]

At a special meeting on December 28, 2017, 41,431,473 shares of CCC common stock, comprising 81.54% of the stock entitled to vote, were represented.[66] ***The Merger was approved by an overwhelming supermajority of***

[64] A217 ¶83; *see generally* B442–656.

[65] *See* A84–86, A111–121.

[66] *See* A179 ¶6; A225–227 ¶¶ 102, 109 (alleging that CCC stockholders approved the merger); *see also* B659.

94% of the voted stock.[67] Plaintiff also voted in favor of the Merger.[68] The Merger was consummated in March 2018.[69]

[67] *Id.*

[68] B849.

[69] B683.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFF'S CLAIMS UNDER *CORWIN*.

A. Question Presented

Whether the Court of Chancery correctly held that Plaintiff has not met its burden under *Corwin v. KKR Financial Holdings, LLC*[70] to plead facts establishing that CCC's disinterested stockholders were not fully informed when they voted overwhelmingly to approve the Merger with Kuraray. This issue was preserved.[71]

B. Scope of Review

The Court reviews *de novo* the dismissal of a complaint pursuant to Rule 12(b)(6).[72]

C. Merits of Argument

1. The Court of Chancery Applied the Correct Legal Standards.

Given the inherent weakness of its claims, Plaintiff attacks the Court of Chancery for supposedly applying incorrect standards governing a Rule 12(b)(6) motion under *Corwin*. Plaintiff's four claims of error are easily refuted by the Court of Chancery's carefully reasoned Opinion.

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[70] 27 A.3d 531 (Del. 2015).

[71] *See* Op. 2; B980-998; B1028-1043.

[72] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167–168 (Del. 2006).

First, Plaintiff contends the Court of Chancery failed to apply Delaware's "reasonably conceivable" standard.[73] Plaintiff's argument is clearly contradicted by the Opinion.[74] The Court of Chancery expressly contrasted Plaintiff's insufficient allegations against other cases in which plaintiffs had "pled facts making it ***reasonably conceivable***" that the allegedly omitted information was material.[75] The Court of Chancery plainly apprehended and applied the correct legal standard.

Second, Plaintiff contends that the Court of Chancery "failed to draw all reasonable inferences in favor of Plaintiff."[76] But the Court of Chancery acknowledged that it "must draw all reasonable inferences in favor of the non-moving party."[77] Plaintiff does not identify any specific reasonable inferences that supposedly were not drawn in its favor. On the contrary, the Opinion identified specific "reasonable plaintiff-friendly inference[s]" that were drawn.[78]

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[73] Br. 12.

[74] *See* Op. 24 ("[T]he touchstone to survive a motion to dismiss is reasonable 'conceivability.' This standard is 'minimal' and 'plaintiff-friendly.'").

[75] Op. 35, 38 (emphasis added).

[76] Br. 27.

[77] Op. 24.

[78] Op. 13–14, n.27.

Third, Plaintiff contends that the Court of Chancery failed to assess the materiality of the allegedly undisclosed information from the perspective of a "reasonable stockholder."[79] But the Court of Chancery correctly articulated and applied Delaware's standard for materiality for allegedly omitted facts: whether "there is a substantial likelihood that a ***reasonable shareholder*** would consider [an omitted fact] important in deciding how to vote."[80] It then applied this standard and correctly held that the allegedly undisclosed information would not "alter the total mix of information available to stockholders."[81]

Finally, Plaintiff contends that the Court of Chancery did not "carefully apply" *Corwin*.[82] But the Court issued a well-reasoned 50-page Opinion detailing why each of Plaintiff's allegations of non-disclosure failed as a matter of law "[a]fter careful consideration."[83] Any notion that the Court of Chancery failed to apply Delaware law "carefully" is easily defeated.

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[79] Br. 12, 13, 26.

[80] Op. 28 (emphasis added) (quoting *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018)); *see also* Op 28 n.98 (citing *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985), and *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

[81] Op. 43.

[82] Br. 26.

[83] Op. 30.

2. The Court of Chancery Correctly Held All Claims Should Be Dismissed Under *Corwin*.

Under *Corwin*, absent a validly pled claim of waste, which Plaintiff has not asserted, the approval of a transaction by a fully informed, uncoerced majority of disinterested stockholders results in an irrebuttable presumption that the defendants' conduct is subject to the business judgment standard of review and the claims should be dismissed.[84] On a Rule 12(b)(6) motion seeking dismissal under *Corwin*, Plaintiff has the burden to plead facts that "identify a deficiency in the operative disclosure document."[85] To do so, Plaintiff must allege well-pled facts that "support[] a rational inference that material facts were not disclosed or that the disclosed information was otherwise materially misleading."[86]

Throughout its brief, Plaintiff repeatedly misstates the test for whether omitted facts must be disclosed.[87] The test is not whether the omitted information

[84] *See Corwin*, 125 A.3d at 306 ("[T]he voluntary judgment of the disinterested stockholders to approve the merger invoked the business judgment rule standard of review[.]"); Op. 50 ("Plaintiff has not attempted to plead [a waste] claim."); *Singh v. Attenborough*, 137 A.3d 151, 151–52 (Del. 2016) ("When the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result.").

