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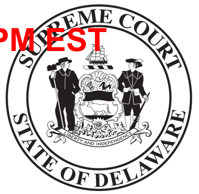

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, STEAMFITTERS LOCAL 449 PENSION FUND, and STEAMFITTERS LOCAL 449 RETIREMENT SECURITY FUND,	)	No. 305, 2023
Plaintiffs-Below, Appellants,	)	Court Below: Court of Chancery of the State of Delaware
v.	)	C.A. No. 2022-0698-KSJM
INOVALON HOLDINGS, INC., KEITH R. DUNLEAVY, MERITAS GROUP, INC., MERITAS HOLDINGS, LLC DUNLEAVY FOUNDATION, ANDRE HOFFMAN, 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.	)	

ANSWERING BRIEF OF APPELLEES INOVALON HOLDINGS, INC., ISAAC S. KOHANE, DENISE K. FLETCHER AND LEE D. ROBERTS

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Dated: November 14, 2023

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NATURE OF PROCEEDINGS

The complaint in this action (the "Complaint") challenges the acquisition of Inovalon Holdings, Inc. (the "Company") by a consortium led by private equity firm Nordic Capital for a 25% premium. At the first sign of a potential conflict with the Company's controlling stockholder, the Company formed a fully-empowered special committee of independent directors that negotiated and approved the transaction. The transaction was also approved by the holders of a majority of the minority shares. As a result of these approvals, the Court of Chancery applied the analysis set forth in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*") and dismissed this action. The Court of Chancery's decision is correct in all respects and should be affirmed.

Even if this Court reverses that ruling, however, the dismissal of the Company directors who did not serve on the Special Committee—Isaac S. Kohane, Denise K. Fletcher and Lee D. Roberts (the "Non-Committee Directors")—and the Company should be affirmed. The Complaint does not state a claim for breach of fiduciary duty against the Non-Committee Directors. In addition, the Complaint does not state a claim against the Company for breach of contract.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that the parties committed *ab initio* that any transaction would be contingent on approval by both a special committee and an unaffiliated stockholder vote.

2. Denied. The Court of Chancery correctly held that Plaintiffs did not sufficiently plead that the operative proxy statement failed to disclose material facts.

3. Regardless of whether the Court affirms the Court of Chancery's application of *MFW*, the Non-Committee Directors should be dismissed under *In re Cornerstone Therapeutics Inc. Stockholder Litigation*, 115 A.3d 1173 (Del. 2015) because the Complaint does not state a non-exculpated claim against them.

4. Regardless of whether the Court affirms the Court of Chancery's application of *MFW*, the Company should be dismissed because the Complaint does not state a claim for breach of the Company's Second Amended and Restated Certificate of Incorporation (the "Certificate"). Indeed, the Complaint concedes that the requirements of the Certificate were satisfied.

STATEMENT OF FACTS

The Company and the Non-Committee Directors hereby incorporate by reference the Statement of Facts set forth in the Answering Brief of Appellees Mark A. Pulido, William D. Green, and William J. Teuber (the "Committee Brief").

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFFS FAILED TO PLEAD THAT *MFW*'S *AB INITIO* REQUIREMENT WAS NOT SATISFIED

The Company and the Non-Committee Directors hereby join in and incorporate Argument Section I of the Committee Brief.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFFS FAILED TO PLEAD FACTS SHOWING THAT THE STOCKHOLDER VOTE WAS NOT FULLY INFORMED

The Company and the Non-Committee Directors hereby join in and incorporate Argument Section II of the Committee Brief.

III. DISMISSAL OF THE COMPLAINT AGAINST THE NON-COMMITTEE DIRECTORS SHOULD BE AFFIRMED UNDER *CORNERSTONE*

A. Question Presented

Whether the Complaint stated a claim against the Non-Committee Directors for breach of fiduciary duty. This argument was preserved in the Court of Chancery at A911-23 and A1067-79.

B. Scope of Review

While the Court of Chancery did not address this issue in its ruling, this Court "may affirm on the basis of a different rationale than that which was articulated by the trial court" and "may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (citing *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 647 (Del. 1993)); *see also Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 333 n.7 (Del. 2012) (considering separate basis for summary judgment not relied on by the trial court where that basis "was fairly presented to the trial judge").

C. Merits of Argument

The Certificate contains a standard Section 102(b)(7) provision which exculpates the Non-Committee Directors from monetary liability for breaches of the duty of care. A1160-61. As this Court held in *In re Cornerstone Therapeutics Inc. Stockholder Litigation*, "plaintiffs must plead a non-exculpated claim for breach of

fiduciary duty against an independent director protected by an exculpatory charter provision, or that director will be entitled to be dismissed from the suit." 115 A.3d 1173, 1179 (Del. 2015). "[T]he mere fact that a director serves on the board of a corporation with a controlling stockholder does not automatically make that director not independent." *Id*. at 1183 (citing *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984)). Rather, "[t]he liability of the directors must be determined on an individual basis." *Chen v. Howard Anderson*, 87 A.3d 648, 677 (Del. Ch. 2014) (citation omitted). For the reasons set forth in the Committee Brief and the additional reasons set forth below, the Complaint fails to state a claim against the Non-Committee Directors.

