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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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

**PUBLIC VERSION**

**E-filed: October 1, 2024**

# APPELLEES' ANSWERING BRIEF

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Dated: September 16, 2024

**TABLE OF CONTENTS**

## TABLE OF CITATIONS

**Cases** **Page(s)**

**Other Authorities**

## NATURE OF PROCEEDINGS

For years, Plaintiff pursued a claim that Hennessy's directors and officers allegedly breached their fiduciary duties by promoting a "bait-and-switch" merger, in which Defendants purportedly touted an outdated business model for Hennessy's target, Legacy Canoo, that they knew or should have known was being dramatically reconfigured before the Merger closed.[1] After Defendants showed that this theory is implausible on its face, Plaintiff pursued multiple efforts to shore up his Complaint with additional allegations about Legacy Canoo's pre-Merger activities—including that it retained a consultant (McKinsey & Company) to study its business model, that Legacy Canoo's Executive Chairman expressed concerns about aspects of that model, and (most recently) that the SEC concluded that Legacy Canoo lacked a reasonable basis for the revenue projections it developed based on that model. As to each iteration of the Complaint, however, Plaintiff never wavered from his theory that the *sole* impairment of his redemption right arose from Hennessy's failure to disclose Legacy Canoo's purported pre-Merger reconfiguration of its business model, including conceding at oral argument that this was the only basis for his claims.

[1] Unless otherwise defined, Defendants use the defined terms set forth in Appellant's Opening Brief ("OB").

Plaintiff's dogged adherence to this single, untenable theory ultimately sank his suit. As the trial court correctly held in its well-reasoned opinion, Plaintiff's factual allegations foreclose any reasonable inference that a decision to change Canoo's business model had been made *before* the Merger closed, and therefore there was nothing to disclose. To the contrary, the only reasonable inference to be drawn from his allegations is that the post-Merger entity, New Canoo, in consultation with its new officers and directors, decided *after* the Merger to scrap the old business model.

Plaintiff now uses this appeal to set forth a new and different theory: that Defendants failed to disclose that Legacy Canoo lacked a reasonable basis for its revenue projections because the potential engineering services projects underlying those projections had fallen apart. That theory was never presented to the trial court and it is therefore waived. It also suffers from the same infirmities as the theory presented below. The well-pleaded facts, taken as a whole, do not adequately allege that Legacy Canoo's revenue projections were unsupported or, if they were, that Defendants knew it. To the contrary, the very documents Plaintiff relies on for this new theory demonstrate that Hennessy was the *victim* of Legacy Canoo's fraud to inflate its revenue projections, meaning that it received the same allegedly false information during due diligence that Legacy Canoo presented to the public. Plaintiff's eleventh-hour pivot is too little, too late.

Ultimately, the trial court's analysis was straightforward and correct: it carefully analyzed Plaintiff's allegations and the documents on which Plaintiff relied; drew all *reasonable* inferences from those allegations in Plaintiff's favor, while discarding speculative, contradictory, and facially implausible conjecture; and correctly concluded that Plaintiff had not alleged a reasonably conceivable breach of fiduciary duties because he had not identified any existing, knowable, and concrete fact that Defendants failed to disclose. Regardless of the theory Plaintiff pursues, he failed to state a reasonably conceivable claim because his own allegations and the documents on which he relied contradict the very "inferences" he faults the trial court for refusing to draw.

After serial failed attempts to cobble together a reasonably conceivable disclosure violation, Plaintiff has finally come to the end of the road. This Court should affirm the trial court's dismissal with prejudice of his claims.

## SUMMARY OF ARGUMENT

1. **Denied.** Under entire fairness review, Plaintiff bears the initial burden of alleging some facts showing the transaction was unfair *before* any burden shifts to Defendants to prove it was entirely fair. The trial court properly applied this pleading framework.

2. **Denied.** The trial court granted Plaintiff all reasonable inferences drawn from well-pleaded factual allegations, but properly refused to credit speculation and conjecture contradicted by the very documents Plaintiff incorporated into his Complaint. Plaintiff's allegations do not support a reasonable inference either (1) that Legacy Canoo had decided to overhaul its business model before the Merger closed or (2) that Legacy Canoo's engineering services revenue projections were unsupported *and* Defendants knew or should have known it.

3. **Denied.** The trial court correctly applied Rule 15(d) to permit supplementing the Complaint with allegations describing the conclusions the SEC reached during its investigation concerning Legacy Canoo's revenue projections, but prohibit including the underlying substantive factual allegations—all of which concerned events from before the Merger closed. In addition, the trial court properly dismissed the Complaint with prejudice because, after three failed attempts to state

a reasonably conceivable claim, there are no factual allegations Plaintiff could add that would cure the deficiencies.

## STATEMENT OF FACTS

### A. Before August 2020: Hennessy's Formation and IPO.

In August 2018, Hennessy was formed under a charter requiring that it consummate a business combination with a private company within 18 months of its initial public offering (though the deadline was eventually extended).[2] *See* A506, A521 (Compl. ¶¶ 8, 56–57); B132, B140.[3] If it failed to complete a merger within that timeframe, Hennessy would liquidate and return public stockholders' investment. A526 (Compl. ¶¶ 75–76); B169.

Hennessy completed its initial public offering (the "IPO") in March 2019. A525 (Compl. ¶ 72). In advance of the IPO, Hennessy issued a prospectus containing

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[2] Defendant Daniel Hennessy was Chairman and CEO of Hennessy and managing member of Defendant Hennessy Capital LLC, which in turn was managing member of Hennessy's Sponsor, Defendant Hennessy Capital Partners IV LLC. A517, A519–20 (Compl. ¶¶ 39, 48–49). Defendants Greg Ethridge and Nicholas Petruska were also officers of Hennessy, as President and COO and Executive Vice President, CFO, and Secretary, respectively. A518 (Compl. ¶¶ 40, 47). In addition to Daniel Hennessy and Ethridge, Hennessy had six more directors: Defendants Bradley Bell, Richard Burns, Juan Carlos Mas, Gretchen W. McClain, James F. O'Neil III, and Peter Shea. A518 (Compl. ¶¶ 41–46).

[3] The Court may consider documents cited in the Complaint, including the Prospectus, Proxy, and any other documents referenced in the allegations, as if fully incorporated therein. *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 51 n.3 (Del. 2017). In addition, even if not incorporated into the Complaint, the Court may take judicial notice of publicly available facts not subject to reasonable dispute, including those contained in SEC filings. *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170–71 (Del. 2006).

information about the control and management of the SPAC (the "Prospectus"). The Prospectus disclosed that Daniel Hennessy controlled the Sponsor (through control of its managing member) and Hennessy (as its CEO). B279, B296; *see also* A505, A517–19 (Compl. ¶¶ 5–6, 39, 48). The Prospectus also disclosed the identities of Hennessy's directors, four of whom had served on the boards of other SPACs that Daniel Hennessy previously initiated and controlled. B279–84; *see also* A505, A518, A524 (Compl. ¶¶ 6, 41–42, 45–46, 68).