[85] Op. 27.

[86] *Id.*

[87] *See* Br. 3, 8, 9, 12, 29, 30, 32, 34, 35, 37, 40.

might be "important" or "relevant" in the abstract.[88] Rather, as the Court of Chancery correctly stated, the test for materiality is whether there is a "substantial likelihood" that a "reasonable shareholder" would view the omitted information as "having ***significantly altered*** the total mix of information made available" and "would consider it important in deciding how to vote."[89]

Plaintiff asks this Court to reverse the well-reasoned decision of the Court of Chancery based on supposed disclosure deficiencies concerning (1) the ballast water opportunity, (2) the BCG Report, and (3) a financial model adjustment for the "CECA" business. For the following reasons, Plaintiff has failed to plead any disclosure deficiency.

a. Ballast Water Opportunity

Plaintiff's principal argument is that although the company-wide five-year projections disclosed in the Proxy constituted CCC's best estimate of its future

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[88] *See, e.g.*, *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 184 F.3d 280, 294 (3d Cir. 1999) ("[A]lthough information may be relevant and an investor may want to know that information, it may be "of such 'dubious significance' as to be 'trivial,' and 'hardly conducive to informed decision making,' so that to reasonable shareholders, such omission must be immaterial as a matter of law.") (quotations omitted); *Rosenblatt*, 493 A.2d at 944 (Del. 1985) (applying federal standard for materiality).

[89] Op. 28 (emphasis added). *See Morrison*, 191 A.3d at 282 (cited in Op. 27); *accord TSC Indus., Inc.*, 426 U.S. at 449 (cited in Op. 28 n.98).

cash flows, CCC "should have disclosed management's [Hyde Marine analysis], and also should have disclosed that the five-year fairness projections included the downside start-up costs for the Ballast Water Initiative program but not the upside revenues/cash flow."[90] Both arguments fail.

(1) Hyde Marine Financial Analysis

CCC was not required to disclose the Hyde Marine financial analysis because the Proxy disclosed the five-year projections (2017–2021) that were the Board's best estimate of CCC's prospects in the years ahead, which projections included the expected earnings from Hyde Marine.

The Court of Chancery rightly observed that "[i]n the context of a cash-out merger, reliable management projections of the company's future prospects are of obvious materiality to the electorate."[91] Here, CCC disclosed all reliable management projections of CCC's future performance that the Board approved and its advisors considered.[92] Plaintiff does not contend that the Board, Morgan

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[90] Br. 31.

[91] Op. 31.

[92] *Compare with City of Warren Gen. Emps.' Ret. Sys. v. Roche*, 2020 WL 7023896, at *21 (Del. Ch. Nov. 30, 2020) *and Chester Cnty. Emps.' Ret. Fund v. KCG Holdings, Inc.*, 2019 WL 2564093, at *13–14 (Del. Ch. Jun. 21, 2019) (finding disclosure violations where companies created and considered additional undisclosed company-wide projections).

Stanley, or management prepared or considered any undisclosed company-wide projections.[93] Nor has Plaintiff alleged facts suggesting that CCC's fiduciaries selected a five-year period to obscure potential value from the ballast water treatment opportunity.[94] As the Court of Chancery observed, because of the inherent difficulties of predicting the future, five-year projections are routinely used.[95]

Plaintiff has conceded that the disclosed five-year projections included CCC's best estimate of the value it expected from Hyde Marine during the 2017–2021 projection period. After IMO regulations were delayed by two years, CCC "correspondingly adjusted its assumptions and delayed earnings [anticipated from Hyde Marine] by two years[,]" and then incorporated this revised Hyde Marine forecast into the disclosed five-year projections.[96] As the Court of Chancery noted, Plaintiff has conceded that the disclosed five-year company-wide projections were accurate and reliable because they incorporated earnings from Hyde Marine.[97] This concession is fatal.

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[93] Op. 34.

[94] Op. 32.

[95] Op. 32, 34.

[96] Op. 30.

[97] Op. 32.

