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Case Number 388,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY EDELMAN, Plaintiff-Below/Appellant, v. JOHN BRYAN KING, LEE S. HILLMAN, BIANCA A. RHODES, MARK F. MOON, ANDREW B. ALBERT, I. STEVEN EDELSON, RONALD J. KNUTSON, LKCM HEADWATER INVESTMENTS II, L.P., LKCM HEADWATER II SIDECAR PARTNERSHIP, L.P., HEADWATER LAWSON INVESTORS, LLC, LKCM MICRO-CAP PARTNERSHIP, L.P., LKCM CORE DISCIPLINE, L.P., and LUTHER KING CAPITAL MANAGEMENT CORPORATION, Defendants-Below/Appellees, -and- DISTRIBUTION SOLUTIONS GROUP, INC., a Delaware corporation, Nominal Defendant-Below /Appellee.	No. 388, 2023 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0886-JTL **PUBLIC VERSION** **Filed: December 15, 2023**

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Jeffrey Edelman, Plaintiff-Below, Appellant ("Plaintiff") appeals from the Court of Chancery's Telephonic Ruling and Order dismissing Plaintiff's claims and finding that Defendants-Below, Appellees ("Defendants")[1] satisfied the conditions for shifting the standard of review from entire fairness to business judgment under *Kahn v. M&F Worldwide Corp*., 88 A.3d 635 (Del. 2014) ("*MFW*"). Plaintiff's derivative complaint challenged Lawson's[2] acquisition of King Capital Equity's TestEquity Acquistion, LLC ("TestEquity") and King Capital Equity's 301 HW Opus Holdings, Inc. ("Gexpro") (the "Merger") pursuant to an agreement of merger dated December 29, 2021 (the "Merger Agreement"). King-Affiliated Controllers[3] controlled all three of the companies involved in the Merger at all relevant times.

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[1] The term "Defendants" refers to Luther King Capital Management Corporation ("LKCM"), LKCM Headwater Investments II, L.P. ("LCKM Headwater I"), LKCM Headwater II Sidecar Partnership, L.P. ("LKCM Headwater II"), Headwater Lawson Investors, LLC ("LKCM Headwater III" and together with, LKCM Headwater I and LKCM Headwater II, "King Capital Equity"), and John Bryan King ("King").

[2] Plaintiff refers to Distribution Solutions Group, Inc., which was formerly known as Lawson Products, Inc. as "Lawson."

[3] The terms "King-Affiliated Controllers" refers to LKCM, King Capital Equity, and King.

Before ruling that Defendants satisfied *MFW*, the Court of Chancery found that demand was futile due to, *inter alia*, conflicts of interest arising from Defendant Rhodes' position as an "Operating Partner" of King Capital Equity that was held by Lawson director Bianca Rhodes ("Rhodes"). Specifically, on September 13, 2023, the Court of Chancery heard oral arguments,[4] during which the Court of Chancery emphasized that "you are going to win" and "[a]t the pleading stage, you win" on the issue of Rhodes' conflict for purposes of demand futility. Sept. 13, 2023 Transcript at 53 (A01808). The Court of Chancery then denied Defendants' Rule 23.1 motion due to, *inter alia*, Rhodes' "[O]perating [P]artner" conflict. (A01839). Later that day, the Court of Chancery issued an Order denying Defendants' Rule 23.1 motion. Appendix Tab 12 (A01844-46).

On September 19, 2023, the Court of Chancery provided Telephonic Rulings of the Court on Defendants' Motion to Dismiss (the "Telephonic Rulings")[5], finding that Defendants satisfied the requirements of *MFW* to shift the standard of review to business judgment, and granting Defendants' motions to dismiss pursuant to Court of Chancery Rule 12(b)(6). Telephonic Rulings at 3-4. The Telephonic Rulings did

[4] The Oral Argument Transcript and Partial Rulings of the Court on Defendants' Motion to Dismiss may be found at Appendix Tab 11 (A01756 –A01843).

[5] The Telephonic Rulings may be found at Exhibit A.

not address the issue of whether the nondisclosure of director Rhodes' Operating Partner conflict—which had been severe enough to render her conflicted for demand futility—made the Definitive Proxy Statement filed with the SEC on February 10, 2022 (the "Proxy") materially deficient.[6]

Plaintiff appeals from the Telephonic Rulings and the Dismissal Order. The Court of Chancery erred in finding that *MFW* was satisfied, in that the well-pled facts and the reasonable inferences that can be drawn from them demonstrated that the stockholder vote on the Merger had not been fully informed in at least two respects.

