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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

APPELLANT'S CORRECTED REPLY BRIEF

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PRELIMINARY STATEMENT[1]

Defendants' Answering Brief ("AB") concedes that to shift the burden of proving entire fairness to Defendants in this case, Plaintiff merely needed to allege "facts that suggest the absence of fairness." AB 22. The prominent inclusion of baseless revenue projections in the Proxy easily clears this low hurdle. The Court need go no further to conclude that the trial court's pleading stage dismissal of Plaintiff's well pled claims must be reversed.

Recognizing as much, Defendants falsely assert that Plaintiff "fail[ed] to fairly present [the theory that the Proxy contained unsupported revenue projections] to the trial court." *See* AB 1, 2, 18, 32-35. That argument fails for three independent reasons. First, this "theory" is not new. Plaintiff has always consistently alleged that the Proxy materially misrepresented Legacy Canoo's engineering services business and the supposed expectation that it would generate $120 million of revenues in year 1 and $250 million in year 2. The SEC Enforcement Action added powerful evidence further supporting this theory by exposing that the revenue projections in the proxy were fraudulent because, in reality, Legacy Canoo had ***zero*** engineering services projects capable of producing

[1] Capitalized terms are defined in the Glossary of Terms to Plaintiff's Opening Brief ("OB").

near term revenue. Secondly, the baseless revenue projections are pled in the operative Complaint (filed almost 9 months after the oral argument transcript Defendants inexplicably cite for waiver) *and* were expressly raised in the briefing on the motion to dismiss. *See, e.g.*, Plaintiff's Supplemental Submission in Opposition to the Motion to Dismiss at A622 ("The SEC allegations amply demonstrate that the stockholders' redemption rights were impaired. ***They confirm that the revenue projections included in the Proxy were utterly baseless*** . . .") (emphasis added). Thirdly, the trial court addressed this claim on the merits (Op. 37-39) and it is therefore unquestionably "properly before this Court on appeal." *Lawson v. Preston L. McIlvaine Const. Co., Inc*., 552 A.2d 858 (Table), 1988 WL 141168, at *2 (Del. Dec. 7, 1988).

The remaining arguments amount to little more than asking the Court to resolve factual disputes and to draw competing inferences in Defendants' favor. Most prominently, Defendants ask the Court to simply accept as true that information concerning Legacy Canoo's pipeline of potential engineering services projects was both concealed, and entirely unknowable, even though the Proxy claimed Defendants performed "extensive third-party due diligence consisting of commercial due diligence with Canoo's current and planned commercial partners" and "review of Canoo's . . . material contracts." ¶167. Defendants ask this Court

to just take their word for it that they performed all the due diligence they claimed but it would have been *impossible* to discover that the projections were baseless, with no explanation of what they actually did or how their inquiries were somehow thwarted; versus the alternative possibility that they were blinded by the large incentives to see the Merger close, and thus they looked the other way, or failed to inquire diligently. *See* OB 28-37.

Defendants' argument requires the Court to weigh competing inferences and to accept a single defense friendly inference as correct. *See* OB 35-36 (citing this Court's authorities that make clear that the trial court was not free to disregard or discount reasonable inferences by weighing them against other, perhaps contrary inferences that might also be drawn). Defendants do not even attempt to address this argument or the cited authorities.

Plaintiff's Complaint contains abundant, detailed, non-conclusory allegations that make it *likely* – not merely reasonably conceivable – that the Merger was unfair. Tellingly, Defendants do not dispute that Plaintiff and other Hennessy stockholders were defrauded; rather, they ask the Court to simply assume *at the pleading stage* that the fraud was not their fault. *See* AB 2 (contending that the SEC documents demonstrate "Hennessy was the victim of Legacy Canoo's fraud to inflate its revenue projections"); *id*. at 46-47 (asserting

that the SEC's findings "prov[e] that Defendants . . . were the victims of a fraud perpetrated by Legacy Canoo officers."). The trial court erred when it adjudicated this Defendant-friendly assertion as true at the pleading stage without any evidentiary record.[2] Op. 39.