The Court of Chancery was also correct in holding that the Hyde Marine analysis need not have been disclosed because it was outdated and prepared for another purpose. The Hyde Marine analysis was prepared in May 2017 for the Investment Committee as part of a return-on-capital analysis. It was never approved by the Board. After the Hyde Marine analysis was created, the IMO regulations were delayed until September 2019. The Court of Chancery correctly held that the intervening IMO regulatory delay rendered the Hyde Marine analysis "outdated."[98]

Plaintiff contends that the outdated Hyde Marine analysis should have been disclosed even after the IMO delay.[99] Not so, as "Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information."[100] Here, disclosure of the Hyde Marine analysis after the IMO regulatory delay would have done exactly that. In deciding how to vote on the Merger, the additional disclosure of this outdated single-product financial analysis prepared for another purpose and

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[98] Op. 35. Plaintiff also admitted during argument that the Hyde Marine analysis was outdated. *See* B1068 87:17–22.

[99] Br. 9.

[100] *Kihm*, 2021 WL 3883875, at *14–15 (Del. Ch. Aug. 31, 2021), *aff'd*, 276 A.3d 462 (Del. 2022) (quoting *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994)).

already incorporated into the disclosed projections in revised form would confuse stockholders and not serve the goal of meaningful and helpful disclosure.[101]

Plaintiff's real complaint is not that CCC failed to disclose the Hyde Marine analysis, but that "Plaintiff would have used a different window for projecting the Company's future or handled the [IMO ballast water regulatory] delay adjustments differently."[102] In other words, Plaintiff contends that CCC should have created and then disclosed longer and less reliable projections.[103] But, as the Court of Chancery correctly held, "disagreement with management's or Morgan Stanley's chosen methodology is not a disclosure claim."[104]

(2) Exclusion of Hyde Marine "Upside" From Disclosed Projections

Plaintiff's claim that CCC should have disclosed that the "upside revenues/cash flow" for Hyde Marine were not included in the five-year fairness

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[101] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1289 (Del. 1989) ("We see no reason why candor would demand that shareholders be deluged with conflicting estimates of financial performance, many of which have been made stale by the passage of time.").

[102] Op. 34.

[103] *See Kihm*, 2021 WL 3883875, at *15 (rejecting claim that company should have disclosed additional ten-year projections considered by board because the "divergence [compared to the disclosed projections] is almost completely confined to the second half of the ten-year projections, where the exact figures are inherently more speculative.").

[104] Op. 34.

projections fails because the Proxy's extensive disclosures about the ballast water opportunity made these facts clear to investors.

The Proxy and the SEC filings it incorporated by reference described in detail the ballast water retrofit market, Hyde Marine, and how future demand was driven by the IMO and USCG regulations.[105] CCC told investors in early 2017 that it "began experiencing a notable increase in customer inquiries for its BWTS" due to regulatory developments, that CCC estimated "the size of the future market for BWTS to be in the range of $18 billion to $28 billion," and that a "majority" of the vessels in the BWTS market would be outfitted with BWTS "over the next 5 to 7 years."[106] In July 2017, after the IMO regulations were delayed until September 2019, CCC told investors that this would "dampen the pace of near-term market development and demand growth for ballast water treatment systems," and "[t]he pace of change in the Company's BWTS sales beyond September 2019 will be dependent upon the amended IMO Convention compliance schedule[.]"[107]

These disclosures (which Plaintiff ignores) refute any notion that investors were misled about the ballast water opportunity. From these disclosures, a CCC

[105] B83; B280–281.

[106] B106.

[107] B281.

investor would understand that the ballast water retrofit market represented a future opportunity for CCC, but due to the regulatory landscape a critical part of this opportunity fell ***after*** the period covered by the 2017–2021 projections in the Proxy.

Additional disclosures about the ballast water opportunity would not have significantly altered the total mix of information. Requiring companies to detail every cost and/or benefit considered in connection with preparing projections would not benefit stockholders, but instead is the type of minutia Delaware courts have repeatedly rejected as not needing to be disclosed.[108] Indeed, in *In re Volcano Corp. Stockholder Litigation*,[109] the Court of Chancery rejected a similar claim. There, plaintiff claimed that although stockholders were informed of a decrease in value over time, they were misled because the rate of decline was not disclosed.[110] This Court affirmed the Court of Chancery's holding that "although a more exhaustive disclosure of the Warrants' value decay over time may have been 'somewhat more informative,' a reasonable stockholder would not have viewed

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[108] *See In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *9 (Del. Ch. Mar. 31, 2017) (a complaint does not state a disclosure violation by noting "tell-me-more" details left out).

