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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, STEAMFITTERS LOCAL 449 PENSION FUND, and STEAMFITTERS LOCAL 449 RETIREMENT SECURITY FUND, Plaintiffs-Below, Appellants, v. INOVALON HOLDINGS, INC., KEITH R. DUNLEAVY, MERITAS GROUP, INC., MERITAS HOLDINGS, LLC, DUNLEAVY FOUNDATION, ANDRÉ HOFFMANN, CAPE CAPITAL SCSp, SICAR - INOVALON SUB-FUND, ISAAC S. KOHANE, MARK A. PULIDO, DENISE K. FLETCHER, WILLIAM D. GREEN, WILLIAM J. TEUBER, and LEE D. ROBERTS, Defendants-Below, Appellees.	No. 305, 2023 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0698-KSJM **Redacted Version Filed on**: October 27, 2023

APPELLANTS' OPENING BRIEF

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Dated: October 12, 2023

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GLOSSARY

Term	Definition
22C	22C Capital LLC
Appellants or Plaintiffs	City of Sarasota Firefighters' Pension Fund, Steamfitters Local 449 Pension Fund, and Steamfitters Local 449 Retirement Security Fund
Appellees or Defendants	Inovalon, Dunleavy, Meritas Group, Meritas Holdings, Dunleavy Foundation, Kohane, Pulido, Fletcher, Green, Teuber and Roberts
Board	Inovalon's board of directors
Consortium	Nordic, GIC, Insight and 22C
Committee	The special committee of the Board formed on July 18, 2021, consisting of Pulido, Green, and Teuber
Complaint	The Verified Class Action Complaint filed in the Trial Court on August 9, 2022
Dunleavy	Keith Dunleavy
Evercore	Evercore Group L.L.C.
Fletcher	Denise Fletcher
GIC	GIC Pte. Ltd.
Green	William Green
Inovalon or the Company	Inovalon Holdings, Inc.
Insight	Insight Venture Partners, L.P.
JPM	J.P. Morgan Securities LLC
Kohane	Isaac Kohane
Latham	Latham & Watkins LLP
Meritas Group	Meritas Group, Inc.
Meritas Holdings	Meritas Holdings, LLC
Nordic	Nordic Capital Epsilon SCA, SICAV-RAIF (together with its affiliates)
Proxy	The Schedule 14A filed by Inovalon with the SEC on October 15, 2021
Pulido	Mark Pulido
Roberts	Lee Roberts
Transaction	The Consortium's acquisition of Inovalon on November 24, 2021

Term	Definition
Transcript Ruling or Tr.	The Trial Court's July 31, 2023 Transcript Ruling on Defendants' Motions to Dismiss
Trial Court	Court of Chancery of the State of Delaware
Teuber	William Teuber

NATURE OF PROCEEDINGS

The *MFW*[1] doctrine seeks to mitigate the risk of controlling stockholders exploiting their power in conflicted transactions by incentivizing controllers to accept specific procedural safeguards intended to approximate arm's-length bargaining and empower public stockholders. The doctrine strikes a delicate balance: in exchange for faithfully instituting the dual procedural protections (*i.e.*, negotiation by a fully empowered special committee and uncoerced approval by fully informed public stockholders), the controller receives business judgment rule protection that judicially cleanses a species of transaction that Delaware has long recognized to pose heightened risk of self-dealing and unfairness.

This appeal concerns a take-private transaction negotiated by the acquired company's severely conflicted controlling stockholder, and in which judicial cleansing under *MFW* is foreclosed for two independent reasons: (i) the special committee was only formed ***after*** the conflicted controller negotiated material economic terms including the transaction price, and (ii) the stockholder vote approving the transaction was secured via a materially deficient proxy.

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[1] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*").

Through the challenged Transaction, Inovalon Chairman, CEO, and controlling stockholder Dunleavy, along with a Consortium of private equity firms led by Nordic, acquired Inovalon for $41 per share in cash. Dunleavy rolled over $700 million of equity into—and secured employment at—the post-close Company, and negotiated an undisclosed Management Incentive Plan ("MIP") through which Dunleavy and other Inovalon management received hundreds of millions of dollars in additional value.

Despite knowing of Dunleavy's obvious conflicts, the Company's Board allowed him to lead the Transaction process and belatedly formed a special committee only ***after*** Dunleavy and Nordic negotiated material economic terms, including the Transaction price. Discussions between Dunleavy and Nordic began in April and May 2021, and became substantive economic negotiations no later than July 5, when Nordic raised the prospect of Dunleavy and other management participating in a rollover. On July 12, after negotiating only with Dunleavy, Nordic submitted a written offer for the Consortium to acquire Inovalon for $43 per share and again raised the prospect of Dunleavy and other management rolling over equity.

The Board acknowledged Dunleavy's conflict of interest given his likely rollover, but nevertheless permitted Dunleavy to continue negotiating and propose a $44 per share price, which Nordic accepted. Thus, by the Committee's July 18

formation, Dunleavy had not only set the playing field with Nordic with respect to the deal price—the game had apparently concluded.

Even after the Committee's formation, Dunleavy continued leading negotiations, during which the Consortium reneged on the $44 offer and eventually acquired Inovalon for $41 per share. Dunleavy was assisted in negotiations by JPM, which was not only Inovalon's long-time financial advisor, but—unbeknownst to Inovalon's stockholders—(i) had also received over [redacted] in fees from Consortium members over the previous two years, and (ii) was simultaneously representing Nordic and other Consortium members on at least ***four*** other engagements. Evercore, whom the Committee engaged to provide a facade of legitimacy, similarly suffered from undisclosed conflicts (including concurrent engagements with the Consortium) and, at the Committee's direction, took a backseat to JPM throughout the sale process. The Proxy issued in connection with the Transaction nevertheless falsely implied that Evercore worked with conflicted JPM to solicit interest from other potential bidders, purportedly serving as a check on JPM, when Evercore was not involved in the market outreach.

The Trial Court held that Defendants satisfied *MFW*'s requirements that the Transaction be "conditioned *ab initio* upon the approval of ***both*** an independent, adequately-empowered Special Committee that fulfills its duty of care, and the

uncoerced, informed vote of a majority of the minority stockholders."[2] But *MFW* mandates that a controller "self-disable ***before*** the start of substantive economic negotiations."[3] Plaintiffs' undisputed allegations establish the *MFW* conditions were not imposed—and the Committee was not formed—until ***after*** Dunleavy and Nordic had negotiated the price and ***after*** Nordic had twice reiterated its typical practice of requesting management to rollover equity. Yet, the Trial Court held that no conflict arose for Dunleavy—and thus *MFW* protections were unnecessary—"until Nordic formally requested that Dunleavy roll over a portion of his equity as part of [a] written offer" on July 21.[4] The Trial Court's ruling contravenes both Delaware law and the pleadings-stage record, which shows the Board allowed Dunleavy to negotiate the Transaction despite knowing he would likely rollover his equity and continue as CEO post-Transaction.

The Trial Court also reversibly erred in holding that the stockholder vote was fully informed despite three material disclosure violations.

First, the Proxy failed to disclose the MIP, which was a material non-ratable benefit providing Dunleavy (and others) hundreds of millions of dollars in value.

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[2] 88 A.3d at 642 (emphasis in original).

[3] *Olenik v. Lodzinski*, 208 A.3d 704, 707 (Del. 2019). Emphasis is added unless otherwise noted.

[4] Tr. at 27.

The Trial Court erroneously excused that non-disclosure on the basis that the MIP was preliminary, even though implementation of an MIP was ***required*** by the Rollover Agreements on terms "consistent with" the MIP Term Sheet. The Trial Court also erroneously ruled that the Proxy disclosed the Committee's discussions regarding the MIP. In reality, the disclosed discussions clearly concerned Inovalon's treatment of unvested equity under ***existing*** incentive programs for its employees, not the MIP.

