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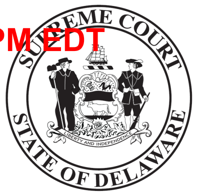

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE ORACLE CORPORATION DERIVATIVE LITIGATION	No. 139, 2024 Court Below: Court of Chancery of the State of Delaware C.A. No. 2017-0337-SG	PUBLIC VERSION FILED JUNE 18, 2024

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NATURE OF PROCEEDINGS

This derivative action challenged Oracle Corporation's 2016 acquisition of NetSuite Inc. (the "Transaction"). Oracle had traditionally provided enterprise resource planning ("ERP") software to large business enterprises. That software was installed on the customer's physical servers in return for an up-front license fee. NetSuite had a different model: It provided ERP software to small and medium-sized businesses ("SMBs") over the internet, pursuant to a subscription. That model is called Software as a Service, or "SaaS." Although Oracle was developing its own SaaS ERP system, called "Fusion," that product was designed to serve Oracle's traditional market of large companies and was ill-suited for SMBs, which did not need its costly, high-end functionality. NetSuite's product, on the other hand, was ideal for SMBs—it was easy to install and use, and significantly less expensive. Acquiring NetSuite would allow Oracle to serve the entire SaaS ERP market.

From start to finish, Oracle's consideration and negotiation of the Transaction was exemplary. Larry Ellison, Oracle's founder, Chairman and Chief Technology Officer, held minority ownership interests in both companies and therefore recused himself from the Transaction. Oracle's board of directors empowered a Special Committee (the "Committee") of three independent and disinterested directors with full authority to consider, negotiate, and accept or reject the proposed acquisition. The Committee retained its own independent and highly qualified advisors, carefully

analyzed the proposed Transaction through months of diligence, and concluded that Oracle should pursue it. Thereafter, the Committee engaged in aggressive, arm's-length bargaining, which enabled Oracle to acquire NetSuite at a price so low that NetSuite's unaffiliated stockholders almost turned it down. The Transaction has been a massive success for Oracle, which is now recognized as the global leader in cloud-based ERP software, with both Fusion and NetSuite thriving in their respective market segments.

Plaintiffs nonetheless filed this derivative action claiming that Oracle overpaid for NetSuite by billions of dollars. Plaintiffs asserted two theories for subjecting the Transaction to entire fairness review. In a detailed 100-page post-trial opinion ("Opinion"), the trial court thoroughly analyzed and rejected each of Plaintiffs' arguments as factually and legally unsupported.

First, Plaintiffs asserted that Ellison steered the Transaction as Oracle's "controlling stockholder"—despite owning only 28% of Oracle's stock and fully recusing himself from the Transaction. Plaintiffs' theory crumbled at trial. As the trial court found, Plaintiffs failed to prove that Ellison controlled Oracle. In fact, the evidence showed just the opposite: Oracle's board and senior management consistently exercised their independent business judgment and felt free to reject Ellison's ideas when they disagreed with him. And as the court also found, Plaintiffs

failed to prove that Ellison controlled the Transaction. Instead, Ellison scrupulously respected his recusal, and the Transaction was controlled by the Committee.

Second, Plaintiffs asserted that Ellison committed fraud by *not* unilaterally injecting himself into the Committee's deliberations and providing his unsolicited opinions on how Oracle should operate NetSuite post-acquisition—even though doing so would have been inconsistent with his recusal. Plaintiffs argued that NetSuite's future growth prospects were doomed because it would be unable to compete "upmarket" against Fusion. According to Plaintiffs, only Ellison understood this looming disaster and, as a result, defrauded the Committee by failing to volunteer his post-acquisition "plan" to focus NetSuite on the SMB market.

The evidence at trial eviscerated this theory as well. As the trial court found, the Committee and its advisors diligently analyzed the competitive landscape, which showed that Oracle's and NetSuite's products were complementary, not competitive. And contrary to Plaintiffs' litigation pretense that NetSuite's future growth depended on moving "upmarket" into Fusion's territory, the evidence showed that before deal negotiations even began, NetSuite had already embraced the more lucrative strategy of focusing on selected "verticals" and "micro-verticals" in the SMB market. That plan, called "SuiteSuccess," involved designing pre-built software that could be sold in large volumes to specific categories of SMBs. This would increase NetSuite's

high-margin recurring SaaS revenue—and avoid the low-margin, non-recurring customization work required to serve larger and more complex businesses.

The Committee and its advisors understood these facts based on their own diligence and analysis. They carefully evaluated the cloud ERP market, NetSuite's ability to serve the largely untapped SMB segment that Oracle could not address, and the significant growth opportunities the Transaction presented. There was no need for Ellison to violate his recusal by providing his unsolicited opinions on these topics. Nor would it have made any difference to the Committee's analysis, because (as the trial court found) the financial model upon which the Committee relied in evaluating the Transaction did not depend on Oracle's plan for operating NetSuite post-closing.

The evidence also refuted Plaintiffs' attempt to support their theory by comparing the *pre-signing* acquisition model that was prepared for the Committee's use in evaluating the Transaction, with the *post-closing* first-year operating budget that was prepared for NetSuite's integration. As the court explained, this comparison rested on a fundamental misunderstanding of Oracle's modeling. The pre-signing acquisition model and the post-closing operating budget were prepared by different groups at different times to measure different things for different purposes. Accordingly, they considered different inputs—and produced different results. The

differences between them were neither surprising nor relevant—and as the trial court found, did not remotely support Plaintiffs' assertion that Ellison committed fraud.

Plaintiffs offer no basis for this Court to overturn the decision below. Indeed, Plaintiffs' lead argument on appeal can only be described as a "Hail Mary," based entirely on speculation about witness interview memoranda that were prepared by counsel for Oracle's Special Litigation Committee ("SLC"), and thus constituted protected work product. The trial court correctly found that Plaintiffs failed to meet their burden of overcoming the SLC's work-product immunity. Plaintiffs received full plenary discovery, including every document the SLC relied upon (and more), plus dozens of witness depositions (including witnesses interviewed by the SLC). Regardless, any alleged error was at best harmless and would not require vacatur. Plaintiffs' case failed because it was incongruent with reality—not because Plaintiffs were denied access to a lawyer's memorandum offering *post hoc* impressions of various witnesses.

After presiding over this case for six years—overseeing two years of discovery, a record of nearly 3,000 exhibits, hundreds of pages of briefing, and a full trial—the trial court made detailed findings of fact and conclusions of law rejecting Plaintiffs' theories. Plaintiffs have presented no basis for this Court to order a do-over. The Court should affirm.

SUMMARY OF ARGUMENT

1. Denied. As the trial court properly found, Plaintiffs failed to establish a substantial need for the SLC's interview memos, which Plaintiffs concede were protected work product. Furthermore, any alleged error was harmless, as Plaintiffs failed to meet their burden of showing that the interview memos contained material information which Plaintiffs could not otherwise have obtained, and which would have affected the court's judgment.

2. Denied. As the trial court properly found, Plaintiffs failed to prove that Ellison was a controlling stockholder. The court made detailed findings that Ellison—who owned only 28% of Oracle's stock, lacked managerial supremacy over Oracle's operations, and fully recused himself—did not exercise actual control over the Transaction. Plaintiffs have failed to show that these findings are clearly erroneous or otherwise warrant reversal.

3. Denied. The trial court properly applied well-established legal principles in evaluating Plaintiffs' claim that Ellison defrauded the Committee by not sharing his unsolicited opinions about how best to operate NetSuite post-acquisition. Plaintiffs' proposed test is consistent with the test employed by the trial court, and the court's findings demonstrate that Plaintiffs' claim fails even under their own test.

4. Denied. The trial court properly found that Ellison's unsolicited opinions about how Oracle might best operate NetSuite post-acquisition were not material to the Committee's consideration and negotiation of the Transaction. Plaintiffs resort to mischaracterizing or ignoring the court's thorough resolution of disputed factual issues. None of their arguments demonstrates any basis for reversing the court's well-supported decision.

COUNTERSTATEMENT OF FACTS

Plaintiffs' Statement of Facts reflects a one-sided recitation of their own cherry-picked evidence, which completely ignores the trial court's comprehensive factual findings and the extensive evidence supporting them. Because the trial court's findings "are entitled to deference," *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 704 (Del. 2023), Defendants refer to those findings and the bases underlying them.

A. Factual Background

Oracle is a Delaware-incorporated technology company that sells hardware, software, and cloud computing products. Op. 7. Ellison founded Oracle in 1977 and was its CEO until 2014. Op. 7-8. Safra Catz then served as co-CEO with Mark Hurd until Hurd's death in 2019, whereupon Catz continued as sole CEO. Op. 8 & n.14.