[109] 143 A.3d 727 (Del. Ch. 2016), *aff'd*, 156 A.3d 697 (Del. 2017).

[110] *Id.* at 749.

that fact as significantly altering the total mix of available information[.]"[111] The same is true here.

b. BCG Report

Plaintiff next argues that the Court of Chancery erred because four supposedly material details from the BCG Report allegedly were not disclosed in the Proxy. The Court of Chancery correctly held that the Proxy disclosed all material facts relating to the BCG Report and "the stockholders who approved the Acquisition were fully informed even without the details from or about the BCG Report" that Plaintiff contends should have been disclosed.[112]

(1) Financial Projections

Plaintiff first contends that unspecified projections from the BCG Report should have been disclosed and that the Court of Chancery's contrary holding reflects "the same errors" as its holding on the Ballast Water Initiative disclosures.[113] As with the Ballast Water Initiative, however, Plaintiff does not explain how any projections from the BCG Report would have changed the "total

[111] *Id.*

[112] Op. 49.

[113] Br. 35–36.

mix" of information available to stockholders. Plaintiff therefore has not met its burden to plead facts establishing a disclosure deficiency.[114]

The Proxy disclosed the projections that post-dated the BCG Report and that were actually considered in connection with the Merger. The Proxy did not also need to disclose projections from the BCG Report that were outdated and therefore immaterial. As the Court of Chancery correctly explained, substantial intervening events separated the December 2016 BCG Report from the November 2017 Proxy, and Plaintiff's requested inferences regarding the materiality of projections from the BCG Report are not reasonable given that substantial delay and changed circumstances.

Contrary to Plaintiff's assertion, the Court of Chancery did not misapply *In re PNB Holding Co. Shareholders Litigation*.[115] The Court of Chancery cited *PNB* for the straightforward proposition that "it is not [Delaware] law that every extant estimate of a company's future results, however stale or however prepared, is material."[116] *PNB* does not hold that the immateriality of "stale" projections can

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[114] *See In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *8 (plaintiff must plead "facts from which one might reasonably conceive that the vote was not fully informed").

[115] 2006 WL 2403999 (Del. Ch. Aug. 18, 2006).

[116] *Id.* at *16.

never be decided from the pleadings. Here, Plaintiff's own allegations demonstrate the BCG projections were outdated and overrun by subsequent events. Moreover, it is undisputed that CCC satisfied its obligation to provide stockholders with its best estimate of CCC's future. Delaware law requires nothing more.[117]

(2) Other Potential Acquirers

Plaintiff next argues that the Proxy was deficient because it did not disclose information from the BCG Report about potential [redacted] that supposedly conflicted with information in the Proxy and rendered the Proxy misleading.[118]

There is no conflict between the BCG Report and the Proxy. The BCG Report identified [redacted][119] The Proxy, however, disclosed that at a meeting in June 2017, "[t]he working group, the members of the [CCC] senior management team and representatives of Morgan Stanley discussed a list of other potential strategic and financial companies that might be interested in an

[117] *See Weinberger v. Rio Grande Indus., Inc.*, 519 A.2d 116, 126–131 (Del. Ch. 1986) (only reliable projections are required to be disclosed).

[118] Br. 37–38.

[119] B69.

acquisition of [CCC] ***at that time***, and determined that it was highly unlikely that any of those potential counterparties would be interested in an acquisition of [CCC] ***and have the ability to implement an acquisition*** of [CCC] ***at that time*** due to competing strategic priorities and recent acquisitions in the industry."[120] Plaintiff's conflict argument deliberately ignores the change of circumstances posed by Kuraray's substantial premium bid [redacted] Having received that premium bid, management and Morgan Stanley reasonably believed at that time that no bidder would be interested in topping this premium bid, which proved true. There is no inconsistency between the BCG Report and the Proxy, which were prepared at different times and under different circumstances. The Proxy provided stockholders with the up-to-date assessment of CCC and the advice of CCC's banker.

Because the BCG Report does not render the Proxy disclosure misleading, Plaintiff's argument reduces to the contention that the Proxy should have disclosed additional details about potential acquirers that never actually expressed interest in acquiring CCC and that CCC never considered to be realistic acquisition partners. Such information would add nothing to the "total mix" of information available to stockholders and is therefore immaterial. "Delaware law does not require

[120] A96–97 (emphases added).

disclosure of … potential offers that a board has determined were not worth pursuing."[121] The Proxy did not need to state the number of potential acquirers identified in 2016 [redacted][122]

Stockholders were informed of the material information: there were, in theory, other potential acquirers, but none had come forward given the substantial 63% price premium Kuraray offered,[123] and the Board believed that announcing the transaction publicly would inspire any potential acquirers with serious interest to make an offer.[124] That is all that is required.