The Prospectus also described the incentives and compensation afforded to Defendants in connection with any eventual merger. It disclosed the purchase price and value of the founder shares, as well as the number of founder shares transferred to each director and officer. *See* B147–49; *see also* A524–25 (Compl. ¶¶ 69–71). It also disclosed that the founder shares were subject to different terms than shares offered to public stockholders:

- For public stockholders, if Hennessy failed to consummate a merger within the specified timeframe, Hennessy would liquidate and reimburse them at a rate of $10.10 per share. A526 (Compl. ¶ 75); B161, B169. In addition, before any merger closed, public stockholders would have the option to redeem their shares for $10.10 per share, providing an exit opportunity. B161–66.

- For holders of founder shares, on the other hand, there was no option to redeem before any merger, and those shares were subject to lock-up restrictions after a merger. B149–51, B299. And, if Hennessy failed to consummate a merger, the founder shares would expire worthless and the holders would lose their investment. A526 (Compl. ¶ 75); B193.

The Prospectus expressly disclosed that the differences in incentives between public stockholders and those holding founder shares (like Defendants) might create "a conflict of interest" concerning "whether a particular business combination target is appropriate for our initial business combination." B193–95.

**B. August 2020–December 2020: The Merger Agreement.**

In the summer of 2020, Hennessy identified Legacy Canoo as a potential target for a business combination, and began due diligence on the company. A528–29 (Compl. ¶¶ 81–83). On August 17, 2020, Hennessy and Legacy Canoo executed a merger agreement (the "Merger Agreement"). A529 (Compl. ¶ 84).

The following day, Hennessy and Legacy Canoo jointly announced the Merger Agreement through a press release and conference call. A529 (Compl. ¶ 85). During the call, Legacy Canoo CEO Ulrich Kranz and CFO Paul Balciunas described its business model as driven by three distinct revenue streams:

> We have three phases of revenue streams. ***In the first phase, we call it Engineering Services. This is a phase that already exists today.*** So, we are working for companies and we are already making money with the first revenue stream. ***The second revenue stream is a B2C.*** This is a stream that we will have available when we launch our first vehicle, our lifestyle vehicle, by 2022. This is a consumer vehicle and it will be on subscription. ***The B2B service, that you see on the right side, is our third revenue stream.*** This will be a vehicle introduced in 2023, what we call a last-mile delivery vehicle, and this will be for sales. Three different revenue streams give us very good flexibility, and it makes also sure that we can really tap into different areas to be profitable.

A530 (Compl. ¶ 87) (emphasis in original); *see also* A533–34 (Compl. ¶¶ 92–93).

An investor presentation attached to the press release announcing the Merger Agreement contained additional information about Legacy Canoo's projected revenue streams, including that the company projected revenue of $120 million in 2021, the first year following the anticipated Merger. A529–32 (Compl. ¶¶ 84–85, 89). Kranz and Balciunas were responsible for the "Business Development Pipeline" of potential contract engineering opportunities that supported those publicly stated revenue projections, as well as the "Canoo Operating Model" used to calculate the company's financial projections. A563–64 (Compl. ¶¶ 151–52).

### C. December 2020: Hennessy's Proxy and Closing of Merger.

On December 4, 2020, Hennessy issued a Proxy recommending that stockholders approve the Merger. A535 (Compl. ¶ 95). The Proxy repeated the disclosures from the Prospectus concerning the relationships among Hennessy's Sponsor, officers, and directors, and the compensation and economic incentives provided to Hennessy's officers and directors—including that the founder shares would expire worthless if Hennessy failed to consummate a business combination by the end of the month. *See* B386–87, B659–66, B679, B717–19.

The Proxy also repeated the information that Hennessy had received from Legacy Canoo about its business plan and revenue projections, including describing the three anticipated revenue streams for the prospective new company and reporting five years of projected revenue, both based on Legacy Canoo's business plans. In particular:

- With respect to engineering services, the Proxy described a "pipeline for engineering services [that] includes EV concept design and engineering services for other OEMs, autonomous driving strategics and high growth technology companies." A536–37 (Compl. ¶ 99). The Proxy disclosed that Legacy Canoo "has already received significant interest in its skateboard technology . . . , 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." A537 (Compl. ¶ 99). It concluded that "[t]his 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." A537 (Compl. ¶ 99) (emphasis omitted); *see also* A508, A539–40 (Compl. ¶¶ 14–15, 101) (disclosing financial projections provided by Legacy Canoo through 2026).[4]

- With respect to the subscription-based consumer model, the Proxy stated that the company's consumer vehicles "are initially intended to be made available to consumers via an innovative subscription business model." A538 (Compl. ¶ 100). The Proxy noted that the subscription model "provid[ed] Canoo with a distinct opportunity for recurring revenue, a unique profit margin profile and compelling return on equity." A539 (Compl. ¶ 100) (emphasis omitted). It also disclosed

[4] Contrary to Plaintiff's false assertion that Legacy Canoo's projected revenue for 2022 was $250 million, "attributed ***solely*** to the company's engineering services business," OB 10 (emphasis in original), Legacy Canoo actually projected $329 million in total revenue for 2022, a significant portion of which was based on "[s]ubscription [r]evenue" and "B2B [r]evenue," A541 (Compl. ¶ 101). *See also* OB 12, 14.

statistics and research supporting use of the subscription model for future vehicle releases. A509, A535 (Compl. ¶¶ 16, 96).

The Proxy also described the due diligence Hennessy performed before recommending the Merger, including "extensive meetings and calls with [Legacy] Canoo's management team" regarding its "current and planned operations," "product development timeline," "go-to-market strategy," and "revenue assumptions, projections and strategy," among other topics, as well as third-party due diligence. A570 (Compl. ¶ 167). Under the Merger Agreement, Legacy Canoo was required to "promptly inform" Hennessy of "any event or circumstance" that would require an amendment to the Proxy, B904, such as changing business models. There is no allegation that such a notice was provided.

### D. December 2020–March 2021: Creation of New Canoo and Analysis of Business Model.

Only 0.03% of public stockholders opted to redeem their shares, leaving $306.5 million in the trust account (as well as robust PIPE investments of $323 million) to put New Canoo on strong financial footing as it went public. A529, A542 (Compl. ¶¶ 84, 105). On December 21, 2020, 99.85% of the voting stockholders approved the Merger. B930. Hennessy changed its name to Canoo Inc., Defendants Daniel Hennessy, Bell, Burns, Mas, McClain, O'Neil, and Shea (*i.e.*, all Hennessy directors except for Ethridge) resigned as directors, and Defendants Daniel Hennessy, Ethridge, and Petruska resigned as officers. B938, B944.

On March 26, 2021, more than three months after the Merger closed, the New Canoo board received a presentation on the company's business strategy and financial performance. *See* B959. Only two of the seven New Canoo board members had been affiliated with Legacy Canoo in any capacity, and only one (Ethridge) was a member of the Hennessy board. B1227–33.

New Canoo management first delivered an "Update" that described the "Private to Public Transition," including a "Leadership change" that coincided with efforts to "Re-cast[] the Vision and Strategy" of the company. B959, B964. Management also discussed New Canoo's business model, commenting that Legacy Canoo's business model "[n]eeded a [r]eboot" because, among other things, it was a "[c]omplex business model" and the company was "[c]ompeting against ourselves through sale of core IP to potential competitors." A553–54 (Compl. ¶¶ 128, 130) (emphasis omitted).