When Oracle acquired NetSuite in 2016, Ellison owned approximately 28.4% of Oracle's common stock. Op. 10. While Ellison has long been associated with Oracle as its founder and served as Chairman of its board, "the Oracle board vigorously debated assumptions and was not afraid to stand opposed to Ellison." Op. 57. The "executive function of Oracle resided in its dual CEOs, Catz and Hurd," who similarly were not "cowed or overawed" by Ellison. *Id.*

Oracle historically sold ERP software principally to large enterprises. Op. 9. Oracle traditionally sold its software "on premises"—*i.e.*, loaded onto the customer's physical servers, for a one-time license fee. *See* Op. 11. In approximately 2006, Oracle began developing a SaaS ERP system that customers could access via the internet, for a periodic subscription fee. *Id.*

1. NetSuite Was A Perfect Strategic Fit For Oracle

Evan Goldberg and Ellison co-founded NetSuite in 1998. Op. 9. NetSuite sold SaaS ERP software principally to the SMB market. *Id.*; B5008-17. SaaS ERP revenue is "stick[y]": Once a customer begins using the software to run its core business functions, that customer tends to "stick[]" with the SaaS ERP provider, which receives annual subscription revenue. Op. 8, 27; *see* A1496:2580; A1518:2669-70. It is thus critical for SaaS ERP companies to secure market share, as this recurring SaaS revenue operates like an annuity. *See* Op. 27; A1069:881-82; A1496:2580.

By 2016, Oracle's traditional market of large enterprises was well saturated. The SMB market that NetSuite served, however, was lucrative and largely untapped. Op. 86-87 & n.486 (citing B1886-88; A1440:2356-57); *see* B0005; B1765; A1504:2614-15; A1074:901-02. Oracle's ERP software was ill-suited for SMBs because it was complex, difficult to use, and expensive to install and operate. NetSuite was exactly the opposite: Its software was designed for ease of installation

and operation, and was significantly less expensive. Op. 9, 13; B5008-17, B5051-55; A871:91, A886:149; A1122-23:1093-94; A1501-02:2602-06.

Though NetSuite occasionally sold to select larger companies, those customers required more software customization work, and longer installation times.[1] Op. 14; *see* A1070:884-86; A1294-95:1778-81. As Plaintiffs highlight, Ellison (among others) had expressed concerns in 2015 about NetSuite's costly and challenging efforts to secure larger customers. OB 13-14, 19-20. But as Plaintiffs ignore, by the time of the Transaction "NetSuite was in the process of implementing changes to address Ellison's 2015 concerns." Op. 83-84.

Specifically, starting in 2015, NetSuite management—at the urging of Ellison and NetSuite COO Jim McGeever—had "prioriti[zed]" a new product development, sales, and marketing strategy called "SuiteSuccess" (formerly called "Atlas"). Op. 13-15, 83-84; *see* B0065, B0083; B0395; B0522; B0569; B0598; B0945; B2086-89; A1037:752-54; A1064:860-61, A1073:897-98, A1076-78:909-18, A1082-83:932-38, A1087:953; A1117:1071-73, A1120-22:1084-90. This strategy focused on designing software for specific industries and industry subsections in the SMB market—often referred to as "verticals" (*e.g.*, health care) and "micro-verticals"

[1] NetSuite also sold its products to smaller divisions and subsidiaries of larger companies, which required more sophisticated ERP software (like Fusion) at the headquarters level. Op. 84-85.

(*e.g.*, dentist offices). This would reduce the need for customization (which ate into margins) and installation time (which delayed revenue recognition). Op. 13-14, 83; *see* B4556:31-32; B0569-72; A1656. By the time of the Transaction, NetSuite had fully and publicly embraced this initiative. Op. 83-84; *see* B0536, B0539; B0552-58; B0861, B0872.

2. The Transaction Was Timed To Benefit Oracle

After Ellison stepped down as CEO in 2014, Oracle began discussing whether to purchase NetSuite. Op. 10. In February 2015, Ellison and co-CEOs Catz and Hurd met to discuss the possibility, and determined that the timing was not right—NetSuite's trading price was too high, and Oracle's own cloud ERP product (Fusion) was just gaining traction in the market and required significant management focus. Op. 10-12; A1201:1407-08; A1339-40:1959-63. Accordingly, Oracle did not pursue NetSuite. Op. 12.

In January 2016, Oracle revisited the question. Op. 15. The market for SaaS companies had softened and Fusion had matured, making NetSuite a "more attractive acquisition target." Op. 15-16, 63-64; *see* A995-96:587-88; A1202:1410; A1341-42:1967-71; B0882, B0887. Catz confirmed that Ellison, who could have blocked the deal in his NetSuite capacity, would not oppose the acquisition. Op. 59. On January 15, Doug Kehring, Oracle's head of Corporate Development, presented three potential acquisition targets to Oracle's board, including NetSuite. Op. 15;

A1661-62. Ellison "left the room and recused himself from the discussion." Op. 15; A1662; A1133:1136; A1266:1665-66. The board decided to explore a potential acquisition of NetSuite. Op. 16.

3. With Ellison Recused, Oracle Empowered An Independent Special Committee To Evaluate The Transaction

On March 18, 2016, Oracle's board (less Ellison) formed an independent special committee—consisting of former Intel president Renée James, former Secretary of Defense Leon Panetta, and former Akamai CEO George Conrades—to consider an acquisition of NetSuite along with potential alternatives. Op. 20-21. The Board gave the Committee full authority to assess, negotiate, and approve or reject a transaction. Op. 21-22; B0897-98. The Committee held fifteen meetings over the ensuing seven months. Op. 22. Consistent with his recusal, Ellison "insulated himself from the board's discussion of [the] NetSuite acquisition," and "scrupulously avoided any discussion of the transaction with the Special Committee." Op. 53-54, 60; *see* A876:112; A1174:1299, A1184:1341, A1189:1358; A1307:1828-29.

After considering four candidates, the Committee retained Moelis & Company ("Moelis") as its independent financial advisor, citing Moelis's expertise in the area, its "emphasis on alternatives to the Transaction, including no acquisition," and its "demonstrated ability to challenge management." Op. 23-24.

4. The Committee Thoroughly Investigated And Understood NetSuite's Unique Ability To Serve The Lucrative SMB Market Segment

From the start, the Committee "brought their collective experience to bear in the performance of diligence," which included an in-depth analysis regarding the "strategic rationale of acquiring NetSuite and potential alternatives." Op. 85-86; *see id.* at 24-25, 28-29, 98.

In early May, Committee Chair James joined Moelis and Oracle management for an all-day diligence session with NetSuite representatives, where the discussion included "NetSuite's 'market positioning'" and the "'competitive environment.'" Op. 86 (quoting B2594); B0959-64; B1244-45; A1441:2362-63. NetSuite also provided written diligence materials. *See, e.g.*, B0956; A1696-98; B1077-1165; A1441:2362-63. Moelis interviewed senior Oracle personnel, evaluated the SaaS ERP landscape, and "provided the Special Committee with analyst reports highlighting the potential of competition between … Oracle and NetSuite." Op. 24, 98 (citing B0914; B1572-1687; A1461-62:2444-45); *see* B0915-21; A1437-38:2345-48, A1439:2355, A1442:2364-65. In addition, Oracle management and Moelis each made presentations focused on the strategic positioning of NetSuite relative to Oracle. Op. 28-29 (citing B1391; B1433, B1435; B1463). Thus, as the trial court found, the Committee was well "aware of the two companies' positions within the market." Op. 98.

This diligence showed that the companies' products were complementary—and that Oracle was weak in the SMB market, where NetSuite enjoyed unique advantages. Op. 23-28. As former Oracle executive Thomas Kurian testified: "[W]e had designed Fusion applications as a SaaS suite for large enterprises. We were not competing with NetSuite, a product that was mostly sold to small and medium enterprises." A953:416. Similarly, Goldberg testified that when the two companies occasionally found each other pitching for the same customer, it meant that "one of us was in the wrong room." Op. 81 (quoting A1084:941). The companies, in other words, "were not significant competitors" and at most "competed [only] at the margins."[2] Op. 77; *see id.* at 78-85. Acquiring NetSuite would be additive and "complement Oracle's current offerings." Op. 29.

Both Oracle management and Moelis recommended that the Committee move forward with the acquisition, with management highlighting "NetSuite's strategic fit" and Moelis advising that a "NetSuite acquisition could 'directly address the [Oracle] shortcomings in Cloud ERP,' which 'should be viewed as a strategic imperative.'" Op. 28-29 (alteration in original) (citing B1391; B1433); *see* B1899; A1438-39:2351-52, A1445:2377-78. Following robust presentations from Oracle

[2] The court's finding is reinforced by unrebutted expert evidence demonstrating the complementarity of their products (B4978, B5063-64; A1503:2609-10) and the lack of meaningful competition between them (B4810-4817; A1533-34:2731-33).

management and Moelis, and after considering alternatives, the Committee determined that NetSuite "could fill a strategic gap" for Oracle and decided to make an initial offer. Op. 29-30 (quoting B1463).