The "partial disclosures" alleged here are nothing like the misleading partial disclosures alleged in *Morrison v. Berry*[125] or *Appel v. Berkman*.[126] In *Morrison*, the company failed to disclose troubling facts regarding director behavior, including facts shedding light on the depth of management's commitment to the bidder, the extent of the pressure on the board, and the degree to which this

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[121] *City of Miami Gen. Empls.' v. Comstock*, 2016 WL 4464156, at *15 (Del. Ch. Aug. 24, 2016), *aff'd*, 158 A.3d 885 (Del. 2017).

[122] Br. 38.

[123] A97.

[124] A106.

[125] 191 A.3d 268 (Del. 2018).

[126] 180 A.3d 1055 (Del. 2018).

influence may have impacted the structure of the sale process.[127] In *Appel*, the board told stockholders that possible strategic and financial alternatives to a sale of the company were less favorable to the company's stockholders than the proposed transaction, but it failed to disclose the Chairman's then-existing contrary view that it was a bad time to sell and that mismanagement had negatively affected the sale price.[128] Here, by contrast, the Proxy disclosed the Board's assessment, based on Morgan Stanley's advice, that it was "highly unlikely" a potential acquirer other than Kuraray would be able to acquire CCC at the time of the Proxy.[129]

(3) "Further Upside Opportunities"

Plaintiff argues that the Proxy was materially misleading because its financial projections did not incorporate or disclose the existence of "Further Upside Opportunities" described in the BCG Report and reflected in the July 31,

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[127] 191 A.3d at 275.

[128] 180 A.3d at 1064.

[129] *See In re 3Com S'holders Litig.*, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009) (board is not required to disclose "the panoply of possible alternatives to the course of action it is proposing") (internal quotes and cites omitted); *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 736 (Del. Ch. Dec. 1, 1999), *aff'd*, 757 A.2d 1278 (Del. 2000) ("[R]equiring disclosure of . . . every decision not to pursue another option would make proxy statements so voluminous that they would be practically useless.") (citation omitted); *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *11 (similar); *In re Om Grp., Inc. S'holders Litig.*, 2016 WL 5929951, at *12–14 (Del. Ch. Oct. 12, 2016) (similar).

2017 management presentation to Kuraray.[130] But the "Further Upside Opportunities" did not need to be disclosed.

The "Further Upside Opportunities" are [redacted][132] [redacted][133] Presenting "optimistic figures [to a buyer] in an effort to solicit higher offers is not persuasive evidence that those figures are, in fact, reliable or likely to alter the total mix of information available to shareholders."[134] The mere identification of "Further Upside Opportunities" in

[130] A207–208 ¶61; A221–222 ¶91.

[131] B246.

[132] B246–247.

[133] *Id.*

[134] *In re Chelsea Therapeutics Int'l Ltd. S'holders Litig.*, 2016 WL 3044721, at *5 (Del. Ch. May 20, 2016).

the BCG Report or the presentation to Kuraray is insufficient to establish that any material information was excluded from the Proxy.

(4) Existence of the BCG Report

Lastly, Plaintiff argues that the Proxy is deficient because it did not disclose the existence of the BCG Report.[135] But the Proxy states that Mr. Dearth shared with Kuraray a "strategic plan and limited other nonpublic information for purposes of enabling Kuraray to increase its proposed price above $20.00."[136] Though the Proxy did not identify the BCG Report by name, as the Court of Chancery explained, "[t]he space between 'the BCG Report' and 'limited other nonpublic information' does not amount to 'concealing' the BCG Report's existence from the Company's stockholders, as Plaintiff suggests."[137] Plaintiff has not articulated how further details concerning the BCG Report would have altered the "total mix" of information.[138]

Plaintiff also makes the contradictory argument that the Proxy ***did*** disclose the existence of the BCG Report, but only through a "partial disclosure" that was

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[135] Plaintiff conceded in the briefing on the motion to dismiss that the BCG Report did not need to be disclosed. *See* A279.

[136] A97.

[137] Op. 47.

[138] Br. 4, 17.