[2] *See Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531 (Del. 2011) ("When considering a defendant's motion to dismiss, a trial court should . . . deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.") (citation omitted).

ARGUMENT

I. DEFENDANTS' WAIVER ARGUMENT IS MERITLESS

Defendants concede they must prove the Merger was entirely fair so long as Plaintiff alleges facts "that suggest the absence of fairness." AB 22. As the Complaint alleges, the SEC found, after a lengthy investigation, that the revenue projections included in the Proxy were baseless – and therefore fraudulent. ¶¶28-30, 35. This alleged fact obviously "tends to show" that the Merger was unfair. *See* OB 19-25. Defendants respond with a waiver argument that fails for numerous reasons.

A. There is no "New Theory"

First, it is evident that Plaintiff is not "us[ing] this appeal to set forth a new and different theory." AB 2. Plaintiff consistently asserted below that the Proxy materially misrepresented, *inter alia,* Legacy Canoo's engineering services business and the supposed expectation it would generate $120 million of revenues in year 1 and $250 million in year 2. For example, Plaintiff's prior complaint filed December 14, 2022 (A31-108) ("superseded complaint") alleged:

> 14. The proxy statement 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." (Emphasis added.) Indeed,

> this was highlighted as the only prospect for revenue in the near term.
>
> * * *
>
> 17. On December 21, 2020, shareholders approved the Merger on the basis of [Hennessy]'s representations about Legacy Canoo and the Merger closed the same day (the "Closing Date"). However, on March 29, 2021, after just its first quarter as a public company, New Canoo stunned shareholders and analysts by announcing radical changes to its vaunted business model. Its "engineering services" business—billed as producing New Canoo's ***only*** near-term revenue while it developed its vehicles—would be "deemphasized," as would New Canoo's pursuit of the subscription-based revenue model for its lifestyle vehicle. ***[Hennessy] had emphasized both of these business segments in the proxy statement and falsely used them as key selling points for the Merger***.

(Emphasis added). *See also id*. at ¶¶13-16, 20, 94-95, 97; Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss (A109-67) at pp. 4, 16, 18, 32-33, 35-37. Not surprisingly, upon the revelation that Canoo's business would radically differ from how it was described in the Proxy, including the disappearance of hundreds of millions of dollars of near-term revenues the Proxy claimed the company's engineering services business was expected to generate, Canoo's stock price immediately dropped and the SEC swiftly commenced an investigation. ¶¶32-33, 146.

On August 4, 2023, the SEC brought the Enforcement Action and alleged that the Proxy was materially misleading and violated the federal securities laws.

The SEC specifically found that Legacy Canoo did not have even a single potential engineering services project capable of producing near term revenue and that this was apparent months before Hennessy issued the Proxy. *See* OB 15-16; ¶¶ 28-30, 35, 145-49; A287-91, A489-92, A592-96.

The SEC's findings constitute "smoking-gun" evidence of fraud. They confirm what Plaintiff consistently asserted: the Proxy fundamentally misrepresented Legacy Canoo's business model and prospects.[3] *See* A287-91, A489-92, A592-96, A622-24.

B. Allegations Pleaded in the Operative Complaint and Argued in Briefs Filed with the Trial Court are not Waived.

Defendants cite the superseded complaint and the oral argument transcript from May 2023 (A168-239) for the proposition that Plaintiff asserted that stockholders' redemption right was impaired *solely* because Defendants failed to disclose that a major shift in the Company's supposedly unique business plan was well underway. *See* AB 2, 25, 34. That argument is silly given that the SEC Enforcement Action was not announced until August 4, 2023, and thereafter the