Second, the Proxy omitted that Evercore and JPM were concurrently representing Nordic and other Consortium members, and that JPM had earned hundreds of millions of dollars in fees from Consortium members in the two years preceding the Transaction. Ignoring the materiality of those conflicts from stockholders' perspective, the Trial Court summarily dismissed those disclosure claims under a different and improper standard by relying on its earlier finding that the Committee purportedly met its duty of care in managing its advisors.

Third, the Proxy falsely overstated Evercore's role in market outreach to potential bidders, *e.g.*, that Evercore was instructed by the Committee to and/or did participate directly in market outreach to potential buyers, when the minutes show that JPM alone conducted the outreach. The Trial Court acknowledged this inconsistency but deemed it immaterial. But the very retention of Evercore to

ostensibly cure JPM's conflicts demonstrates why the Proxy's disclosures regarding Evercore's role are material.

MFW's delicate balance is thwarted where one of its dual conditions is not faithfully applied. Because ***neither*** condition was satisfied here, the Trial Court's Ruling should be reversed.

SUMMARY OF ARGUMENT

1. Judicial cleansing is unavailable under *MFW* because Plaintiffs' well-pled allegations establish a strong inference that Dunleavy engaged in substantive economic negotiations with Nordic before the Committee's formation.[5] The Trial Court's ruling that no conflict arose, and thus no *MFW* protections were necessary, until Nordic ***formally*** requested a rollover contravenes Delaware law and the Board's acknowledgement of Dunleavy's conflict.

2. Judicial cleansing under *MFW* is independently foreclosed because Plaintiffs' well-pled allegations entitle Plaintiffs to "a rational inference that material facts were not disclosed [in the Proxy] or that the disclosed information was otherwise materially misleading."[6] The Trial Court erroneously rejected Plaintiffs' arguments regarding three material disclosure violations: (i) the failure to disclose the MIP's existence or negotiation; (ii) the failure to disclose JPM's and Evercore's concurrent engagements with Consortium members, as well as the hundreds of millions of dollars in fees JPM received from Consortium members in the preceding two years; and (iii) the false embellishment of Evercore's involvement in market outreach that ***JPM*** actually conducted.

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[5] *See Olenik*, 208 A.3d at 715-16.

[6] *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018), *as revised* (July 27, 2018).

STATEMENT OF FACTS

A. Parties

Plaintiffs were Inovalon Class A stockholders before the Transaction.[7]

Defendant Inovalon provides cloud-based platforms used by healthcare providers, life-sciences companies and pharmacy organizations.[8] Prior to the Transaction, Inovalon had publicly traded Class A stock entitled to one vote per share and non-publicly traded Class B stock entitled to ten votes per share.[9]

Defendant Dunleavy founded Inovalon, served as its CEO and Chairman for decades, and controlled the Company through his 70% ownership of the Class B shares, which gave him approximately 64% of Inovalon's voting power.[10] Dunleavy rolled over $700 million of Inovalon stock for 15.6% of the post-closing entity, and remained Inovalon's CEO after the Transaction.[11]

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[7] A33, ¶10.

[8] A33, ¶11.

[9] A41, ¶32.

[10] A33-A34, ¶¶12-13. Dunleavy owned his Class B shares through Defendants Meritas Group, Meritas Holdings, and the Dunleavy Foundation.

[11] A33-A34, A97-A98; ¶¶12-13, 155-56.

The Director Defendants—Dunleavy, Kohane, Pulido, Fletcher, Green, Teuber and Roberts—constituted Inovalon's Board that issued the Proxy.[12] Pulido, Green, and Teuber served on the Committee.[13]

B. Inovalon Is Poised for Growth

Inovalon experienced rapid growth after Dunleavy took it public in 2015.[14] By the time of the Transaction, Inovalon had an expansive client list and was "the premier technology platform in health care."[15]

For fiscal year 2020, despite the pandemic, Inovalon increased year-over-year ("YoY") revenue and cash flow from operations ("CFFO") by 4% and 22%, respectively.[16] Inovalon management projected 2021 as a banner year, forecasting 10%-14% YoY revenue growth and 25% YoY CFFO growth.[17]

Inovalon immediately outperformed its projections, reporting blowout results for both Q1 and Q2 2021, which prompted Inovalon to increase its 2021 projected

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[12] A33, A35, A36-A40; ¶¶12, 17, 20-26, 29.

[13] A40, A64; ¶¶30, 86.

[14] A41, ¶32.

[15] A46-A47, ¶¶44-45.

[16] A45-A46, ¶¶41-42.

[17] A45-A46, ¶42.

revenue.[18] Dunleavy praised Inovalon's "[s]trength ... across all business units," "deepening customer relationships, increasing contract durations, [and] contract expansions" (*e.g.*, an eight-year contract extension with Walmart), and stressed his "enthusiasm for 2021 and beyond."[19] JPM highlighted Inovalon's "long-term growth potential" and "[v]aluation trajectory ... [that] continues to trend up."[20]

C. Dunleavy Enlists JPM and Controls Inovalon's Strategic Review Process

In late 2019 through 2020, the Board discussed strategic alternatives to capitalize on Inovalon's rapidly increasing growth prospects.[21] From the outset, the Board recognized that Dunleavy's "conflicts of interest[] as ... a director [and] large stockholder" could result in "circumstances in which it would be prudent to form a special committee of independent directors," but the Board took no action to mitigate Dunleavy's potential conflicts.[22]

In late 2020 and early 2021, Dunleavy began discussions with potential deal partners and informed the Board he would exclusively handle negotiations.[23] The

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[18] A46, A49-A50; ¶¶43, 49.

[19] A50, ¶50.

[20] A46-A47, ¶44.

[21] A51-A52, ¶55; A258.

[22] A51-A52, ¶55.

[23] A51, ¶¶53-54.

Board then authorized Dunleavy "to engage in discussions with financial advisors who could potentially assist the [] Board with an exploration of various strategic alternatives," including raising capital.[24]

On April 20, 2021, Nordic contacted Dunleavy regarding a potential transaction, prompting him to enlist JPM.[25] The Board authorized management to hire JPM to explore strategic partnerships and capital-raising, but not a sale of Inovalon.[26] JPM, acting under Dunleavy's "oversight," immediately pursued a sale anyway, contacting multiple potential acquirers throughout May and June 2021.[27]

On May 26, Dunleavy spoke to Nordic, which confirmed its interest in acquiring Inovalon.[28]

On June 11, Dunleavy, without Board approval, hired Latham to advise on a potential transaction.[29] Latham was Nordic's longtime legal advisor, having

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[24] A51-A52, ¶55; A259.

[25] A52, ¶56.

[26] A52, ¶58.

[27] A54, ¶60.

[28] A54, ¶61.

[29] A56-A57, ¶67.

represented it on numerous engagements immediately prior to and during the Transaction process.[30]

On June 17, Dunleavy updated the Board on pending acquisition offers and discussions with potential acquirers, essentially foreclosing any potential debt or equity offerings or strategic partnerships.[31] In late June, Dunleavy instructed JPM to work with Nordic, which signed an NDA on June 24.[32]

D. Dunleavy Negotiates the Transaction Price Directly with Nordic

On July 5, 2021, Dunleavy and Nordic met to discuss an Inovalon acquisition.[33] Nordic informed Dunleavy: "[I]n transactions of a similar size and assuming an advanced stage of discussions, Nordic … would typically request that members of management participate in a rollover of their investment."[34] Nordic then indicated it would submit a written indication of interest.[35]

On July 12, Nordic offered to acquire Inovalon for $43 per share, partially funded by other equity investors that would eventually form the Consortium (*i.e.*,

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[30] *Id.*

[31] A57-A58, ¶68.

[32] A58, ¶69.

[33] A58-A59, ¶72.

