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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE ANAPLAN, INC. STOCKHOLDERS LITIGATION	)	No. 284, 2024
	)	Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-1073-NAC
	)	**PUBLIC VERSION as filed on September 17, 2024**

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal of the Court of Chancery's Opinion granting Defendants' motion to dismiss ("Opinion" or "Op.") under the *Corwin* doctrine. Breaches of fiduciary duty between signing and closing caused a $400 million reduction in the transaction price, but the Court of Chancery's application of *Corwin* leaves no avenue for stockholders to redress that harm.

The facts of this case are unprecedented. Under the Original Merger Agreement (defined below), Thoma Bravo agreed to acquire all outstanding shares of Anaplan, Inc. ("Anaplan" or the "Company") for $66 per share (the "Transaction"). That agreement contained strict and unambiguous limitations on Defendants' ability to grant equity to employees between signing and closing. Nevertheless, Defendants breached their fiduciary duties by knowingly causing the Company to far exceed those unambiguous equity grant limitations between signing and closing.

The damages resulting from Defendants' breaches of duty are undisputed. After Defendants caused the Company to violate the unambiguous terms of the Original Merger Agreement, Thoma Bravo asserted a breach and threatened to walk away. To preserve the Transaction, the Company was forced to agree to a reduced price of $63.75 per share, costing Anaplan stockholders more than $400 million.

Appellant Pentwater Capital Management LP ("Pentwater" or "Plaintiff") alone lost approximately $11 million due to Defendants' breaches of duty.

The trial court's determination that stockholders released $400 million claims by voting in favor of the Revised Merger Agreement was legal error for three reasons, each of which provides an independent ground for reversal.

First, *Corwin* cannot apply because stockholders were not specifically asked to ratify Defendants' breaches of duty. In applying the ratification doctrine, the court must balance "competing concerns—utility of the ratification defense and the need for judicial scrutiny of certain self-interested discretionary acts by directors—by focusing on the specificity of the acts submitted to the stockholders for approval." *In re Invs. Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1211 (Del. 2017). Were Anaplan stockholders specifically asked to release $400 million dollar claims that exist independent of the Transaction's fairness or merely asked to choose between the Revised Merger Agreement and remaining a standalone company? In *In re Santa Fe Pacific Corporation Shareholder Litigation*, this Court considered a similar question and refused to find ratification because the challenged breaches of duty (defensive measures) were distinct from the approved merger. 669 A.2d 59, 68 (Del. 1995). Application of settled precedent compels the same conclusion here.

Second, if this Court determines that stockholders were specifically asked to ratify Defendants' breaches, *Corwin* cleansing is still unavailable because the vote was coerced. The trial court concluded that acceptance of the Transaction was conditioned on stockholders releasing the claims asserted in this action. That rendered the vote coerced. Stockholders "were not able to 'easily protect themselves at the ballot box by simply voting no'" because "[i]f they voted one way, they would forgo [a] lucrative deal[]," and if they voted the other way, "and, should *Corwin* apply, [they would] release a potentially valuable fiduciary duty claim." *Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152, at *22 (Del. Ch. May 31, 2017).

Stockholders' inability to return to the status quo by voting no further underscores the coercive nature of the vote. "If a transaction is negotiated and structured in a particular way, and presented to the stockholders such that they may ratify it, or reject it and retain the status quo, such a vote is not structurally coercive." *Liberty Broadband*, 2017 WL 2352152, at *21. Here, by contrast, stockholders could not vote no and return to the pre-breach status quo of a signed and enforceable merger agreement requiring the buyer to pay $66 per share.

Third, if stockholders were specifically asked to ratify Defendants' breaches, *Corwin* cleansing is also unavailable because the vote was not fully informed. The trial court found that "Anaplan stockholders had the material information they needed—including, most importantly, about the price—to make an informed decision whether or not to vote in favor of the Revised Merger Agreement." (Op. 18.) But to the extent stockholders were being asked to release claims against Defendants (they were not), stockholders did not have the information they needed to assess the viability (or value) of those claims. The Proxies (defined below) failed to disclose, *inter alia*, the merger agreement schedule setting out the strict equity grant limitation or the presentations Defendants received demonstrating their knowledge that they were exceeding that limitation. Just as a stockholder vote could not ratify a transaction negotiated by a conflicted board absent disclosure of the board's conflicts, the stockholder vote here could not ratify Defendants' breaches without disclosure sufficient to assess them.

* * *

Corwin does not supersede the maxim that equity will not suffer a wrong without a remedy. Yet that is the impact of the trial court's ruling. It deprives minority stockholders of the ability to return to the position they would have been in but-for Defendants' breaches. The trial court's application of *Corwin* as a "broad eraser," exonerating Defendants for breaches of duty despite undisputed harm of $400 million, finds no support in Delaware law. The Opinion should be reversed.