First, the [redacted]

[6] The Court's Order on the Motion to Dismiss (the "Order") may be found at Exhibit B. The Proxy may be found as Exhibit 2 to Tab 4 of the Appendix.

[redacted]

Second, the Proxy was materially deficient because it concealed that Rhodes—a purportedly independent director of Lawson who had voted to approve the Merger—was plainly conflicted because she was an Operating Partner of King Capital Equity. The Court of Chancery held that Rhodes' Operating Partner position rendered her conflicted for the purposes of demand futility, ***but never addressed whether it was reasonably conceivable that Rhodes' undisclosed Operating Partner position was material to the stockholder vote.***

For these reasons, as further set forth below, the Court of Chancery's erroneous rulings should be reversed, and this matter should be remanded for further proceedings.

SUMMARY OF ARGUMENT

1.The Merger was plainly a conflicted transaction involving the combination of three companies—Lawson, TestEquity, and Gexpro—which were all controlled by the King-Affiliated Controllers. Hence, entire fairness would be the applicable standard to Plaintiff's claims, unless the stringent *MFW* requirements were met. They were not.

2.Specifically, the *MFW* conditions were not satisfied because the stockholder vote on the Merger was not "fully informed." *In re Dell Technologies Inc. Class V Stockholders Litigation*, 2020 WL 3096748, at *39 (Del. Ch. June 11, 2020) (citation omitted). "[A] plaintiff only needs to plead the existence of one disclosure violation" to establish that *MFW*'s informed vote requirement was not satisfied. *Goldstein v. Denner*, 2022 WL 1671006, at *19 (Del. Ch. May 26, 2022). In this instance, Plaintiff sufficiently pled at least two material omissions that rendered the minority vote materially uninformed. [redacted] (ii) misrepresented and omitted Rhodes' conflicts of interest as a King Capital Equity Operating Partner. As a result of these material

disclosure deficiencies, the stockholder vote was not fully informed. Accordingly, entire fairness should have remained the applicable standard, the motions to dismiss should have been denied, the Dismissal Order should be reversed, and this matter should be remanded for further proceedings.

STATEMENT OF FACTS

I. KING APPOINTS RHODES AS A DIRECTOR

Leading up to the Merger, LKCM affiliates and King owned directly, indirectly and/or beneficially approximately 48% of Lawson shares.[7] Complaint ¶ 37 (A00034). Most of King's beneficial ownership is through LKCM and its affiliates, but he also owned some Lawson shares directly. ¶ 37 (A00034).

King has also been the Chairman of the board of directors (the "Board") of Lawson for several years and had referred Rhodes, a King Capital Equity "Operating Partner", to be a Lawson director. ¶ 38 (A00034). Plaintiff could not locate a Lawson SEC filing disclosing that Rhodes is a King Capital Equity Operating Partner. ¶ 38 (A00034).

While King was a controller of Lawson, he and his associated entities had a substantially larger financial interest in the targets, TestEquity and Gexpro. TestEquity and Gexpro are King Capital Equity portfolio companies. ¶ 4 (A00023-24). Entities affiliated with LKCM and King beneficially owned approximately 82% of the ownership interests in the TestEquity Equityholder, and approximately 79%

[7] The Verified Stockholder Derivative Complaint (the "Complaint") is Appendix Tab 2 and cited herein as "¶ __ (A___)."

of the ownership interests in the Gexpro Services Stockholder. ¶¶ 43-44 (A00035-36).

II. KING-AFFILIATED CONTROLLERS' TESTEQUITY WAS GOING UNDER

In 2017, King Capital Equity acquired a controlling stake in TestEquity. ¶ 25 (A00030). Since then, TestEquity has been hemorrhaging money each year, often losing more than $ 10 million per year:

	Nine Months Ended September 30,		Year Ended December 31,		
	2021	2020	2020	2019	2018
	(Dollars in thousands)				
Statement of Operations:					
Revenue	$201,477	$188,001	$256,292	$286,291	$323,509
Net income (loss)	$ (5,566)	$ (11,672)	$ (15,929)	$ (13,520)	$ (839)

¶ 26 (A00030-31). In fact, TestEquity had lost more than $45 million from 2018 through the nine months ended September 30, 2021. ¶ 27 (A00031).