Consulting group McKinsey then presented its "External Analysis" in a set of slides titled "Building a successful business model." B959, B1040; *see also* A547 (Compl. ¶ 119). McKinsey explained that it had begun to "[a]ssess Canoo's initial economic model" in September and October 2020, "[i]dentify [the] most attractive segments to focus on" in October and November 2020, and then "[d]etermine [the] location of Canoo's facilities" in February and March 2021. A510–11, A547–548 (Compl. ¶¶ 22–23, 121–122).[5] Subsequently, "[c]ritical changes were made to Canoo's business model given these subscription model insights," including a "pivot from subscription-led sales model to outright sale led sales model." A550 (Compl. ¶ 125).

### E. March 2021: New Canoo's Announcement of a Modified Business Model.

On March 29, 2021, just days after the board received McKinsey's presentation, New Canoo held its first earnings call. On that call, Executive Chairman Tony Aquila announced that "it was decided ***by our [New Canoo] board*** to deemphasize the originally stated contract engineering services line." B1302 (quoted in A543 (Compl. ¶ 111)) (emphasis added). Responding to an analyst's question, Aquila elaborated:

> We ***at the board*** really feel like the best thing to do is to accelerate our derivatives and focus our talent on creating IP for the company. . . . [F]rom my perspective, if I had been more involved earlier, certainly, ***once I invested and then I took the chairmanship, we started*** the analysis.

[5] The slides contradict Plaintiff's conjecture that McKinsey "prepared the study and began their work" *before* September 2020. *See* A547–48 (Compl. ¶ 121).

B1306 (quoted in A543–44, A555–56 (Compl. ¶¶ 112, 134)) (emphases added); *see also* B1314 ("I wanted to go in a different direction ***based on the study we did***. And ***with the Board's help and observations*** also, it kind of solidified that.") (quoted in A510, A556 (Compl. ¶¶ 20, 135)) (emphases added).

Aquila also addressed Legacy Canoo's subscription-based model for its yet-to-be-introduced vehicles, and said that when he joined the company in October 2020 "we spent a lot of money analyzing the weight that this will have on the balance sheet," and ultimately decided to scale the model back to "something sub-20% of our sales." B1311, B1313 (quoted in A546 (Compl. ¶¶ 117–18)).

After the earnings call, New Canoo's stock price fell from $11.80 per share at the close of trading on March 29, 2021 to $9.64 per share when trading opened the following day. *See* Nasdaq, GOEV Historical Data, accessible at https://www.nasdaq.com/market-activity/stocks/goev/historical. The stock price bounced back above $10 per share on April 8, only ten days after the earnings call, and hovered between $7 and $11 per share for several months. *Id.*

### F. This Litigation.

Plaintiff filed his original complaint in June 2022. A1. After Defendants moved to dismiss for failure to state a claim, Plaintiff elected to file an amended complaint. A4–9. Defendants again moved to dismiss and, after the parties briefed the motion, the trial court heard oral argument on May 16, 2023. A10–19.

### G. The SEC Cease and Desist Order and Complaint.

On August 4, 2023, the SEC Cease and Desist Order settling proceedings against Canoo (A592–99) and the SEC Complaint asserting claims against former Legacy Canoo officers Kranz and Balciunas (A601–19) (collectively, the "SEC Documents") were made public.

The SEC Documents reflect the results of a "fact-finding inquiry" initiated in April 2021, A559 (Compl. ¶ 144), from which the SEC alleged that Legacy Canoo had disclosed 2021 and 2022 revenue projections that lacked a reasonable basis. A593, A602–03.

The SEC Documents allege the following:

- Kranz and Balciunas "were responsible for Canoo's engineering services 'pipeline' of potential projects and associated revenue projections," A606, which flowed from two internal sources: the "'Business Development Pipeline' of potential engineering services projects" and "an Excel spreadsheet titled 'Canoo Operating Model'" that calculated revenue projections associated with those potential projects. A594. Kranz, in particular, was "the primary contact for several of [Legacy] Canoo's potential revenue-generating business partners." A606.

- Starting in mid-August 2020, discussions with Legacy Canoo's two most promising potential contract engineering partners "indicated that the projects were unlikely to produce revenue in 2021 and 2022."

A594–95. However, Legacy Canoo remained in discussions with other potential partners until at least December 2020. A595.

- On December 14, 2020, Legacy Canoo acknowledged during an internal budgeting meeting that it projected zero revenue for 2021. A595. However, Legacy Canoo "did not communicate the negative engineering updates or their associated negative impact on 2021 and 2022 projected revenue to [Hennessy]." A596.

Going one step further, the SEC concluded that, even though the Merger Agreement obligated Legacy Canoo to "promptly inform [Hennessy] of any material fact included in the registration statement that was no longer true," Legacy Canoo "***concealed*** material information from [Hennessy] and misled investors regarding potential engineering services projects." A596 (emphasis added and capitalization altered). Neither New Canoo nor Legacy Canoo's officers admitted to the SEC's conclusions. A592; A262.

Plaintiff requested that the trial court take judicial notice of the SEC's allegations. A240–82. However, after Defendants showed that the SEC's allegations were not appropriate for judicial notice because they remained in dispute (B1382–83), Plaintiff moved to supplement his complaint with allegations parroting the SEC's factual findings and conclusions. A283.

On January 31, 2024, the trial court ruled that Plaintiff could supplement his complaint only "to add that the SEC Order was filed on August 4, 2023 and to describe what the Order concluded." Pl.'s Ex. C ("Supplementation Order"). It expressly prohibited Plaintiff from "lift[ing] factual assertions from the Order to bolster his pleading" since the underlying facts "transpired long before the plaintiff's Amended Complaint was filed." *Id.* The trial court requested supplemental briefing addressing whether, and if so how, the new allegations affected arguments made in the motion to dismiss briefing. *Id.*

On May 31, 2024, the trial court issued a lengthy and well-reasoned opinion dismissing all of Plaintiff's claims with prejudice.

# ARGUMENT

## I. THE COURT CORRECTLY CONCLUDED THAT PLAINTIFF FAILED TO ALLEGE A REASONABLY CONCEIVABLE BREACH OF FIDUCIARY DUTIES.

### A. Question Presented.

Whether the trial court correctly determined that Plaintiff failed to allege a reasonably conceivable breach of fiduciary duties arising from Defendants' failure to disclose (1) that Legacy Canoo had retained a consultant to study its business model and was considering whether to make changes and (2) that Legacy Canoo's revenue projections for its engineering services business line were allegedly not supported. The first part of this question regarding Legacy Canoo's business model was preserved below. A143–61; A194–202; A244–48; A290; A497; A622–34. The second part of this question regarding Legacy Canoo's revenue projections was not preserved, and is therefore waived on appeal.

Plaintiff says nothing about his unjust enrichment or aiding and abetting claims, which were dismissed for reasons independent of his fiduciary duty claims. Op. 40–44 & n.182. Appeal of those claims is waived.