SUMMARY OF ARGUMENT

1. *Corwin* does not apply to Appellant's claims because stockholders were not specifically asked to approve Defendants' breaches of fiduciary duty that deprived Anaplan stockholders of $400 million. *Corwin* cannot cleanse breaches of duty that, as here, were not inherent in the transaction for which stockholder approval was solicited and that exist independent of the Transaction's fairness.

2. If this Court concludes that the trial court correctly determined that stockholders were asked to ratify Defendants' breaches, *Corwin* cleansing is still unavailable because the vote was coerced and materially uninformed. The vote was coerced because: (i) stockholders had to choose between foregoing a valuable transaction and releasing valuable claims and (ii) by voting no, stockholders could not return to the pre-breach status quo of a binding merger agreement entitling them to $66 per share. The vote was materially uninformed because the Proxies failed to disclose information sufficient for stockholders to assess the viability (or value) of the claims they were being asked to release. Thus, stockholders could not make an informed comparison of the value of the standalone entity with claims for breach of fiduciary duty (the give) to the $63.75 per share Transaction consideration (the get).

STATEMENT OF FACTS

A. The Parties

Pentwater was the beneficial owner of 5,325,000 Anaplan shares at the time of the Transaction. (A019-A020, ¶17.) Defendants' breaches reduced Pentwater's Transaction consideration by more than $11 million. (*Id.*)

At the time of the Transaction, (i) Defendant Frank Calderoni was Anaplan's CEO, President, and Chairman (A020, ¶18); (ii) Defendant Vikas Mehta was Anaplan's CFO (A020, ¶19); and (iii) Defendant Gary Spiegel was Anaplan's Senior Vice President and General Counsel. (A020-A021, ¶20.) Mehta and Spiegel were members of the Equity Administration Committee, which handled the issuance of certain equity awards and reported to Calderoni. (A039, ¶76.) Under the Original Merger Agreement, Calderoni, Mehta, and Spiegel were required to "cause the Company to perform its obligations under the Merger Agreement and to consummate the Merger and other transactions contemplated by the Merger Agreement[.]" (A033-A034, ¶59.) Calderoni, Mehta, and Spiegel are the "Officer Defendants."

Defendants Robert Beauchamp, Susan Bostrom, and Suresh Vasudevan served on Anaplan's Compensation Committee between signing of the Original Merger Agreement and closing. (A021, ¶¶21-23.) The Compensation Committee approved equity grants in breach of the Original Merger Agreement. (A036-A037, A040-A041, ¶¶67-70, 79-81.) Beauchamp, Bostrom, and Vasudevan are collectively referred to as the "Compensation Committee" and, together with the "Officer Defendants," as the "Defendants."

B. Anaplan Launches a Sale Process, Delays Anticipated Equity Grants, and Agrees to Sell to Thoma Bravo for $66 Per Share

In late 2021, following poor quarterly financial results that prompted a steep decline in Anaplan's stock price, Anaplan engaged financial advisors to explore potential strategic alternatives. (A022-A023, ¶¶25-26.)

Between December 2021 and February 2022, Anaplan faced pressure from large investors Corvex Management ("Corvex") and Sachem Head Capital Management L.P. ("Sachem Head"), who expressed displeasure with Anaplan's performance and voiced activist intentions. (A023-A024, ¶¶28-31.) On February 22 and 28, 2022, Corvex and Sachem Head, respectively, delivered director nomination notices. (A024, ¶¶31-32.)

Faced with mounting activist pressure, and recognizing their positions would be in jeopardy if Anaplan remained a target of activist investors, Calderoni and the Board accelerated the sale process. (A025, ¶¶33-34.) A corporate sale likely would provide Calderoni's best personal outcome, as he would either cash out at a premium or roll over his equity. (A025, ¶34.) Absent a sale, Anaplan would remain an activist target and Calderoni's job would likely stay in jeopardy. (*Id.*)

On March 8, 2022, the Company received several bids from potential acquirers, including Thoma Bravo. (A025, ¶38.) On March 11, 2022, Thoma Bravo informed Anaplan's financial advisor that its "best and final offer" was $66 per share in cash. (A026, ¶39.)

The Board met later that day to discuss Thoma Bravo's offer, and directed management and its advisors to prioritize discussions with Thoma Bravo. (A026, ¶¶40-41.) At the same meeting, the Board concluded that the Company should delay its regular equity compensation so that the buyer could determine how and when to compensate employees. (A026, ¶41.)

