IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE HENNESSY CAPITAL ACQUISITION CORP. IV STOCKHOLDER LITIGATION	No. 245, 2024 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0571-LWW

Public Version Filed
September 3, 2024

APPELLANT'S OPENING BRIEF

P. Bradford deLeeuw (#3569)
DELEEUW LAW LLC
1301 Walnut Green Road
Wilmington, DE 19807
(302) 274-2180
(302) 351-6905 (fax)
brad@deleeuwlaw.com

Counsel for Plaintiff Below-Appellant

OF COUNSEL:

Robert C. Schubert
Willem F. Jonckheer
SCHUBERT JONCKHEER & KOLBE LLP
2001 Union Street, Suite 200
San Francisco, CA 94123
(415) 788-4220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER

GLOSSARY OF TERMS

Canoo	Canoo Inc., a Delaware corporation f/k/a Hennessy Capital Acquisition Corp. IV
SEC Cease and Desist Order	Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-And-Desist Order against respondent Canoo Inc., Release Nos. 33-11217 and 34-98052, File Number: 3-21544
Complaint	Plaintiff's Supplemented Amended Class Action Complaint
Defendants	Daniel J. Hennessy, Greg Ethridge, Nicholas A. Petruska, Bradley Bell, Richard Burns, Juan Carlos Mas, Gretchen W. McClain, James F. O'Neill III, Peter Shea, Hennessy Capital Partners IV LLC, and Hennessy Capital LLC
Hennessy	Hennessy Capital Acquisition Corp. IV, a Delaware SPAC
Legacy Canoo	Canoo Holdings Ltd., a private Cayman Islands company
Merger	The December 21, 2020 merger transaction in which Hennessy combined with Legacy Canoo surviving as a wholly-owned subsidiary of Hennessy
Plaintiff	Paul L. White, Jr.
Proxy	December 4, 2020 proxy statement distributed to Hennessy stockholders in connection with the Merger
Op.	May 31, 2024 Opinion granting Motion to Dismiss
SEC	U.S. Securities and Exchange Commission
SPAC	Special Purpose Acquisition Company
Sponsor	Hennessy Capital Partners IV LLC
Motion to Supplement	Plaintiff's Motion to Supplement Verified Amended Class Action Complaint filed on August 22, 2023
Supplementation Order	January 31, 2024 Order granting, in part, the Motion to Supplement

NATURE OF THE PROCEEDINGS

Plaintiff respectfully appeals the trial court's dismissal under Rule 12(b)(6) of a class action complaint concerning a merger subject to entire fairness review.

Plaintiff and other Hennessy stockholders entrusted over $300 million to fiduciaries of a Delaware SPAC who represented that they would "seek to acquire one or more established companies with consistent historical financial performance," not a start-up devoid of revenue. Facing an imminent deadline, the fiduciaries issued a Proxy to solicit stockholder approval to combine the SPAC with an electric vehicle company with a "Unique Multi-Pronged Go-to-Market Strategy," projecting $120 million in revenue in the first year. In reality, the $120 million in revenue was a complete fabrication exposed by the SEC in an enforcement action. ***There was zero actual or potential revenue and the SEC found in a cease and desist order that the Proxy was false and misleading.*** Furthermore, at the same time Hennessy stockholders were being solicited to invest, the target company was secretly working with McKinsey & Co. to completely redo the purportedly unique and resilient business model portrayed in the Proxy from the ground up in a project aptly titled "Building a successful business model." Hennessy stockholders were affirmatively misled by the Proxy and duped into investing in the target company rather than exercising their right to redeem their shares for $10.00 a share plus interest, and have lost 99% of the value of their investments since the disastrous transaction was consummated.[1] Despite this fiasco, the fiduciaries rewarded themselves with at least $68 million worth of incentives by persuading investors to approve the Merger on false pretenses. Had the transaction deadline passed without a completed merger, investors would have received their money back and the conflicted fiduciaries would have received nothing.

Though Defendants conceded and the trial court held that the Merger was subject to entire fairness scrutiny, the trial court ignored abundant allegations of unfairness and dismissed the case at the pleading stage under Rule 12(b)(6) for failure to state a claim. In so doing, the trial court weighed fragments of evidence and adopted Defendants' version of events, concluding that the fiduciaries could not conceivably have known that the revenue projections were a sham, nor that the entire business model of the target company was under strategic review to find a viable path forward. By drawing several inferences *against* the Plaintiff, this case was dismissed before discovery into whether the fiduciaries had done anything at

[1] The trial court determined that "[t]oday, Canoo stock trades around $2.46 per share" (Op. 17 n.84) but failed to take into account a 1-for-23 reverse stock split the company effectuated on March 8, 2024 to avoid delisting. *See, e.g.*, https://electrek.co/2024/03/06/canoo-goev-reverse-stock-split-price-new-low/. The split-adjusted price is less than 10 cents per share.

all to verify the crux of the deal: the claim of a unique business plan expected to earn $120 million of immediate revenue in year one, with another $250 million in year two.

The issue on appeal is whether the trial court erred in applying the incorrect pleading standard and drawing several adverse inferences against the Plaintiff in a case where the SEC exposed a fraud and the CEO confessed to deceiving investors. The appropriate inference on a Rule 12(b)(6) motion is that the fiduciaries fumbled their duties by failing to verify the $120 million of forecasted revenues, along with other material facts concerning the company that needed to be disclosed, and they did so in a self-dealing transaction to obtain shareholder approval and limit redemptions so they could reap at least $68 million in profit for themselves. The trial court concluded without real evidence that the fiduciaries could not possibly have known of the revenue fraud or business reconfiguration under any set of facts subject to proof. Such a pleading-stage inference was legal error because the Plaintiff is entitled to receive the benefit of all reasonable inferences.

Discovery in this case will ascertain whether the merger was entirely fair to investors, as that is the conceded legal standard. Shareholders approved the transaction and decided to invest in a company with an expectation of $120 million in revenue in the first year and a unique business plan going forward, not a start-up with zero prospects for revenue and an unworkable business plan that was being scrapped. The fiduciaries claimed that they performed extensive merger due diligence before seeking shareholder approval. If or how they missed the revenue fraud is unknown at this point. But the structural incentives strongly point to fiduciaries looking the other way, or perhaps even blessing the fraud. Both scenarios are reasonably conceivable. The inferences must be drawn in Plaintiff's favor on a Rule 12(b)(6) motion.

The trial court expressed policy concerns about strike suits, but this case presents compelling allegations of serious fraud and fiduciary self-dealing. Under Delaware's notice pleading standard, combined with the conceded lack of good-faith business judgment protection here, the allegations in this complaint far exceed the minimal threshold to proceed to discovery.

SUMMARY OF ARGUMENT

1. The conceded standard of review is entire fairness. Therefore, the burden of proof shifted to Defendants to show that the Merger was entirely fair in terms of process and price. The trial court did not correctly analyze the Rule 12(b)(6) motion under this burden-shifting framework.

2. The trial court misapplied the applicable pleading standard by failing to treat Plaintiff's well-pled allegations as true and to afford Plaintiff all reasonable inferences. The trial court erred in deciding at the pleading stage that Defendants could not possibly have known, under any set of facts, that Legacy Canoo's business had zero prospects for generating near term revenue and was undergoing drastic changes. Further, on a Rule 12(b)(6) motion, the trial court should not have credited the Defendants' suggested timeline of events instead of Plaintiff's allegations.