### B. Scope of Review.

A final judgment granting a motion to dismiss is reviewed *de novo*. *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007).

### C. Merits of Argument.

Plaintiff's claims are rooted in *Multiplan*, which provides a narrow path for a direct breach of fiduciary duty claim where public stockholders in a SPAC have allegedly been harmed by an impairment of their right to make a fully informed decision concerning whether to redeem their shares in the SPAC or convert them to shares in the post-merger company. *See, e.g.*, *In re MultiPlan Corp. Stockholders Litig.*, 268 A.3d 784, 802 (Del. Ch. 2022); *Delman v. GigAcquisitions3, LLC*, 288 A.3d 692, 709 (Del. Ch. 2023). A *Multiplan* claim is focused not on any alleged unfairness in the de-SPAC transaction itself, but rather on alleged unfairness that infects the stockholder's choice to exercise redemption rights before the transaction is consummated. Op. 24–28. Where the alleged impairment of the redemption right takes the form of a disclosure violation, "the facts must provide grounds to infer that the defendants made a material misstatement or omission—one affecting the total mix of information available to public stockholders deciding whether to redeem." *Id*. 24–25.

Plaintiff concedes that his claims are based solely on a purported impairment to his redemption right from alleged disclosure violations. *See* A219; OB 23 n.10. To the extent he suggests his claim is premised on the alleged unfairness of the Merger itself (*e.g.*, misaligned incentives between Defendants and public stockholders or failure to close the Merger within a range of fair value), it is "classically derivative" and was properly dismissed. Op. 22 & n.107 ("[A] claim premised solely on these conflicts would seemingly be non-viable if public stockholders had a fair opportunity to exercise their redemption rights."); *see also, e.g.*, *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1263–64 (Del. 2021); *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006) (harm to a company from overpayment for an acquisition "has no logical or reasonable relationship to the harm caused to the shareholders *individually* for being deprived of their right to cast an informed vote").

The trial court carefully considered Plaintiff's well-pleaded factual allegations, and concluded that those allegations failed to clear the threshold of a reasonably conceivable disclosure violation. Plaintiff tries to excuse his pleading failure by preemptively shifting the burden to Defendants or, alternatively, faulting the trial court for not affording him every favorable inference, no matter how strained or unreasonable. Neither gambit has any merit. The trial court's judgment should be affirmed.

### 1. Plaintiff Must Plead Facts Supporting a Reasonable Inference of Unfairness Through Impairment of His Redemption Right.

Plaintiff's argument that the trial court erred by requiring him to allege facts supporting a reasonable inference of unfairness betrays that he has once again "lost sight of [pleading] fundamentals." Op. 2. Plaintiff argued below that he need not allege such facts because the pleading standards are somehow "relaxed" in SPAC cases. A155; A198. The trial court corrected that "misperception," clarifying that "pleading requirements exist even where entire fairness applies." Op. 2, 25. Plaintiff does not renew this precise argument, shifting instead to two other attempts to sidestep the baseline requirement that he allege facts supporting a reasonably conceivable claim.

*First*, Plaintiff contends that, because entire fairness applies, "the burden should have been shifted to Defendants to prove that the Merger was entirely fair." OB 19–20. That skips a step. As the trial court explained, even under entire fairness review, the *plaintiff* must plead facts supporting a reasonably conceivable claim *before* any burden shifts to the defendants to prove the fairness of the transaction after discovery. Op. 23 & n.110.[6] "Simply put, a plaintiff who fails to do this has not

[6] *See also, e.g., Olenik v. Lodzinski*, 208 A.3d 704, 719 n.74 (Del. 2019) ("To survive a motion to dismiss in an entire fairness case, the plaintiff must plead facts that, with all reasonable inferences drawn in their favor, show the transaction was unfair.");

stated a claim." *Carlson*, 2010 WL 2376890, at *2. Indeed, Plaintiff himself cites cases establishing that burden-shifting comes into play *only* if the plaintiff first alleges facts raising a reasonable inference of unfairness. *See, e.g.*, *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.") (emphases added); *Ravenswood Investment Co. v. Winmill*, 2011 WL 2176478, at *4 (Del. Ch. May 31, 2011) ("[N]onetheless, [plaintiff] bears the burden of alleging facts that suggest the absence of fairness."). Shifting the burden of *proof* in entire fairness cases does not alter the plaintiff's basic *pleading* obligations.

Plaintiff argues that "this case is entirely different from the few outlier decisions the trial court cited" because his allegations purportedly show the transaction is unfair. OB 23. His disagreement with the trial court's well-reasoned conclusion as to the *adequacy* of his pleadings (a separate issue which, as discussed

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*Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *5 (Del. Ch. Apr. 21, 1995) (plaintiff must "allege some facts that tend to show that the transaction was not fair"), *aff'd*, 672 A.2d 35 (Del. 1996); *Monroe Cnty. Emps. Ret. Sys. v. Carlson*, 2010 WL 2376890, at *2 (Del. Ch. June 7, 2010) ("even where . . . entire fairness review is in play . . . plaintiff must make factual allegations about the transaction in the complaint that demonstrate the absence of fairness").

below, has no merit) does not show that the trial court applied the wrong pleading *standard*. The trial court properly applied the entire fairness pleading framework: it first assessed whether Plaintiff had pleaded "some facts that tend to show that the transaction was not fair." Op. 27 (cleaned up). Because the trial court determined Plaintiff had not done so, it did not err in "not shifting the burden to Defendants." OB 19 (capitalization altered).

*Second*, and relatedly, Plaintiff repeatedly observes that dismissal is granted only rarely in cases reviewed under entire fairness. *See* OB 20–21. But rare is not never. The trial court was correct that "[e]ntire fairness is not . . . a free pass to trial." Op. 23. Indeed, Plaintiff concedes that "where entire fairness applies, dismissal ***is*** . . . appropriate" when the plaintiff does not allege facts demonstrating unfairness. OB 21 (emphasis added). As the trial court cautioned, to hold otherwise and allow "faulty claim[s]" to proceed would only "fuel perverse incentives and invite strike suits." Op. 2; *id.* 24 (observing that "SPAC suits are no exception" to the sort of litigation in which "the risk of strike suits means that too much turns on the mere survival of the complaint").

In short, there was no error in holding Plaintiff to his fundamental obligation to allege facts supporting a reasonable inference that Defendants made a material misstatement or omission that affected his redemption decision.

### 2. The Trial Court Did Not Err in Concluding that Plaintiff Failed to Allege a Reasonably Conceivable Disclosure Violation.

In addition to his arguments regarding the pleading standard, Plaintiff asserts that the trial court erred in refusing to credit the speculative, far-fetched, and outright illogical inferences he asked it to draw from his allegations. The trial court, however, is "not required to accept every strained interpretation of [Plaintiff's] allegations," *General Motors*, 897 A.2d at 168, but rather only the "*reasonable* inferences" that can be drawn from well-pleaded facts, *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002) (emphasis added). Nor should the trial court accept "inferences [or] conclusions of fact unsupported by allegations of specific facts," *In re Lukens Inc. Shareholders Litigation*, 757 A.2d 720, 727 (Del. Ch. 1999), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000), much less inferences *contradicted* by the alleged facts, *see Teamsters Local 677 Health Servs. & Insurance Plan v. Martell*, 2023 WL 1370852, at *7 (Del. Ch. Jan. 31, 2023) ("[A] complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict[s] the complaint's allegations.") (quotation omitted).