After the full Board meeting, the Compensation Committee met privately with Calderoni in an "Executive Session with CEO." (A026-A027, ¶42.) The Compensation Committee discussed with Calderoni "the Board's feedback with respect to the Company's ordinarily-scheduled annual executive equity refresh grants" and "the need to be sensitive to the impact of any retention grants on the ongoing strategic process and the concerns of the Investors." (A027, ¶43.) The Compensation Committee "explain[ed] to Mr. Calderoni that given the possibility that Anaplan may enter into a definitive agreement with a prospective acquirer, the

Compensation Committee had ***determined to delay*** the regularly scheduled equity award refresh grant cycle." (A028, ¶44 (emphasis added).)

On March 18, 2022, the Compensation Committee met again with both Calderoni and Spiegel in attendance. (A028, ¶46.) The Compensation Committee and management learned that, year-to-date, Anaplan had granted 383,211 shares of equity. (A028-A029, ¶47.)

The full Board met later that day. (A029, ¶48.) Despite determining a week earlier to delay issuing 2022 equity grants, the Board revisited the same topics, including "(i) the treatment of unvested equity awards of the Company in connection with the proposed acquisition by [Thoma Bravo] and (ii) the status of the Company's FY 2023 annual equity refresh awards (which were otherwise scheduled to be made by this point in time but had been postponed due to the pendency of negotiations with [Thoma Bravo])." (A029-A030, ¶49.) The Board also discussed the Compensation Committee's instruction to pursue "a negotiation approach with [Thoma Bravo] on these topics," and instructed "Calderoni to discuss these topics with [Thoma Bravo] and report back to the full Board." (A030, ¶¶50-51.)

On March 20, 2022, the Board approved the Transaction after receiving the full Original Merger Agreement and its accompanying schedules. (A030-A031, ¶52.) The Board's resolutions approving the Transaction directed the "Authorized

Officers" (Defendants Calderoni, Mehta, and Spiegel) to "cause the Company to perform its obligations under the Merger Agreement and to consummate the Merger and other transactions contemplated by the Merger Agreement[.]" (A033-A034, ¶59.) The parties executed the Transaction agreement ("Original Merger Agreement") (A063-A137) that day, with Calderoni signing on behalf of Anaplan in his capacities as Chairman and CEO. (A030-A031, ¶52.)

C. The Original Merger Agreement Expressly Caps Anaplan's Ability to Issue Equity Between Signing and Closing

The Original Merger Agreement capped the Company's ability to issue equity between signing and closing. (A030-A033, ¶¶52-56.) The interim operating covenants concerning Anaplan's ability to grant equity "was among the final issues resolved before signing—after intensive discussion." (A031, ¶53.)

Section 5.1 of the Original Merger Agreement expressly prohibited Anaplan from granting any new equity awards absent prior written approval from Thoma Bravo. (A031, ¶54.) Subject to a single exception discussed below, Anaplan ***could not*** "issue, sell, pledge, dispose of, grant or encumber, or authorize the issuance, sale, pledge, disposition, grant or encumbrance of, any Company Securities"[1] or "make or grant any bonus or any incentive compensation other than annual bonuses

[1] "Company Securities" was broadly defined. *See* A031, ¶54 n.22.

payable with respect to the 2022 fiscal year … in accordance with the terms of the annual bonus plan in effect as of the date of this agreement." (A031-A032, ¶¶54-55 (citing Original Merger Agreement §§5.1(b)(ii) and 5.1(b)(xvii)).)

Schedule 5.1 to the Original Merger Agreement—which was never disclosed to stockholders—provided the sole exception to Section 5.1(b)'s general prohibition on equity grants. It permitted the Company to make merit-based awards to existing employees of up to $105 million, no more than $20 million of which could be allocated to a defined subset of senior employees:

> As part of its customary annual review cycle, the Company may make its ordinary course merit-based award grants to employees, directors, officers or independent contractors in the form of Company [Restricted Stock Units ("RSUs")] ***in an amount not to exceed $105,000,000*** (determined based on the Merger Consideration), no more than $20,000,000 (determined based on the Merger Consideration) of which may be granted in the aggregate to Company employees who are party to a CiC [*i.e.*, change-in-control] and Severance Agreement or Executive Offer Letter (or are otherwise officers or management-level employees as determined by the Company in its sole discretion (provided that (x) [Thoma Bravo]'s prior consent will be required on any individual Equity Award Grant to an employee in an aggregate amount in excess of $500,000 (such consent not to be unreasonably withheld, conditioned or delayed)….

(A032-A033, ¶56 (quoting Original Merger Agreement Schedule 5.1) (emphasis added).) Because the Schedule 5.1 exception only covered merit-based awards in connection with the Company's 2022 annual review cycle, it did not permit equity grants to new hires as they had no performance to be reviewed. (A033-A034, ¶¶57-

59.) No other section of the Original Merger Agreement permitted equity award grants to new hires.