[3] *See In re Under Armour Sec. Litig.*, 540 F. Supp. 3d 513, 521 (D. Md. 2021) (cited at A244) ("Taking into consideration the facts alleged in the SEC [Cease and Desist] Order, this Court is satisfied that the Plaintiffs' allegations survive the Defendants' Motion to Dismiss.").

parties litigated a Request for Judicial Notice and a Motion to Supplement, Plaintiff filed a new operative Complaint, and the parties submitted supplemental briefs on the motion to dismiss – all of which specifically dealt with the Complaint's allegations regarding the SEC Enforcement Action. Here is the timeline:

Date	**Event**
December 14, 2022	Plaintiff filed his Amended Complaint
May 17, 2023	Oral argument on Motion to Dismiss
August 4, 2023	SEC Enforcement Action
August 10, 2023	Request for Judicial Notice
August 22, 2023	Motion to Supplement
January 31, 2024	Supplementation Order
February 7, 2024	Plaintiff filed his operative Supplemented Complaint
February 27, 2024	Supplemental Briefs on Motion to Dismiss

It is disingenuous for Defendants to accuse Plaintiff of an "eleventh-hour pivot" (AB 2), given that the parties and the Court spent more than 9 months *after the oral argument*, from early August 2023 to May 31, 2024, grappling with the SEC's allegations of fraud, including the filing of a new operative Complaint that incorporates those allegations, and court-ordered supplemental briefing submitted

months before the Opinion was issued, to address the very subject of the SEC's findings.

The issue of the baseless revenue projections was presented to the trial court in the Complaint (*see, e.g.*, ¶¶28-30, 35, 101, 144-49), the exhibits thereto (A592-619) the briefs Plaintiff filed in support of the Request for Judicial Notice (A242, A245-48, A251-82) and the Motion to Supplement (A289-91, A489-91), and in the court-ordered supplemental brief Plaintiff filed in opposition to the Motion to Dismiss (A621-624, A621-31).

C. Allegations and Arguments Addressed and Resolved by the Trial Court in its Decision are Not Waived.

Lastly, the trial court specifically addressed the merits of claims based on the baseless revenue projections in its Opinion, albeit characterized more charitably than in the SEC Cease and Desist Order:

> [The SEC Documents] detail contradictions between Legacy Canoo's disclosed revenue projections and setbacks affecting its engineering services business. The plaintiff maintains that these documents bolster his claim that Hennessy public stockholders' redemption rights were impaired. . . . The SEC documents could perhaps support an inference that Legacy Canoo officers misrepresented the strength of the company's projected contract engineering revenue. But the documents make it unreasonable to infer that Hennessy's directors and officers knew or could have known about these issues. . . . 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. 37-39 (footnotes omitted). Accordingly, it is clear that the baseless revenue claims were fairly presented to the trial court. *See Lawson,* 1988 WL 141168, at *2 ("Because the trial judge … addressed the merits of the [claim], the question was fairly presented to the Superior Court and is thus properly before this Court on appeal.").

II. THE COMPLAINT PLEADS AMPLE UNFAIRNESS

The standard of review below is entire fairness. Therefore, Defendants bear the burden of demonstrating that the Merger was entirely fair to Hennessy stockholders. *In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446, 459 (Del. 2024). Defendants argue that Plaintiff did not meet the minimal threshold of alleging facts suggesting the absence of fairness. AB 21-22. On the contrary, the Complaint pleads abundant facts that show the transaction was unfair.[4] Therefore, the burden of proof rests on the Defendants to prove that the Merger was the product of fair dealing and fair price.

A. The Proxy's Baseless Revenue Projections and Other Materially False Statements Concerning Legacy Canoo's Engineering Services Business Demonstrate Unfairness.

Plaintiff and other Hennessy stockholders were asked to approve the Merger and to determine whether to exercise their redemption rights based on a Proxy which Defendants caused Hennessy to issue. The SEC found and charged that the Proxy contained material misrepresentations and violated the antifraud provisions

[4] *See id.*, 315 A.3d at 469 n.159 ("Under Court of Chancery Rule 12(b)(6), in an entire fairness case, 'the plaintiff must plead facts that, with all reasonable inferences drawn in their favor, show the transaction was unfair.'") (citation omitted).

of the federal securities laws because it contained baseless revenue projections attributable Legacy Canoo's engineering services business. OB 15-17.