3. Alternatively, the trial court misinterpreted and misapplied Ct. Ch. R. 15(d) in denying, in part, Plaintiff's motion to supplement his amended complaint. The trial court compounded this error by dismissing the complaint with prejudice, without addressing Plaintiff's argument that such dismissal without leave to amend would not be just under the circumstances.

STATEMENT OF FACTS[2]

Hennessy

Hennessy was a SPAC or "blank check company" formed as a Delaware corporation in August 2018 by Daniel Hennessy. Hennessy was Daniel Hennessy's fourth SPAC vehicle, and Hennessy's registration statement lauded him as one of the most experienced and longest tenured in the SPAC arena. ¶¶2, 5, 67.

Hennessy was controlled by Hennessy Capital Partners IV LLC ("Sponsor") and a board of directors consisting of Daniel Hennessy and seven others he personally selected (together, the "Director Defendants"). ¶¶6, 67.[3] At least four of those directors had deep financial and personal ties to Daniel Hennessy through their involvement in Daniel Hennessy's previous SPAC entities. ¶¶6, 39-46, 158-59. Additionally, each director Daniel Hennessy selected had an ownership interest in Sponsor, and received a substantial allocation of Hennessy's highly lucrative founder shares from Sponsor, tightly linking each Hennessy director's

---

[2] "¶__" refers to paragraphs in the Complaint (A501-589).

[3] Sponsor was ultimately controlled by Daniel Hennessy through his management and control of Hennessy Capital LLC ("Hennessy Capital"). ¶5.

personal interests with those of Daniel Hennessy. ¶¶7, 68, 71.[4] In or about October 2018, Sponsor transferred 75,000 founder shares to each of defendants Bell, Burns, Mas, McClain, O'Neill, and Shea, 225,000 founder shares to director Defendant Ethridge, and 300,000 founder shares to defendant Petruska.[5] The balance of the founder shares was retained by Sponsor and deemed beneficially owned by Daniel Hennessy personally, as Sponsor's controller. ¶71.

Under its charter, Hennessy had an 18-month window from going public within which to consummate a merger, or until September 5, 2020. ¶8. If Hennessy failed to complete a deal during that window, its charter required that it liquidate and return its public stockholders' funds ($10 per share), with interest. *Id*. A liquidation would have rendered the Sponsor's investment, and all of the founder shares, worthless. ¶¶8, 76. Thus Hennessy's structure created incentives for Defendants to get a deal done—regardless of its value—because even in a value-decreasing deal for common investors (*i.e.*, where the post-transaction company's stock trades at less than $10 per share), completion of the deal would yield

[4] At Hennessy's formation, Sponsor purchased an aggregate of 7,187,500 founder shares of Hennessy for an aggregate purchase price of $25,000, or approximately $0.003 per share, with the expectation that such <u>founder shares would represent 20% of the outstanding shares of Hennessy</u>. ¶69.

[5] Defendant Ethridge also stood to receive a $500,000 cash payment upon successful completion of an initial business combination. ¶40.

windfalls to them as holders of the SPAC's founder shares, issued at a nominal cost of $0.003 per share. ¶¶8, 64, 96-97, 156.

In its IPO registration statement, Hennessy stated that: ***"[w]e will seek to acquire one or more established companies with consistent historical financial performance***. We will typically focus on companies with ***a history of strong operating and financial results*** and strong fundamentals. ***We do not intend to acquire start-up companies*** or companies with recurring negative free cash flow." ¶77 (emphasis added).

<u>The Bait and Switch Merger</u>

A. <u>The Bait</u>

On August 18, 2020, less than a month before the September 5, 2020 liquidation deadline, Hennessy announced that it had entered into a merger agreement with Legacy Canoo, an electric vehicle start-up founded in January 2018 as a private company. ¶¶81, 85. A joint investor presentation made that day touted Legacy Canoo's three-pronged business strategy: (1) "engineering services," or providing contract engineering services to third party original equipment manufacturers (OEMs) such as traditional automobile companies; (2) the development of a business-to-business (B2B) vehicle for sale to last-mile commercial delivery companies; and (3) the development of a business-toconsumer (B2C) lifestyle vehicle available by monthly subscription. ¶¶87-88. On August 27, 2020, Hennessy's stockholders approved and adopted an amendment to its charter to extend the date by which it had to consummate a business combination, from September 5, 2020 to December 31, 2020. ¶12.

A December 4, 2020 proxy statement (the "Proxy") defendants caused Hennessy to disseminate to its stockholders urged them to vote in favor of the Merger. ¶¶98-103. Like the August 18, 2020 joint investor presentation, the Proxy touted Legacy Canoo's "Unique Multi-Pronged Go-to-Market Strategy" and specifically highlighted Legacy Canoo's engineering services business as "***a unique opportunity to generate immediate revenues in advance of the offering of our first vehicles and our current pipeline in this area is supportive of a projected $120 million of revenue in 2021***." ¶99. It also emphasized Legacy Canoo's subscription model, pursuant to which customers would pay monthly charges rather than purchase the vehicle outright, as "considerably more profitable and resilient" than direct sales. ¶100. The Proxy glowingly stated:

> ***Canoo's engineering and technology services business includes consulting and contract engineering work that is in high demand*** due to the team's unique experience and technical capabilities. […] Canoo has already received significant interest in its skateboard technology and the Canoo team's expertise in platform engineering, powertrains and vehicle design, as is exemplified by the announcement of an agreement between Canoo and Hyundai Motor

Group for the co-development of a future EV platform based on Canoo's modular skateboard technology. ***In addition to providing external commercial validation of Canoo's technical capabilities, these contract engagements establish an attractive strategic pipeline for future business opportunities and de-risk the overall business model***.

* * *

This business offers a unique opportunity to generate immediate revenues in advance of the offering of our first vehicles and our current pipeline in this area is supportive of a projected $120 million of revenue in 2021. We expect our engineering and technology services business to offer significant growth potential in the future as projected demand grows for EVs and their related technologies, namely in platform/skateboard development, powertrain, battery technologies and power electronics, among other areas, in which we have substantial expertise.

* * *

Contract Engineering services offer a ***separate revenue stream*** and validate the quality of our technology[.]

¶99 (emphasis added).

The Proxy also contained the following "Projected Financial Metrics" which included $120 million of projected revenue for 2021 and $250 million of projected revenue for 2022, in each case attributed ***solely*** to the company's engineering services business:

Projected Financial Metrics:

(in millions)	Forecast Year Ended December 31, 2021E	2022E	2023E	2024E	2025E	2026E
Subscription Revenue[1]	$ —	$ 79	$ 265	$ 630	$ 1,191	$ 1,927
Engineering & B2B Revenue[2]	$ 120	$ 250	$ 575	$ 800	$ 1,150	$ 2,200
Total Revenue	$ 120	$ 329	$ 840	$ 1,430	$ 2,341	$ 4,127
Subscription Gross Profit[3]	$ —	$ 30	$ 108	$ 256	$ 468	$ 730
Engineering & B2B Gross Profit[2]	$ 25	$ 95	$ 89	$ 172	$ 239	$ 449
Total Gross Profit[3]	$ 25	$ 125	$ 197	$ 429	$ 707	$ 1,178
EBITDA[3]	$ (349)	$ (245)	$ (69)	$ 188	$ 522	$ 964
EBIT	$ (372)	$ (287)	$ (118)	$ 127	$ 461	$ 903
Operating Capital expenditures[4]	$ 128	$ 175	$ 56	$ 91	$ 16	$ 16

(1) Includes subscriptions for the Lifestyle Vehicle and the Sport Vehicle.
(2) Includes sales of the Delivery Vehicle.
(3) Includes projected fleet vehicle depreciation in cost of goods sold.
(4) Excludes vehicle fleet capital expenditures.