5. The Committee Prepared An Initial Offer Based On Advice From Moelis

In late May, Oracle management and Moelis separately presented valuations to the Committee. Op. 31; B1533-34. Oracle management followed the Company's standard framework for assessing potential acquisition targets—a framework Oracle had developed and applied to more than one hundred acquisitions over a decade. Op. 8-9, 88-89 (citing A981:529-31, A986-87:549-52, A991:569-70). Specifically, Oracle had created what its Corporate Development team called the "incremental model." Op. 88-90. This model seeks to "reflect the *incremental* revenue and expenses" Oracle would receive and incur if it acquired the target. Op. 89 (emphasis added) (quoting A986:548); *see* A1235:1541-42; A974:500-02, A987-98:555-56; A1448-49:2391-92.

This model does *not* consider post-acquisition operating plans; instead, it conservatively assumes that the incremental revenue to Oracle will be no higher than the revenue the target itself was projecting on a stand-alone basis. Op. 88-89; A986-88:548-56. When examining incremental costs, the model takes "into account additional costs to Oracle as well as synergies and savings." Op. 89 (citing A988:556). The model does *not* include costs that Oracle already would incur

regardless of whether it acquired the target, such as costs of "previously unused Oracle office space"—even though, post-acquisition, those costs might well be allocated to the target for accounting and budgeting purposes. Op. 91 (citing A974-75:501-04; A1235-36:1543-44).

Oracle management followed this standard framework with respect to the Transaction, preparing for the Committee an incremental model, as well as DCF, precedent transactions, and comparable companies analyses. Op. 31-32, 90-91; *see* B1536-48; B4764-65; B0734; A977-78:515-17, A981:529-31, A987-90:555-66; A1227:1508-10; A1519-20:2675-76; A1922; B5182. The Committee understood Oracle's acquisition process, including the incremental model, and actively engaged with it. A868:77; A1168:1275-76; A1450-51:2396-2400; B4374:212-13; B3758:200, B3768-69:240-42. The model conservatively "projected NetSuite revenues [to be] *lower* than Wall Street's projections of NetSuite as a standalone company and did not include [potential] revenue synergies." Op. 31 (emphasis added) (citing B1496; B2614; A986-87:550-55; A1236-:1544-46, A1237:1548). And, following Oracle's standard practice, the incremental model included only the *additional* costs Oracle would incur from running NetSuite. Op. 89 (citing A974:501-02, A987-88:555-56). "On the assumption of use of Oracle's infrastructure and resources," and based on historical precedent, the model projected that, over the course of several years post-acquisition, NetSuite's "EBIT margins

[would] gravitate[] towards those of Oracle."[3] Op. 31-32 (citing A989:560; B1537). "Moelis reviewed these models, performed diligence on their assumptions, questioned management about them, and concluded that they were reasonable." Op. 32 (citing A1448-49:2389-93, A1450:2398-2399); *see* Op. 96; B1511-31.

Oracle management recommended an initial offer of $100 per share, based on NetSuite's 52-week high ($99.73) and a 25% premium over the then-current trading price. Op. 32, 96 (citing A1003-04:618-21; A1214-15:1459-65; B1534; B1542); *see* B5171-72. Moelis then separately presented to the Committee its own "report and analyses on public market price targets, revenue multiples, and precedent transactions"—and advised that the initial offer needed to begin with a "1" in order to secure NetSuite's interest. Op. 97 (citing B1508-32; B1534; A1455-56:2419-20). Following these presentations, the Committee directed Moelis to communicate an initial offer of $100 per share. Op. 32-33.

6. The Committee, With Support From Moelis And Oracle Management, Bargained Hard To Drive Down The Price

Thereafter, the Committee directed hard-nosed negotiations, repeatedly holding fast on price, even at the risk of killing the deal. Op. 33-42. NetSuite's initial demand was $125 per share and Oracle countered at $106. Op. 33. NetSuite

[3] This was not unique to NetSuite. Because of Oracle's significant scale and resources, a similar EBIT margin "uplift" was projected in the incremental models for *all* Oracle acquisitions during this period. *See* A1922; A989-90:560-66.

countered at $120 per share and signaled it had little room to move. Op. 34. After discussions with Moelis and Oracle management, the Committee informed NetSuite that it would not counter. Op. 33-35. The Committee "was prepared to let the deal die"; indeed, Moelis's lead banker believed it *was* dead and went on vacation overseas. Op. 35.

In late June, NetSuite's advisor called Moelis and indicated that NetSuite might have more flexibility on price. Op. 35-36. At Catz's suggestion, the Committee requested additional diligence before proceeding, "signal[ing] toughness on price and a lack of anxiety to re-start negotiations." Op. 36. By mid-July, the Committee conveyed that Oracle's offer remained $106 per share. Op. 38. NetSuite responded by bidding against itself, countering "the Special Committee's non-bid" at $111 per share. *Id.*

The Committee then met with Oracle management and Moelis, which provided additional advice and modeling. Op. 39. Consistent with Moelis's recommendation, the Committee conveyed $109 as Oracle's best and final offer. Op. 39-40. NetSuite accepted.

Following confirmatory diligence meetings in late July, Moelis presented its final valuation analyses to the Committee and "reported that it was prepared to provide a written fairness opinion stating that $109.00 per share was fair to Oracle stockholders." Op. 41; *see* B2619-24; B2641; A1466-68:2463-68. Two days later,

Oracle management presented its final valuation analyses to the Committee, confirming that "its diligence provided confidence in" its modeling. Op. 41 (citing B2644, B2647, B2657; B2727-28; A1224:1497-99, A1227:1511). Management left and Moelis "confirmed" its view that "$109.00 per share was fair to Oracle's stockholders." Op. 41-42 (citing A397). The Committee approved the Transaction and executed a merger agreement on July 28, 2016. Op. 42.

7. The Transaction Quickly Cleared Antitrust Review But NetSuite's Unaffiliated Stockholders Nearly Rejected The Offer As Too Low

The Transaction was conditioned on antitrust approval from the Department of Justice ("DOJ"), and tender of a majority of the unaffiliated NetSuite shares. Op. 42-43. The parties made the necessary antitrust filings, and the DOJ completed its review quickly—approving the transaction without even issuing a "second request" for information. Op. 43; A1228:1512.

Contrary to Plaintiffs' assertion that the deal was a windfall for NetSuite's stockholders, the tender offer took much longer than expected—and very nearly failed. Op. 42-43. The Committee *twice* was forced to extend the tender deadline. Op. 43-45. During that period, NetSuite's largest unaffiliated stockholder, T. Rowe Price, told NetSuite's transaction committee that the agreed $109 price was far too low, and that it would tender its shares if Oracle increased its offer to $133 per share. Op. 43-44.

The Committee considered whether to raise the offer price, but Catz's recommendation was strong and unequivocal: Oracle should not "pay a single penny more." Op. 44 n.260. The Committee agreed, stating that $109 was the final price, and publicly announced that it would terminate the deal if sufficient tenders were not received by November 4. Op. 44-45. Ultimately, the offer succeeded with only a bare majority (53.2%) of NetSuite's unaffiliated shares tendered. Op. 45. The Transaction closed on November 7, 2016. *Id.*

8. The Transaction Has Been A Resounding Success

After closing, Oracle began to plan for NetSuite's integration in a way that would "maximize NetSuite's value to Oracle." Op. 92. Contrary to Plaintiffs' assertion, the plan was neither dictated by Ellison nor concealed from anyone—it simply implemented (and emphasized) NetSuite's existing focus on "verticals" and "micro-verticals" in the SMB market. *See* Op. 13-14, 81-87; A1085:945-47; A1234:1537-38; A922:294-95; A983:537-39, A1021:691; A1309:1836-37.

As part of this post-closing process, Oracle prepared a first-year operating budget for NetSuite. Op. 90. Although Plaintiffs tried to compare this post-closing budget with the pre-signing incremental model considered by the Committee, *see* OB 23-25, that comparison was fundamentally flawed. Op. 99. While Oracle relies on the incremental model to "assess a potential acquisition target," Oracle's "modeling method change[s] post-signing. Post-signing, Oracle's Financial

Planning and Analysis team [builds] a 'bottoms-up' operating budget." Op. 88-90 (citing A905:225; A984:540-42).

This first-year operating budget is designed for operational purposes, not valuation. A905:225-26, A932:333-35. Thus, it is *not* intended to mirror the incremental model, and it "treat[s] pre-existing expenditures differently." Op. 90 (citing A984-85:540-45). The incremental model *excludes* costs that Oracle was already incurring, because it is designed to show only the *additional* (*i.e.*, "incremental") costs resulting from the proposed acquisition. Op. 91; *see supra* at 15-16. The first-year operating budget, by contrast, *includes* costs that Oracle was already incurring pre-acquisition—and allocates some of those costs to the acquired company for internal budgeting and accounting purposes. Op. 90-91 (citing A974-75:501-04; A1235-36:1543-44). As a result, the operating budget's costs invariably are *higher* than the incremental model's costs, and EBIT expectations in the operating budget are correspondingly *lower* than in the incremental model. Simply put, they are measuring different things at different times for "entirely different purposes." Op. 99.