Accepting Plaintiff's well pled allegations as true and affording him all reasonable inferences, the Complaint adequately alleges that the Proxy falsely described Legacy Canoo's engineering services business and its potential for generating near term revenue because, *inter alia,* it contained baseless revenue projections. The Complaint quotes from and attaches the SEC Cease-and-Desist Order, which lays out in detail that Legacy Canoo lacked even a single potential project capable of generating near term revenue. A592-99. This fact alone is "sufficient to raise a reasonably conceivable inference of an unfair transaction at the plaintiff-friendly pleading stage." *Knight v. Miller*, 2022 WL 1233370, at *1 (Del. Ch. Apr. 27, 2022). *See also Delman v. GigAcquisitions3, LLC*, 288 A.3d 692, 727 (Del. Ch. 2023) ("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.").

As a fall-back to their waiver argument, Defendants argue that "Plaintiff's allegations do not support a reasonable inference . . . that Legacy Canoo's

engineering services revenue projections were unsupported *and* Defendants knew or should have known it." AB 4, 35-37. Both assertions are incorrect.

First, the notion that Plaintiff's allegations do not support a reasonable inference that the revenue projections were unsupported may be quickly dispensed with. Plaintiff pleaded and incorporated the SEC's charges in his operative Complaint. ¶¶28-30, 35, 101, 144-49; A592-99. The SEC Cease and Desist Order specifically charges that "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.***" A593 (emphasis added). Defendants argue that the Supplementation Order renders these allegations in the Complaint a nullity. AB 36-37 (asserting that the SEC's factual findings are "not within the scope of well-pleaded factual allegations ***that should be considered***.") (emphasis added). But the trial court specifically delineated which allegations Plaintiff could include in his operative pleading, and which he could not, and ordered Plaintiff to file a complaint that conformed to its Order. A500. Defendants do not appeal that Order. The trial court appears to have treated the SEC findings as incorporated by reference into the Complaint. Op. 38. And hypocritically, Defendants themselves assert that the SEC's factual assertions should be "taken as true" – but only with

respect to one assertion therein arguably favorable to them. AB 37-39. This entire argument is tantamount to suggesting that the Supplementation Order somehow modifies the Rule 12(b)(6) pleading standard to be applied to Plaintiff's operative pleading. It clearly does not.

Secondly, Defendants ask the Court to just assume that even a faithful fiduciary (not suffering from the conflicts present in this case) could not have discovered problems with the revenue projections, under any circumstances. That is a speculative and unreasonable conjecture. A faithful fiduciary would have requested the basis for the projections and then evaluated whether the basis was legitimate or fanciful. Without discovery it is impossible to know what, if anything, the conflicted fiduciaries in this case actually did. All that is presently known for certain is what the Proxy claims they did, and also that the SEC concluded that the projections were baseless.

The reasonable inference that logically flows from Plaintiff's allegations concerning Hennessy's supposedly "significant" due diligence is that if Defendants had performed the diligence the Proxy claimed, then they would have discovered that Legacy Canoo was in the process of trying to come up with a workable business plan and had zero potential engineering services projects capable of producing near term revenue. As Plaintiff noted in his Opening Brief, the trial

court has afforded this inference to plaintiffs in virtually every other SPAC decision. *See* OB 29-37. Defendants nonetheless claim that they are entitled to a defense-friendly competing inference that overrides any inference of actual or constructive knowledge. *See* AB 42 (contending that the SEC's factual allegations "refute" that Defendants knew or must have known of significant problems with the engineering services business line). This is improper at the pleading stage. Where "the pleading-stage record also support[s] reasonable inferences that cut in the defendants' favor[,] [d]iscovery and, if necessary, a trial will disclose which set of inferences prevails." *Lebanon Cnty. Emps'. Ret. Fund v. Collis*, 311 A.3d 773, 805-06 (Del. 2023). Plaintiff's Opening Brief made this precise point but Defendants failed to address it or any of the cited authorities. *See* OB 36; Section III.(D) *infra.*[5]