TestEquity's constant losses rendered it unable to pay off its substantial debt, including two loans under a credit agreement ("Credit Agreement"). ¶ 28 (A00031). The Credit Agreement included a term loan for more than $120 million that was set to expire on April 28, 2022 absent the Merger (the "Term Loan") with related party financial institutions. ¶ 28 (A00031). TestEquity defaulted on the Term Loan in 2019, and then defaulted again in 2020. ¶ 29 (A00031). In addition to the Term Loan, TestEquity also had a revolving loan facility that was expiring in April, 2022 and

was part of the Credit Agreement. ¶ 28 (A00031). Absent the Merger, the Credit Agreement would have expired, and all outstanding borrowings—exceeding $120 million—thereunder would have become due on April 28, 2022. ¶ 30 (A00032).

III. KING-AFFILIATED CONTROLLERS' GEXPRO SERVICES WAS LIMPING INTO THE MERGER

Leading up to the Merger, Gexpro Services' long-term debt consisted of a $60.0 million term loan and borrowings under a $35.0 million committed revolving credit facility, which both would have expired on February 24, 2025. ¶ 33 (A00032-33). Subsequent to September 25, 2021 (and just two years after King Capital Equity formed it in 2019), Gexpro Services had to refinance its existing term loan and its revolving credit facility. The new arrangement consisted of a 6-year $137.0 million term loan and a 5-year $25.0 million revolving credit facility. The term loan contained a delayed draw feature for $83.0 million. ¶ 35 (A00033).

Considering Gexpro Services' debt obligations to pay off at least $137 million in roughly five years, Gexpro Services was teetering on the verge of failing to satisfy its debt obligations:

	Nine Months Ended September 25, 2021	February 23, 2020 – September 26, 2020	January 1, 2020 – February 23, 2020	February 23, 2020 – December 31, 2020
	(Dollars in thousands)			
Statement of Operations:				
Net revenue	$ 189,335	$ 151,467	$ 36,566	$ 213,343
Net income (loss)	$ 6,660	$ 1,271	$ 1,307(a)	$ 2,225

¶ 36 (A00033-34).

IV. KING HAD LAWSON RESCUE HIM AND HIS PARTNERS

Recognizing that TestEquity was going under and Gexpro was struggling, King schemed to have Lawson expend its resources to throw a lifeline to him and his King Capital Equity partners. On March 3, 2021, a King Capital Equity partner, who is also a Chairman of GS Operating, LLC (a wholly owned subsidiary of Gexpro) ("GS Operating"), sent a letter on behalf of GS Operating and its affiliates to the Lawson Board expressing interest in opening discussions for a business combination between Lawson and Gexpro. ¶ 45 (A00036-37).

One week later, on March 10, 2021, the Lawson Board established the Special Committee, comprised of purportedly independent directors Andrew Albert, Steven Edelson, and Lee Hillman. ¶ 46 (A0037). The Special Committee was only empowered to recommend a merger to the Board and was not empowered to enter into a merger agreement. ¶ 46 (A00037).

On April 6, 2021, and April 8, 2021, Hillman and representatives of Cowen held discussions regarding Cowen's qualifications to potentially serve as financial advisor to the Special Committee in connection with a potential business combination between Lawson and affiliates of LKCM. ¶ 49 (A00038).

[redacted]