¶101.

The transaction came down to the wire with an extended liquidation date of December 31, 2020. ¶12. To protect their interests and control the outcome, Defendants did not obtain a third-party fairness opinion on the transaction, claiming to have performed their own "significant due diligence." ¶¶36, 102-04. *See also* ¶¶167-68 (detailing the due diligence supposedly undertaken, including "extensive meetings and calls with Canoo's management team and its representatives regarding [Legacy] Canoo's current and planned operations, . . . go-to-market strategy; subscription-based revenue assumptions, projections and strategy . . . and Canoo's financial prospects," "***extensive third-party due diligence***

consisting of commercial due diligence with Canoo's current and planned commercial partners," and "***review of [Legacy] Canoo's . . . material contracts***") (emphasis added).

The Merger was approved by a stockholder vote with only minimal redemptions on December 21, 2020. ¶¶95, 105.

B. <u>The Switch</u>

Just three months later, on its very first earnings call on March 29, 2021, Canoo (as Hennessy had been renamed) announced that its engineering services business—billed in the Proxy as a "unique opportunity to generate immediate revenues in advance of the offering of our first vehicles" and expected to produce Canoo's ***only*** near-term revenue ($120 million in 2021 and $250 million in 2022) while it developed and rolled out its electric vehicle offerings over time—would be "deemphasized," as would Canoo's pursuit of its vaunted subscription-based revenue model. ¶¶17, 109-11.

CEO Tony Aquila confessed: "I think that [Legacy Canoo management] were [] maybe a little more aggressive than I would be in their statements. ... [T]hey weren't at our standard of representation to the public market. […] You have to be careful with the [public company] statements you make. So again, I think it was a little premature[.]" ¶116.

With two of the three pillars of Canoo's business rationale gone or severely curtailed, one analyst admonished Aquila that these "significant surprises" were "not ideal after a SPAC IPO process." ¶115. Aquila conceded that investors had previously been shown a "different model" and stated: "Fully understand your perspective. […] I wanted to get ahead of this and explain to you how this really is going to work and how to build a profitable company." ¶¶114-15.

Upon these revelations, Canoo's stock price instantly plummeted more than 21% to below the $10 redemption price, and the SEC's Division of Enforcement swiftly initiated an investigation. ¶¶144, 161-62.

<u>The Truth is Revealed</u>

Plaintiff's investigation, including review of documents obtained pursuant to 8 *Del. C.* §220, together with the SEC's investigation (discussed further below), revealed, *inter alia,* that:

(1) Legacy Canoo did ***not*** have: a "Unique Multi-Pronged Go-to-Market Strategy." Internal Canoo documents obtained by Plaintiff and bolstered by statements by Tony Aquila, Canoo's CEO (and the former executive chairman of Legacy Canoo), demonstrate that the Company was working with McKinsey & Co. in the months leading up to the Proxy to develop a workable business model from the ground up in a project titled "Building a successful business model."

McKinsey had already completed the first two phases of the project, including an overall evaluation of the prior business model and identifying the "most attractive segments to focus on." McKinsey determined that the subscription model was based on unrealistic economic assumptions and that the "most attractive segments to focus on" did <u>not</u> include engineering services – the only source of the $120 million (2021) and $250 million (2022) in revenue touted in the Proxy. *See* ¶¶17-26, 34, 36, 108-40, 176-77, 181; and

(2) Legacy Canoo did ***not*** have: a "separate revenue stream," "a unique opportunity to generate immediate revenues in advance of the offering of [its] first vehicles", nor a "pipeline in this area [engineering services] supportive of a projected $120 million of revenue in 2021" (and $250 million of revenue in 2022). The SEC's investigation would later reveal that not only did Legacy Canoo have ***zero*** actual engineering services contracts but that the revenue projections in the Proxy were based on ***only two potential projects*** which were dead months

before the Proxy was issued, and the company had no other potential projects capable of generating near term revenue. *See* ¶¶27-30, 35, 144-53.[6]

The SEC Enforcement Action

On August 4, 2023, the SEC Cease and Desist Order against Canoo was announced.[7] The SEC also filed a Complaint and Jury Demand against Legacy Canoo executives Ulrich Kranz and Paul Balciunas in the United States District Court for the Central District of California ("SEC Complaint") (taken together, the "Enforcement Action").[8] ¶¶27, 145.

Following its investigation, the SEC determined that numerous pre-Merger SEC filings by both Legacy Canoo and Hennessy, including the Proxy, violated federal securities laws. Both the SEC Cease and Desist Order and SEC Complaint assert that the Proxy contained material misrepresentations, specifically regarding fiscal year 2021 and 2022 revenues projected to be earned from engineering services projects. *See, e.g.*, SEC Cease and Desist Order ¶1:

[6] Plaintiff asked the trial court to judicially notice the fact, made evident from Canoo's subsequent SEC filings, that the Company never reported even a single dollar of revenue from engineering services after July 2020. The trial court instead accepted the demonstrably false explanation Defendants proffered, which was that Plaintiff's argument misapplied GAAP accounting principles. Op. 36 n.162.

[7] The SEC Cease and Desist Order (a term defined in the Glossary *supra*) was filed as Exhibit A to the Complaint (A591-99).

[8] The SEC Complaint was filed as Exhibit B to the Complaint (A600-19).

> Specifically, Canoo—which generated only $2.6 million of revenue in 2020—stated that its pipeline of engineering services projects would generate $120 million of revenue in 2021 and $250 million in 2022 without having a reasonable basis for those projected amounts. In July 2020, Canoo's internal "pipeline" identified two potential projects as the entire basis of the 2021 revenue projection, as well as the basis of over 70% of its 2022 revenue projection. By August 2020, however, both potential projects were paused or considered unviable, and no other potential projects were likely to generate near-term engineering services-related revenue. Canoo nevertheless continued to include these revenue projections in its submissions and filings with the Commission until March 2021.

See also id. at ¶11 ("[B]y mid-August 2020, discussions with [third-party companies] indicated that the [contract engineering] projects were unlikely to produce revenue in 2021 and 2022."); *id*. at ¶15 ("On December 14, 2020, Canoo held an internal Budget Review meeting, the purpose of which was to perform budgeting work for the following year and plan out cash burn. The slide deck attached to the meeting summary stated that Canoo would have '$0M expected revenue during 2021.'"); *id*. at ¶20 (noting "the fact that discussion and negot[i]ations with any potential engineering services partners had effectively ended by early December 2020").

The SEC found that the projected contract engineering revenues were wholly unsupported and contrary to information readily at hand. It alleged fraud—not merely "contradictions between Legacy Canoo's disclosed revenue projections and setbacks affecting its engineering services business," as the trial court charitably characterized these allegations in the kindest light to Defendants. Op. 37-38.

Neither the SEC Complaint nor the SEC Cease and Desist Order specifically addressed what Hennessy's directors were doing during the fraud. The trial court seized upon one section heading in the SEC Cease and Desist Order stating: "Canoo Concealed Material Information from the SPAC Company and Misled Investors Regarding Potential Engineering Services Projects." Op. 39. However, the single paragraph beneath that section heading neither mentions Hennessy's directors nor describes any active concealment from them, stating only that "[Legacy] Canoo did not communicate the negative engineering updates or their associated negative impact on 2021 and 2022 projected revenue to [Hennessy]." SEC Cease and Desist Order ¶21 (A596). Moreover, the SEC Cease and Desist Order is based on an "Offer of Settlement" by Canoo and thus may not present a complete picture of what took place. *See* SEC Cease and Desist Order, Section II (A592).