Lastly, even were Defendants ignorant of the revenue projection fraud, the fact that Hennessy stockholders were furnished with a Proxy that contained baseless revenue projections and falsely described Legacy Canoo's engineering

[5] *See also New Enter. Associates 14, L.P. v. Rich*, 292 A.3d 112, 160 (Del. Ch. 2023) ("If the plaintiffs have alleged facts at the pleading stage that support an inference of unfairness, then the court must credit those allegations. The defendants cannot introduce evidence at the pleading stage, nor can a court weigh competing evidence. Therefore, a plaintiff who has alleged facts sufficient to . . . support an inference of unfairness will survive a Rule 12(b)(6) motion.").

services business, is a fact demonstrating that the transaction was unfair and Defendants would still bear the burden of proving that the transaction was entirely fair. *See Voigt v. Metcalf*, 2020 WL 614999, at *23 (Del. Ch. Feb. 10, 2020) ("'Not even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness. Rather, the transaction itself must be objectively fair, independent of the board's beliefs.'") (citation omitted).

B. The Failure to Disclose that Legacy Canoo was Trying to Come up with a Workable Business Plan While the Proxy Touted its Supposedly Unique and Successful Business Plan also Demonstrates Unfairness

Even prior to the SEC Enforcement Action, Plaintiff's superseded complaint sufficiently alleged that the Merger was not entirely fair, sufficient to shift the burden to the Defendants.

Plaintiff alleged in detail a bait-and-switch Merger in which Hennessy's stockholders were asked to forego their redemption rights and instead invest in a company which the Proxy prominently claimed had a "Unique Multi-Pronged Go-to-Market Strategy". That strategy purportedly featured an engineering services business the Proxy described as being "in high demand" and "offer[ing] 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." Superseded complaint at ¶¶13-15, 95, 97. It also purportedly featured a subscription sales model described as "considerably more profitable and resilient" than sales. *Id*. at ¶¶16, 96.

Shortly after the Merger closed, Canoo shocked investors, analysts and the market when it suddenly announced that both of these (2 of 3) key components of business plan touted in the Proxy would be sharply curtailed. *Id*. at ¶¶17, 105-107.

Plaintiff's books-and-records investigation revealed that the purported "Unique Multi-Pronged Go-to-Market Strategy" was, in reality, being dramatically reconfigured behind the scenes for months prior to the publication of the Proxy. *Id.* at ¶¶22-26; 115-26. The documents indicate that by September 2020 at the latest, Legacy Canoo had commissioned McKinsey & Co. to conduct a ground up evaluation of the business model touted in the Proxy titled "Building a successful business model." *Id*. McKinsey "[a]ssessed Canoo's initial economic model" in September and October 2020 and "[i]dentif[ied] [the] most attractive segments to focus on" in October and November 2020, but did not identify contract engineering ***at all*** as part the company's future business model. *Id*.

Plaintiff bolstered these allegations with after-the-fact admissions by Canoo's Executive Chairman Tony Aquila. *Id*. at ¶¶19-20, 106-114. For example, Aquila characterized prior public statements about the company's business plan

and prospects as "premature", "[not] at our standard of representation to the public market" and "a little more aggressive than I would be." *Id*. Acquila also acknowledged that analysts following the company had previously been "showed a different model." *Id*. at ¶110. Acquila also admitted that when he "invested" in Legacy Canoo (in July 2020) and "took the chairmanship" (October 2020), he "started the analysis" to overhaul the company's business "to go in a different direction," which also was not disclosed in the Proxy. *Id*. at ¶¶128-37.