"incomplete and misleading given the nature of the BCG report, the projections and analyses it contained, and how heavily [CCC] relied on and used the BCG report throughout the merger process[.]"[139] The Complaint never alleges that the BCG Report was relied upon "heavily" during the Merger process, and this conclusory argument cannot carry Plaintiff's burden to plead specific facts that were missing from the Proxy and "why they meet the materiality standard."[140]

c. Updated CECA Model

CCC did not withhold any material information from stockholders regarding the updated CECA model requested by Morgan Stanley, relating to a business that CCC had recently acquired. Plaintiff alleges that Morgan Stanley asked management to provide an "updated segment model that has the CECA EBITDA updated to $18.8MM and other segments revised downwards" so that total EBITDA was unchanged, and management complied with the request.[141] The update requested by Morgan Stanley involved an accounting change to a model that allocated expenses incurred in the CECA acquisition that allegedly were "buried" in the corporate bucket.

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[139] Br. 39.

[140] *Malpiede v. Townson*, 780 A.2d 1075, 1087 (Del. 2001).

[141] B206; A209 ¶63.

The Proxy disclosed that CCC's projections were based on "underlying assumptions" and underwent "frequent revisions."[142] The Proxy also disclosed that CCC completed the CECA acquisition in November 2016 and that Morgan Stanley's financial analyses for the prior twelve months were adjusted to reflect the "impact of Calgon Carbon's acquisition of … CECA."[143]

The Court of Chancery correctly held that CCC's disclosure of the fact of revisions, but not the specific details of each such revision, was sufficient.[144] Additional facts—such as the circumstances surrounding the line-item adjustments to a model shown only to Kuraray that had no effect on CCC's revenues, earnings, or any other aspect of the projections—need not be disclosed "simply because they might be helpful."[145] Rather, the benefits of additional disclosures must be balanced against "the risk that insignificant information may dilute potentially valuable information."[146]

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[142] A112.

[143] A85; A122–123; *see also* B264 [redacted].

[144] *See* Op. 43 n.166; *see also In re Merge Healthcare Inc. S'holders Litig.*, 2017 WL 395981, at *10 (Del. Ch. Jan. 30, 2017) (proxy disclosures were "sufficient for the stockholders to usefully comprehend, not recreate, the analysis" on which the board relied).

[145] *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000).

[146] *In re Volcano Corp. S'holder Litig.*, 143 A.3d at 749.

Plaintiff argues that disclosing the fact of revisions was inadequate because the circumstances of the CECA adjustment supposedly cast doubt on the reliability of the projections disclosed in the Proxy. Plaintiff's theory below was that there was a purported scheme to somehow manipulate the financial projections so that "management was able to avoid both having to go back to the Board with a now-higher set of projections, and having to give those higher projections to stockholders."[147] On appeal, Plaintiff has flip-flopped and argues for the first time that CCC's "investment banker discovered an error in those projections related to CECA."[148] Aside from violating Rule 8, the Complaint does not allege any such error. In any event, the facts as alleged do not support allegations of improper motive, and Plaintiff has not alleged that the adjustment impacted CCC's projected consolidated revenues and income.[149]

As to motive, the Court of Chancery correctly explained that Plaintiff's theory of a management scheme fails because the "adjustment" was requested by Morgan Stanley, not management.[150] The Court of Chancery also correctly noted

[147] Br. 41.

[148] Br. 7, 21, 41.

[149] *See* A209 ¶63.

[150] Op. 41.

obvious problems of timing.[151] When this "adjustment" was made, no member of CCC management had begun employment negotiations with Kuraray; indeed, more than six weeks would pass until Mr. Dearth began limited negotiations with Kuraray concerning his post-deal employment.[152] There are no well-pled facts to indicate that the "adjustment" was made with an improper motive rooted in the potential for post-deal employment.

As to the adjustment's impact, while Plaintiff argues that this is a question of fact that cannot be resolved at the motion to dismiss stage, Plaintiff does not allege that the adjustment had any impact on the projections already approved by the Board, CCC's standalone value, or the fairness opinion. Indeed, the Complaint does not even allege what purported difference resulted from this change. Plaintiff does not allege facts establishing that a "higher set of projections" for CCC would have existed if the adjustment were not made.[153] Indeed, the Court of Chancery held that there was no impact on CCC's consolidated revenues and income and,

[151] *Id.* at 41–42.

[152] *See* Op. 15–16.

[153] A209 ¶63.

despite bearing the pleading burden, Plaintiff's counsel has never disputed that point.[154]

The Court of Chancery correctly noted that allegations must be extreme to cast doubt on the reliability of projections. In *KCG*, the management team made last-minute and drastic downward adjustments to the company's financial projections.[155] Similarly, in *Goldstein*, management revised several key assumptions and reduced projected revenue by billions of dollars, decreasing the company's standalone value by about one-third.[156] By contrast, the CECA model update was requested by CCC's financial advisor[157] and made by a CFO with no motive to depress CCC's value, before negotiations or agreements regarding retention of management.[158] The Court of Chancery correctly explained that the updated CECA model was not required to be disclosed in the Proxy because the change was neither suspicious nor drastic and was therefore insufficient to impugn

[154] A209 ¶63; A276–277; Br. 41–42; B1066–1067 63:9–13, 64:8–11.