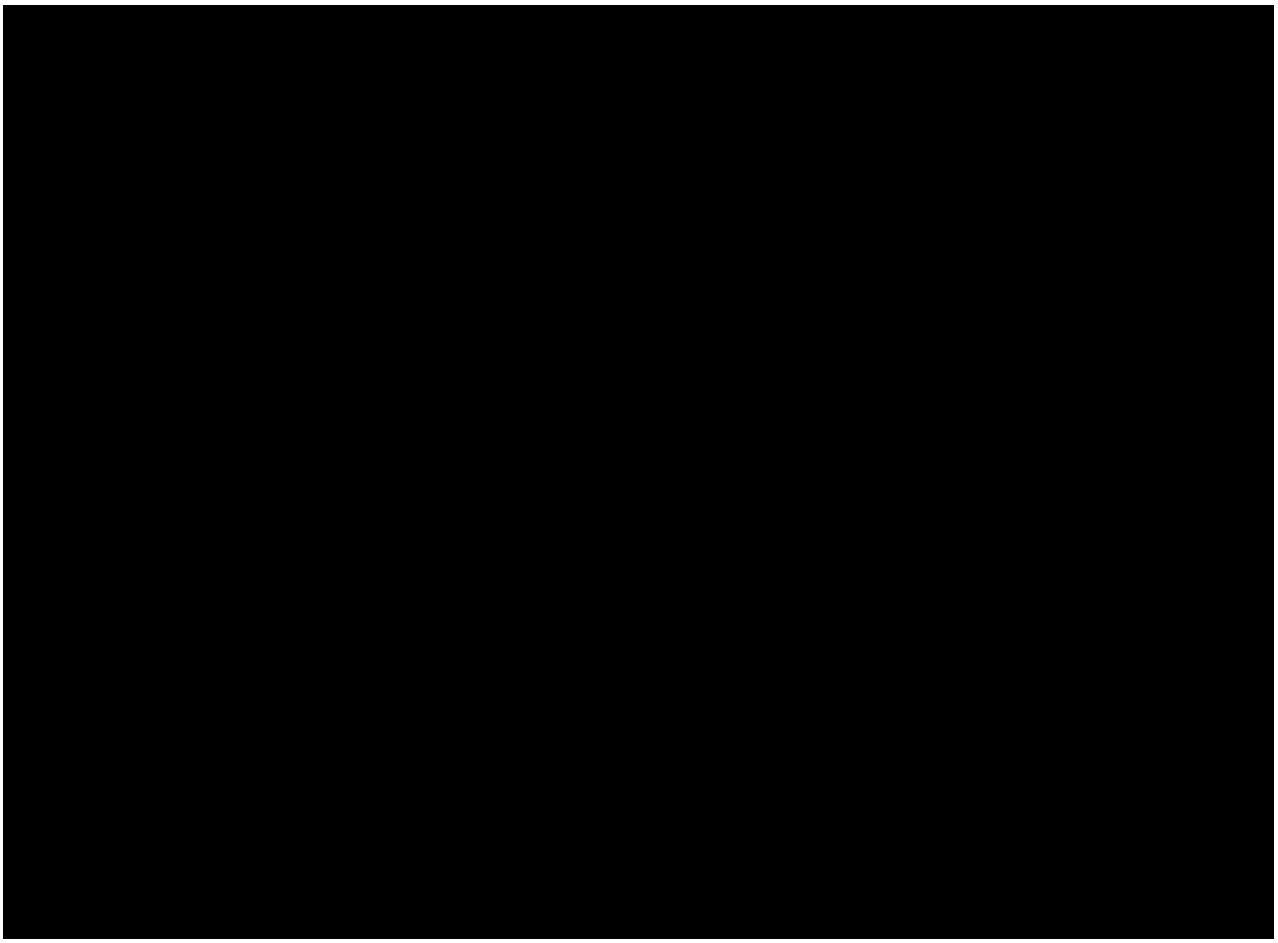
[redacted]

[redacted]

[redacted]

[redacted]

¶ 69 (A00045-46). [redacted]



¶ 124 (A00076-78).