This Litigation

Plaintiff filed his amended complaint on December 14, 2022. Defendants moved to dismiss the amended complaint on January 25, 2023 and briefing of the motion to dismiss was completed on March 14, 2023. Oral argument was conducted on May 16, 2023.

On August 4, 2023, 80 days after oral argument, the SEC announced the Enforcement Action. Plaintiff filed a Request for Judicial Notice on August 11, 2023. A239-82. After the Defendants took the position that the trial court could not judicially notice the contents nor the findings stated in the Enforcement Action, Plaintiff filed a Motion to Supplement on August 22, 2023. A283-92. After briefing, the Court entered the Supplementation Order granting, in part, the Motion to Supplement on January 31, 2024. The Supplementation Order instructed the parties to "each file a supplemental submission…addressing whether (and how) the new allegations affect arguments made in the motion to dismiss briefing (if at all)." Plaintiff filed the Complaint on February 7, 2024. The parties filed their supplemental submissions on February 27, 2024. On May 31, 2024, the trial court issued the Opinion granting Defendants' motion to dismiss pursuant to Court of Chancery Rule 12(b)(6) and dismissing the Complaint with prejudice.

ARGUMENT

I. THE COURT ERRED BY NOT SHIFTING THE BURDEN TO DEFENDANTS TO PROVE THAT THE MERGER WAS ENTIRELY FAIR

A. Question Presented

Whether the trial court erred in dismissing Plaintiff's claims where Plaintiff alleged ample facts from which it is at least reasonably conceivable that the Merger was not entirely fair to Hennessy stockholders. This issue was preserved below in Plaintiff's opposition brief to the Motion to Dismiss, at oral argument, in Plaintiff's Request for Judicial Notice, in Plaintiff's briefs in support of the Motion to Supplement, and in Plaintiff's Supplemental Submission in Opposition to Motion to Dismiss. A143-46; A194-98; A244-48; A290; A497; A622-24.

B. Scope of Review

This Court reviews trial court rulings granting motions to dismiss *de novo*. *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

C. Merits of the Argument

Defendants conceded and the trial court held that "[t]he entire fairness standard applies to plaintiff's breach of fiduciary duty claims." Op. 26. Thus, the burden should have been shifted to Defendants to prove that the Merger was entirely fair. *Salladay v. Lev*, 2020 WL 954032, at *8 (Del. Ch. Feb. 27, 2020) ("Where entire fairness is the standard of review, and where, as here, a plaintiff alleges facts making it reasonably conceivable that the transaction was not entirely fair to stockholders, the granting of a motion to dismiss is inappropriate, because the burden is on the defendants to develop facts demonstrating entire fairness.") (citations omitted). Given the burden shift, at the pleading stage Plaintiff needed only to clear "the low hurdle of pleading sufficient facts to make it [reasonably conceivable] that the price and process of the [] transaction were not entirely fair." *Knight v. Miller*, 2022 WL 1233370, at *1 (Del. Ch. Apr. 27, 2022).[9] *See also id.* at *10 (plaintiff needed only to plead "facts . . . sufficient to raise a reasonably conceivable inference of an unfair transaction at the plaintiff-friendly pleading stage."); *Salladay,* 2020 WL 954032, at *1 ("It is nearly as axiomatic that, where entire fairness is the standard of review, a motion to dismiss is rarely granted, because review under entire fairness requires a record to be meaningful."); *Hamilton P'rs, L.P. v. Highland Capital Mgmt., L.P.*, 2014 WL 1813340, at *12 (Del. Ch. May 7, 2014) ("The possibility that the entire fairness standard of review may apply tends to preclude the Court from granting a motion to dismiss under

[9] *See id*. at *1 n.2 (clarifying that though the term "plausible" was used, the Court meant "reasonably conceivable").

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.") (emphasis added); *Knight,* 2022 WL 1233370, at *9 (where entire fairness applies, dismissal is only appropriate at the pleading stage "where plaintiffs fail to allege ***any*** evidence of unfair process or price") (emphasis added). *See also Stein v. Blankfein*, 2019 WL 2323790, at *8 (Del. Ch. May 31, 2019) ("To my mind, [Plaintiff's allegations] raise[] at least an inference of unfair transactions. Under entire fairness review, it is the Defendants' burden to rebut these allegations."); *Klein v. H.I.G. Cap., L.L.C.*, 2018 WL 6719717, at *16 (Del. Ch. Dec. 19, 2018) (controller could not "show, conclusively, that the challenged transaction was entirely fair based solely on the allegations of the complaint and the documents integral to it . . . given numerous facts alleged in the Complaint that raise litigable issues concerning the fairness of [transactions at issue]"); *Sciabacucchi v. Liberty Broadband Corp.*, 2018 WL 3599997, at *15 (Del. Ch. July 26, 2018) (court's review of board's decision for entire fairness "typically precludes dismissal of a complaint under Rule 12(b)(6)"); *In re CBS Corp. S'holder Class Action & Deriv. Litig.*, 2021 WL 268779, at *46 (Del. Ch. Jan. 27, 2021) (noting that "overcoming entire fairness is typically a Sisyphean task for defendants at the pleading stage, where the court must accept all of Plaintiffs' well-pled facts as true and draw every reasonable inference in their favor").

Here, well-pled factual allegations indicative of unfairness are manifest: The Complaint specifically alleges that Hennessy stockholders were told that Legacy Canoo's engineering services business offered "a unique opportunity to generate ***immediate revenues*** in advance of the offering of our first vehicles and our current pipeline in this area is supportive of a projected $120 million of revenue in 2021 and furnished a Proxy containing financial projections of hundreds of millions of dollars of near-term revenues that lacked any legitimate basis. *See, e.g.*, ¶¶14, 28-30, 35, 89, 99, 101, 144-49. These allegations are not conclusory. They are based on the SEC Enforcement Action and Plaintiff's pre-suit investigation. In addition, the very structure of the transaction allowed the Defendants to obtain at least $68 million at the expense of Hennessy stockholders even if Legacy Canoo was worthless. ¶¶8-10, 96-97, 157.[10] Taken as true, these allegations clearly allege a lack of entire fairness.

Given that Plaintiff alleges concrete facts, supported by the SEC Enforcement Action, which demonstrate that the Merger was unfair to Hennessy stockholders, this case is entirely different from the few outlier decisions the trial court cited in which plaintiffs failed to allege, or alleged in a wholly conclusory manner, that a transaction was unfair. *See, e.g., Monroe County Employees' Retire. Sys. v. Carlson*, 2010 WL 2376890, at *2 (Del. Ch. June 7, 2010) (Op. 23 n.110, 24 n.112, 27 n.126 and 30 n.130) (plaintiff incorrectly argued "that to survive a motion to dismiss the complaint need only allege that a transaction between the controlling shareholder and the company exists" and asserted "*no* factual allegations geared towards proving that the [transactions in question] were executed at an unfair price"); *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *6 (Del. Ch. Apr. 21, 1995) (Op. 23 n.110&111, 24 n.113, 27 n.126, 40 n.177) ("In this instance plaintiff has simply alleged that the transaction

[10] Plaintiff's allegations of unfairness plainly do not present a claim "premised solely on [SPAC] conflicts", nor an overpayment claim, as the trial court alternatively suggested (Op. 8, n.107). The allegations are that Hennessy's conflicted fiduciaries "failed, disloyally, to disclose information necessary for [stockholders] to knowledgeably exercise their redemption rights." *Delman v. GigAcquisitions3, LLC*, 288 A.3d 692, 723 (Del. Ch. 2023) (quoting *In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784 (Del. Ch. 2022)).

was a self-dealing one and, in conclusionary fashion, that it was ill-informed, coercive, grossly unfair, etc. This is insufficient to state a claim.").[11] Because the Complaint here details material fraud in the Proxy used to solicit stockholder approval of the Merger, based in part on the SEC Enforcement Action, and presents the fraudulent process and self-dealing structure of the Merger, these cases actually weigh *against* dismissal. *See Ravenswood Inv. Co., L.P. v. Winmill*, 2011 WL 2176478, at *4 (Del. Ch. May 31, 2011) (observing that plaintiff merely had to allege "facts ***that suggest the absence of fairness***" at the pleading stage) (emphasis added).