[34] *Id.*

[35] *Id.*

GIC, Insight and 22C).[36] Nordic's offer letter indicated there would be no changes to Inovalon's management and Dunleavy would remain CEO, stating [redacted] and that Nordic [redacted][37] The letter also noted that if Nordic followed its typical practice of permitting a management rollover, then the transaction would be conditioned on approval of a special committee and majority-of-the-minority vote.[38]

On July 13, the Board acknowledged the "likelihood that … Dunleavy may participate in a rollover," citing (i) "the [] Board's understanding [that rollovers are] typical market practices for financial sponsors[,]" (ii) "the statements made during the July 5 meeting between [] Dunleavy and … Nordic" and (iii) "the statements made … in Nordic[]'s July 12, 2021 indication of interest[.]"[39] However, the Board "authorized [JPM] and [Dunleavy] to continue discussions with [Nordic] and propose a price of $44.00 per share" and "decided to form a special committee … in

[36] A59-A60, ¶75.

[37] A60, ¶76.

[38] A265.

[39] A262.

the event that [Nordic] proposed transaction terms that would include Dr. Dunleavy … receiving different consideration than [Inovalon's public stockholders]."[40]

On July 14, Dunleavy and Nordic engaged in negotiations, after which Nordic offered to acquire Inovalon for $44 per share, with a $3.5 billion equity commitment from Nordic and the other Consortium members.[41] Nordic reiterated (i) it was contemplating [redacted] and (ii) its intention to retain Dunleavy and the rest of Inovalon management post-close, stating: [redacted][42]

On July 16, Latham—representing Inovalon/Dunleavy—met with Nordic to "discuss[] the fact that the Company Board was meeting soon to consider and approve the establishment of a special committee," confirming all parties understood that a Transaction with Nordic would include a Dunleavy rollover.[43]

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[40] *Id*.

[41] A61, ¶80.

[42] A61-A62, ¶81.

[43] A62-A63, ¶83.

E. With the Transaction Price Set, the Board Belatedly Forms a Special Committee

On July 18, 2021, after Dunleavy formally confirmed—as was clear for weeks—that he would rollover significant equity in the Transaction, the Board finally formed the Committee.[44]

On July 20, the Committee retained Latham (*i.e.*, Inovalon/Dunleavy's counsel to that point, which had a longstanding relationship with Nordic) as its counsel.[45] Latham also continued to serve as Inovalon's counsel throughout the Transaction process.[46]

The Committee then searched for an independent financial advisor—*i.e.*, an advisor with an "absence of conflicts of interest with the Company's management (including Dr. Dunleavy)[,] Nordic Capital" and other Consortium members.[47] The Committee could not hire JPM because it represented Inovalon and Dunleavy, whose rollover rendered him indisputably interested in the Transaction.[48] Moreover, JPM

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[44] A63-A64, ¶¶85-86.

[45] A65, ¶87.

[46] A65, ¶87 & n.61.

[47] A67-A68, ¶93; A263.

[48] A65, ¶89.

had lucrative, longstanding and ongoing relationships with Nordic and the other Consortium members.[49]

Indeed, concurrently with representing the Company on the Transaction, JPM represented both Nordic and GIC on ***two*** separate transactions ***each***.[50] Two of those deals—Nordic's potential sale of Veonet GmbH and GIC portfolio company [redacted] backdoor listing through a merger with EJF Acquisition Corp—were multi-billion-dollar transactions.[51] And, in the prior two years, JPM had received (i) [redacted] and (ii) [redacted][52]

On July 23, the Committee hired Evercore as its financial advisor.[53] The Committee tasked Evercore with ***reviewing*** [redacted] but determined to leave the actual outreach to JPM.[54]

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[49] A103-A106, ¶¶169-71.

[50] A105-A106, ¶171.

[51] *Id.*

[52] A74-A76, A104; ¶¶106-08, 170.

[53] A70, ¶98.

[54] A65-A66, A70-A71, A74; ¶¶89, 98-99, 104-05.

Evercore's engagement terms provided that [redacted][55] There is no indication, however, that Evercore ever received an "additional fee."

Evercore, like JPM, was severely conflicted as to Nordic and all other Consortium members.[56] Evercore received $9 million in advisory fees from Nordic in the two years preceding the Transaction and, concurrently with Evercore's representation of the Committee, [redacted][57] Evercore also (i) had a concurrent engagement with Insight regarding its fundraise for a $20 billion fund, (ii) admitted to [redacted] and (iii) collected over $100 million in advisory fees collectively from Consortium members other than Nordic in the two years preceding the Transaction.[58]

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[55] A70, ¶98.

[56] A68-A70, ¶¶94-96.

[57] A68, ¶94.

[58] A69-A70, A108-A109; ¶¶95-96, 176.

F. The Committee Continues to Permit Conflicted Dunleavy and JPM to Negotiate Directly with the Consortium and Conduct Market Outreach

At meetings on July 25 and 26, 2021, JPM discussed with the Committee, *inter alia*, (i) the "buyer outreach and market check conducted by [JPM] to date" and (ii) JPM's negotiations with Nordic.[59] The Committee questioned JPM's market check at both meetings, but continued to allow it to exclusively conduct buyer outreach and merely tasked Evercore with reviewing JPM's work.[60]

At July 27 and 28 meetings, the Committee again questioned JPM's market check and expressed concerns that JPM might be favoring Nordic as a buyer, but continued to allow JPM to conduct buyer outreach without Evercore's involvement.[61]

On July 29, JPM gave the Committee "an update on the status of the Company's negotiations with Nordic," and the Committee authorized further direct negotiations by JPM and Dunleavy from which the Committee was excluded.[62] On

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[59] A71, ¶99.

[60] A71-A72, ¶¶99-100.

[61] A73-A74, ¶¶103-05.

[62] A76-A77, ¶110.

July 30, the Committee discussed the necessity of a go-shop given concerns about the reliability of JPM's market check.[63]

In late July and early August 2021—and without the Committee's involvement—Dunleavy negotiated his rollover.[64] During that same period, Dunleavy also negotiated directly with Nordic regarding the Transaction terms, including the (i) treatment of his and management's unvested equity and (ii) "retention and incentivization" of Dunleavy and management at the post-closing Company.[65]

On August 3, JPM provided the Committee "an update on the status of the Company's negotiations with Nordic," and Evercore again confirmed that JPM was exclusively conducting the market check, with Evercore merely reviewing JPM's work.[66] Later on August 3, Dunleavy met with the Consortium members—without any Committee members present—"to discuss the Company and the proposed transaction."[67]

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[63] A77, ¶111.

[64] A78, ¶¶113-15.

[65] A79, ¶116.

[66] A79-A80, ¶¶117-18.

[67] A80, ¶119.

G. Nordic Reneges on Its $44 Per Share Offer

On August 10, 2021, Nordic reneged on its $44 per share offer because, per JPM, Nordic could not secure equity funding at that price.[68] Nordic proposed a revised transaction at $40.50 per share.[69] JPM informed the Committee that Nordic continued to value Inovalon at $44 per share and the [redacted][70]

At its August 11 meeting, the Committee concluded that Nordic's "revised proposal would not be in the best interests of the Company and its stockholders" and discussed rejecting it given Inovalon's strong standalone prospects.[71] The Committee then directed JPM—not Evercore—to expand its "buyer outreach and negotiations with potential buyers other than Nordic Capital as quickly as possible."[72] Later that day, Nordic again reduced its offer, this time from $40.50 per

[68] A82, ¶123.

[69] A82, A83; ¶¶123, 125.

[70] A83-A84, ¶126.

[71] A83-A84, ¶¶126-27.