First, "[t]he liability of the directors must be determined on an individual basis." *Chen*, 87 A.3d at 677. Far from stating "specific acts" constituting non-exculpated breaches of fiduciary duty by the Non-Committee Defendants, *see Cornerstone*, 115 A.3d at 1182 & n.36 (citation omitted), the Complaint alleges in conclusory fashion that the *Board* breached its fiduciary duties by causing the Company to enter into the merger agreement, by failing to provide full disclosure to the stockholders and by breaching the Certificate. A135-36 at ¶¶ 237-39. Nothing in the allegations concerns the conduct of the Non-Committee Directors in particular. Such group pleading is impermissible. *See Genworth Fin., Inc. Consol. Deriv. Litig.*, 2021 WL 4452338, at *22 (Del. Ch. Sept. 29, 2021) (because a plaintiff

"must adequately plead a breach of fiduciary claim 'against each individual director or officer, so called 'group pleading' will not suffice.'"). "[E]ach director has a right to be considered individually when the directors face claims for damages in a suit challenging board action." *Cornerstone*, 115 A.3d at 1182 & n.36 (citing *Steinman v. Levine*, 2002 WL 31761252, at *15 n.81 (Del. Ch. Nov. 27, 2002), *aff'd*, 822 A.2d 397 (Del. 2003) (holding that a plaintiff "is required to identify specific acts of individual defendants . . . for his claim to survive.")).

Second, the Complaint does not even try to allege conduct constituting a non-exculpated breach of fiduciary duty against any of the Non-Committee Directors, none of whom served on the Special Committee. In fact, the Complaint barely mentions them at all. Specifically, in Plaintiffs' 113-page, 259-paragraph complaint, other than a paragraph in which all members of the board of directors are listed, Kohane is mentioned in two paragraphs, and Fletcher and Roberts are mentioned in one each. A36-40 at ¶¶ 20-21, 23 and 26. Plaintiffs' half-hearted efforts to state a claim against the Non-Committee Directors do not satisfy Plaintiffs' burden of alleging that the Non-Committee Directors acted in bad faith.

Accordingly, even if the Court reverses the Court of Chancery's *MFW* determination, the claims against the Non-Committee Directors should be dismissed.

IV. DISMISSAL OF THE COMPLAINT AGAINST THE COMPANY SHOULD BE AFFIRMED BECAUSE THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT

A. Question Presented

Whether the Company breached Article IV, Section D(2)(c) of the Certificate. This argument was preserved in the Court of Chancery at A911-23 and A1067-79.

B. Scope of Review

While the Court of Chancery did not address this issue in its ruling, this Court "may affirm on the basis of a different rationale than that which was articulated by the trial court" and "may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court." *Unitrin*, 651 A.2d at 1390.

C. Merits of Argument

The only claim against the Company alleges breach of Article IV, Section D(2)(c) of the Certificate. A97-99 at ¶¶ 254-59. That provision provides:

> **Equal Treatment in a Change of Control or Any Merger Transaction.** In connection with any Change of Control Transaction, shares of Class A Common Stock and Class B Common Stock shall be treated equally, identically and ratably, on a per share basis, with respect to any consideration into which the shares are converted or any consideration paid or otherwise distributed to stockholders of the Corporation, unless different treatment of the shares of each class is approved by the affirmative vote of the holders of a majority of the outstanding shares of Class A Common Stock and Class B Common Stock, each voting separately as a class.

A41 at ¶ 33. Plaintiffs concede, however, that the transaction was approved by each class of Inovalon stockholders. A139 at ¶ 257. The analysis should end there.

Plaintiffs alleged, however, that the vote should be disregarded because the proxy statement failed to disclose material facts. A139 at ¶ 257. But as set forth in the Committee Brief—and determined by the Court of Chancery—the proxy statement disclosed all material facts. A197-211; Tr. at 38-48. Even if it did not, however, that does not mean that there was a breach of the Certificate. It would simply mean that there was potential liability for breach of the duty of disclosure. The requirements of the Certificate were undisputedly satisfied.

The Complaint does not state a claim for breach of the Certificate. Accordingly, Count V should be dismissed whether or not this Court agrees with the Court of Chancery's *MFW* analysis.[1]

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[1] The Non-Committee Directors are named in Count V, but they are not parties to the contract, so they cannot be held liable. *See MCG Cap. Corp. v. Maginn*, 2010 WL 1782271, at *11 (Del. Ch. May 5, 2010) (dismissing claims against director defendants for breach of corporation's certificate of incorporation because "[i]t is true that under Delaware law corporate officers and directors are not parties to a contract simply because the corporation they serve is a party to the contract" and they were not indispensable parties).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Chancery should be affirmed, and the claims against the Non-Committee Directors and the Company should be dismissed.

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Dated: November 14, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 14, 2023, true and correct copies of the foregoing *Answering Brief of Appellees Inovalon Holdings, Inc. Isaac S. Kohane, Denise K. Fletcher and Lee D. Roberts* were caused to be served by File & Serve*Xpress* on the following counsel of record:

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