Before the trial court, Plaintiff pursued a single disclosure theory: the Proxy failed to disclose a purported "change" in Legacy Canoo's business model. As the trial court noted, Plaintiff went "all in" on that argument and "disavow[ed] any other basis for claiming that stockholders were unable to make a fair redemption choice." Op. 29–30; *see also* A219 (Plaintiff agreeing that "the sole impairment of the redemption right that [he was] alleging concern[ed] the disclosures about the business plan and McKinsey"). Yet, on appeal, Plaintiff downplays this "sole" theory he pursued before the trial court and subordinates it to an entirely new argument: that there was a separate violation from Defendants' disclosure of Legacy Canoo's revenue projections for engineering services, which purportedly lacked a reasonable basis.

Neither theory is viable.

#### a. *There Is No Reasonable Inference That Defendants Failed to Disclose an Existing Change to Legacy Canoo's Business Model.*

With respect to his original theory that Defendants failed to disclose a change to Legacy Canoo's business model, Plaintiff argues that the trial court improperly denied him favorable inferences about the timing of Canoo's decision to transform its business model and Defendants' knowledge of that decision. But the trial court explained that it refused to credit the speculative, unsupported, and inconsistent inferences Plaintiff asked it to draw because they were "belied by the plaintiff's own allegations and the documents incorporated into his complaint." Op. 2. The inferences Plaintiff sought were facially unreasonable, and there was no error in the trial court's refusal to accept them.

**Timeline.** Plaintiff's primary complaint is that the trial court did not accept an inference that Legacy Canoo had already decided to transform its business model before the Merger closed. OB 40–42. The trial court, however, carefully considered Plaintiff's allegations and correctly concluded that "the Complaint and documents it incorporates belie any reasonable inference that Legacy Canoo's business plan changed pre-closing." Op. 33. Plaintiff alleges that the following events transpired before the Merger closed:

- "[S]ometime in or before September 2020, . . . Legacy Canoo commissioned a study from the consulting firm McKinsey & Co. titled 'Building a successful business model.'" A547 (Compl. ¶ 119);
- In September and October 2020, McKinsey "began their work" on a three-stage analysis, including a first phase under which McKinsey "[a]ssess[ed] Canoo's initial economic model," A511 (Compl. ¶ 23);
- In October 2020, after Aquila invested in Legacy Canoo, he "started the analysis" of engineering services, including "a deep dive to determine how to optimize our growth opportunities and maximize our shareholder value," A543–44, A557 (Compl. ¶¶ 112, 138–39) (emphasis omitted); and
- In October and November 2020, McKinsey completed the second phase of its analysis by "[i]dentify[ing] [the] most attractive segments to focus on," A511 (Compl. ¶ 23).

That the business model continued to be studied and evaluated through at least November cannot be reconciled with Plaintiff's speculation that "the process to 'reboot' and 'transition' the business model had occurred as early as September," A554–55 (Compl. ¶ 131), and that the business model was already being "radically reconfigured" by the first few days of December, A510–11 (Compl. ¶ 22); *see also* A547 (Compl. ¶ 120).

In addition, Plaintiff's allegations as to post-closing events confirm that it was not until a "[n]ew leadership team [was] in place" after the Merger closed, B970, and the new board (comprised almost entirely of new directors with no affiliation to Legacy Canoo) provided its "help and observations," B1314, that New Canoo decided "to go in a different direction based on the [McKinsey] study we did." A544–45 (Compl. ¶¶ 113–15); *see also* B1302; A509–10, A543–46 (Compl. ¶¶ 19–21, 110–18) ("it was decided by our board"—meaning the New Canoo board on whose behalf Aquila spoke—"to deemphasize" certain segments of Legacy Canoo's business plan).

The trial court also found that Plaintiff's allegations concerning Legacy Canoo's revenue reporting were "inconsistent with [his] timing theory." Op. 36. Putting aside that Plaintiff's argument misconstrued GAAP (an explanation he asserts is "demonstrably false," though without making any such demonstration, OB 15 n.6), the argument also further undermines his speculative timeline. Plaintiff alleged that Legacy Canoo's failure to record any revenue from engineering services in the fourth quarter of 2020 meant that Legacy Canoo had already abandoned that business line *before* September 2020—the same month that Plaintiff also alleged McKinsey *began* the work underlying the business transformation process. As the trial court observed: "Both cannot be true." Op. 36.

The only reasonable inference to be drawn from Plaintiff's allegations, taken as true and considered together, is that an analysis regarding whether to change Legacy Canoo's business model had begun (but not been completed) before the Merger and that no concrete decision to change the business model was made until after closing. The trial court did not err by refusing to accept Plaintiff's illogical and contradictory timeline.

**Due Diligence.** Plaintiff next argues that the trial court failed to give sufficient weight to his allegations about Defendants' due diligence—both that Defendants disclosed that they had performed extensive due diligence and that they were allegedly "incentivized not to look too hard" during that process. OB 32. But he fails to identify any alleged facts about Legacy Canoo's business model that Defendants had an obligation to disclose and that they could have learned through due diligence.

Plaintiff does not (and cannot) dispute that Defendants had no obligation to disclose preliminary analyses of Legacy Canoo's business model. *See Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 145 (Del. 1997) (public company not required to disclose "speculat[ion] about its future plans").[7] Instead, he faults the trial court for "simply accept[ing] Defendants' characterization of these events as preliminary analyses and discussions and a nascent internal analysis" in the first place. OB 35 (cleaned up). But, as discussed above, Plaintiff's own allegations show that is exactly what they were: Legacy Canoo began its internal analysis and deliberations during September, October, and November 2020, but those deliberations did not crystallize into a concrete decision until months later when the new board took control *after* closing.

Moreover, regardless of whether these internal analyses were preliminary, the complaint lacks any allegations supporting a reasonable inference that *Hennessy's* directors or officers—who were on the opposite side of the transaction—knew or should have known of *Legacy Canoo's* internal deliberations. The trial court was correct that the "strained" and conclusory assertion that Defendants "must have

[7] *See also, e.g., City Pension Fund for Firefighters & Police Officers in City of Miami v. The Trade Desk, Inc.*, 2022 WL 3009959, at *23 (Del. Ch. July 29, 2022) ("failure to disclose preliminary discussions" by the board did not "render[] the stockholders' vote . . . uninformed"); *In re Columbia Pipeline Grp., Inc.*, 2017 WL 898382, at *5 (Del. Ch. Mar. 7, 2017) ("[A] board does not have a fiduciary obligation to disclose preliminary discussions, much less an analysis of preliminary discussions."); *Red Oak Fund, L.P. v. Digirad Corp.*, 2013 WL 5740103, at *16–17 (Del. Ch. Oct. 23, 2013) (no requirement to disclose that management "had already 'analyzed and evaluated' whether to implement" a plan, but the board had not "voted or in some other way decided to adopt [it]").

known” of this analysis simply because they performed due diligence is insufficient. Op. 37; *Pfeffer v. Redstone*, 965 A.2d 676, 687 (Del. 2009) (requiring “well-pleaded *facts* from which it can be reasonably inferred that [the omitted information] was knowable and that the defendant was in a position to know it”) (emphasis added); *see also Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1244 (3d Cir. 1993) (affirming judgment for defendants where plaintiffs could not prove “that the defendants were aware of the findings [of an allegedly undisclosed report] but intentionally withheld the results”) (internal quotations and citation omitted).