[72] A84, ¶127.

share to $40.25 per share, an approximately $550 million value reduction from the agreed-upon $44 per share offer.[73]

The Committee met on August 12 to review Nordic's twice-reduced offer.[74] At that meeting, JPM updated the Committee on JPM's (i) continuing negotiations with the Consortium and (ii) additional outreach and negotiations with several parties who had "expressed interest in a transaction with the Company, but required more time to conduct preliminary diligence."[75]

H. The Committee Rushes into a Transaction with Nordic

At the end of the August 12 meeting, the Committee authorized JPM to "simultaneously continue negotiations with Nordic Capital and continue the buyer outreach and negotiations with potential buyers other than Nordic."[76]

On August 13, JPM updated the Committee on its continuing negotiations with the Consortium, and acknowledged several parties were interested in acquiring Inovalon.[77] Nevertheless, the Committee committed to expedite a deal with Nordic, agreeing that $41 per share (*i.e.*, a reduction of nearly $470 million from Nordic's

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[73] A85, ¶129; A1025.

[74] A85-A87, ¶¶130, 133.

[75] A86, ¶131.

[76] A86-A88, ¶¶132, 134.

[77] A88-A89, ¶136.

$44 per share offer) was in the Company's best interest.[78] The Committee then authorized Dunleavy and JPM to continue negotiating with Nordic and engaging in active buyer outreach.[79]

Later that day, after further negotiations with Dunleavy, Nordic submitted a revised $41 per share offer, including an approximately $1.24 billion combined rollover from Dunleavy and other Inovalon investors.[80] At the August 14 Committee meeting, JPM updated the Committee on its Consortium negotiations.[81] The Committee again authorized Dunleavy and JPM—rather than the Committee or Evercore—to continue "to negotiat[e] … with Nordic" and "reach out to and negotiate with potential buyers other than Nordic[.]"[82]

On August 15, Nordic submitted its "best and final offer," which contained the same $41 per share price as its revised August 11 offer, and a slight rollover increase to $1.3 billion (*i.e.*, $700 million for Dunleavy and $600 million for others).[83] That same day, the Committee discussed the substantial third-party

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[78] A88, ¶135.

[79] A88-A89, A109-A112; ¶¶135-36, 178.

[80] A89, ¶137.

[81] A89-A90, ¶138.

[82] *Id*.

[83] A90-A91, ¶140.

interest in Inovalon and again instructed JPM (and not Evercore) to "continue to reach out to and negotiate with potential buyers other than Nordic …."[84]

On August 16, the Committee again permitted JPM to unilaterally "continue to reach out to and negotiate with potential buyers other than Nordic Capital while [Dunleavy] pursued negotiations with Nordic Capital to finalize a transaction."[85]

On August 17, JPM updated the Committee on buyer outreach, noting that several parties remained interested, and at least one party "offered a [] potential price" as high as "the merger consideration offered by Nordic [], at $41 per share."[86]

The Board met the same day, at which time Dunleavy provided "an update on the negotiations with Nordic Capital from his perspective as Company management" and Latham confirmed that JPM continued to conduct the market outreach.[87] Dunleavy then encouraged the Board to approve the Transaction.[88]

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[84] A91, ¶141.

[85] A93, ¶146.

[86] A93-A94, ¶147.

[87] A95, A96; ¶¶149, 151.

[88] A95, ¶150.

I. The Committee and Board Approve the Transaction

On August 18, the Committee recommended—and the Board and Audit Committee approved—the Transaction.[89] The parties signed the "[Merger] Agreement, the Confidentiality Agreement, the Rollover Agreements, the Support Agreements and…other [Transaction] documents"—which "constitute[d] the entire agreement of the parties"—on August 19.[90] Through his Rollover Agreement, Dunleavy rolled over into the post-closing entity, on a tax-free basis, $700 million of Inovalon shares.[91]

The Rollover Agreements also provided that upon closing, the parties would execute an LP Agreement that "reflect[s] the terms as set forth on Annex B hereto."[92] Annex B granted Dunleavy the MIP, stating: "Upon or as soon as practicable after the Closing, the Company ***will implement a[n] MIP*** on terms and conditions consistent with those set forth in Annex [B] hereto."[93] An Annex to the LP Agreement details the expected "terms and conditions" of the MIP (the "MIP Term Sheet"), which reserved [redacted] of the post-close entity's equity for an incentive award

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[89] A96, ¶¶152-53.

[90] A96, A100-A101; ¶¶153, 161-62.

[91] A97-A98, ¶¶155-56.

[92] A98-A100, ¶¶158-60; A601.

[93] A620.

pool consisting of profits interests, [redacted] of which were granted to employees (including Dunleavy and management) at closing and the remaining [redacted] reserved for future issuances, [redacted].[94]

J. The Proxy

On October 15, 2021, the Board issued the Proxy, which was materially deficient in several respects.[95]

First, the Proxy failed to disclose the MIP.[96] The Proxy included an execution version of Dunleavy's Rollover Agreement[97] that omitted Annex B and the MIP Term Sheet[98] and contained no disclosure of the MIP or its terms.

Second, the Proxy omitted material information regarding JPM's and Evercore's conflicts,[99] *e.g.*, (i) Evercore concurrently advising several Consortium members, including Nordic and Insight;[100] (ii) JPM concurrently representing both

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[94] A99-A100, ¶¶159-60.

[95] A101, ¶163.

[96] A101, ¶164.

[97] A451-A470.

[98] A99-A100, A101; ¶¶159-60, 164.

[99] A103-A109, ¶¶168-77.

[100] A108-A109, ¶¶176-77.

Nordic and GIC on two separate transactions each; and (iii) the nearly ***$400 million*** in fees JPM received from Consortium members in just the two years preceding the Transaction.[101]

Third, the Proxy falsely, misleadingly, and repeatedly stated that Evercore was instructed by the Committee to and/or did participate directly in market outreach to potential buyers, when meeting minutes confirm only JPM was instructed to—and did—perform that outreach.[102]

[101] A104-A106, ¶¶170-71.

[102] A109-A114, ¶¶178-80.

ARGUMENT

I. THE TRANSACTION IS SUBJECT TO ENTIRE FAIRNESS BECAUSE THE TRANSACTION FAILS *MFW*'S *AB INITIO* REQUIREMENT

A. Question Presented

Whether the Trial Court erred in finding Plaintiffs did not plead facts creating a reasonably conceivable inference that the *MFW* conditions were adopted ***after*** conflicted Dunleavy conducted "substantive economic negotiations" with Nordic. The question was raised below[103] and considered by the Trial Court.[104]

B. Scope of Review

This Court reviews the application of *MFW* on a motion to dismiss *de novo*.[105] At the pleadings stage, all well-pleaded allegations are accepted as true and the Court must draw all reasonable inferences in Plaintiffs' favor.[106] Dismissal is inappropriate unless Plaintiffs "would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[107]

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[103] A961-A966.

[104] Tr. at 24-28.

[105] *Olenik*, 208 A.3d at 714.

[106] *Savor, Inc. v. FMR Corp*., 812 A.2d 894, 896-97 (Del. 2002).

[107] *Id.*

C. Merits of Argument

Given the heightened risk of unfairness presented by transactions in which a controlling stockholder receives a non-ratable benefit, defendants must prove the transaction is entirely fair[108] unless it was conditioned *ab initio* on (i) negotiation and approval by an independent special committee and (ii) the affirmative vote of a majority of the minority stockholders.[109] "*MFW*'s dual protections contemplate that the Special Committee will act as the bargaining agent for the minority stockholders, with the minority stockholders rendering an up-or-down verdict on the committee's work."[110] As the Trial Court explained, "[t]he purpose of the *ab initio* requirement is to implement the procedural protections of *MFW* in time to disable conflicts and simulate arm's-length negotiations."[111] Thus, to comply with the *ab initio* requirement, the *MFW* protections must be established "***before*** the start of substantive economic negotiations."[112]

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[108] *In re Ezcorp Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016).

[109] *MFW*, 88 A.3d at 644.

[110] *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *17 (Del. Ch. June 11, 2020).

[111] Tr. at 26-27; *see also Olenik*, 208 A.3d at 716 (confirming "ab initio" means controller-disabling mechanisms must be implemented before "any economic horse trading").

[112] *Olenik*, 208 A.3d at 707.