Other post-acquisition developments led to additional differences between the incremental model and the first-year operating budget. During the integration process, Oracle management was able to confer much more closely with NetSuite personnel and found even greater growth potential than had been anticipated. *See*

Op. 92 (citing B3330-58; B3417-54; A922:294; A1224-25:1499-1500, A1231-32:1527-28). The operating budget therefore reflected a post-acquisition decision, repeatedly refined by management, to *reinvest into NetSuite* the cost savings and synergies that were anticipated in the pre-acquisition modeling—consistent with Hurd's post-closing directive to grow NetSuite's revenues as fast as possible, even if it lowered profits in the short term. A928:316-18; A1085:945-47, A1086-87:951-52, A1090-92:965-70; B3466-84; B5167-68. The budget also accounted for lower-than-expected revenues due to the lengthy period of uncertainty about whether the deal would close—which caused NetSuite to lose some customers and have difficulty meeting its hiring goals. A928:316-18; A985-86:547-48; A1041:768-69; B5167-68.

Since the acquisition, NetSuite has thrived under Oracle's stewardship. Notwithstanding the early deal disruption and an intervening global pandemic, NetSuite's growth rate has consistently exceeded 20% and has shown no signs of slowing. *See* B5169; B5173. NetSuite's former COO estimated that NetSuite was worth $40-$50 billion in 2021—roughly five times the $9.3 billion Oracle paid just five years earlier. A1113:1054-55. And with Fusion serving large enterprises and NetSuite serving SMBs, Oracle is now recognized as the ERP market leader—an achievement Oracle has been "working toward for decades." A1238-39:1555-56; *see* B5105-07.

B. This Lawsuit, Pretrial Rulings, And Trial

Plaintiffs filed this derivative action on May 3, 2017, alleging that a host of Oracle directors and officers breached their fiduciary duties by causing Oracle to enter into the Transaction on unfair terms. Op. 46.

On May 4, 2018, Oracle's board formed a Special Litigation Committee ("SLC") to investigate the claims. Op. 47. After conducting an investigation, the SLC declined either to take over the litigation or dismiss it, returning the case to Plaintiffs. *Id.*

As part of its investigation, the SLC's counsel had interviewed certain witnesses and prepared memos containing information "that [counsel] determined to record, as well as attorney thoughts and impressions." 7/9/2020 Op. 14. When Plaintiffs demanded the interview memos at the outset of discovery, the SLC claimed work product protection. Plaintiffs did not dispute that the memos were work product, and the trial court found that Plaintiffs had failed to establish a "substantial need" for them—because Plaintiffs could obtain any material information the memos might have contained through other sources, including depositions. *Id.* at 15-18. The court did require the SLC to produce all of the underlying documents upon which it relied in reaching its decision, including some Oracle privileged documents. 12/4/2019 Op. 47-48.

Plaintiffs then engaged in extensive discovery—obtaining hundreds of thousands of pages of additional documents from Oracle and NetSuite directors, officers, advisors, and other parties, and taking dozens of fact witness depositions. *See* Op. 49. Plaintiffs amended their complaint five times. Op. 47-49. Before trial, Plaintiffs stipulated to the dismissal of their claims against two of the three Committee members (Conrades and Panetta). Op. 48.

By the time of trial, the only defendants remaining were Ellison, Catz, and Committee Chair James. In July and August 2022, the court held a ten-day trial. Op. 50. The court heard live testimony from eight fact witnesses and five expert witnesses, viewed videotaped testimony from twelve fact witnesses, and considered 2890 exhibits, including 34 deposition transcripts. The parties submitted post-trial briefing, and gave oral argument on November 18, 2022. *Id.* On December 22, 2022, Plaintiffs dismissed with prejudice their claims against James. *Id.*

C. Post-Trial Decision

On May 22, 2023, the trial court issued its 100-page Opinion finding for Defendants. The court made extensive factual findings and credibility determinations based on the evidence. Op. 7. The court concluded that (1) the "transaction was negotiated at arm's length by a fully empowered Special Committee" of "independent directors," *id.* at 74, 100; *see id.* at 53-54; (2) Ellison did not exercise "actual control" over Oracle or the Transaction, *id.* at 58-59; *see id.*

at 54-74; and (3) neither Ellison nor Catz "materially misle[d] or defraud[ed] the Special Committee," *id.* at 100; *see id.* at 74-100. Accordingly, the court applied the business judgment standard of review, *id.* at 52, 100—a bar that all agree the Transaction easily clears.

ARGUMENT

Plaintiffs had the burden of establishing facts sufficient to overcome the business judgment rule, *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995), and after six years of litigation and a full trial, the trial court found that Plaintiffs failed to meet their burden. As relevant here, the court found that Plaintiffs failed to establish a basis for invading the SLC's protected work product. The court also found that Plaintiffs failed to satisfy their burden for invoking entire fairness review by proving either (1) that Ellison was a controlling stockholder, or (2) that Ellison and/or Catz defrauded the Committee.

Plaintiffs have identified no basis for this Court to upset those determinations (and do not even challenge the findings regarding Catz). The Court should affirm.

I. THE TRIAL COURT'S RULING RESPECTING THE SLC'S WORK PRODUCT IMMUNITY DOES NOT WARRANT VACATUR

A. Question Presented

Whether the trial court reversibly erred in finding Plaintiffs failed to establish, as required by Court of Chancery Rule 26(b)(3), that they had a substantial need for, and could not otherwise obtain the substantial equivalent of, information contained in protected work product reflecting the SLC counsel's thoughts and impressions about pre-litigation witness interviews. *See* 12/4/2019 Op. 31; 7/9/2020 Op. 7-10.

B. Scope Of Review

This Court "review[s] the Court of Chancery's discovery rulings for abuse of discretion." *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010). This Court exercises *de novo* review over rulings regarding work product immunity and waiver, but only "insofar as they involve questions of law." *Espinoza v. Hewlett-Packard Co*., 32 A.3d 365, 371 (Del. 2011); *see Hopkins v. State*, 893 A.2d 922, 927 n.5 (Del. 2006).

C. Merits Of Argument

Unable to prove their claims based on the mountain of documentary and testimonial evidence they received in this case, *see supra* at 23-24, Plaintiffs are reduced to speculating, without support, that perhaps some other evidence exists which might have led to a different outcome. Notably, Plaintiffs do not contend they were deprived of a single contemporaneous document relating to the events at issue. Instead, Plaintiffs argue that they *might* have found *something* to support their claims if only the trial court had disregarded the SLC's work product immunity and ordered the SLC to produce memoranda reflecting the "'information that'" counsel "'determined to record, as well as attorney thoughts and impression[s]'" about the SLC's witness interviews—even though Plaintiffs had the opportunity to depose those very same witnesses. 7/9/2020 Op. 14 (citation omitted). Plaintiffs' arguments are meritless and do not warrant reversal.

1. The Trial Court's Ruling Was Correct

Plaintiffs do not deny that the "Interview Memoranda constitute[d] attorney work product." 7/9/2020 Op. 11-15. Plaintiffs quibble only with the trial court's conclusion that they failed to demonstrate a "substantial need" for the information contained therein, and could not otherwise obtain its "substantial equivalent." Ct. Ch. R. 26(b)(3). Although the SLC doubtless will address more fully the merits of Plaintiffs' contentions, a few points are worth noting.

First, *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), does not apply here, as the SLC did not seek to terminate the litigation (indeed, quite the opposite). Furthermore, *Zapata* has no bearing on work-product immunity. Tellingly, even in the cases Plaintiffs cite where an SLC sought to end the case, the courts analyzed the SLC's assertion of work-product immunity without applying *Zapata* scrutiny. OB 27-28.

Second, the trial court did not abuse its discretion in finding that Plaintiffs failed to show a "substantial need" for the memoranda, Ct. Ch. R. 26(b)(3); substantially equivalent information was "available from other sources," as documents and depositions allowed Plaintiffs "to obtain the information without intruding on" the SLC's work product. *Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co.*, 2018 WL 346036, at *5 (Del. Ch. Jan. 10, 2018).

In the cases Plaintiffs cite where interview memoranda were produced, the interviewed witnesses were *not* available in discovery, usually because the SLC sought to end the case. OB 27-28. And Plaintiffs here never "argued that the SLC was able to obtain certain information from interviewees" that Plaintiffs could not obtain. 7/9/2020 Op. 16-17. Nor do Plaintiffs identify any gaps in interviewed witnesses' memories that the memoranda might have filled. And while Plaintiffs now try to invoke Hurd's death as a basis for unavailability, OB 39, Plaintiffs waived that argument by failing to raise it below—as the trial court found. 7/9/2020 Op. 16 n.61.