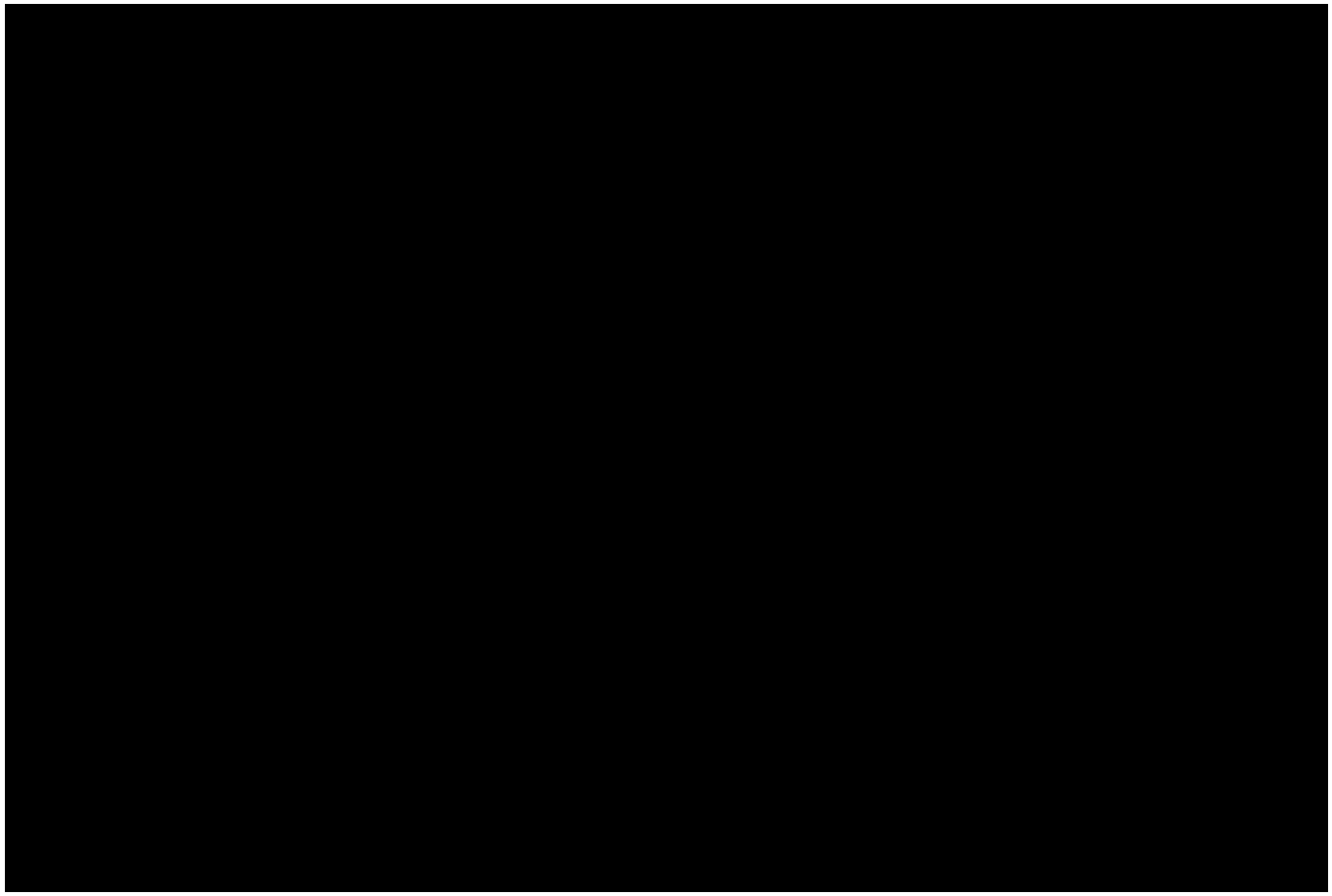
V. KING CAPITAL EQUITY SEEKS TO INCREASE TESTEQUITY'S VALUE

On December 8, 2021, a King Capital Equity partner proposed an offer via email to the Special Committee based on "multiples of estimated 2021 EBITDA of 13.17x for Lawson, 12.00x for TestEquity and 13.17x for Gexpro Services." ¶ 76 (A00048). Later in the day, the King Capital Equity partner and a Special Committee member discussed "the multiples used by LKCM and its affiliates' in their

valuation." ¶ 76 (A00048). After the discussion, the King Capital Equity partner emailed the Special Committee a new revised proposal, which was premised upon "a multiple of estimated 2021 EBITDA of 13.17x for each of Lawson, TestEquity and Gexpro Services." ¶ 76 (A00048-49).

VI. COWEN REWRITES ITS FINANCIAL ANALYSIS

On December 28, 2021, the time arrived for Cowen to issue its so-called fairness opinion. ¶ 77 (A00049). [redacted]



¶ 124 (A00076-78). [redacted]

[redacted]

¶ 77 (A00049-50).

The Proxy [redacted]

[redacted]

Less than one month before the $120+ million Term Loan was set to expire, on April 4, 2022, Lawson filed a Form 8-K with the SEC confirming that the Merger had closed. ¶ 81 (A00051). For King-Affiliated Controllers, it was just in the nick of time. ¶ 81 (A00051).