Here, "substantive economic negotiations" occurred before the Board formed the Committee, as Nordic and Dunleavy not only exchanged an offer and counter-offer, but reached agreement on a $44 per share price, and thus went well beyond merely "set[ting] the field of play for the economic negotiations to come by fixing the range in which offers and counteroffers might be made."[113] The Trial Court nevertheless concluded there was no "conflict" implicating entire fairness "until Nordic ***formally requested*** that Dunleavy roll over a portion of his equity as part of its written offer."[114] In so holding, the Trial Court defied the pleading stage record and standard by denying Plaintiffs the reasonable inference that Dunleavy was conflicted by his (and the Board's) understanding via both formal and informal communications that Dunleavy would be required to rollover his equity and remain Inovalon's CEO post-close.

On both July 5 and July 12, 2021, while Dunleavy was engaged in price negotiations, Nordic made clear its expectation that Dunleavy participate as a rollover investor. Nordic's July 12 offer letter also indicated that Nordic would

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[113] *Id.* at 717 (finding "preliminary discussions transitioned to substantive economic negotiations when the parties engaged in a joint exercise to value [the combining companies]").

[114] Tr. at 27.

retain management and Dunleavy would remain CEO of the post-close Company.[115] On July 13, the Board itself recognized the likelihood that Dunleavy might be required to participate in a rollover, acknowledging it was "typical market practice" for Nordic, and that both Dunleavy and Nordic had already discussed Dunleavy's potential rollover.[116] Nordic then again formally told the Board on July 14, in the midst of Dunleavy's price negotiations, that it contemplated "material participation from the Company's significant shareholders," and reiterated its intention to retain Dunleavy and the rest of Inovalon management post-close.[117] Nonetheless, the Board did not form the Committee until July 18,[118] by which time Dunleavy's negotiations with Nordic had resulted in an agreed-upon Transaction price.

That Nordic's formal ***written*** request for rollover participation did not occur until July 21 is irrelevant[119] because by July 12, at the latest, both Dunleavy and the Board knew that a rollover was highly likely. Further, Dunleavy and the Board knew

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[115] A58-A60, ¶¶72, 75-76.

[116] A61, ¶79.

[117] A61-A62, ¶¶80-81.

[118] A63-A64, ¶¶85-86.

[119] A64, A66; ¶¶86, 90.

Nordic intended to retain Dunleavy as CEO post-closing. That independently creates a disqualifying conflict the Trial Court did not even address.[120]

In briefing below, Defendants insisted Dunleavy told Nordic on July 5 that he would "not consider any rollover at this point" and would only discuss it if the "rollover proposal was supported by the Company Board."[121] That *post hoc* assertion in the Proxy is unsupported by the Section 220 record,[122] but even if it were true, it would merely confirm Dunleavy knew a rollover was on the table, and therefore had a conflict between his roles as negotiator on behalf of minority stockholders, on the one hand, and a controlling stockholder who is also an anticipated buy-side participant and post-closing CEO, on the other. That is antithetical to the arm's-length dealing by an independent special committee that *MFW* requires for a controller to secure judicial cleansing.[123]

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[120] *See Firefighters' Pension Sys. of Kansas City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 267 (Del. Ch. 2021) ("Delaware law recognizes that management's prospect of future employment can give rise to a disabling conflict in the sale context." (citation omitted)); *see also Teamsters Loc. 237 Additional Sec. Benefit Fund v. Caruso*, 2021 WL 3883932, at *13 (Del. Ch. Aug. 31, 2021) (finding CEO's knowledge of continued employment with acquirer rendered him conflicted as negotiator); *In re Xura, Inc., S'holder Litig.*, 2018 WL 6498677, at *13 (Del. Ch. Dec. 10, 2018) ("Continued employment in itself is a material interest.").

[121] A1094.

[122] A962 n.15.

[123] *Supra* n.111.

In sum, the pleading stage record—and, at minimum, the reasonably conceivable inferences arising therefrom—establish that Dunleavy had two disabling conflicts while he substantively negotiated with Nordic ***before*** the Committee's formation. The Trial Court reversibly erred in holding that Dunleavy's conflict did not arise, and thus the *MFW* protections were unnecessary, until Nordic made a formal ***written*** request for him to rollover his equity. Affirmance would reduce *MFW* to a choreographed charade in which sophisticated parties could avoid entire fairness review simply by delaying formal ***written*** confirmation of otherwise communicated non-ratable benefits giving rise to clear disabling conflicts.

II. THE TRANSACTION IS SUBJECT TO ENTIRE FAIRNESS BECAUSE THE PROXY WAS MATERIALLY MISLEADING

A. Question Presented

Whether the Trial Court erred in finding that Plaintiffs failed to plead a reasonably conceivable material misrepresentation or omission in the Proxy. The question was raised below[124] and considered by the Trial Court.[125]

B. Scope of Review

This Court reviews the application of *MFW* on a motion to dismiss *de novo*.[126] At the pleadings stage, all well-pleaded allegations are accepted as true and the Court must draw all reasonable inferences in Plaintiffs' favor.[127] Dismissal is inappropriate unless Plaintiffs "would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[128]

C. Merits of Argument

Judicial cleansing under *MFW* is unavailable where a plaintiff alleges facts "support[ing] a rational inference that material facts were not disclosed or that the

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[124] A981-A997.

[125] Tr. at 39-48.

[126] *Olenik*, 208 A.3d at 714.

[127] *Savor*, 812 A.2d at 896-97.

[128] *Id.*

disclosed information was otherwise materially misleading."[129] A fact is material when "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[130] Materiality "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote[,]" only that the omitted fact "alter[] the total mix of information made available."[131]

1. The Proxy Failed to Disclose the MIP, Which Was a Material Non-Ratable Benefit that Independently Rendered Dunleavy Conflicted

The Trial Court erred by ruling the Proxy need not disclose the MIP's existence or negotiation.[132] This material, non-ratable benefit obtained by Dunleavy in connection with the Transaction independently rendered him conflicted and thus should have been disclosed to stockholders.[133]

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[129] *Morrison*, 191 A.3d at 282.

[130] *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985).

[131] *Morrison*, 191 A.3d at 283 (internal citation and quotations omitted).

[132] Tr. at 43.

[133] *See, e.g.*, *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 987-88 (Del. Ch. 2000) (finding information regarding side deal providing unique consideration material); *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *23 (Del. Ch. Aug. 8, 2017) (same).

First, the Trial Court mistakenly framed the issue as "[w]hether the ***MIP Term Sheet*** … [was] a concrete side deal for Dunleavy," stating "***the MIP was merely a term sheet*** that the parties agreed to attempt to negotiate further. It was not set in stone, at least not on its face. On its face, the ***MIP Term Sheet*** states that it was not legally binding …."[134] That some of the precise terms of the MIP were potentially open to negotiation is not the issue given that there can be no credible dispute that implementation of an MIP in some form "consistent with"[135] the MIP Term Sheet was a "concrete," "legally binding" condition of the Transaction.[136]

The execution version of Dunleavy's Rollover Agreement ***required*** the parties to finalize an LP Agreement that "reflect[ed] the terms as set forth on Annex B hereto," and Annex B—which was not included in the Proxy—in turn stated that "[u]pon or as soon as practicable after the Closing, the Company ***will implement a[n] MIP*** on terms and conditions consistent with those set forth in [the MIP Term Sheet]."[137] Thus, implementation of an MIP was a mandatory condition of the Rollover Agreement, which was a mandatory condition of the Transaction.[138] That

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[134] Tr. at 40, 42.

[135] A98-A100, ¶¶158-60; A620.

[136] Tr. at 40, 42.

[137] A98-A100, ¶¶158-60; A601, A620.

[138] A66, A78, A82, A90-A91, A118, ¶¶90, 113, 123, 140, 191; A264, A265, A266,

was a "concrete" non-ratable benefit that required disclosure; whether certain aspects the ***MIP Term Sheet*** were still subject to negotiation is irrelevant.