Plaintiffs' assertion that the SLC memoranda *might* have contained "'impeachment material'" (OB 27, 33) is complete speculation. And as the trial court recognized, the speculative possibility of finding impeachment material "cannot be the standard for unavailability under [Rule] 26(b)(3)" or "little would be left of the [work-product] protection." 7/9/2020 Op. 16; *see Banks v. Wilson*, 151 F.R.D. 109, 113-14 (D. Minn. 1993) (rejecting "[m]ere speculation" that a protected statement might be useful for "impeachment purposes"); *Buttonwood*, 2018 WL 346036, at *6 (possibility a deponent may not be truthful fails to establish unavailability).

Third, the trial court did not abuse its discretion in rejecting Plaintiffs' argument that the SLC waived work product immunity by summarizing information

from witness interviews in mediation statements. Referencing facts learned through an investigation would not constitute a waiver of work-product protection. If "waiver could extend so broadly, an attorney drafting a complaint would be unable to rely on investigative work product because doing so would risk placing the entirety of the attorney's work product at issue." *United States ex rel. Bassan v. Omnicare, Inc.*, 2023 WL 7297152, at *1 (S.D.N.Y. Nov. 6, 2023). Moreover, the mediation statements themselves were confidential and privileged from outside use. *See* 7/9/2020 Op. 22; Ct. Ch. R. 174(h)(1). As the trial court observed, finding waiver in these circumstances would chill settlement discussions, contrary to Delaware's "strong public policy favoring confidentiality in all mediation proceedings." 7/9/2020 Op. 22.

2. Any Error Would Be Harmless

Regardless, any alleged error in this context would be "harmless," as "it would not substantively affect the outcome of the proceedings." *Walls v. Ford Motor Co.*, 160 A.3d 1135, 2017 WL 1422626, at *4 (Del. 2017). Plaintiffs offer nothing to suggest that the interview memoranda would have affected the court's well-reasoned and heavily supported post-trial opinion. Indeed, Plaintiffs' case was far from "impair[ed]." OB 33. Plaintiffs enjoyed full plenary discovery, including document productions and depositions, and Plaintiffs received wide-ranging materials from the SLC even before discovery started. Plaintiffs were able to obtain for themselves

whatever factual information the interview memoranda might have contained. *Cf. DoubleLine Cap. GP LLC v. Barach*, 2024 WL 278943, at *9 (Del. Ch. Jan. 25, 2024) ("refusal to order production" of documents not improper when the information "was available from another source").

Moreover, Plaintiffs do not point to any finding by the trial court that the interview memoranda would have altered. Aside from their waived theory about Hurd, *see supra* at 29, the most they muster is speculation that the memoranda *might* have contained relevant evidence about the extent to which Catz and Nelson discussed a potential price range in January 2016. OB 40. But as the trial court concluded—in a factual finding Plaintiffs do not challenge—the Committee's opening bid was based not on any alleged "anchoring conversation" between Catz and Nelson (about which the Committee was unaware in any event, as Plaintiffs concede), but on Moelis's independent analysis and recommendation. Op. 97. Nor do Plaintiffs explain how any such alleged discussion is relevant to the two substantive issues they appeal: Ellison's (1) alleged control, and (2) failure to volunteer his unsolicited opinions on how best to operate NetSuite post-acquisition. Plaintiffs' speculative assertions about the SLC's work product memoranda do not justify unwinding six years of litigation and a full-blown trial.

II. THE TRIAL COURT CORRECTLY FOUND THAT PLAINTIFFS FAILED TO PROVE ELLISON WAS A CONTROLLING STOCKHOLDER

A. Question Presented

Whether the trial court erred in finding that Plaintiffs failed to prove Ellison—who owned only 28% of Oracle's stock, lacked managerial authority over Oracle's operations, and fully recused himself from the Transaction—was a controlling stockholder. B5251-5260; B5313-5327.

B. Scope Of Review

The determination of whether Ellison had "obtained the status of a 'controlling stockholder' is intensely factual." *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 550-51 (Del. Ch. 2003). Accordingly, "[t]he standard of appellate review with regard to the Court of Chancery's factual findings is deferential"—they "will not be set aside by this Court unless they are clearly erroneous or not the product of a logical and orderly deductive reasoning process." *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114 (Del. 1994).

C. Merits Of Argument

After carefully considering all of the evidence, the trial court concluded that Plaintiffs failed to prove Ellison was a controlling stockholder. Plaintiffs have offered no basis for this Court to overturn that well-supported conclusion.

1. Plaintiffs Failed To Prove That Ellison Wielded Coercive Voting And Managerial Power Sufficient To Demonstrate Actual Control Over The Transaction

A "stockholder that owns less than half of a corporation's shares will generally not be deemed to be a controlling stockholder." *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 507 (Del. 2005). To overcome this general rule, "the plaintiff must establish the [minority stockholder's] *actual exercise* of control over the corporation's conduct." *Id.*

The "test for actual control 'is not an easy one to satisfy.'" *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 307 n.8 (Del. 2015) (citation omitted). A plaintiff must show that the stockholder wields "a combination of potent voting power and management control" so dominant and "'coercive'" that it prevents the directors "'from freely exercising [their] independent judgment in considering the proposed [transaction].'" *Id.* at 307-08 (quoting *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 994-95 (Del. Ch. 2014), *aff'd sub nom. Corwin*, 125 A.3d 304). In other words, "the minority blockholder's power must be 'so potent that independent directors … cannot freely exercise their judgment, fearing retribution' from [that] minority blockholder." *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 665 (Del. Ch. 2013) (alteration in original) (citation omitted); *see, e.g.*, *Lynch*, 638 A.2d at 1114-15 (43.3% stockholder "dominated" the boardroom, repeatedly coerced and "vetoed" board decisions, and ultimately "'scared'" the board "'to

death,'" such that board members "deferred to [the stockholder] because of its position as a significant stockholder and not because they decided in the exercise of their own business judgment that [the stockholder's] position was correct").

The touchstone of this determination is actual control. The "plaintiff [must] show that the stockholder '*actually* controlled the board's decision about the transaction at issue.'" *Olenik v. Lodzinski*, 208 A.3d 704, 718 n.72 (Del. 2019) (emphasis altered) (citation omitted). That standard typically requires proof that the stockholder directly interfered with the challenged transaction (sometimes called "transaction-specific control"). *See, e.g.*, Op. 73 (collecting cases). In some circumstances, a minority stockholder's voting, managerial, and other powers may be so pervasive that the stockholder is found to have actual control over the corporation itself (sometimes called "general control"). *See Lynch*, 638 A.2d at 1114-15; *Cysive*, 836 A.2d at 552. But to find such control, the minority stockholder's actual authority must be so dominant that it overpowers the directors' business judgment and renders the stockholder, "as a practical matter[,] no differently situated than if [it] had majority voting control." *Corwin*, 125 A.3d at 307 n.8 (citation omitted).

Here, the trial court found that Plaintiffs failed to prove Ellison exercised actual control over the board's decision with respect to the Transaction. Op. 54-74. Plaintiffs faced a particularly uphill challenge because their theory "start[ed] from

an overall level of ownership that is relatively low." *In re PNB Holding S'holders Litig.*, 2006 WL 2403999, at *10 (Del. Ch. Aug. 18, 2006). At the time of the Transaction, Ellison owned only 28% of Oracle's voting stock. Op. 10. In the realm of actual control cases, this level of ownership is "not impressive on its own." *In re Rouse Props., Inc.*, 2018 WL 1226015, at *18 (Del. Ch. Mar. 9, 2018); *see, e.g.*, *PNB Holding*, 2006 WL 2403999, at *10 (33.5% ownership is "relatively low"); *In re GGP, Inc. S'holder Litig.*, 2021 WL 2102326, at *20 (Del. Ch. May 25, 2021) (35.3% ownership is "'not impressive'"), *aff'd in part, rev'd in part on other grounds*, 282 A.3d 37 (Del. 2022). And while Plaintiffs contend "Ellison testified that his boardroom authority has remained the same despite fluctuations in his ownership," OB 44, they omit his next sentence—it was because he still has only "one vote on the board." A1319:1876.

Nor did Plaintiffs prove that Ellison exercised managerial supremacy. Ellison's role at the time of the Transaction was Chief Technology Officer, having relinquished the CEO role two years earlier. Op. 7-8. As the court found, the "record does not show that [Ellison] controlled the day-to-day function of Oracle, or dictated the operation of the company to the Board." Op. 57-58. And Ellison "scrupulously avoided" any direct interference with the Transaction itself, by fully recusing himself from its consideration. Op. 59-60, 74.

Given Ellison's relatively low ownership interest and lack of managerial supremacy, the court unsurprisingly found he did not possess the kind of coercive power that would "diminish[] the directors' ability to bring business judgment to bear on the exercise of their duties." Op. 2-3, 55-56. On the contrary, the "evidence presented at trial demonstrated that the Oracle board vigorously debated assumptions and was not afraid to stand opposed to Ellison." Op. 57 (citing A855:27-28; A898:197-98). Indeed, the trial record contains numerous examples of Ellison being overruled by board members, or being convinced to change his views through debate. These include, for example, "the board forc[ing] Ellison to fire a senior member of his team over his strong objection." Op. 57 (citing A1317-18:1871-72). Witnesses also recounted instances when "Ellison was in favor of an idea and after raising it with the board [the idea] was not pursued." Op. 57 n.341 (citing A855:27-28); *see* B3024, B3030; B3842-43:61-65, B3863:143; B4107:24-25. As this Court has recognized, such evidence demonstrates the *absence* of "domination and control." *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 703-04 (Del. 2023).