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN SHIFTING THE STANDARD OF REVIEW TO BUSINESS JUDGMENT FROM ENTIRE FAIRNESS WHERE THE STOCKHOLDER VOTE WAS MATERIALLY UNINFORMED AS A RESULT OF NON-DISCLOSURE [redacted]

A. Question Presented

Whether the Proxy's failure to disclose [redacted] and thereby should have precluded a shift of the standard of review from entire fairness to business judgment? This issue was preserved below in Plaintiff's Complaint, in Plaintiff's Omnibus Answering Brief in Opposition to Defendants' Motion to Dismiss ("Plaintiff's Answering Brief"),[8] and at oral argument. *See, e.g.*, ¶¶ 105-06 (A00066-67). A00066-67; Appendix Tab 6 (A01184-90); Appendix Tab 11 (A01799-A01802).

B. Scope of Review

This Court reviews the application of *MFW* on a motion to dismiss *de novo*. *Olenik v. Lodzinsk*, 208. A.3d 704, 714 (Del. 2019).

[8] Plaintiff's Answering Brief is Appendix Tab 6.

C. Merits of the Argument

"When a transaction involving self-dealing by a controlling stockholder is challenged, the applicable standard of judicial review is entire fairness, with the defendants having the burden of persuasion." *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1239 (Del. 2012); *see also Kahn v. Lynch Commc'n Sys., Inc*., 638 A.2d 1110, 1115 (Del. 1994). "Under current law, the entire fairness framework governs any transaction between a controller and the controlled corporation in which the controller receives a non-ratable benefit." *In re EZCORP Inc*. *Consulting Agreement Derivative Litigation*, 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016); *see Salladay v. Lev*, 2020 WL 954032, at *8 (Del. Ch. Feb. 27, 2020) (entire fairness applies where "a controlling stockholder is conflicted or competes for consideration with fellow stockholders"); *Gradient OC Master, Ltd. v. NBC Universal, Inc*., 930 A.2d 104, 108 (Del. Ch. 2007).

This standard shifts to business judgment review if—and only if—the conflicted controller transaction satisfies all six requirements set forth in *MFW*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and say no definitively; (iv) the Special Committee satisfies its duty

of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority. *Dell,* 2020 WL 30967348, at *15. If a plaintiff pleads a reasonably conceivable set of facts showing that any of the six enumerated conditions did not exist, the standard of review remains that of entire fairness. *Id.*

Specifically, a shift in standard of review to business judgment under *MFW* is unavailable if a plaintiff alleges facts which "support[] a rational inference that material facts were not disclosed or that the disclosed information was otherwise materially misleading." *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018). Defendants shoulder the "burden of demonstrating that the stockholders were fully informed . . . ." *Firefighters' Pension Sys. v. Presidio, Inc.*, 251 A.3d 212, at 261 (Del. Ch. Jan. 29, 2021) (internal quotation omitted). Information is material if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote[.]" *Morrison*, 191 A.3d, at 282 (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, at 944 (Del. 1985)). The "materiality test 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 it would have "altered the total mix of information made available." *Id*. at 283 (citation and quotations omitted).

Delaware courts have long held that a financial advisor's dramatic changes in its analysis to justify an outcome present a material fact that requires disclosure. *See, e.g., In re Topps Co. S'holders Litig.,* 926 A.2d 58, 74-77 (Del. Ch. 2007) (enjoining stockholder vote for failure to disclose earlier valuation analyses in order to make the proposed deal "look much more attractive"); *Clements v. Rogers,* 790 A.2d 1222, at 1243-44 (Del. Ch. 2001) (rejecting summary judgment for defendants because facts supported inference that financial advisor changed its analysis to justify bargaining outcome).

[redacted]

(A00049). [redacted]

[redacted]

- [redacted]

- On December 8, 2021, a King Capital Equity partner sent an email to the Special Committee proposing to crank up TestEquity's EBITDA multiple to 12. ¶ 76 (A00048-49). After a phone call later that same day, the Special Committee member and the King Capital Equity partner agreed that all three of the Merger companies would use the same EBITDA multiple of 13.17. ¶ 76 (A00048-49).