As the trial court itself stated the standard in *Newbold v. McCaw*, No. 2022-0439-LWW, at 25 (Del. Ch. Jul. 21, 2023) (TRANSCRIPT), "[g]iven the application of entire fairness, at the pleading stage, the plaintiff need only 'allege ***some fact that tends to show the transaction was not fair***' to survive the motion to

---

[11] The trial court's citation of *HUMC Holdco, LLC v. MPT of Hoboken TRS, LLC*, 2022 WL 3010640 (Del. Ch. July 29, 2022) (Op. 24 n.112) is inaccurate because the Chancellor did <u>not</u> dismiss an entire fairness claim in that case. A party opposing dismissal of counterclaims had sought to distinguish *Carlson* on the basis that *Carlson* involved entire fairness claims. *See id.* at *21. But the Chancellor observed that "the entire fairness standard of review does not ***raise*** the pleading standard required by Rule 8(a) or Rule 12(b)(6)." *Ibid* (emphasis added).

dismiss." (emphasis added).[12] Here, the Complaint's well-founded allegation that the Proxy contained utterly baseless revenue projections of $120 million for 2021 and $250 million for 2022 is a powerful fact tending to show that the Merger was unfair. *See Delman*, 288 A.3d at 727 ("The plaintiff has sufficiently pleaded that the Proxy contained material misstatements and omitted material, reasonably available information. I therefore cannot conclude that the transaction was the product of fair dealing."). This alone compels reversal.

[12] In *Newbold*, the financial projections disclosed in the proxy, "did not take into account the prospect of launching 500 kg rockets by 2023." No. 2022-0439-LWW, Tr. at 27. Here, the revenue projections in the Proxy were based almost entirely on two hypothetical deals. "By August 2020, however, both potential projects were paused or considered unviable, and no other potential projects were likely to generate near-term engineering services-related revenue." ¶¶29-30, 146-49, Ex. A.

II. THE COMPLAINT PLEADS A REASONABLY CONCEIVABLE BREACH OF FIDUCIARY DUTIES

A. Question Presented

Whether the trial court applied the reasonable conceivability pleading standard in ruling on Defendants' Rule 12(b)(6) motion to dismiss, accepted the well-pled allegations as true, and accorded Plaintiff all reasonable inferences. This issue was preserved below in Plaintiff's opposition brief to the Motion to Dismiss, at oral argument, in Plaintiff's Request for Judicial Notice, in Plaintiff's briefs in support of the Motion to Supplement, and in Plaintiff's Supplemental Submission in Opposition to Motion to Dismiss. (A146-61, A245-48, A497, A621-634).

B. Scope of Review

This Court reviews trial court rulings granting motions to dismiss *de novo*. *Central Mortgage*, 27 A.3d at 535.

C. Merits of the Argument

The trial court held that "[t]he entire fairness standard applies to [ ] [P]laintiff's breach of fiduciary duty claims" but that Plaintiff failed to plead a reasonably conceivable claim. In particular, the trial court found that Plaintiff did not sufficiently allege that Hennessy's conflicted fiduciaries failed to disclose "concrete facts" about Legacy Canoo's prospects that were either known or knowable by directors and officers acting consistent with their fiduciary duties and that would have been material to stockholders deciding whether to redeem their shares or invest in Legacy Canoo. Op. 32-33. This was error.

> The pleading standards governing the motion to dismiss stage of a proceeding in Delaware are minimal. When considering a defendant's motion to dismiss, a trial court should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.

Central Mortgage, 27 A.3d at 536.

The trial court concluded, at the pleading stage, that Defendants could not conceivably have known, under any set of facts susceptible of proof, that Legacy Canoo had zero *actual or potential* deals capable of generating near term revenue, and therefore had zero expectation of revenue—contrary to the $120 million and $250 million in revenues the Proxy forecast for years 1 and 2, respectively. The trial court similarly concluded that Defendants could not conceivably have known, under any set of facts susceptible of proof, that Legacy Canoo's vaunted business model was being scrapped. Reaching such conclusions required inferences favoring the Defendants, rejecting the allegations in the Complaint and cherry-picking from a meager evidentiary record.

1. The trial court misapplied the pleading standard.

The "reasonable conceivability" standard asks whether there is a "possibility" of recovery. *Cent. Mortg.*, 27 A.3d at 537 & n.13. But rather than asking whether Plaintiff's Complaint stated a claim that is provable under any reasonably conceivable set of circumstances, the trial court held the Complaint to a much higher standard. *Id*. at 538. To give an example, the Complaint alleges the following:

> The SEC's investigation revealed the utter falsity of one of [Hennessy]'s primary selling points in the proxy statement: that Legacy Canoo's contract engineering business was capable of generating, and was expected to generate, significant revenues ***immediately*** (including $120 million in 2021 alone) while it ramped up development and production of its own vehicle offerings. In reality, Legacy Canoo had ***zero*** viable contract engineering projects expected to generate revenue in 2021. According to the SEC, based on its investigation, these facts were plainly reflected in Legacy Canoo's records and internal projections prior to the Merger.

¶30 (emphasis in original). *See also* ¶¶28-29, 35, 99, 101, 146-49. These are non-conclusory allegations based upon detailed findings by the SEC in an Enforcement Action for violations of the federal securities laws. It is reasonably conceivable that were Plaintiff to prove these allegations, recovery would be possible. The trial court erred in finding that the Defendants could not possibly know about these negative facts, despite the absence of an evidentiary record of what the Defendants investigated or discussed prior to the Merger.

2. The trial court denied Plaintiff reasonable inferences and instead accepted competing inferences in Defendants' favor.

The trial court denied Plaintiff reasonable inferences and accepted competing inferences in Defendants' favor. Most importantly, the Court failed to afford Plaintiff the reasonable inference that Hennessy's conflicted fiduciaries knew, or that a faithful fiduciary would have known, the undisclosed true facts regarding Legacy Canoo's prospects. Noting the powerful incentives SPAC fiduciaries have to complete even a value destroying merger and the disincentives they have to surface negative information, the trial court has drawn this inference in plaintiffs' favor in virtually every other similar case—even when the information in question was much less concrete and significantly harder to verify than the projections based on non-existent deals in this case. For example, in *Delman v. GigAcquisitions3, LLC*, the trial court held:

> The nature of Lightning's business model was 'knowable' through the sort of diligence and analysis expected of the board of a Delaware corporation undertaking a major transaction. ***It can be inferred that the defendants knew (and should have disclosed) or should have known (but failed to investigate) that Lightning's production would be difficult to scale in the manner predicted***. In either event, it is reasonably conceivable that the Board deprived Gig3's public stockholders of an accurate portrayal of Lightning's financial health.