In short, the allegations do not support a *reasonable* inference that Defendants knew or should have known before the Proxy was issued that the New Canoo board would adopt a plan to change the company’s business model months later.

**Statements by New Canoo Chairman Aquila.** Finally, Plaintiff argues that, because Aquila “confessed that previous statements by Legacy Canoo had been ‘aggressive’”—which he characterizes as “a euphemism for materially misleading”—the trial court should have inferred that Aquila “conced[ed] that the Proxy was materially false and misleading.” OB 37–38. Plaintiff overreaches. On their face, Aquila’s comments were about statements made by *Legacy Canoo’s* officers concerning *their* expectations for the business model. Any “aggressive[ness]” in Legacy Canoo’s public statements cannot be bootstrapped into an inference that different statements in the Proxy issued *by Hennessy* were false or misleading.

Moreover, though Plaintiff faults the trial court for purportedly "not draw[ing] any inference at all" from Aquila's comments, OB 37, the trial court did carefully analyze those statements and drew the only reasonable inference: that the decision to switch to "a 'different model,'" *id.*, was made by new leadership and a new board of directors *after* the Merger closed. *See* Op. 34 (describing Aquila's comment that the decision to change the business model "was made with the input of [post-closing] Canoo's board").

Accordingly, even drawing all reasonable inferences in Plaintiff's favor, he has not alleged an ***existing, concrete, and knowable*** fact regarding Legacy Canoo's potential change in business model that Defendants failed to disclose. That pleading failure distinguishes Plaintiff's claim from the handful of recent cases that have survived dismissal only because the SPAC directors and officers allegedly failed to disclose then-existing facts knowable through reasonable due diligence. *Cf., e.g.*, *MultiPlan*, 268 A.3d at 816 (company's largest customer had announced it would move its accounts within a couple of years); *GigAcquisitions3*, 288 A.3d at 727 (company's existing production model would be difficult to scale); *Newman v. Sports Entertainment Acquisition Holdings LLC*, No. 2023-0538-LWW, Tr. 21–22

(Del. Ch. May 20, 2024) (new European gaming regulations affecting the company's operations had already been approved); *In re XL Fleet (Pivotal Stockholder Litig.)*, No. 2021-0808-KSJM, Tr. 35–36 (Del. Ch. June 9, 2023) (company had already lost a regulatory board certification); *Newbold v. McCaw*, No. 2022-0439-LWW, Tr. 27–29 (Del. Ch. July 21, 2023) (company had reduced its development forecast and goals); *In re Kensington-QuantumScape De-SPAC Litig.*, No. 2022-0721-JTL, Tr. 5, 7, 48–50, 65 (Del. Ch. Feb. 21, 2024) (company's then-existing technology could not achieve the projected benefits); *Offringa v. DMY Sponsor II, LLC*, No. 2023-0929-LWW, Tr. 25–27 (Del. Ch. July 30, 2024) (company had agreed to pay a single client most of its revenue, which made projections for the post-transaction company unattainable).

As the trial court summarized, Plaintiff's theory that Defendants failed to disclose a change to Legacy Canoo's business model is not reasonably conceivable because it relies on "post-closing developments, strained inferences, and documents that contradict [Plaintiff's] theories." Op. 30. The only reasonable inference to be drawn from the well-pleaded factual allegations is that Canoo had not yet changed its business model when Hennessy issued the Proxy—which means that there was no concrete, existing fact that Defendants were required to, but did not, disclose.

#### b. *Plaintiff's New Theory That Defendants Knew, But Failed to Disclose, That Legacy Canoo's Revenue Projections Lacked a Legitimate Basis Was Waived and Is Not Supported.*

On appeal, Plaintiff also asks this Court to reverse the trial court's judgment based on a new theory that Defendants failed to disclose that Legacy Canoo's revenue projections for engineering services "lacked any legitimate basis." OB 22. Plaintiff waived this argument by failing to fairly present it to the trial court. In any event, his allegations and the documents they incorporate show that there is no reasonable inference Defendants knew or should have known that the revenue projections Legacy Canoo presented to Hennessy were unsupported. Accordingly, Plaintiff's late-raised theory fails for multiple reasons.

*First*, under Delaware Supreme Court Rule 8, "[o]nly questions fairly presented to the trial court may be presented for review" on appeal. This rule exists so that courts of appeal "have the benefits that come with a full record and input from learned trial judges." *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017). Where such a record is absent because a party shifts to a novel theory on appeal, this Court routinely refuses to consider the newly-raised arguments "seemingly conjured up as pure afterthoughts" on appeal. *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 270 (Del. 2022); *see also Protech Mins., Inc. v. Dugout Team, LLC*, 284 A.3d 369, 377–79 (Del. 2022).

Here, Plaintiff expressly acknowledged before the trial court that his *only* theory was that Defendants failed to disclose that Legacy Canoo was considering or had decided to change its business model before the Merger. *See, e.g.*, A151 (Plaintiff arguing that pre-Merger disclosures were misleading because "key changes in the business model had apparently occurred as of the date of the Proxy"). Indeed, at oral argument, Plaintiff rejected any other disclosure theory and stated unequivocally that his theory as to the "*sole* impairment of the redemption right" rested on "the disclosures about the business plan and McKinsey." A219 (emphasis added).

Even after learning of the SEC Documents, Plaintiff continued to argue that the SEC's factual findings were relevant only to his original theory that Defendants failed to disclose a change in Legacy Canoo's business model. A630 (Plaintiff arguing the "SEC's findings corroborate Plaintiff's allegations . . . that the engineering services business was being jettisoned, and that the reconfiguration of the business model was well under way—if not complete—by the date of Proxy"). He never argued that the SEC's conclusions revealed a distinct violation from failure to disclose a lack of support for the contract-engineering revenue projections.

Therefore, far from fairly presenting his new theory regarding Legacy Canoo's revenue projections to the trial court, Plaintiff instead affirmatively disclaimed it. *See In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 55 (Del. 2006) (refusing to consider a new argument that "borders on being unfairly presented, since the appellants are taking the trial court to task for adopting the very analytical approach that they themselves used in presenting their position"). From beginning to end, Plaintiff consistently presented his theory that Defendants failed to disclose a change to Legacy Canoo's business model—and only that theory—to the trial court. This Court should decline to consider Plaintiff's freshly-minted argument that was never fairly presented below, as Plaintiff does not offer any reason why the interests of justice require otherwise.