- [redacted]

In *Clements*, then-Vice Chancellor Strine reasoned that the facts supported the inference that the financial advisor changed its analysis to justify the bargaining outcome because the record lacked any evidence that there were good "reasons for the large differences between the two Presentations." 790 A.2d at 1243. The later presentation, *inter alia*, had "used a more pessimistic multiple for its DCF valuation, reducing the resulting value from $18.43 per share to $14.98." *Id*. at 1233. The Court of Chancery then held that the proxy statement's failure to note the differences might be a material omission and rejected the defendants' summary judgment motion. *Id*. at 1244.

Here, Plaintiff has an even stronger claim than the *Clements* plaintiffs. [redacted]

Moreover, [redacted]

[redacted]

The Dismissal Order erroneously found the Proxy had been materially complete in this respect. Specifically, the Telephonic Rulings reasoned that "the description of what happened with the change in EBTIDA values is right there in the definitive proxy at pages 76 to 77. All the chronology is there. An explanation of the reasons is there." *Id*. at 12.

But, as can be seen, pages 76 to 77 of the Proxy only addressed December 8 to December 9 changes in the negotiated EBITDA multiples [redacted] *See* Appendix Tab 4 (A00268-69). [redacted]

[redacted] Without being aware of [redacted] the stockholders were unaware [redacted]

The Proxy's failure to disclose these material facts rendered it materially deficient under *MFW* and should preclude an early pleadings-stage dismissal. *See, e.g., Topps*, 926 A.2d, at 74-77; *Clements*, 790 A.2d, at 1243-44; *In re Netsmart Techs., Inc. S'holders Litig*., 924 A.2d 171, 209 n.120 (Del. Ch. 2007) ("When directors described their decision-making process leading up to a merger, they must do so in a fair and balanced way."); *Malone v. Brincat*, 722 A.2d 5, 11 (Del. 1998) ("Accordingly, directors have definitive guidance in discharging their fiduciary duty by an analysis of the factual circumstances relating to the specific shareholder action being requested and an inquiry into the potential for deception or misinformation.").[9]

[9] "The possibility that the entire fairness standard of review may apply tends to preclude the Court from granting a motion to dismiss under Rule 12(b)(6) unless the alleged controlling stockholder is able to show, conclusively, that the challenged transaction was entirely fair based solely on the allegations of the complaint and the documents integral to it." *Klein v. H.I.G. Capital, L.L.C*., 2018 WL 6719717, at *16 (Del. Ch. Dec. 19, 2018).

II. THE COURT OF CHANCERY ERRED IN SHIFTING THE STANDARD OF REVIEW TO BUSINESS JUDGMENT FROM ENTIRE FAIRNESS WHERE THE STOCKHOLDER VOTE WAS MATERIALLY UNINFORMED AS A RESULT OF NON-DISCLOSURE OF A VOTING DIRECTOR'S CONFLICT AS AN OPERATING PARTNER OF THE CONTROLLER

A. Question Presented

Whether the non-disclosure of a purportedly independent director's position as an "Operating Partner" of the controller was a material omission where that director voted to approve the Merger, and thereby should have precluded a shift of the standard of review from entire fairness to business judgment? This issue was preserved below in Plaintiff's Complaint, in Plaintiff's Answering Brief, and at oral argument. *See, e.g.,* A00067, A01178-79, A01196, A01802, A01808.

B. Scope of Review

This Court reviews the application of *MFW* on a motion to dismiss *de novo*. *Olenik*, 208 A.3d at 714.

C. Merits of the Argument

Because "'the standard under Rule 12(b)(6) is less stringent than the standard under Rule 23.1, a complaint that survives a Rule 23.1 motion to dismiss generally will also survive a Rule 12(b)(6) motion to dismiss, assuming that it otherwise contains sufficient facts to state a cognizable claim." *In re Boeing Company*

Derivative Litigation, 2021 WL 4059934, at *23 (Del. Ch. Sep. 7, 2021) (quoting *In re Walt Disney Co. Deriv. Litig*., 825 A.2d 275, 285 (Del. Ch. 2003)); *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (reasoning that notice pleading is "less stringent" than pleading demand futility). Here, Rhodes' undisclosed conflict that rendered demand futile under Rule 23.1 also should preclude dismissal under the less stringent Rule 12(b)(6) standard. However, the Court of Chancery *never* addressed Rhodes' conflict as a King Capital Equity Operating Partner as a disclosure issue for the purposes of *MFW* in the Telephonic Rulings or in the Dismissal Order. *See* Telephonic Rulings; Dismissal Order.