288 A.3d 692, 726–27 (Del. Ch. 2023) (emphasis added) (internal footnotes omitted). Similarly in *Dylan Newman v. Sports Acquisition Holdings LLC*, the trial court held:

> The parties' briefing here largely focuses on disclosures, but my analysis isn't one of rote materiality that ignores purported conflicts. The defendants not only allegedly failed to disclose material information needed to exercise redemption rights ***but were also disincentivized to thoroughly investigate the target and disclose potentially negative information, given the substantial financial incentives created by the Founders Shares***.

C.A. No. 2023-0538-LWW, at 16-17 (Del. Ch. May 20, 2024) (TRANSCRIPT) (emphasis added). Likewise, *In re XL Fleet (Pivotal) S'holder Litig.*, the Chancellor held:

> [D]efendants' argument ignores that several of these disclosures were knowable outside of the Muddy Waters report. For example, ***it was knowable to the board through due diligence*** that Legacy XL had lost its CARB certification and that its common stock had been valued by a third party at $4.75 per share."

Consol. C.A. No. 2021-0808-KSJM, at 35 (Del. Ch. June 9, 2023) (TRANSCRIPT) (emphasis added). And in *Newbold v. McCaw*, the court held:

> I am certainly not a rocket scientist. I do not know whether a 66.7 percent increase in payload could have been achievable by Astra within the time frame contemplated by Astra's projections. ***It is reasonably conceivable, though, that at the time these disclosures were made, the directors painted an overly rosy picture of Astra's development forecast -- despite having information to the contrary***

> ***or utterly failing to do diligence that would allow it to obtain that information.*** It is reasonably conceivable that the directors had hoped to satisfy their disclosure obligations through a general disclaimer. But in my view, that is not what we expect of loyal fiduciaries.
>
> * * *
>
> Here, as alleged, the target's business materially changed, and that change would have significant and foreseeable consequences to the projections -- ***something that loyal fiduciaries would have known through diligence and would have told stockholders***.
>
> ***So given this, I conclude that it is reasonably conceivable the board breached its fiduciary duties by failing to tell stockholders about Astra's true prospects***. Rather than provide thorough disclosures of material information, the plaintiff alleges that the defendants attempted to shield themselves with vague generalities and cautionary language as a substitute for thorough diligence and an accurate portrayal of Legacy Astra's health.
>
> These two categories of disclosures lead me to conclude that the complaint adequately pleads that the proxy contained material misstatements and lacked material, reasonably available information. ***It is reasonably conceivable, then, that the defendants breached their fiduciary duties by impairing public stockholders' redemption rights, under the entire fairness standard of review***.

No. 2022-0439-LWW, at 28-32 (Del. Ch. Jul. 21, 2023) (TRANSCRIPT) (emphasis added). *See also In re Kensington-QuantumScape DE-SPAC Deriv. Litig*., C.A. No. 2022-0721-JTL, at 65 (Del. Ch. Feb. 21, 2024) (TRANSCRIPT) ("I do think that it's reasonably conceivable that these defendants were just along for the ride and not really paying attention."); *Offringa v. dMY Sponsor II, LLC*, C.A. No. 2023-0929-LWW, at 25-29 (Del. Ch. July 30, 2024) (TRANSCRIPT) (holding that operating company's entry into a contract five days after issuance of proxy statement that negatively impacted company's ability to meet projections included in the proxy statement "was known or knowable pre-redemption deadline and pre-vote.")

In this case, Plaintiff specifically alleged ***both*** that Defendants claimed in the Proxy to have performed extensive due diligence (*see* ¶¶33, 66, 102, 167-69, 177)[13] and were strongly incentivized not to look too hard because any negative information they unearthed would have jeopardized their $68 million payday. ¶¶8, 64, 156, 177. Though plainly germane to the issue of actual or constructive knowledge, the trial court barely mentioned Plaintiff's detailed allegations concerning Defendants' alleged due diligence. Op. 8 ("Hennessy's management team toured Legacy Canoo's headquarters and began due diligence in early July. On July 14, Hennessy and its financial advisors participated in a due diligence session with Legacy Canoo to discuss the company's financial model.") (citations omitted). The trial court reached its conclusion – that "[i]t cannot fairly be inferred

[13] Plaintiff alleged in the alternative that Defendants' due diligence efforts ended quickly in August of 2020 and they did nothing further to verify Legacy Canoo's *bona fides* despite representing that the information in the Proxy was current as of the date of its filing. *See* ¶¶170-71.

that the defendants withheld knowable information material to public stockholders deciding whether to redeem or invest in the combined company" (Op. 2, 25, 32, 37, 39 n.172) – without crediting, *or even addressing* the detailed allegations in the Complaint concerning Hennessy's claimed due diligence.

Had the trial court credited Plaintiff's allegations, it would have reached the opposite conclusion. The inference of actual or constructive knowledge is even stronger here than in the cases discussed above, given that:

(1) The projected engineering services business revenue was the company's ***only*** potential source of revenue in the first two years after the Merger, and was specifically touted in the Proxy as differentiating Legacy Canoo from other EVs that would only burn cash while trying to develop their vehicles. It was a key value proposition for the Merger. It is not a stretch to infer that reasonable, non-conflicted fiduciaries would have taken *some* steps to verify this information;

(2) The projected engineering services business revenue was easily verifiable. The SEC exposed that Legacy Canoo had zero actual engineering services projects and only ever had two *potential* projects (neither of which were viable after August 2020). Had Defendants asked to see the contracts for these two deals, or for that matter any other engineering services projects (something the

Proxy said Hennessy's board of directors did as part of due diligence (¶167)), they would have discovered that ***no such contracts existed***; and

(3) Defendants faced comparatively more risk than conflicted fiduciaries in other de-SPAC mergers. They were on the brink of forfeiting more than $68 million and had no time left to regroup and find another company to take public. They had represented that they would seek to find a company with "a history of strong operating and financial results" and—right before its dissolution window expired—claimed to have found such a company in Legacy Canoo. They secured stockholder approval to extend the original dissolution deadline so that the Merger could be consummated (which ultimately occurred ***with just 10 days*** to spare).[14] With ***no time left***, the exposure of *any* negative information about Legacy Canoo would have torpedoed Defendants' only remaining chance to cash in on their

[14] *Delman* concerned a SPAC with 11 months left to complete a transaction. The trial court still granted plaintiff a favorable inference based on the *possibility* that the Sponsor was motivated to complete the deal. 288 A.3d at 218 ("The nature of the Sponsor's promote incentivized it to complete a merger with Lightning, even if the deal proved disastrous for non-redeeming public stockholders. That Gig3 had 11 months left to consummate a transaction does not support a conclusion otherwise. Drawing all inferences in the plaintiff's favor, the Sponsor might have desired to take the money in hand and focus on the next 'Gig' SPAC rather than continuing to seek a target for Gig3.").

founder shares and to avoid forfeiting their investment.[15] These conflicted fiduciaries were therefore even more "disincentivized to thoroughly investigate [Legacy Canoo] and disclose potentially negative information given the substantial financial incentives created by the Founders Shares". *Dylan Newman*, TR at 16-17.

But in this case the trial court accepted competing inferences as true. With respect to Plaintiff's allegations that Legacy Canoo was in the process of developing a workable business plan and had already decided to abandon its engineering services business prior to the Merger, while at the same time the Proxy touted the company's ability to generate hundreds of millions of dollars in revenue from that very same business (*see, e.g.*, ¶¶13-26, 87-94, 98-101, 112-41, 166, 176), the trial court simply accepted Defendants' characterization of these events as "preliminary analyses and discussions" and a "nascent internal analysis." Op. 35, 37. With respect to allegations that, in fact, Legacy Canoo had *zero* actual engineering projects, that the only two *potential* projects capable of generating near term revenues were completely dead before the Merger, and that Legacy Canoo had abandoned any efforts to obtain other projects (*see, e.g.*, ¶¶27-30, 35,

---

[15] *See Newbold* (TRANSCRIPT) at 23:1-3 ("The Founder Shares had an implied market value of $68.96 million for McCaw. This is obviously material.")