*Second*, even had Plaintiff not waived this new theory, his argument should be rejected on the merits because the Complaint—even after supplementation—does not allege that Legacy Canoo's revenue projections were unsupported. The trial court's ruling was clear: Plaintiff was permitted to supplement his complaint to "describe what the [SEC] Order concluded," but he was *not* allowed "to lift factual assertions from the Order to bolster his pleading." Supplementation Order. Therefore, the only well-pleaded facts concerning the SEC's investigation are that the *SEC drew certain conclusions* and filed documents reflecting those conclusions. *See, e.g.*, A513 (Compl. ¶ 29) (describing what "the SEC's findings in the SEC Cease and Desist Order revealed"); A559 (Compl. ¶ 145) (alleging that the SEC

Documents “ma[de] public for the first time its allegations and findings with respect to the investigation into New Canoo”); A560 (Compl. ¶ 147) (stating “the SEC’s key findings”).

The substance of the SEC’s factual findings—which, according to the SEC, is “not binding on any other person or entity” and which New Canoo expressly did not admit, A592–93—is not within the scope of well-pleaded factual allegations that should be considered. Plaintiff’s purported “example” of these allegations illustrates the point. *See* OB 28. Although Plaintiff characterizes this material as a factual allegation “based upon detailed findings by the SEC,” the language he spotlights merely alleges *what the SEC concluded*. *Id.* (quoting A513–14 (Compl. ¶ 30), which alleges only what “[t]he SEC’s investigation revealed” and conclusions “[a]ccording to the SEC, based on its investigation”). Consistent with the trial court’s Supplementation Order, the SEC’s underlying factual findings (*e.g.*, that Legacy Canoo lacked viable engineering services prospects to support its projections) are *not* incorporated into the Complaint.

Nor can Plaintiff bootstrap the factual content of the SEC’s conclusions into the Complaint by attaching the SEC Documents as exhibits. The Court explicitly ruled that Plaintiff cannot “lift factual assertions” from those documents, Supplementation Order—which means that those documents cannot be either the "source for the facts as pleaded," *Murray v. Mason*, 244 A.3d 187, 193 (Del. Super. Ct. 2020), *modified* (Jan. 5, 2021), or used "to prove the truth of [their] contents," *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 873 (Del. 2020). To allow otherwise would permit an end-run around the trial court's ruling. Therefore, Plaintiff has not pleaded any facts supporting a reasonable inference that Defendants omitted or misstated any material facts about Legacy Canoo's revenue projections.

*Third*, even *if* the SEC's factual findings had been incorporated into the complaint (to raise a reasonable inference that Legacy Canoo's engineering services revenue projections were not supported), Plaintiff still fails to state a claim because those same findings make it "unreasonable to infer that Hennessy's directors and officers knew or could have known about" Legacy Canoo's misrepresentations. Op. 38–39.[8]

The SEC's factual assertions, taken as true, confirm that Defendants *did not know* about any issues with the engineering services business line because Legacy

[8] The SEC's factual findings also contradict Plaintiff's original theory that Legacy Canoo's business model was being reconfigured *before* the Merger because the SEC concluded that Legacy Canoo was still trying to negotiate relationships with potential contract engineering clients through the end of 2020. *See* A594–55 (describing exchanges of proposals with potential client through November 2020); A595 (noting that "Canoo was in discussions with other companies about potential engineering services projects" through December 2020). It is not reasonable to infer that Legacy Canoo completely abandoned the contract engineering business line by October, yet continued to pursue potential clients through December.

Canoo's officers concealed that information from them. The SEC concluded, *inter alia*, that:

- Legacy Canoo officers Kranz and Balciunas shared responsibility for the "pipeline" of contract engineering projects and knew that "negative developments" had made the company's revenue projections in 2021 and 2022 unsupportable. A606–08, A610.

- Using projections inflated by those non-viable projects, Kranz and Balciunas "helped prepare and present" the August 2020 investor presentation and "were involved in preparing the July 2020 Canoo Operating Model that formed the basis" for the statements the SEC found to be false or misleading. A608–09.

- Even though Legacy Canoo was contractually obligated to "'promptly inform [Hennessy]' of any material fact included in the registration statement that was no longer true," Legacy Canoo "did not communicate the negative engineering updates . . . or their associated negative impact on 2021 and 2022 projected revenue to [Hennessy]." A596; A612–13.

Indeed, the SEC went one step further and concluded that "Canoo ***concealed*** material information from [Hennessy] and misled investors regarding potential engineering services projects." A596 (emphasis added and capitalization altered).

In other words, the SEC concluded not only that Legacy Canoo (i) knew that its pipeline of projects did not support projected revenue in 2021 and 2022; and (ii) developed an "Operating Model" spreadsheet that falsely projected revenue for those years based on non-viable projects; but also that Legacy Canoo (iii) *misled Hennessy* by presenting those false revenue projections to Hennessy itself. As the trial court observed, there can be no "claim for breach of fiduciary duty against

Hennessy fiduciaries for failing to disclose information that was kept from them." Op. 39; *see also In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2011 WL 227634, at *6 (Del. Ch. Jan. 14, 2011) (directors do "not owe a duty to disclose facts that they are not aware of"); *Malpiede v. Townson*, 780 A.2d 1075, 1088 (Del. 2001) ("[a]bsent some indication" that the board knew a fact, "the board did not have a duty to disclose").

Plaintiff makes two arguments in an effort to avoid the SEC's full conclusions, but neither saves his claims.

**Rationale for the SEC's Conclusions.** Plaintiff complains that the trial court erred by inferring "that negative information was 'kept from' Hennessy fiduciaries," based solely on a "single assertion" from the SEC that Legacy Canoo "concealed" the negative contract engineering developments from Hennessy. OB 38–39 (cleaned up). But Plaintiff cannot have it both ways. He attempted to rely on the SEC Documents and incorporate them into his Complaint, so they must be considered "as a whole to ensure that the plaintiff has not misrepresented their contents and that any inference the plaintiff seeks to have drawn is a reasonable one." *Martell*, 2023 WL 1370852, at *8 (cleaned up). To the extent the Court considers the SEC's factual findings to be incorporated into the Complaint, the trial court properly considered the finding that Legacy Canoo "concealed" information from Hennessy.

Plaintiff quibbles that this conclusion appeared in a heading, and that the detailed explanation following that heading stated only that Canoo "did not communicate" such information. OB 38–39. That strained distinction fails. As noted, Legacy Canoo had an affirmative contractual obligation to provide accurate and timely information to Hennessy. A failure to communicate under such circumstances is tantamount to concealment. And, in any event, the SEC's finding of concealment is no less a factual conclusion because it appears in a heading. Having chosen to rely on the SEC Documents as a source of factual allegations, Plaintiff cannot disclaim the unhelpful portions because, in his view, the SEC did not provide adequate written support for its conclusions. *See* OB 17 (arguing "the SEC Cease and Desist Order . . . may not present a complete picture of what took place").

**Due Diligence.** Plaintiff next argues that his allegations as to Hennessy's due diligence support an inference of "actual or constructive knowledge" about the lack of viable projects underlying Legacy Canoo's revenue projections. OB 33–35. This is illogical, since the officers responsible for the alleged fraud at Legacy Canoo were the same individuals who supplied information to Hennessy during due diligence, including in the internal "Operating Model" that formed the basis of the projections and the "Business Development Pipeline" that reflected an overly optimistic list of "potential engineering services projects for Canoo to pursue." A594. In other words, the information that Defendants received during due diligence falsely touted the strength of the allegedly non-viable engineering services business line.