[155] *See KCG*, 2019 WL 2564093, at *17.

[156] *See Goldstein v. Denner*, 2022 WL 1671006, at *1, 13–14 (Del. Ch. May 26, 2022).

[157] A209 ¶63.

[158] B287; A215 ¶¶77–78; A99; B564; B315.

the reliability of the projections or "alter the total mix of information available to stockholders."[159]

[159] Op. 43.

II. ALTERNATIVELY, ALL CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS NOT ALLEGED A BREACH OF FIDUCIARY DUTY BY ANY DEFENDANT.

A. Question Presented

Whether the Court of Chancery's decision should be affirmed on the independent, alternative ground that Plaintiff has not alleged facts stating a claim for breach of fiduciary duty. This issue was preserved.[160]

B. Scope of Review

The Court reviews de novo the dismissal of a complaint pursuant to Rule 12(b)(6).[161] This Court may affirm on the basis of a different rationale than that articulated by the trial court, if the issue was fairly presented to the trial court.[162]

C. Merits of Argument

The Court of Chancery's decision should by affirmed for the independent, alternative reason that the Complaint fails to allege facts stating a claim for breach of fiduciary duty by any Defendant. This argument was presented to the Court of Chancery, but the Court did not reach it because it granted Defendants' motion to dismiss under *Corwin*.

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[160] B1006–1013.

[161] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 167–168.

[162] *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015).

Under *Revlon*, the Board had a duty to "secure the best value reasonably attainable for its shareholders, and to direct its fiduciary duties to that end."[163] This Court has recognized that "there is no single blueprint that a board must follow to fulfil its duties."[164] Rather, *Revlon* commands that directors act reasonably "by undertaking a sound process to get the best deal available."[165] To state a claim, Plaintiff must allege an "intentional failure or a conscious disregard of the duty to seek the highest price reasonably available."[166] Under these circumstances, "the scienter requirement compels that a finding of bad faith should be reserved for situations where the nature of [the director's] action[s] can in no way be understood as in the corporate interest."[167]

Plaintiff has failed to state a claim under *Revlon* for multiple reasons.

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[163] *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595 (Del. Ch. 2010).

[164] *C & J Energy Services, Inc. v. City of Miami General Employees' & Sanitation Employees' Retirement Trust*, 107 A.3d 1049, 1067 (Del. 2014).

[165] *In re Dollar Thrifty*, 14 A.3d at 595 (internal quotation and citation omitted); *see also Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994) (explaining that court decides "whether the directors made a **reasonable** decision, not a **perfect** decision") (emphasis in original).

[166] *In re USG Corp. S'holder Litig.*, 2020 WL 5126671, at *29 (Del. Ch. Aug. 31, 2020), *aff'd sub nom Anderson v. Leer*, 265 A.2d 995 (Del. 2021) (cleaned up).

[167] *Id.* (alterations in original, citation omitted).

First, Plaintiff's allegations establish that the Board was informed and engaged. Each director had extensive business experience, and eight of nine were outside independent directors.[168] The Board undertook a careful and comprehensive analysis of CCC's business only months before beginning negotiations with Kuraray.[169] The Board promptly hired independent financial and legal advisors (Morgan Stanley and Jones Day, respectively) and formed a working group to consider Kuraray's proposal.[170] The Board and working group, armed with their extensive business experience and the detailed background information about CCC's business, met ***fourteen times*** during negotiations with Kuraray, and Plaintiffs' allegations reflect careful analysis and active engagement at every step of the process.[171] These facts fall far short of pleading "circumstances which demonstrate that the Board *knowingly and completely* failed to satisfy [*Revlon*] duties."[172]

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[168] A185–192 ¶¶15–22.

[169] A195–196 ¶32.

[170] A96.

[171] A93-106.

[172] *In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *6 (Del. Ch. Oct. 16, 2013); *see also In re USG Corp.*, 2020 WL 5126671, at *30.

Second, Plaintiff cannot impugn the reasonableness of the Board's actions.[173] Following aggressive negotiations, the Board accepted Kuraray's $21.50 per share all-cash bid, with no financing contingency, and with a "fiduciary out" clause that allowed the Board to accept a superior proposal, subject only to a low termination fee.[174] Recognizing the strength of this deal, CCC's stockholders voted overwhelmingly for the Merger.