99, 101, 145-49), the Court accepted as true that Defendants did not know and could not have discovered such facts. *See, e.g.*, Op. 39 (accepting as true that Hennessy's fiduciaries did not know that projections included in the Proxy were fraudulent).

This was not appropriate on a motion to dismiss. *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) ("On a motion to dismiss, the Court of Chancery was not free to disregard [a] reasonable inference, or to discount it by weighing it against other, perhaps contrary, inferences that might also be drawn."). *See also IBEW Loc. Union 481 Defined Contribution Plan & Trust v. Winborne*, 301 A.3d 596, 632 (Del. Ch. 2023) ("At the pleading stage, the court does not decide between competing inferences. The plaintiff receives the benefit of the inference that favors its case."); *Lebanon Cnty. Emps'. Ret. Fund v. Collis*, 311 A.3d 773, 805-06 (Del. 2023) ("Of course, the Court of Chancery acknowledged that the pleading-stage record also supported reasonable inferences that cut in the defendants' favor. Discovery and, if necessary, a trial will disclose which set of inferences prevails.").

It is reasonably conceivable that Plaintiff can prove that that Hennessy's conflicted fiduciaries knew, or that a faithful fiduciary would have known, the undisclosed true facts regarding Legacy Canoo's business and prospects. The trial court erred in subjecting the Complaint to an evidentiary standard more suitable on summary judgment.

3. The trial court drew no inference at all from the CEO's confession during the earnings call.

The trial court acknowledged a candid statement by Canoo's CEO during the first earnings call after the Merger: "After several analysts expressed surprise at the shift, Aquila observed that Legacy Canoo's management had been "a little more aggressive than [he] would [have] be[en] in their [public] statements" and had lacked an "experienced public company team." Op. 16-17 (citing ¶116). Aquila specifically conceded that investors had previously been shown a "different model." ¶114. Yet there is no analysis of these important allegations in the Opinion.

The CEO confessed that previous statements by Legacy Canoo had been "aggressive," a euphemism for materially misleading. He expressly noted that investors had previously been shown a "different model" when they were asked to decide whether to invest or exercise their redemption rights, a frank admission that the Merger was a bait and switch. The trial court did not draw any inference at all from these candid admissions. Insofar as the statements are ambiguous or vague, all inferences must be drawn in favor of the Plaintiff at the pleading stage. The appropriate inference at the pleading stage is that the CEO was conceding that the Proxy was materially false and misleading. In discovery the litigants can depose the CEO to establish what he meant and take discovery of his communications. But on a Rule 12(b)(6) motion, the trial court erred by drawing no plaintiff-friendly inference from this well-pled allegation.

4. The trial court did not address Plaintiff's due diligence allegations and accepted as true a single section heading from the SEC Cease-and-Desist Order favoring the Defendants.

The SEC Enforcement Action was announced 80 days after oral argument on the motion to dismiss. The trial court partially permitted Plaintiff's motion to supplement the pleading, then proceeded to credit a single assertion from the SEC documents to make a critical evidentiary finding. In concluding that the Defendants could not have known about the revenue fraud at Legacy Canoo, the trial court cited a section heading from the SEC Cease and Desist Order which conspicuously does not match the body text underneath it:

> [T]he [SEC] documents make it unreasonable to infer that Hennessy's directors and officers knew or could have known about these issues. The plaintiff quotes the SEC's allegation that Legacy Canoo and its officers were obligated to but "did not communicate the negative engineering updates or their associated negative impact on 2021 and 2022 projected revenue to [Hennessy]." The Cease and Desist Order goes further, concluding that Legacy Canoo actively "[c]oncealed [m]aterial [i]nformation from [Hennessy]" about engineering services prospects by presenting it with false

> revenue projections. I cannot conclude that the plaintiff has stated a claim for breach of fiduciary duty against Hennessy fiduciaries for failing to disclose information that was kept from them.

Op. 39.

The trial court selectively quoted the section heading but then omitted the substance below the heading, which does not detail any concealment efforts except to say: "Canoo did not communicate the negative engineering updates or their associated negative impact on 2021 and 2022 projected revenue to the SPAC Company." SEC Cease and Desist Order ¶21 (A596).

Thus, the trial court drew an adverse inference that negative information was "kept from" Hennessy fiduciaries, without any evidentiary basis other than the quoted section heading. Such an inference is inappropriate at the pleading stage. The trial court's analysis was akin to the weighing of evidence that takes place at trial, or on summary judgment, with a complete evidentiary record. Plaintiff cited assertions in the Proxy of extensive due diligence which support a reasonable inference that the Hennessy fiduciaries knew or should have known about problems inside Legacy Canoo (*see* ¶¶33, 66, 102, 167-69, 177). But as noted above, the trial court did not substantively discuss these allegations *at all* (*see* page 32-33 *supra*) and instead granted Defendants a competing inference, that the Hennessy fiduciaries could not have possibly known any negative information about Legacy Canoo, based solely on a single section heading from the SEC order, standing alone without supporting facts. This error also warrants reversal.

5. The trial court erred in its timeline inferences.

The Complaint alleges a detailed timeline of events, from the early retention of McKinsey (*see, e.g.*, ¶¶119-22), then the substantial altering of the business model before the Proxy was disseminated (*see, e.g.*, ¶¶125-36), to the disclosure of this business model change to the board after the Merger (¶¶111, 128). Here is a key timing allegation in the Complaint: "The March 2021 presentation to the New Canoo board demonstrates that the decision to hire McKinsey and the process to 'reboot' and 'transition' the business model had occurred as early as September of 2020-- well before the December 4, 2020 proxy statement." ¶131. This allegation is based in part on Canoo's limited Section 220 production. The exact details would be fleshed out in discovery.

The Defendants countered with their own timeline of events at oral argument. A172 ("If I could just put up the timeline here."), A173 ("So what we've done here is to put up kind of the relevant events or a number of the relevant events for the period between signing and closing and then a couple of months after that"). Defendants pointed to the lack of definitive proof that the board had approved a business model change, in the form of board minutes. A176-79

("There are not Board minutes. There is not a board presentation. There is nothing from prior to the closing that would indicate that Legacy Canoo had made some sort of fundamental change to its business.").

Unsurprisingly, Plaintiff's timeline allegations conflict with the Defendants' timeline theory. Plaintiff only has limited board materials at this early stage, without any emails or other communications or testimony by Legacy Canoo or Hennessy board members or executives.[16] The business reality of what McKinsey was doing, and what Legacy Canoo was doing, and what Defendants were asking from Legacy Canoo before the date of the Proxy, cannot be presented with certainty at the pleading stage based on a meager record. The trial court declined to accept as true the reasonable timeline alleged in the Complaint, and instead accepted Defendants' timeline of events. On a Rule 12(b)(6) motion, such analysis was erroneous.

Finally, the trial court failed to draw an inference favoring Plaintiff from the fact that the abrupt revelations in Canoo's first earnings call came only three months after the Proxy. The appropriate inference at the pleading stage is that the negative information was known or knowable by Defendants before the Proxy was

[16] Plaintiff could only obtain board materials from Canoo, not Legacy Canoo. A204.

filed, not that the negative facts suddenly materialized in the brief interlude between the Proxy and the first earnings call.