Lawson characterized Rhodes as a purportedly independent director, and the Proxy noted that she had voted to approve the Merger. *See, e.g.,* Appendix Tab 5 (A00185). However, the Proxy failed to disclose that Rhodes was an Operating Partner of King Capital Equity and thus was not independent. *See, e.g.*, ¶107 (A00067). As a result of this partnership, Rhodes was plainly conflicted with regard to the Merger. *See, e.g*., *Patel v. Duncan*, 2021 WL 4482157, at *19 (Del. Ch. Sep. 30, 2021) (reasoning that director "certainly" shares interest of entity for which the director is partner); *Berteau v. Glazek*, 2021 WL 2711678, at *19 (Del. Ch. June 30, 2021) (holding that demand is futile because plaintiffs pled that director is partner of entity on other side of transaction); *Silverberg v. Padda*, 2019 WL 4566909, at *8

(Del. Ch. Sep. 19, 2019) (holding that demand is futile because plaintiffs pled that director is partner of entities on other side of transaction); *Calma v. Templeton*, 114 A.3d 563, 575 (Del. Ch. 2015) (internal quotation omitted) ("[A] director is not disinterested if he or she 'appear[s] on both sides of a transaction . . . .'").

Rhodes' conflicting role as a King Capital Equity Operating Partner, which was sufficient to render her not independent for the purposes of the Court of Chancery's Rule 23.1 analysis, would have been material to a reasonable stockholder. *See, e.g.*, *Kihm v. Mott*, 2021 WL 3883875, at *19 (Del. Ch. Aug. 31, 2021) ("Generally, stockholders are entitled to know whether their fiduciaries face conflicts of interest.") *aff'd* 276 A.3d 462, 2022 WL 1054970 (Del. 2022); *Feldman v. Cutaia*, 2006 WL 920420, at *8 (Del. Ch. Apr. 5, 2006) (reasoning that failure to disclose potential director conflict of interest is materially misleading); *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 15-19 (Del. Ch. 2002) (invalidating stockholder vote (for director election) procured through false/misleading proxy materials that omitted information about two allegedly independent directors' investments with inside director); *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1061 (Del. Ch. 1987) (granting preliminary injunction because, inter alia, "[t]he Preferred shareholders were entitled to know that certain of their fiduciaries had a self-interest that was arguably in conflict with

their own, and the omission of the fact was material"); *cf. Goldstein v. Denner*, 2022 WL 1671006, at *41 (Del. Ch. May 26, 2022) ("It is likewise a basic principle, firmly embedded in our law, that a director must disclose material information about any potential conflicts [to fellow directors].").

Indeed, Rhodes' Operating Partner position was of particular importance to public stockholders for additional reasons. First, the Special Committee was only empowered to ***recommend*** a merger to the Board, and Rhodes was a director who cast a final vote for the Merger. *See, e.g.,* ¶ 46 (A00037); Appendix Tab 5 (A00272-73).

Second, it was also of special importance because she was purported to be an independent director. *See, e.g.,* Appendix Tab 5 (A00833-34, A01119); Appendix Tab 6 (A01143). As a result, the Proxy was obligated to disclose all of Rhodes' potential conflicts, not just her actual conflicts. *See Allen v. Harvey*, 2023 WL 7122641, at *6 (Del. Ch. Oct. 30, 2023); *In re Orchard Enterprises, Inc. S'holder Litig*., 88 A.3d 1, 21 (Del. Ch. 2014) (where "omitted information goes to the independence or disinterest of directors who are identified as the company's 'independent' or 'not interested' directors, the 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).

CONCLUSION

For the reasons stated above, Plaintiff respectfully submits that the Court of Chancery's dismissal of this action should be reversed and that this action should be remanded for further proceedings.

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CERTIFICATE OF SERVICE

I, Tiffany Geyer Lydon, Esquire, do hereby certify that on the 15th day of December 2023, I caused a true and correct copy of the *Public Version of Appellant's Opening Brief* to be served on the following counsel of record via File & Serve*Xpress:*

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