Nevertheless, even if the MIP was a mere proposal (it was not), it would still be material, as Delaware law does not require that non-ratable benefits be "set in stone" or "concrete" to be material information requiring disclosure.[139] And the MIP Term Sheet was far from "gestational,"[140] as it outlined with specificity the parties' understandings regarding the MIP's scope and operation.[141] That was more than enough at the pleading stage to establish (at least) a reasonable inference that the MIP was a potential "means of diverting merger consideration" to Dunleavy and management and thus material.[142]

A267, A294; *see also* Tr. at 17 (acknowledging "Dunleavy's rollover agreement states that the post-closing entity will implement an MIP consistent with the term sheet after closing ….").

[139] *See, e.g.*, *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 720 (Del. 2020) (finding stockholder vote uninformed where proxy failed to disclose compensation *proposal* made to target CEO during merger negotiations); *Maric Cap. Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1179 (Del. Ch. 2010) (finding proxy materially misleading where it disclosed there were no "negotiations" between target and acquirer regarding employment terms but failed to disclose CEO discussed with acquirer its typical management equity package).

[140] Tr. at 43.

[141] A621-A626.

[142] *In re Golden Nugget Online Gaming, Inc. S'holders Litig.*, Consol. C.A. No. 2022-0897-JTL, Tr. at 74-75 (Del. Ch. June 8, 2023) (TRANSCRIPT) (holding nonspecific side deal where "a lot of the[] components, weren't reduced to specific

The Trial Court's reliance on *Trade Desk* was erroneous. In that case, the plaintiffs merely pled that at the time of the stockholder vote, the company's compensation committee held a meeting to ***consider*** potentially granting stock options to the controller.[143] Here, by contrast, the parties were not merely ***considering*** the MIP; rather, they ***agreed to implement*** an MIP, and negotiated a detailed term sheet through which that MIP would be implemented.

Second, the Trial Court's observation that "while Dunleavy qualified for the MIP under the parties' understanding that he would continue as CEO, the benefit was not his alone" as "[o]ther employees would get a piece of the surviving entity's pie presumably"[144] only further supports that the MIP was a non-ratable benefit that required disclosure. Indeed, those "[o]ther employees" were other members of Inovalon management, as Nordic did not "foresee any changes to Inovalon's

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dollar figures or percentages or actual deal terms or the time of the deal doesn't undercut the idea that it's, in fact, a means of diverting merger consideration"); *id.* at 75 ("One inference is that [the parties] didn't have to time to [negotiate the side deal terms]. Another inference is that they wanted to postpone it because of the lower level of transparency that it would provide. At this stage of the case, the plaintiffs get the inference.").

[143] *City Pension Fund for Firefighters & Police Officers in Miami v. Trade Desk, Inc.,* 2022 WL 3009959, at *22 (Del. Ch. July 29, 2022) ("There is no allegation that the Compensation Committee took any action this meeting or at any time prior to October 2021 concerning this potential option grant.") & *22 n.179 (emphasizing plaintiffs had only alleged committee was ***considering*** grant).

[144] Tr. at 44.

organization or employees following the completion of the Proposed Transaction."[145] Thus, they were interested in the Transaction, and non-ratable benefits inuring to them ***also*** needed to be disclosed.[146]

But even if the supposed "other employees" who were MIP recipients were not interested (which is unsupported by the record), it would be irrelevant as Dunleavy was ***also*** a recipient and thus received a non-ratable benefit. And based on the post-closing entity's $4.475 billion valuation,[147] the MIP would be worth $358 million, if not more.[148] Thus, like the CEO in *ACP*, Dunleavy—as CEO of the post-close Company, to whom the MIP ***specifically*** allocated a portion of the equity[149]—stood to "reap[] millions of dollars in personal benefits to the exclusion of public stockholders" through the MIP.[150]

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[145] A61-A62, ¶81.

[146] *See, e.g.*, *Maric*, 11 A.3d at 1179 (finding proxy materially misleading for failing to disclose management discussion with acquirer regarding its "typical equity incentive package given … to management" and practice of "keep[ing] existing management after an acquisition").

[147] A97-A98, ¶155.

[148] *See id.* ($4,475,000,000 x .08 = $358,000,000).

[149] A621 ("[T]he remainder of such Profits Interests Pool reserved for future grants, including a grant to any subsequent CEO ....").

[150] Tr. at 43-44 (citing *ACP*, 2017 WL 3421142).

Third, the Trial Court erroneously held: "Inovalon apprised stockholders of the special committee's consideration of potential equity incentive compensation plans, and the stockholders could readily conclude that Dunleavy would receive part of that incentive."[151] In fact, the Proxy did not disclose the existence or negotiation of the MIP ***at all***.

In rejecting Plaintiffs' arguments, the Trial Court appeared to credit Defendants' half-hearted contention that the Proxy's general references to "the special committee's consideration of 'the Company's management's proposal regarding treatment of equity incentives for employees'" referred to the MIP.[152] But the minutes and Nordic's correspondence confirm the discussions mentioned in the Proxy[153] concerned not the MIP, but rather the treatment of unvested equity under ***existing*** employee incentive programs in the Transaction.[154] Indeed, at the Committee's August 2 meeting, Dunleavy presented a proposal for "treatment of unvested outstanding equity for employees."[155] The Committee authorized

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[151] Tr. at 44.

[152] Tr. at 39-40.

[153] *See* A264, A266, A275.

[154] *See* A597 (addressing proposed treatment of unvested outstanding equity awards); A705 (same); A710-A711 (same); A806 (same); A810 (same); A814 (same).

[155] *Supra* n.154 (citing A597).

Dunleavy to approach Nordic regarding the proposal, which was negotiated by the parties, and to what the Proxy is referring when it discusses the "treatment of equity incentives for employees."[156] Even if there were ambiguity as to whether the Proxy's disclosures concerned pre- or post-closing equity incentive plans (there is not), Plaintiffs—not Defendants—were entitled to an inference in their favor.[157]

The Trial Court also erred to the extent it credited Defendants' argument below that a "FAQ" document attached as an exhibit to a lengthy proxy supplement separately filed the day the deal was announced somehow "apprised stockholders of the special committee's consideration" of the MIP.[158] The FAQ, which was intended for Inovalon's ***employees***—not its stockholders—merely informed employees, in between paragraphs of immaterial text, that "there will be a profit share equity unit incentive program that will give eligible associates access to the upside of the Company."[159] That oblique reference to an incentive program for "eligible associates" cannot cure Defendants' failure to disclose the MIP.[160]

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[156] *Supra* n.153.

[157] *Supra* n.106.

[158] Tr. at 44 (referencing A198-A199).

[159] A198; A673.

[160] *Voigt v. Metcalf*, 2020 WL 614999, at *24 (Del. Ch. Feb. 10, 2020) (finding material information must be disclosed in "clear and transparent manner," and stockholders are not required to "go on a scavenger hunt"); *Zalmanoff v. Hardy*,

Finally, the Trial Court's decision should be rejected as a matter of public policy. When fiduciaries of a corporation seek stockholder action, the law requires "complete candor."[161] If upheld, the Trial Court's ruling would erode that candor by requiring disclosure of only completely finalized side deals, encouraging deal participants to conceal non-ratable benefits that are "informal" or in which not every term is formally and finally memorialized when a Board agrees to a transaction.[162]

2. The Proxy Failed to Adequately Disclose JPM's and Evercore's Conflicts

The Trial Court erred by applying the wrong standard in dismissing Plaintiffs' disclosure claims relating to Evercore's and JPM's potential conflicts.[163] In evaluating the materiality of those disclosures, the Trial Court held that Plaintiffs had not adequately alleged the Committee violated its duty of care by failing to

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2018 WL 5994762, at *5 (Del. Ch. Nov. 13, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (TABLE) ("[O]ur law does not impose a duty on stockholders to rummage through a company's prior public filings to obtain information that might be material to a request for stockholder action.").

[161] *See, e.g.*, *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977).