Similarly, the court found that senior management "gave Ellison's ideas a respectful hearing but did not appear cowed or overawed by him." Op. 57. Management challenged Ellison's ideas and overruled him on several major decisions. *See, e.g.*, A1199:1399-1401; A856-57:32-33; B3464; B3846:75-76; B4067-68:129-30. And even when they did not overrule Ellison, they exercised their

independent judgment in considering his ideas. For example, "when Catz determined that it was not in Oracle's best interest to pursue multi-cloud with Microsoft and shut the project down, it took Ellison in his capacity as CTO a year to convince her to change her mind." Op. 57 (citing A1316:1865-66).

Plaintiffs' failure to demonstrate that Ellison wielded such dominating power distinguishes this case from their lead authority, *Cysive*. OB 43-44. There, the controlling stockholder was an extremely "hands-on" CEO who exercised "day-to-day managerial supremacy" over "all aspects of the company's business." 836 A.2d at 552. He also placed "two of his close family members in executive positions," giving him even greater influence over the "managerial operations of the company." *Id.*; *see Morton's*, 74 A.3d at 665 (stressing that the CEO in *Cysive* "exercised more power than a typical CEO" due to his family members' positions). Furthermore, he effectively controlled a 40% voting block, rendering him the "dominant force" in any stockholder vote. *Cysive*, 836 A.2d at 535, 552 & n.30. The CEO was well-positioned to install a "new slate [of directors] more to his liking without having to attract much, if any, support from public stockholders." *Id.* at 552. Based on this "combination of stock voting power and managerial authority," the court found that the CEO possessed "inherent[ly] coerci[ve]" power sufficient to be deemed a controlling stockholder. *Id.* at 552-53.

The decision in *Cysive* "has been recognized"—including by its author, then-Vice Chancellor Strine—"as perhaps [the Chancery] Court's 'most aggressive finding that a minority blockholder was a controlling stockholder.'" *KKR*, 101 A.3d at 991 (quoting *Morton's*, 74 A.3d at 665). This Court has never expressly endorsed its reasoning. But even assuming that *Cysive*'s finding of control was appropriate on the facts presented there, the facts in this case come nowhere close. As explained above, Plaintiffs did not prove that Ellison possessed the extreme combination of voting and managerial powers found in *Cysive* to create actual control over the corporation. *See supra* at 34-37. Nor did Plaintiffs prove that Ellison controlled the Transaction itself. Op. 59-62, 74. The court below properly concluded that, based on "the evidence presented at trial," Plaintiffs failed to prove Ellison wielded "actual control." Op. 58.

2. Plaintiffs' Reliance On Ellison's "Potential Control" Is Unavailing

Plaintiffs argue that the trial court "erroneously discounted the import" of its own references to "Ellison's '*potential*' to exercise control." OB 42 (quoting Op. 74). The only "import" of those references, however, is to underscore the failure of Plaintiffs' control theory. It is well-settled that "Delaware law requires actual control, not merely the potential to control," before a minority stockholder will be deemed a controller. *Williamson v. Cox Commc'ns, Inc.*, 2006 WL 1586375, at *5 (Del. Ch. June 5, 2006); *see supra* at 34. Even Plaintiffs' own authority stresses that

"[t]he *potential* ability to exercise control is not sufficient." *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *26 (Del. Ch. July 6, 2018) (citation omitted), *aff'd sub nom. Davenport v. Basho Techs. Holdco B, LLC*, 221 A.3d 100 (Del. 2019). Thus, regardless of whether the *potential* for control existed, the court's finding that Ellison did not exercise "*actual* control" ends the matter. Op. 58 (emphasis added).

Plaintiffs' suggestion that *Cysive* says otherwise (OB 42-43) is meritless. The court in *Cysive* observed that, even though the CEO did not assert control by directly "interfer[ing] with the special committee['s]" consideration of the challenged transaction, the CEO possessed general control of the corporation through a "combination of stock voting power and managerial authority that enable[d] him to control the corporation, if he so wishes." 836 A.3d at 552-53. In other words, the court found that the CEO possessed *actual* control (not merely *potential* control) of the corporation as a result of his "potent retributive capacity" and his "day-to-day managerial supremacy." *Id.* Here, by contrast, the court held—repeatedly and unequivocally—that Ellison did *not* possess this type of general control. *See, e.g.*, Op. 5 (Ellison "was not in control of Oracle generally"); *id.* at 57 (Ellison "did not exercise general control"); *id.* at 69 (Ellison "did not exercise control generally in regard to Oracle's operations"); *id.* at 70 (Ellison did not control Oracle's "'business

and affairs in general'"); *id.* at 73-74 (Ellison "neither possessed voting control nor ran the company *de facto*").

Plaintiffs ignore these consistent findings and focus instead on the court's references to Ellison's "potential" to "control" "particular transactions"—which the court connected to Ellison's "'visionary'" leadership at Oracle. Op. 58-59. Being a visionary leader is not equivalent to wielding the kind of inherently coercive power that animates the controlling-minority-stockholder doctrine. *See infra* at 42. But more fundamentally, the court's references to "potential control" simply highlight Plaintiffs' failure to prove what Delaware law requires: Ellison's exercise of "*actual*[] control[]" over "*the transaction at issue*" here. *Olenik*, 208 A.3d at 718 n.72 (first emphasis added) (citation omitted); *see* Op. 59-62.

3. Plaintiffs' Remaining Arguments Lack Merit

Plaintiffs' remaining arguments merely ask this Court to reweigh the evidence and come to a different conclusion. Their arguments are meritless.

First, Plaintiffs claim that "abundant authority support[s] control for high status officers with stock ownership in the vicinity of 20%." OB 43. Plaintiffs' only source for this "abundant" authority is a footnote in *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024), citing cases for the unremarkable point that the absence of "[m]athematical voting control" is "'not always dispositive.'" *Id.* at 498 & n.556. Those cases do *not* suggest that mere 20% ownership "support[s]" a finding of

control. OB 43. Nor does 8 *Del. C.* § 203(c)(4) (cited at OB 43), which provides a statute-specific definition of "control" that is expressly limited to its "use[] in this section only." And while Plaintiffs claim that Ellison's voting block was "indispensable" to the election of "outside directors who sat on the Compensation Committee," OB 44-45, "[n]o amount of mental or mathematical gymnastics can establish controllership by metaphysically stretching [less than] one-third into more than one-half," *GGP*, 2021 WL 2102326, at *21. Indeed, Plaintiffs themselves point out that Oracle's Say-on-Pay vote repeatedly failed, thereby acknowledging that Ellison did *not* control stockholder votes. OB 44 n.8.

Regardless, as *Tornetta* stresses, the stockholder's power over "managerial decisions, decision makers, and the process" plays a far "bigger role" in the analysis than "stock ownership." 310 A.3d at 502; *see id.* at 504 (stressing the "avalanche of evidence" showing that Musk "exercised managerial authority over all aspects of Tesla and often without regard to Board authority"). As explained above, the trial court found no evidence that Ellison wielded such dominating power. *See supra* at 35-36.

Second, Plaintiffs point to Ellison's "status" as a "'visionary leader'" at Oracle. OB 44-46. That argument fails. To begin, Ellison's status had no bearing on the Transaction. As the trial court found, the Transaction was considered, negotiated, and approved by a Special Committee of highly experienced and strong-

willed independent directors, aided by independent advisors, and Ellison fully recused himself from the process. Op. 60. In doing so, Ellison followed this Court's "best practice[s]" guidance for conflicted transactions involving leaders fairly characterized as "vision[ary]." *See, e.g.*, *Tesla*, 298 A.3d at 708-09.

More fundamentally, being a "visionary leader" "does not rationally imply that someone is a controlling stockholder" because it does not "implicate the concerns underlying" the actual control doctrine—that the minority stockholder's power is so great it will *inherently coerce* directors into making decisions against their business judgment. Lawrence A. Hamermesh, Jack B. Jacobs, & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 346 (2022); *see Corwin*, 125 A.3d at 307-08. Furthermore, treating "visionary leadership" as a basis for finding control would produce a perverse result: Director-stockholders whose wisdom and successful track records persuasively inspire confidence in their viewpoints would face greater scrutiny than "nearsighted followers" whose knowledge and experience do not inspire such confidence. Nothing in Delaware law supports that counterintuitive result. *Cf. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1, 25-27 (Del. 2017) (rejecting argument that Michael Dell's controller status could be grounded on his importance as Dell's founder and CEO).