These allegations are sufficient to make it reasonably conceivable that the Merger was unfair. Indeed, the glaring disconnect between the disclosures in the Proxy and the post-Merger revelations was alone sufficient for the SEC Division of Enforcement to immediately initiate an investigation. *Id*. at ¶140.

Defendants' response to these allegations is based entirely on presumed facts that Plaintiff did not allege. For example, Defendants claim that the McKinsey study was merely a "preliminary analys[i]s". AB 28. Defendants go so far as to claim, without support that while Legacy Canoo began its analysis months before the Proxy, "those deliberations did not crystallize into a concrete decision until months later when the new board took control *after* closing." AB 29. This is the opposite of what Plaintiff alleges. *See New Enter. Associates 14, L.P.*, 292 A.3d at

162 ("The defendants' account departs from the allegations of the complaint, and at the pleading stage, the court must credit the plaintiffs' account.").

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

The trial court erred in holding that Plaintiff did not sufficiently allege a reasonably conceivable breach of fiduciary duty against Hennessy's conflicted fiduciaries. OB 26-42.

A. The Complaint's Detailed Allegations Regarding the Extensive Due Diligence Defendants Supposedly Undertook Support a Reasonable Inference of Actual or Constructive Knowledge.

Under Rule 12(b)(6) and this Court's guidance in *Central Mortgage*, Plaintiff is entitled to the reasonable inference that Defendants knew or should have known about both the undisclosed business shift and the baseless revenue projections. The Complaint details the due diligence Defendants claimed to have performed, including the review of "material contracts" and "extensive third-party due diligence consisting of commercial due diligence with Canoo's current and planned commercial partners". OB 11-12. The trial court should have credited these non-conclusory allegations and afforded Plaintiff the inference that Defendants knew, or that a non-conflicted fiduciary would have known, that there was no basis whatsoever for the hundreds of millions of dollars of revenue projections in the Proxy. As Plaintiff pointed out, the trial court has afforded

plaintiffs this inference at the motion to dismiss stage in every other SPAC case that Plaintiff found. *See* OB 29-27 (collecting cases).

But the trial court's Opinion failed to credit, and in fact barely mentions Plaintiff's due diligence allegations ***at all***. OB 32-33, 39. The trial court ignored Plaintiff's due diligence allegations and instead accepted as true, based on a single section heading in the SEC Cease and Desist Order, that Defendants did not know, and could not have known (under any reasonably conceivable set of circumstances) the undisclosed information. Op. 39 ("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."). This was error. *See Newbold v. McCaw*, C.A. No. 2022-0439-LWW (Del. Ch. Jul. 21, 2023) (TRANSCRIPT) ("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***.") (emphasis added).

B. Defendants' Due Diligence Claims Contradict their Claims of Ignorance.

Defendants claim that they "could *not* have learned the truth because they were victims of a fraud perpetrated by Legacy Canoo officers." AB 47. While the Proxy states that the Defendants engaged in "extensive third-party due diligence" (OB 11-12), Defendants now assert that "the information that [they] received during due diligence falsely touted the strength of the allegedly non-viable engineering services business line." AB 41. This defense belongs in an answer to the Complaint, since it denies allegations rather than accepting them as true.

Defendants deny that their due diligence review of "material contracts" could have possibly exposed that the touted pipeline was nothing but a pipe dream. AB 41. The case they cite for this proposition, *HBK Master Fund L.P. v. Pivotal Software, Inc.*, 2023 WL 10405169 (Del. Ch. Aug. 14, 2023), is a *post-trial* appraisal decision in which the court conducted a five day trial and considered "1,532 joint trial exhibits, trial testimony from eight fact and two expert witnesses, deposition testimony from 20 fact and two expert witnesses, and 145 stipulations of fact in the pre-trial order" before opining on the reliability of management projections and issuing her ruling. The case offers zero support for Defendants' assumption that Legacy Canoo's projections could be accepted at face value. If

indeed Defendants simply accepted Legacy Canoo's projections at face value without scrutiny, then they seriously failed in their fiduciary duties. Legacy Canoo had almost no revenue history and had every reason to inflate or fabricate projections to attract investments. A faithful fiduciary would have scrutinized the projections with extreme care rather than accepting them at face value to republish in the Proxy.[6]