Plaintiff asserts that Hennessy nonetheless should have known that this information was false because the Proxy represented that Hennessy reviewed the contracts for engineering services projects. OB 33–34. Not so; the Proxy merely states that Hennessy reviewed unspecified "material contracts," A570 (Compl. ¶ 167), and represented that the "pipeline" supported the revenue projections, not specific contracts, A537 (Compl. ¶ 99). Even had Hennessy learned there were no final contracts, it would not have alerted them to an issue with Legacy Canoo's revenue projections because those projections could have been reasonably supported by *potential* projects where no contracts had yet been executed. *See HBK Master Fund L.P. v. Pivotal Software, Inc.*, 2023 WL 10405169, at *29–31 (Del. Ch. Aug. 14, 2023) (projections deemed reliable even when based on potential future subscribers).

The target company's concealment of the very information Plaintiff alleges should have been disclosed sets this case apart from the handful of other SPAC cases that have been allowed to go forward. *See* OB 29–32. In each of those cases, the plaintiff adequately alleged the SPAC directors and officers either actually knew or could have learned through ordinary due diligence of the information that the plaintiff alleged should have been disclosed. *See, e.g.*, *GigAcquisitions3*, 288 A.3d at 726 (fact that target "built highly customized vehicles in small batches," making it difficult to scale, not hidden during due diligence); *Pivotal Stockholder Litig.*, No. 2021-0808-KSJM, Tr. 35 (Del. Ch. June 9, 2023) ("[I]t was knowable to the board through due diligence that Legacy XL had lost its CARB certification."). Here, by contrast, Hennessy's "failure to uncover the fraud during its due diligence review was not unreasonable, as the fraud was intentionally hidden from [it] when its due diligence team went looking." *Cobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, at *28 (Del. Ch. July 20, 2007), *aff'd*, 945 A.2d 594 (Del. 2008). Plaintiff's "conclusory" allegation that Hennessy "would (or must) have been told" something during the due diligence process is insufficient "to support that inference," *Pfeffer*, 965 A.2d at 687—especially where he also alleges that Legacy Canoo concealed that very information from Hennessy.

Taken as a whole, the SEC's factual allegations refute Plaintiff's speculation that Hennessy "must have known" through due diligence of significant problems with the engineering services business line. There are no reasonable "competing inferences." OB 29. To the contrary, because the SEC concluded Legacy Canoo concealed this information from Defendants, the *only* reasonable inference to be drawn from the well-pleaded allegations is that Defendants *did not know* of any issue concerning the engineering services revenue projections because Legacy Canoo hid it from them.

## II. THE COURT PROPERLY LIMITED SUPPLEMENTATION OF THE COMPLAINT AND DISMISSED WITH PREJUDICE.

### A. Question Presented.

Whether the trial court properly limited Plaintiff to supplementing the complaint with allegations describing the SEC's conclusions, while barring Plaintiff from lifting underlying factual assertions from the SEC Documents to bolster his pleadings. This question was preserved for review. A284–91, A489–97, A621–34.

### B. Scope of Review.

Generally, a trial court's order regarding supplementation of a complaint "is reviewable only for abuse of discretion," *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 262 (Del. 1993), though *de novo* review may apply to the extent the request to supplement presents issues of law, *see Difebo v. Board of Adjustment of New Castle County*, 132 A.3d 1154, 1156 (Del. 2016).

### C. Merits of Argument.

In an implicit concession that the Complaint fails to state a reasonably conceivable claim, Plaintiff also argues that the trial court abused its discretion by denying him the opportunity to supplement with cherry-picked findings from the SEC Documents after the motion to dismiss was fully briefed. His criticisms have no merit.

Under Rule 15(d), supplemental pleadings "deal with events that occurred *after the pleading to be revised was filed*." *Agilent Techs., Inc. v. Kirkland*, 2009 WL 119865, at *4 (Del. Ch. Jan. 20, 2009) (emphasis added); *see also* Del. R. Ch. Ct. 15(d). The trial court struck the proper balance under this Rule: it allowed Plaintiff to supplement his complaint to add allegations that the SEC Documents were filed and to describe what the SEC concluded, but barred him from adding new allegations lifted from the SEC's findings about what Defendants could or should have known at the time the Proxy was filed because "[t]hese facts transpired long before the plaintiff's Amended Complaint was filed."[9] Supplementation Order.

Plaintiff argues that the trial court nonetheless misapplied Rule 15(d) because the Rule allows supplementation to (1) bolster a pleading and (2) address facts that "were indisputably exposed for the first time by a subsequent occurrence," even if they transpired long before the prior pleading. OB 44–45. The first claim is irrelevant and the second is incorrect. Supplementation *may* be permitted (at the trial court's discretion) to bolster a defective pleading, but *only* as to events that post-date the prior pleading. Accordingly, the trial court did not err in determining it "would be improper" to bolster the complaint with facts that "transpired long before" the then-

[9] Plaintiff's reference to former Rule 15(aaa) as a basis for the trial court's reasoning is puzzling, OB 45, since the trial court never referred to that Rule in its order. In any event, Rule 15(d) alone supports the trial court's ruling.

operative complaint was filed. Supplementation Order. And Plaintiff does not even attempt to support his bald assertion that supplementation is permitted for facts that were "exposed" for the first time by a subsequent occurrence, even if they transpired much earlier. Plaintiff's purported exception has no basis in the plain text of Rule 15(d).

Finally, Plaintiff asserts that Rule 15's limitations are irrelevant because "dismissal with prejudice would not be just under the circumstances." OB 46. He does not even attempt to explain *why* dismissal with prejudice is unjust, and his "cursory treatment" of this issue waives the argument because it fails to "fully state the grounds for appeal." *Ploof v. State*, 75 A.3d 811, 822 (Del. 2013) (emphasis and quotation omitted). Nor is there any injustice in preventing yet another exercise in futility. Plaintiff has already had three chances to allege a reasonably conceivable claim, but has not been able to do so. Moreover, as discussed, the material Plaintiff seeks to lift from the SEC Documents and add to his complaint, far from saving his claim, confirms that he cannot allege a reasonably conceivable disclosure violation. The lone case Plaintiff cites is easily distinguishable on this basis because the "new developments" in that case allowed the plaintiff to patch a pleading deficiency. *See Inter-Mktg. Grp. USA, Inc v. Armstrong*, 2019 WL 417849, at *8–9 (Del. Ch. Jan. 31, 2019). Here, by contrast, the SEC's factual findings affirmatively undermine

Plaintiff's theory by proving that Defendants could *not* have learned the truth because they were the victims of a fraud perpetrated by Legacy Canoo officers. Under these circumstances, further amendment would be futile, and the trial court was well within its discretion to dismiss the case with prejudice. *See Mooney v. E.I. du Pont de Nemours & Co.*, 192 A.3d 557 (TABLE), 2018 WL 3861371 (Del. Aug. 13, 2018).

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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