* * *

In sum, the trial court applied the wrong standard on a Rule 12(b)(6) motion. Had it applied the correct standard, the court would have denied the motion because the Complaint easily satisfies Delaware's pleading standard. The trial court's decision should be reversed.[17]

[17] The trial court expressed concern over the fact that investors have prevailed in a number of *other* SPAC cases following *MultiPlan* and seemed eager to show that not *all* such cases can succeed. Op. 1-2 ("The success of a few cases begat a host of others. Though the SPAC market has contracted, SPAC lawsuits are ubiquitous in Delaware. Remarkably similar complaints accuse SPAC directors of breaching their fiduciary duties based on flaws in years-old proxy statements that became problematic only when the combined company underperformed.") But in *this* case, the conflicts requiring entire fairness review were conceded, the facts alleged demonstrate <u>fraud</u>, not "flaws" or "underperform[ance]," the Proxy was barely three months old when shocking facts were revealed that caused an immediate SEC investigation – and ultimately the SEC concluded and charged that the Proxy was materially false and misleading and violated the federal securities laws.

III. ALTERNATIVELY, THE TRIAL COURT ERRED IN PARTIALLY DISALLOWING SUPPLEMENTATION OF THE COMPLAINT, AND NOT GRANTING LEAVE TO AMEND

A. Question Presented

In the alternative, whether the trial court erred in denying, in part, Plaintiff's Motion to Supplement because it misapplied the law as it applies to Ct. Ch. R. 15(d) and erred in dismissing the Complaint with prejudice without addressing Plaintiff's argument that dismissal with prejudice would not be just under the circumstances. This issue was preserved below in Plaintiff's opening and reply briefs in support of his Motion to Supplement and in Plaintiff's Supplemental Brief in opposition to the motion to dismiss. A284-91, A490-97, A621-34.

B. Scope of Review

A denial of leave to amend or supplement is generally reviewed for abuse of discretion, but to the extent the trial court misapplied Rule 15 to undisputed facts, the standard of review is *de novo*. *See Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 262 (Del. 1993). Furthermore, the Court did not address Plaintiff's argument that leave to amend would be unjust under the circumstances, thus no discretion was exercised.

C. **Merits of the Argument**

The trial court allowed Plaintiff to supplement his Complaint pursuant to Ct. Ch. R. 15(d) ("Rule 15(d)"), *in part*. *See* Supplementation Order, Ex. C hereto.

By requiring Plaintiff to delete paragraphs of his proposed supplemented complaint that specifically addressed the only aspect of the SEC's findings arguably helpful to defendants – the assertion that "Canoo did not communicate the negative engineering updates or their associated negative impact on 2021 and 2022 projected revenue to the SPAC Company", the trial court required Plaintiff to file a complaint that misleadingly seemed to endorse this assertion, when the opposite was true. *Compare* Proposed Supplemented Complaint ¶¶37(A406), 162(A458) (explaining that this particular assertion was belied by Canoo's own SEC filings and that such information was apparent and readily ascertainable through due diligence) to Op. 39 ("The plaintiff quotes the SEC's allegation that Legacy Canoo and its officers were obligated to but 'did not communicate the negative engineering updates or their associated negative impact on 2021 and 2022 projected revenue to [Hennessy].'").

Plaintiff respectfully submits the trial court misapplied Rule 15(d) as it does not prohibit supplementation "to bolster" a pleading, nor prohibit addressing in a supplemented pleading, facts that, though they may have "transpired long before [a prior pleading] was filed", were indisputably exposed for the first time by a subsequent occurrence – here, the SEC Enforcement Action.

The Supplementation Order cites no authorities in support of the partial denial, save the text of Rule 15(d) itself. But if the trial court's reasoning for striking portions of Plaintiff's proposed complaint as "improper" was based on [former] Ct. Ch. R. 15(aaa), that Rule speaks to consequences of choosing not to amend a pleading in response to a motion to dismiss, but it does not address supplementing a pleading under Rule 15(d). Nor would allowing a plaintiff to supplement his complaint pursuant to Rule 15(d) to include relevant information revealed for the first time *prior to* the adjudication of a motion to dismiss (as such unusual circumstances present in this case) undermine the purposes of Rule 15(aaa). *See Braddock v. Zimmerman*, 906 A.2d 776, 783 (Del. 2006) (purpose of Rule 15(aaa) was "to curtail the number of times that the Court of Chancery was required to adjudicate multiple motions to dismiss the same action.").

Recent amendments to Rule 15 support this interpretation.[18] Rule 15(d) was amended to clarify that "[t]he Court may permit supplementation ***even though the original pleading is defective in stating a claim or defense***", while amended Rule

---

[18] *See* Corrected Amendments to Rules 1-6, 8, 9, 11-15, 23, 23.1, 79, 79.1, 79.2, and 174 of the Court of Chancery Rules, Sections II, III, IV, X, and XVI, effective July 12, 2024 (the "Amendments").

15(a)(5) [Former Rule 15(aaa)] does not mention Rule 15(d) or otherwise suggest it limits the trial court's discretion to permit supplementation pursuant to Rule 15(d). The comments to the Amendments state:

> In 2024, Rule 15 was revised to align its language in certain respects with Federal Rule of Civil Procedure Rule 15, while maintaining the Court's unique approach to (1) subsequent pleadings embodied in former Rule 15(aaa); (2) filing the amended pleading as a separate, signed, and verified docket entry; and (3) the 120-day timeframe in former Rule 15(c)(3). Except as noted, no substantive changes in the interpretation of the rule were intended by these stylistic changes.

Accordingly, the prior version of Rule 15(d) should be interpreted in the same manner as the revised Rule, which clarifies that even if a pleading is defective in stating a claim, the Court may permit supplementation.

Lastly, Plaintiff specifically argued below that any perceived distinction between Rule 15(a) amendment and Rule 15(d) supplementation in this context is a distinction without a difference, because "Plaintiff has shown good cause that dismissal with prejudice would not be just under the circumstances" and therefore, any dismissal should be without prejudice. *See* A494 (citing *Inter-Marketing Grp. USA, Inc. v. Armstrong*, 2019 WL 417849, at *8-9 (Del. Ch. Jan. 31, 2019)). The trial court did not address this argument. In the event that this Court is inclined to affirm dismissal of the Complaint, it should remedy the trial court's failure to allow Plaintiff to amend.

CONCLUSION

The judgment should be reversed.

DELEEUW LAW LLC

<u>/s/ P. Bradford deLeeuw</u>
P. Bradford deLeeuw (#3569)
1301 Walnut Green Road
Wilmington, DE 19801
Tel: (302) 274-2180

Counsel for Plaintiff Below-Appellant

OF COUNSEL:

Robert C. Schubert
Willem F. Jonckheer
SCHUBERT JONCKHEER & KOLBE LLP
2001 Union Street, Suite 200
San Francisco, CA 94123
(415) 788-4220

DATED: August 16, 2024
Public Version Filed
September 3, 2024

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 3rd day of September 2024 that I caused to be served a copy of *Public Version of Appellant's Opening Brief* upon the following in the manner indicated:

VIA E-FILING:

Kevin R. Shannon, Esq.
Christopher N. Kelly, Esq.
Daniel M. Rusk IV, Esq.
POTTER ANDERSON & CORROON LLP
1313 North Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000

/s/ P. Bradford deLeeuw
P. Bradford deLeeuw (Del. Bar No. 3569)