Defendants cite a second *post-trial* decision, *Cobalt Operating, LLC v. James Crystal Enterprises, LLC*, 2007 WL 2142926 (Del. Ch. July 20, 2007) to excuse their failure to uncover the fraudulent projections during their due diligence, but *Cobalt* effectively highlights the necessity of a trial to test Defendants' excuses against the evidence. In fact, in *Cobalt*, the Chancellor specifically noted that he "came into trial skeptical of [Plaintiff's] claim, given the brazen type of fraud it was premised upon" but during "[a] week of trial testimony and thousands of pages of briefs and exhibits" Defendant's "pre-trial explanations

[6] While *HBK Master Fund L.P.* is inapposite, the motion to dismiss opinion in the parallel breach of fiduciary duty action is instructive. *See In re: Pivotal Software, Inc. S'holders' Litig.*, C.A. No. 2020-0440-KSJM (Del. Ch. Jul. 15, 2021) (TRANSCRIPT) ("Defendants' arguments that the complaint fails to state a claim under the entire fairness standard are premature and quarrel with the facts alleged in the complaint and further ask the Court to make defendant-friendly inferences that are improper at a motion to dismiss stage.")

all fell apart or were abandoned at trial." In *Cobalt,* based on an extensive trial record, the Court ultimately determined that "[Defendant]'s own efforts at deception prevented the fraud from being detected". Defendants' citation of *Cobalt* is a tacit acknowledgment that a trial is necessary to establish Defendants' affirmative defense.

Neither decision involved a pleading stage dismissal where the trial court applied the Rule 12(b)(6) standard. Nor are they entire fairness cases where the burden was shifted to defendants to prove fair price and fair process. Both cases effectively illustrate why Defendants' self-serving excuses cannot simply be accepted as true at the pleading stage.

There is also a glaring absence from Defendants' due diligence arguments. They did not explain how their "extensive third-party due diligence consisting of commercial due diligence with Canoo's current and planned commercial partners" (OB 11-12) failed to uncover the fraudulent projections. According to the SEC, the projections were based on only two commercial partners. A593. Did the Defendants in fact undertake *any* due diligence (let alone "extensive" due diligence) with "current and planned commercial partners" as they claimed in the Proxy, in which case they would have quickly discovered the fraud? Or did they blindly republish the fraudulent projections in the Proxy? Either way, they

violated their fiduciary duties by disseminating the fraudulent proxy to Hennessy stockholders. As Defendants' own authorities make clear, this is precisely the type of factual dispute that cannot be resolved at the pleading stage.

C. Aquila's Statements Further Support an Inference that the Defendants Violated Their Duty of Disclosure

Defendants understandably claim to disagree with Plaintiff's interpretation of Aquila's candid statements to investors. AB 30-31. They contend that the statements only refer to representations by Legacy Canoo executives, not by Hennessy. *Ibid.* While it cannot be clarified absent discovery, it appears that Aquila was referring to statements about the revenue projections and business model in the Proxy, which was included in a Registration Statement Defendants signed and distributed to Hennessy shareholders to win votes for the Merger.[7] At the end of the day, the Defendants are responsible for the contents of the Proxy.