Third, Plaintiffs argue that Ellison "promote[d] the idea of buying NetSuite" and "determine[d] its timing." OB 46. The trial court squarely rejected that theory "[b]ased upon the evidence at trial." Op. 62-64. As the court explained, Ellison, Catz, and Hurd debated whether to purchase NetSuite in 2015—and Ellison *opposed* an acquisition due to potential marketplace confusion (given Fusion's recent product launch) and because NetSuite was too expensive. Op. 62. Almost a year later, before the Oracle board's January 2016 meeting, Hurd and Catz discussed a potential NetSuite acquisition with Ellison, who did not oppose it. Op. 63; A1345:1981-82; A1265:1661-62. By then, the "wind had shifted" in a way that made NetSuite a more attractive target for Oracle—Fusion had matured and "settled on the market," NetSuite had grown, and its trading price had declined due to a sector-wide downturn. Op. 15-16, 63. Thus, the timing of the Transaction was driven by Oracle's interests—not Ellison's.[4]

Fourth, Plaintiffs vaguely reference a call from Goldberg to Ellison on January 27, 2016. OB 46-47. Plaintiffs do not even attempt to explain how this call demonstrates Ellison's control.[5] The trial court found that it did not, and the reason

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[4] Indeed, Ellison would have made significantly more money on his NetSuite shares if Oracle had acquired NetSuite in 2015. *See* A994:582-83; A1201:1407-08; A1340:1962.

[5] This Court should, of course, reject any attempt by Plaintiffs to develop new arguments in their reply brief. *See* Supr. Ct. R. 14(b)(vi)(A)(3), (c)(i); *Thompson v. State*, 192 A.3d 544, 553 n.31 (Del. 2018).

is obvious—the Committee, which actually considered and negotiated the Transaction, did not even know about the call due to Ellison's recusal, and it therefore could not have had any impact on the Committee's decision-making. Op. 65-66. Moreover, the content of the call was entirely benign. Ellison simply advised Goldberg that he was recusing himself on the NetSuite side, that NetSuite would need to decide for itself whether to go forward with the Transaction, and that if acquired, he expected Hurd would retain NetSuite management and run NetSuite as a separate business unit within Oracle—but that any such decision would be up to Hurd. Op. 66; A1309:1836-37. Nothing about this call remotely evinces "an act of control." Op. 66.

Fifth, Plaintiffs contend that Catz lacked independence from Ellison, OB 45, but again fail to explain how this demonstrates Ellison's control over the Transaction. If Plaintiffs are suggesting that Ellison controlled the Transaction through Catz, that is yet another argument the trial court fully considered and soundly rejected. Op. 67-69. As the court found, "the Special Committee, not Catz, ran the negotiation process." Op. 67. And Plaintiffs failed to "produce any persuasive evidence" that Ellison asserted (or even attempted to assert) "control over Catz to control the negotiations or acquisition." Op. 68.

On the contrary, the evidence showed that Catz recommended fierce negotiating tactics to the Committee—tactics that were entirely "incongruent with

the theory that Catz drove the deal as an agent of Ellison." Op. 68-69. Indeed, Catz "was prepared to let the deal die if it was not in Oracle's best interests to pursue." Op. 68. She consistently fought for Oracle to "pay the *lowest* price possible and her advice led to several stalls that jeopardized the transaction." Op. 68-69; B1555-56; B3325-26; A1470:2478. As the court found, these actions "demonstrate loyalty to the company, not Ellison's conflicted interests." Op. 68.

III. THE TRIAL COURT APPLIED THE CORRECT LEGAL ANALYSIS IN EVALUATING PLAINTIFFS' "FRAUD ON THE BOARD" THEORY

A. Question Presented

Whether the trial court erred in formulating the legal test for evaluating Plaintiffs' "fraud on the board" theory. B5262-5272; B5328-5361.

B. Scope Of Review

The formulation of legal principles is reviewed *de novo*. *Tesla*, 298 A.3d at 699.

C. Merits Of Argument

Plaintiffs also claim that Ellison committed "fraud on the [b]oard" by not volunteering his unsolicited opinions about how NetSuite might best be operated within Oracle if acquired. OB 48, 53-54.

Plaintiffs' theory has always been problematic, as it criticizes Ellison for doing exactly what Delaware law has instructed conflicted fiduciaries to do—"totally abstain from participation in the matter," *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983), and provide "targeted input only when asked to do so," *Tesla*, 298 A.3d at 708 (citation omitted). Furthermore, Ellison's opinions about how best to run NetSuite post-closing—greater investment, expansion of product offerings, a continued focus on the SMB market, and international growth—were factors the Committee and its advisors considered in deciding to acquire NetSuite. In essence,

Plaintiffs posit that Ellison defrauded the Committee by not voluntarily disclosing what the Committee already knew—that NetSuite represented a critical investment opportunity for Oracle, precisely because of its unique ability to address the vast and lucrative SMB market segment and generate high-margin, SaaS recurring revenue over the long term. Op. 83-85; *see supra* at 9-15. The trial court considered all of Plaintiffs' evidence and properly concluded that it did not show fraud. Op. 74-100.

On appeal, Plaintiffs attack the court's "formulati[on]" of the standard. OB 48-53. That argument fails. As Plaintiffs acknowledge (OB 49-50), their unorthodox "fraud upon the board" theory is grounded in *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989). There, this Court held that entire fairness review applied to an auction process that was tainted when senior officers provided their favored bidder with vital information and then concealed that fact from the board. *Id.* at 1279-80. The Court's holding rested on (1) the "illicit manipulation of [the] board's deliberative process by self-interested corporate fiduciaries," who engaged in "deliberate concealment of material information"; and (2) the "board's own lack of oversight," which rendered it "torpid, if not supine," and allowed the process to be manipulated. *Id.* "In such a context," the Court explained, "the exacting standards of entire fairness" apply. *Id.* at 1279.

Accordingly, as several Court of Chancery decisions have recognized, "a *Mills* theory warranting entire fairness review" requires the plaintiff to prove the

following elements: (1) the "fiduciary must be materially interested"; (2) the "board [or here the Committee] must be 'inattentive or ineffective' and permit the fiduciary's manipulation"; (3) the "fiduciary must commit deception or manipulation"; (4) the "deception must be material"; and (5) the "deception" must "'taint[] the decision-making'" process. *In re Pattern Energy Grp. Inc. S'holders Litig.*, 2021 WL 1812674, at *33 (Del. Ch. May 6, 2021) (citations omitted). The trial court applied that framework here and found that the alleged non-disclosures did not demonstrate fraud on the Committee. *See* Op. 87-92.

Plaintiffs criticize the court's application of this test, insisting that the court should have relied on *Kahn v. Tremont*, 1996 WL 145452, at *16 (Del. Ch. Mar. 21, 1996), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997), and a two-month-old draft section of the Restatement of Corporate Governance that "paraphras[es]" *Tremont*. OB 49-51. Plaintiffs contend that *Tremont*'s "materiality" analysis sets forth the "operative" test for determining whether entire fairness review applies. *Id.*

That argument misreads *Tremont*, where entire fairness review applied because an undisputed "controlling stockholder" stood on both sides of the transaction, 1996 WL 145452, at *6-8—not because of the court's materiality analysis. Indeed, the court in *Tremont* did not even mention *Mills*, which is supposedly the key precedent underlying Plaintiffs' fraud-on-the-board theory.

Realizing this, Plaintiffs ultimately propose a test that largely overlaps with the test the trial court applied, rendering this entire argument academic. Plaintiffs concede that the fiduciary must be "'interested'" in the transaction; engage in "'misleading and deceptive'" conduct that is "material"; and "'manipulat[e]'" the "'deliberative process[].'" OB 49-50, 52 (citations omitted). Thus, the only point of disagreement appears to be whether a court should also consider the question of board (or here, Committee) "ineffective[ness]." OB 52. But the trial court's decision did not rest on this factor; it rejected Plaintiffs' assertions about Ellison's opinions on post-closing business strategies because Plaintiffs failed to establish that Ellison withheld material information from the Committee—the very element that Plaintiffs propose in their alternative test. Op. 87-92. In any event, Plaintiffs are wrong in insisting that an inattentive board is irrelevant. *Mills* made clear that the board's "lack of oversight" was a critical part of the "context" that triggered entire fairness review. 559 A.2d at 1279.

IV. THE TRIAL COURT PROPERLY FOUND THAT ELLISON'S UNSOLICITED OPINIONS ABOUT HOW BEST TO OPERATE NETSUITE POST-ACQUISITION WERE IMMATERIAL

A. Question Presented

Whether the trial court erred in concluding that Plaintiffs failed to prove Ellison manipulated the Committee by not volunteering his unsolicited opinions about how best to operate NetSuite if acquired. B5330-B5341; *see* B5262-5272; B5328-5361.