[162] *See In re Columbia Pipeline Grp., Merger Litig.*, 299 A.3d 393, 429-30 (Del. Ch. 2023) (finding deal attorney recommended unwritten "gentleman's agreement" regarding exclusivity intending to omit it from the proxy).

[163] *In re MCA, Inc., S'holder Litig.*, 785 A.2d 625, 638 (Del. 2001) ("A claim that the trial court employed an incorrect legal standard, however, raises a question of law that this Court reviews de novo." (italics omitted)).

manage Evercore's and JPM's conflicts.[164] Then, when purporting to address Defendants' failure to disclose those conflicts in the Proxy, the Trial Court held:

> And since I've already found that those allegations weren't entirely persuasive, I do not believe that the precise information that plaintiffs deem a disclosure deficiency would have altered the total mix of information available to stockholders.[165]

Thus, the Trial Court erroneously conflated two separate inquiries subject to separate legal standards. In evaluating whether Plaintiffs' allegations regarding the Committee's management of its advisors' conflicts adequately stated a claim, the applicable legal standard is whether it was reasonably conceivable the directors acted grossly negligently.[166] By contrast, in evaluating whether the advisors' conflicts were material information requiring disclosure, the applicable legal standard is whether, from the perspective of stockholders, the facts "altered the 'total mix' of information made available."[167] The Trial Court correctly applied the applicable legal standard and explained why it was satisfied in the former inquiry, but wholly failed to do so in the latter.

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[164] Tr. at 30-32.

[165] *Id*. at 39.

[166] *E.g.*, *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 768 (Del. 2018).

[167] *Morrison*, 191 A.3d at 282 (quoting *Rosenblatt*, 493 A.2d at 944).

"Because of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts."[168] Given that important function, "[b]efore shareholders can have confidence in a fairness opinion or rely upon it to an appropriate extent, the conflicts and arguably perverse incentives that may influence the financial advisor in the exercise of its judgment and discretion must be fully and fairly disclosed."[169] In that context, "[i]t is imperative that ***stockholders be able to decide for themselves*** what weight to place on a conflict faced by the financial advisor."[170] That standard applies regardless of whether a board or committee has fulfilled its fiduciary duty to manage advisors' conflicts.[171] Based on that standard, Evercore's and JPM's conflicts were plainly material and required disclosure.

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[168] *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011); *Kihm v. Mott*, 2021 WL 3883875, at *17 (Del. Ch. Aug. 31, 2021).

[169] *In re Atheros Commc'ns, Inc. S'holder Litig.*, 2011 WL 864928, at *8 (Del. Ch. Mar. 4, 2011).

[170] *Kihm*, 2021 WL 3883875, at *17 (alteration in original).

[171] *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 15 (Del. Ch. 2002) ("[T]he relevant inquiry is not whether an actual conflict of interest exists, but rather whether full disclosure of potential conflicts of interest has been made.") (internal quotation omitted).

Evercore is one of Nordic's longtime financial advisors,[172] and while representing the Committee in negotiations against Nordic and the Consortium, Evercore [redacted].[174] Although stockholders were asked to rely on Evercore's fairness opinion in deciding how to vote on the Transaction, the Proxy failed to disclose Evercore's concurrent engagements with Nordic and other Consortium members. That information is patently material under longstanding Delaware disclosure law.[175]

Similarly, the Proxy failed to disclose that while acting as a key negotiator against Nordic and the Consortium and conducting the market check at the Committee's behest, JPM concurrently represented Nordic and other Consortium

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[172] A68, ¶94.

[173] A68-A69, A107; ¶¶94, 177.

[174] A108-A109, ¶¶176-77.

[175] *See, e.g.*, *Tornetta v. Maffei*, C.A. No. 2019-0649-AGB, Tr. at 18 (Del. Ch. Feb. 23, 2021) (TRANSCRIPT) ("*Pandora* Tr.") (describing proxy's omission of advisor's concurrent engagements with counterparty on unrelated transaction as a "glaring deficiency"); *Ortsman v. Green*, 2007 WL 702475, at *1 (Del. Ch. Feb. 28, 2007) (requiring disclosure of advisor's past engagements); *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *11 (Del. Ch. Mar. 31, 2017), *as revised* (Apr. 11, 2017) ("What was material, and disclosed, was [an advisor's] prior working relationship [with counterparty affiliates] and the amount of fees.").

members on at least ***four*** other engagements.[176] Further, the Proxy completely omitted that JPM had earned almost [redacted] in fees from Consortium members in the two years preceding the Transaction—an amount that dwarfed its Merger-related compensation.[177] The Proxy merely disclosed that JPM received $15.2 million in fees from Nordic and falsely stated "neither J[PM] nor its affiliates have had any other material financial advisory or other material commercial or investment banking relationships with … GIC [], Insight [] or 22C …."[178]

Fees that advisors have recently received from a buyer are disclosed as a matter of course.[179] That information was patently material here as it went directly to the integrity of the negotiation process; JPM led negotiations directly with Nordic, interfaced directly with Consortium members, and conducted the market check.[180]

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[176] A105-A106, ¶171 (detailing JPM's concurrent representations of (i) Nordic in June 2021 offering of Intrum AB (publ) shares to institutional investors; (ii) Nordic in potential $2.4-3.0 billion sale of Veonet GmbH, announced in September 2021; (iii) GIC's portfolio company, [redacted], $8.5 billion merger with EJF Acquisition Corp.; and (iv) GIC in $240 million investment in Arctic Green Energy).

[177] A104-A105, ¶170.

[178] A103-A104, ¶169.

[179] *See, e.g.*, *Kihm*, 2021 WL 3883875, at *18; *In re Rouse Props., Inc.*, *Fiduciary Litig.*, 2018 WL 1226015, at *24 (Del. Ch. Mar. 9, 2018).

[180] A81-A82, A86-A87; ¶¶121-122, 131-132. *See In re Ness Techs., Inc.*, 2011 WL 3444573, at *3 (Del. Ch. Aug. 3, 2011) (granting expedited discovery to ascertain amount of fees sell-side advisor previously earned from buyer and affiliates because "[i]f the amount of business that one of the financial advisors has done with [them]

At the very least, stockholders were entitled to know the "extraordinary fact" that "[JPM] w[as] … representing affiliates of the entity on the other side of the bargaining table [*i.e.*, Nordic and the Consortium] at the same time it was representing [Inovalon] in negotiating the terms of the merger."[181]

Rather than considering these allegations in accordance with the applicable standard, the Trial Court merely noted in its duty of care analysis: "It's a business reality … that most financial advisors have relationships with major private equity firms" and "Evercore represented to the special committee that it did not have any material conflicts, and these disclosures in my view were adequately vetted."[182] The Trial Court failed even to address JPM's concurrent engagements, the significant fees JPM had recently earned from Consortium members or that JPM did not

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is material, then the failure to disclose fully the extent of that business could violate the duty of disclosure."); *In re PLX Tech. Inc. S'holders Litig.*, C.A. No. 9880-VCL, Tr. at 31 (Del. Ch. Sept. 3, 2015) (TRANSCRIPT) ("*PLX* Tr.") (noting "Deutsche Bank also had received many millions more in fees" from the buyer than the sell-side engagement was worth).

[181] *Pandora* Tr. at 18; *see also PLX* Tr. at 31 ("The second conflict affects Deutsche Bank. The most significant aspect of Deutsche Bank's role was its status as an advisor to Avago, the buyer, on a different deal ….").

[182] Tr. at 31.

disclose 95% of those fees until two weeks *after* the Board signed the merger agreement, preventing the Committee from managing those conflicts.[183]

Even assuming many sell-side financial advisors have relationships with major private equity firms, Plaintiffs do not argue the existence of such relationships is disabling, merely that such relationships represent potential conflicts that must be disclosed to stockholders,[184] particularly given the "powerful incentives" for sell-side advisors to maintain good will with private equity buyers.[185] Stockholders were entitled to know about Evercore's and JPM's potential conflicts so they could weigh them and "decide for themselves" the reliability of the advisors' judgment in light of them.[186]

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[183] A75-A76, ¶108.