The deal protections adopted here—including a low termination fee of only 3%—were in line with measures that are routinely upheld and allowed for a superior proposal to be made and accepted.[175]

Contrary to Plaintiff's assertions, the use of a single-bidder process is reasonable, as this Court determined in *C & J Energy Services, Inc. v. City of Miami General Employees' & Sanitation Employees' Retirement Trust*, which held that a permissible "market check does not have to involve an active solicitation, so long as interested bidders have a fair opportunity to present a higher-value

[173] *Dollar Thrifty*, 14 A.3d at 595–96.

[174] B305.

[175] *In re BioClinica*, 2013 WL 5631233, at *8; *Dollar Thrifty*, 14 A.3d at 613–615; A160.

alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal."[176] That is precisely what occurred here.

Lastly, Plaintiff has failed to state a claim against the Officer Defendants. They are not alleged to have had decision-making authority with respect to the Merger.[177] As a result, their principal duty was to keep the Board informed and act according to its instructions, and Plaintiff has not alleged any facts suggesting they failed in that task.[178]

[176] 107 A.3d at 1049, 1067–68 (Del. 2014).

[177] *See Gantler v. Stephens*, 965 A.2d 695, 708 (Del. 2009).

[178] *See In re Solera Holdings, Inc. S'holder Litig.*, 2017 WL 57839, at *12 (Del. Ch. Jan. 5, 2017).

III. ALTERNATIVELY, ALL CLAIMS AGAINST THE DIRECTOR DEFENDANTS SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS NOT PLED A NON-EXCULPATED CLAIM FOR BREACH OF FIDUCIARY DUTY.

A. Question Presented

Whether the Court of Chancery's dismissal of claims against the Director Defendants should be affirmed on the independent ground, also presented to the Court of Chancery but not ruled upon, that Plaintiff has failed to plead facts establishing a non-exculpated breach of fiduciary duty. This issue was preserved.[179]

B. Scope of Review

The Court reviews de novo the dismissal of a complaint pursuant to Rule 12(b)(6).[180] This Court may affirm on the basis of a different rationale than that articulated by the trial court, if the issue was fairly presented to the trial court.[181]

C. Merits of Argument

The dismissal of claims against the Director Defendants should also be affirmed because Plaintiff has not alleged facts establishing a non-exculpated claim for breach of duty. CCC's governing documents bar any personal liability for

[179] B999–1006.

[180] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 167–168.

[181] *RBC Cap. Markets, LLC,* 129 A.3d at 849.

monetary damages for breach of fiduciary duty, except for claims based on disloyalty or bad faith.[182] Therefore, Plaintiff must plead a non-exculpated claim to survive a motion to dismiss.[183]

Accordingly, Plaintiff must allege "facts supporting a rational inference that the director harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith."[184] Plaintiff has failed to allege any such facts. Plaintiff's principal allegation is that the directors received compensation for their unvested equity awards.[185] But any "contention that the vesting of stock options in a change of control transaction implicates the duty of loyalty is frivolous."[186] Because accelerated vesting aligns the directors' interest with that of stockholders, Delaware courts "have therefore routinely held that an

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[182] "The court may take judicial notice of an exculpatory charter provision in resolving a motion addressed to the pleadings." *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 n.40 (Del. Ch. 2000); B1035; 8 *Del. C.* § 102(b)(7); *United Food & Commercial Workers Union v. Zuckerberg*, 2020 WL 6266162, at *13 (Del. Ch. Oct. 26, 2020), *aff'd*, 262 A.3d 1035 (Del. 2021).

[183] *See In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1175 (Del. 2015).

[184] *Id.* at 1179–1180.

[185] A185–192 ¶¶15–22.

[186] *In re BioClinica*, 2013 WL 5631233, at *5.

interest in options vesting does not violate the duty of loyalty."[187] Plaintiff also made no showing that this compensation was material to the directors.[188]

Also missing from the Complaint is any allegation suggesting bad faith. At each significant step during negotiations with Kuraray, management consulted with and obtained the Board's instruction about how to proceed. The Board actively oversaw the process, meeting at least fourteen times.[189] The Board was involved in all material negotiations.[190] Thus, Plaintiff did not plead an actionable claim for breach of fiduciary duty.

CONCLUSION

For the reasons stated, the Court of Chancery's Opinion should be affirmed.

[187] *Id. See also In re Baker Hughes Inc. Merger Litig.*, 2020 WL 6281427, at *19 n.178 (Del. Ch. Oct. 27, 2020).

[188] A96–104.

[189] *Id.*

[190] A104.

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