B. Scope Of Review

An "issue of materiality of an alleged misstatement or omission … is a mixed question of law and fact, but predominantly a question of fact." *Branson v. Exide Elecs. Corp.*, 645 A.2d 568, 1994 WL 164084, at *2 (Del. 1994). The court's factual finding that Ellison's opinions were not material is reviewed for clear error. *See Lynch*, 638 A.2d at 1114; *Zirn v. VLI Corp*., 681 A.2d 1050, 1055 (Del. 1996).

C. Merits Of Argument

According to Plaintiffs, Ellison had a duty to disclose "material *facts*" and breached that duty by not providing the Committee with his unsolicited *opinions* about how Oracle should operate NetSuite if acquired—which Plaintiffs ominously label Ellison's "undisclosed plan for the operation of NetSuite." OB 54 (emphasis added). This theory of non-disclosure fails several times over.

First, as the trial court noted, Ellison's supposed plan was "not a [*Tremont*] fact that ha[d] to be disclosed"; rather, it was "just an opinion." B5414:15-16. And it was a non-binding opinion at that. Contrary to Plaintiffs' repeated insinuations, Ellison could not (and did not) unilaterally implement a "plan" for operating NetSuite post-closing—that was Hurd's responsibility to decide. A1234:1537-38; A1309:1836-37; A922:294; A1085:944-45. Plaintiffs' suggestion that Ellison committed fraud by respecting his recusal and not volunteering his unsolicited and non-binding opinions about the best way to operate NetSuite post-acquisition is meritless.

Second, the trial court found that Ellison's opinions "would have had no impact on the Special Committee's deliberations and therefore were immaterial." Op. 88; *see id.* at 87-92; *Brehm v. Eisner*, 746 A.2d 244, 259 n.49 (Del. 2000) ("material" "mean[s] relevant and of a magnitude to be important to directors in carrying out their fiduciary duty of care in decisionmaking"). The evidence fully supported that finding. As the court explained, Oracle's "practice in M&A transactions" did not rely on "post-close plans and structuring," which "are not decided until *after* a deal is signed." Op. 88 (emphasis added); A983:536-39, A1023:696; A904:223, A917-18:274-79; A1234:1537-38. Ellison's opinions concerning post-acquisition operations had no bearing on the Committee's pre-acquisition analysis.

Third, there simply was no evidence that Ellison's opinions would have impacted the Committee's decision-making. The Committee *knew* that NetSuite was a growing SaaS company in the huge and largely untapped SMB segment; expected Oracle's "heavy investment" in NetSuite's continued growth in order to unlock the value that NetSuite represented; and understood the opportunity to "utilize Oracle's global scale and reach to accelerate the availability of [NetSuite's] cloud solutions in more industries and in more countries." B2686-88; A1475:2497; A998:598; A1152:1210-11. Oracle management emphasized for the Committee NetSuite's sharpened focus on "[d]eepen[ing] vertical capabilities" as well as the "significant opportunity for [international] expansion" that it represented. B2699, B2715. Moelis emphasized the "strategic imperative" of addressing the "greenfield" SMB market, advised the Committee that Oracle could use its existing scale and infrastructure to expand NetSuite, and explained that both SuiteSuccess and international expansion represented important growth opportunities for Oracle. Op. 86-87; B1874-75, B1886, B1911; A1438-39:2349-52, A1440:2356-57, A1445:2377-78, A1478:2509. The Committee understood that these strategies would require investments—and represented the best pathways for Oracle to realize NetSuite's extraordinary value. *See* A867:74-75, A868:79-80; A1152:1210-11; B4240:73.

Against these facts, Plaintiffs contend that the trial court erred by not considering the materiality of Ellison's post-closing opinions through the "prism of valuation." OB 58. They point to their "valuation expert," who compared Oracle's post-closing first-year operating budget for NetSuite with the incremental model's pre-closing projections, and noted that the former contained lower EBIT expectations. OB 55.

Plaintiffs' argument puts the cart before the horse. While valuation is relevant under entire fairness scrutiny, *see Tesla*, 298 A.3d at 717 & n.253, it was Plaintiffs' burden to show that entire fairness applied in the first place. Their expert's valuation opinions have no bearing on whether Ellison controlled Oracle. Nor does a *post hoc* litigation expert's opinion about valuation have any bearing on whether Ellison failed to disclose material *facts* to the Committee. As the trial court found, the Committee understood that verticalization in the SMB market made sense, would render NetSuite more valuable to Oracle, and would require significant investment. Op. 83-87. The fact that Plaintiffs found a valuation expert (with no SaaS industry expertise) who disagreed with the Committee's judgment does not show clear error.

Moreover, Plaintiffs' valuation argument ignores the court's unchallenged factual finding that post-closing operating budgets fundamentally differed from pre-closing acquisition models in purpose, process, and effect—such that any "seeming incongruence" between them was "unsurprising." Op. 88, 99; *see supra* at 20-22.

Plaintiffs' expert similarly failed to grasp these distinctions. *See* OB 23-25; B4705; A1384:2135-36. Plaintiffs' insistence that Ellison's "undisclosed plan" left the Committee with "unrealistic" projections, OB 57, rests on a fundamentally misguided and thoroughly refuted view of Oracle's acquisition process, analysis, and models.[6]

Plaintiffs also seek to bolster their argument by lodging two attacks on the trial court's factual findings, but they do not come close to showing clear error as to either.

Plaintiffs first challenge the trial court's finding that the Committee was "apprised of the level of competition between NetSuite and Oracle." OB 59 (quoting Op. 98). The evidence credited by the court firmly supports its finding. As explained above, *see supra* at 13-15, the Committee conducted diligence into the "competitive environment" and had access to Oracle's competitive intelligence reports, internal sales team materials, and other information. Op. 86 (quoting B2594); *see, e.g.*, B1244; B1186-1232; B1235; B1255-1301; A1178:1316-17; A1442-43:2364-69. Moelis conducted independent research, briefed the Committee on the "lack of competitors in [the SMB] market," and provided the Committee

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[6] Indeed, while not relevant to the issues before this Court, Plaintiffs' expert's valuation analysis also suffered from numerous other flaws. *See* A1379-81:2117-24, A1384-85:2136-39; B5446-47:144-48 (discussing flaws).

"with analyst reports highlighting the potential competition between … Oracle and NetSuite." Op. 86, 98 (citing A1440:2356-57, A1462:2444-45; B1886-88; B1572-1687); *see* A1707-1833; A1438:2349-50, A1444:2372-74, A1445:2377. The Committee, following Moelis' advice, concluded that acquiring NetSuite would be "'highly beneficial'" to Oracle because it "'could fill a strategic gap'" while alternatives were "'unattractive or not readily or timely available.'" Op. 86-87 (quoting B1463); *see* A1447-48:2384-88; A1139:1160-61. And contrary to Plaintiffs' premise, the trial court properly found that competition between Oracle and NetSuite was *in fact* "margin[al]"—consistent with the understanding Plaintiffs have attributed to the Committee. Op. 81-85; *see supra* at 14.

Plaintiffs also challenge the trial court's finding that, at the time of the Transaction, NetSuite was "in the process of implementing" Ellison's suggestion to focus NetSuite on the SMB market segment.[7] OB 59-60 (quoting Op. 77). Again, the evidence powerfully supports the court's finding. NetSuite's internal documents and public disclosures, as well as testimony from NetSuite executives, all confirmed

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[7] Plaintiffs' brief also ignores that terms like "mid-market," "down-market," and "up-market" meant different things at Oracle and NetSuite—given the very different segments of the SaaS ERP market in which each company operated. Op. 25 n.127. Similarly, Plaintiffs' calculation of "win rate" percentages (OB 12) derives from their artificial focus on a very small dataset, and if anything supports the trial court's finding that competition between Oracle and NetSuite was at most "margin[al]." Op. 81-82 & nn.454, 456.

that, by the time of the Transaction, NetSuite was implementing and "prioriti[zing]" the "strategy of investment in verticals and micro-verticals" in the SMB market through "Project Atlas" (later named SuiteSuccess). Op. 13-14, 83-84 (citing A1697; A1037:752-54; A1079:921, A1081:930-32, A1087:953; A1110:1044-45); *see supra* at 9-11. Documents and presentations given to the Committee showed exactly this. *See* B0956; B0968, B0983; A1697-98; B1088, B1103; B1167-76; B1568-71; B1690; B2686, B2699, B2715; A1081-82:929-32.

All told, overwhelming evidence supports the trial court's rejection of Plaintiffs' fraud-on-the-board theory. Indeed, the Committee members endorsed the post-closing plan for NetSuite without expressing surprise, or suggesting that they had been misled. *See* A898-99:199-201; B3735:108; A1090-93:963-75; B3466-84. And when Plaintiffs outlined their fraud theory for Conrades at trial, he expressly rejected it. A859:44.

CONCLUSION

For the foregoing reasons, the trial court's judgment should be affirmed.

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CERTIFICATE OF SERVICE

I, Richard J. Thomas, Esquire, do hereby certify that on June 18, 2024, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

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