[184] *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *14 (Del. Ch. June 27, 2008) ("Perhaps it is unavoidable that financial advisors regularly seem to suffer from conflicts of one degree or another, but, if that is the likely state of affairs, then the stockholders are entitled to know what material factors, if any, may be motivating the financial advisor.").

[185] *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *43 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (TABLE).

[186] *Kihm*, 2021 WL 3883875, at *17; *Margolis*, 2008 WL 5048692, at *14 ("[S]tockholders are entitled to know what material factors … may be motivating the financial advisor.").

3. The Proxy Misleadingly Described Evercore's Role in Conducting Third-Party Outreach

The Proxy misleadingly implied that Evercore was involved in market outreach for which JPM was solely responsible.[187] The Complaint detailed several instances in which the Proxy stated Evercore performed, or was instructed by the Committee to perform, market outreach, but the associated meeting minutes unequivocally stated that JPM, at the Committee's behest, performed that outreach alone.[188] Those false statements were material because they gave stockholders the misleading impression that Evercore mitigated JPM's conflicts, ostensibly legitimizing a tainted market check conducted solely by conflicted Dunleavy's representative.[189]

The Trial Court seemingly agreed the Proxy falsely characterized Evercore's participation in the market outreach, acknowledging "that the proxy [] states that the special committee instructed both [JPM] and Evercore to conduct outreach,"

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[187] *Appel v. Berkman*, 180 A.3d 1055, 1064 (Del. 2018) ("[W]hen a board chooses to disclose a course of events or to discuss a specific subject … it cannot do so in a materially misleading way ….").

[188] A109-A112, ¶178.

[189] *See Xura*, 2018 WL 6498677, at *12 (finding proxy materially misleading because committee "did not do the work attributed to it in the Proxy"); *Morrison*, 191 A.3d at 275 (finding proxy materially misleading for omitting facts sufficient to show "the degree that [conflicted management's] influence may have impacted the structure of [the] sale process[]").

whereas "[t]he special committee minutes do state that Evercore's primary function was to review [JPM]'s work."[190] Nevertheless, the Trial Court found nodisclosure violation, in part because "[Plaintiffs] rel[ied] on the characterization of [JPM] as conflicted" and the Trial Court had "already concluded that that's not a very persuasive argument."[191]

But the Trial Court made no determination regarding the ***existence*** of JPM's conflicts (only that the Committee adequately ***managed*** those conflicts), and there can be no credible dispute that JPM was conflicted: it represented (and was paid by) Dunleavy/Inovalon, and Dunleavy was indisputably interested in the Transaction through his $700 million rollover and retention as post-closing CEO.[192] That conflict prevented the Special Committee from hiring JPM as the Committee's

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[190] Tr. at 45; *see also Morrison*, 191 A.3d at 281-82 (finding based on minutes that proxy was materially deficient).

[191] Tr. at 45.

[192] *See Presidio*, 251 A.3d at 267 (finding CEO's interests aligned with buyer that "would retain [CEO] and allow him to roll over the bulk of his shares").

advisor.[193] And, as explained above, JPM also had significant concurrent and past engagements with the Consortium.[194]

Indeed, the Trial Court acknowledged that "[t]o the extent that the special committee perceived [JPM's] conflicts, they hired Evercore to help with the process,"[195] which is precisely why proper disclosure of what Evercore did and did not do was crucial. JPM had clear conflicts—which the Committee recognized[196]—yet the Proxy mischaracterized the "mitigation" Evercore provided by telling stockholders Evercore and JPM jointly performed market outreach. In fact, JPM conducted that outreach without Evercore's supervision or participation.[197]

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[193] *See, e.g.*, *In re Zale Corp. S'holders Litig.*, 2015 WL 5853693, at *20 (Del. Ch. Oct. 1, 2015) (indicating financial advisor actively working for interested party had conflict so severe that it "cannot be consented to in the proper discharge of a director's fiduciary duties."); *PLX* Tr. at 36-37 ("[P]ermitting a sell-side advisor simultaneously to represent the buyer" is "so pervasively impairing that the directors could not reasonably consent [to it.]").

[194] *Supra* §II(C)(2).

[195] Tr. at 31.

[196] *See* A71, ¶99 (discussing "'importance of the review and analysis by Evercore ... of the buyer outreach and market check conducted by [JPM] to date[]'"), A72, ¶100 (noting "importance of understanding the factors considered by [JPM] in contacting potential strategic buyers'"), A74, ¶104 (instructing Evercore to "determine whether there were potential financial and strategic buyers that should have been, but were not yet, contacted, and the extent to which [JPM] engaged potential buyers in meaningful dialogue[]").

[197] *See Van der Fluit v. Yates*, 2017 WL 5953514, at *8 (Del. Ch. Nov. 30, 2017) (finding "material disclosure violation" where proxy "failed to disclose the identity

The Trial Court also indicated the Proxy's false description of Evercore's involvement in the outreach was immaterial because of certain supposed "practical realities." The Trial Court stated: "It makes sense that [JPM] would continue to spearhead with Evercore's involvement. It also makes sense that [JPM] would be the one to pick up the phone and initiate contact once they had already started the process."[198]

Setting aside whether it "makes sense" for a conflicted advisor to continue exclusively handling market outreach (it does not),[199] the Proxy's false representation that Evercore assisted in that outreach was material because it misled stockholders regarding the market check's sufficiency.[200] Moreover, having

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of the individuals who led the sales outreach process" (internal quotations omitted)); *Chen v. Howard-Anderson*, 87 A.3d 648, 691 (Del. Ch. 2014) (denying summary judgment because proxy failed to disclose information regarding market check's sufficiency).

[198] Tr. at 45-46.

[199] *See, e.g.*, *PLX* Tr. at 40 (stating directors must provide "continuous and diligent oversight" over advisors, and, if conflict arises, "consider[] … whether it tainted the sale process up to that point, whether it suggested any steering, and the implications of [the conflicted advisor's] work to date and for the sale process going forward," and then "take sufficient steps to respond"); *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 90 (Del. Ch. 2014) ("[D]irectors must act reasonably to identify and consider the implications of [an] investment banker's … relationships[] and potential conflicts.").

[200] *See, e.g.*, A116, ¶185 ("[O]ne reason the Special Committee decided to drop its request for a post-signing go-shop was 'the extensive bidder outreach activity by [JPM] and Evercore since May 2021 ....'" (citing A268)); A271 (citing as factor in

travelled down the road of describing the market check, the Board was required to provide accurate information on that topic.[201]

The Trial Court also confusingly stated: "Plaintiffs fail to explain why the special committee would retain another financial advisor and not have that party perform any work in exchange for their fee, including a base fee" and noted that "it appears as if Evercore did, in fact, engage in the process based on the allegations."[202] But Plaintiffs did not allege that Evercore failed to "perform any work." Rather, as the Court acknowledged, Plaintiffs alleged that "Evercore played a largely supervisory role"[203] and issued a fairness opinion.[204] What Evercore ***did not*** do was perform market outreach.[205]

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concluding Transaction was fair "the extensive outreach to and negotiations with potential buyers, conducted at the direction of the Special Committee, with the assistance of experienced independent legal and financial advisors").

[201] *See Appel*, 180 A.3d at 1064; *Rural Metro*, 88 A.3d at 106 ("Under Delaware law, when directors undertake to tell a story they must do it in a non-misleading manner." (internal citation omitted)).

[202] Tr. at 46.

[203] *Id.* at 45.

[204] A96, ¶152; A283-A290.

[205] A70-A71, ¶98 (noting market outreach was additional service for which Evercore was not paid).

CONCLUSION

For the foregoing reasons, this Court should reverse the Trial Court's Ruling and remand the Action for further proceedings.

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CERTIFICATE OF SERVICE

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