Defendants further contend that the information that Defendants received during due diligence falsely touted the strength of the allegedly non-viable engineering services business line. AB 40-41. On the contrary, Plaintiff alleges

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[7] *See* https://www.sec.gov/Archives/edgar/data/1750153/000121390020039415/fs42020a2_hennessycapacqiv.htm

and will show at trial that there was no legitimate basis for the revenue projections in the Proxy, and that if Defendants had actually contacted either of the two commercial partners as part of their "extensive due diligence" then they would have known that the projections were baseless. This fact existed before the Proxy, it was a concrete fact according to the SEC Enforcement Action, and it was knowable through ordinary due diligence. And since the revenue projections were baseless, it was extremely relevant that McKinsey had been retained to find some viable business model *other than* what was presented in the Proxy. In sum, the correct pleading-stage inference on a Rule 12(b)(6) motion is that Defendants knew or should have known before the date of the Proxy that the revenue projections were baseless and therefore the business model did not appear viable without a radical transformation.

D. The Trial Court's Weighing of Competing Inferences was Improper at the Pleading Stage.

Defendants now all but concede that Hennessy stockholders were defrauded, but contend they could not have known of the fraudulent revenue projections under any reasonably conceivable constellation of provable facts, and that the fraud was not their fault. AB 2, 46-47.

As Plaintiff explained in his Opening Brief, even if the SEC's findings gave rise to a reasonable inference that information was concealed from Defendants, it would not be proper for the trial court to accept this competing inference over reasonable plaintiff-friendly inferences. *See* OB 35-36 (citing *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009), *Lebanon Cnty. Emps'. Ret. Fund v. Collis*, 311 A.3d at 805-06 (Del. 2023) and *IBEW Loc. Union 481 Defined Contribution Plan & Trust v. Winborne*, 301 A.3d 596, 632 (Del. Ch. 2023)). Tellingly, Defendants offer no response; their Answering Brief does not mention *any* of these authorities.

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

Defendants' arguments largely hinge upon whether the fraudulent projections were successfully concealed from them despite the due diligence the Proxy claims Defendants performed. AB 2, 37-43. The cases Defendants cite illustrate that the adjudication of this issue requires discovery and trial. *See* pages 22-24 *supra*. The primary support for the *pleading stage* conclusion Defendants ask the Court to draw is one section heading from the SEC Cease-and-Desist Order that doesn't match the text that follows. OB 17, 38-39. There is no other factual support for this affirmative defense, such as contemporaneous emails, affidavits or deposition testimony.

The trial court made an error of law by citing Rule 15(d) to delete paragraphs from Plaintiff's proposed supplemented pleading that provide context and explain why one single portion of the SEC's findings (now Defendants' primary litigation driven excuse) doesn't make sense. OB 44.

Plaintiff alleged with particularity why the Defendants knew or should have known of the fraudulent projections given the Proxy's highly specific claims of extensive due diligence with Legacy Canoo's commercial partners and review of material contracts. The trial court should not have prevented Plaintiff from

addressing the SEC's section heading and other facts that contradict Defendants' claim that the fraudulent projections were concealed from Defendants.

Finally, Plaintiff indisputably argued that dismissal with prejudice would be unjust under the circumstances. OB 46-47; A494.[8]

CONCLUSION

Where entire fairness review applies, dismissal at the pleading stage is rarely appropriate. OB 23-24. The Complaint alleges that conflicted fiduciaries secured a $68 million payday by completing a disastrous Merger with 10 days to spare. It was quickly revealed that the company's business and prospects were entirely different than as described in the Proxy. The SEC immediately commenced an investigation – and ultimately concluded and charged that the Proxy contained materially false and misleading statements regarding Legacy Canoo. Defendants do not seriously dispute that Hennessy's stockholders were defrauded. They ask this Court to assume that the fraud was not their fault, despite supposedly undertaking due diligence that easily would have revealed the truth. But exposing the truth would have cost Defendants $68 million. The dismissal should be reversed.

[8] Defendants' reference to Plaintiff's Rule 15(aaa) argument as "puzzling" (AB 45) is disingenuous. *See* B1388-9.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 22nd day of October, 2024 that I caused to be served a copy of the Public Version of Appellant's Corrected Reply Brief upon the following in the manner indicated:

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