Defendants were aware of the Original Merger Agreement's express prohibition on Anaplan's issuance of new equity and the limited exception provided in Schedule 5.1. The prohibitions were the subject of multiple Board and Compensation Committee discussions, followed intensive negotiations, were among the last issues resolved by the parties, and impacted the Officer Defendants' personal financial interests. (A026-A031, A034-A035, ¶¶41-44, 46-53, 61.)

D. Defendants Cause the Company to Breach the Original Merger Agreement's Equity Grant Caps

On April 4, 2022, the Compensation Committee met and approved millions of dollars in equity grants, including an equity grant to an existing employee that it acknowledged was subject to Thoma Bravo's approval. (A036, ¶¶66-68.) During the same meeting, at Calderoni's recommendation, the Compensation Committee approved $22 million in RSU grants to Company officers (including $9.5 million to Calderoni and $4.5 million to Mehta). (A037-A038, ¶¶71-72.)

The $22 million grant to Company officers exceeded Schedule 5.1's $20 million sub-limit. Accordingly, Calderoni requested Thoma Bravo's consent to increase that sub-limit to $22 million. (A038-A039, ¶73.) After discussion, Thoma Bravo provided its consent, changing only how the $105 million equity grants could be allocated. (A039, ¶74.) Nothing in the agreement approving the re-allocation of equity awards for certain senior executives suggests that Thoma Bravo agreed to adjust the $105 million cap applicable to cumulative equity awards. (*Id.*)

In April and May 2022, Defendants issued and/or approved a flurry of additional equity awards, to both existing employees and new hires, causing the Company to greatly exceed the $105 million cap. (A039-A040, ¶¶77-79.) A May 19, 2022 Compensation Committee presentation (at which Calderoni and Spiegel were present) showed that the Company had exceeded the Original Merger Agreement's $105 million cap by granting 2,023,461 shares of equity to existing employees and new hires—worth over ***$133.5 million*** at the Transaction price—between signing of the Original Merger Agreement and May 19, 2022. (A040-A041, ¶¶79, 81.) Defendants, however, never sought Thoma Bravo's consent. (A039, A041-A043, ¶¶74, 81, 83, 86-87.)

The Company's Supplemental Proxy (defined below) later reported that, all told, following the signing of the Original Merger Agreement, Defendants caused the Company to grant or agree to grant: (i) $107 million of merit-based equity to existing employees and (ii) approximately $50 million of equity to new hires. (A041-A042, ¶82 (citing Supplemental Proxy at 7).) The $157 million in equity grants exceeded the $105 million cap by ***nearly 50%***.

E. Calderoni Concedes Anaplan's Breach of the Original Merger Agreement; Thoma Bravo Leverages Defendants' Breaches Into a $400 Million Price Reduction

Only after Defendants caused Anaplan to violate the Original Merger Agreement's $105 million cap on merit-based equity awards to existing employees and prohibition on granting equity to new hires did Calderoni seek Thoma Bravo's consent. (A042-A043, ¶¶83-86.)

On May 23, 2022, Calderoni informed Thoma Bravo for the first time that Defendants had caused the Company to violate the Original Merger Agreement:

> Calderoni[also] informed and requested that Thoma Bravo (i) agree to approximately ***$50 million of new equity awards*** either granted or allocated to new hires in the ordinary course of business, and (ii) confirm that the $105 million pool of merit-based equity grants permitted under the Original Merger Agreement was ***increased to $107 million*** in light of a prior consent Thoma Bravo had granted of an increase by $2 million to a sub-pool of merit-based equity awards for executives. Mr. Calderoni then indicated that, on a net basis …, Anaplan estimated it would grant ***approximately $137 million*** in merit-based and new hire grants in the interim period, or ***approximately $32 million in excess of the $105 million pool for merit-based grants permitted under the Original Merger Agreement.***

(A042-A043, ¶85 (quoting Supplemental Proxy at 7) (emphasis added).)

Predictably, Thoma Bravo did not agree to the *post hoc* approval that Calderoni sought. (A035, A042, ¶¶64, 84.) To the contrary, Thoma Bravo was a sophisticated private equity sponsor that was suffering "buyer's remorse" due to "the deterioration of the financial markets," (A035, ¶64 (quoting Supplemental Proxy at

12)), and fully exploited the leverage that Defendants' Original Merger Agreement breaches had gifted it. (A042, ¶84.)

Hours after Calderoni admitted that the Company violated the Original Merger Agreement, Thoma Bravo emailed Calderoni that: (i) the $105 million pool for equity awards in the Original Merger Agreement was already generous for the sign-to-close period; (ii) the additional requested equity awards effectively represented a purchase price increase; (iii) the equity awards issued to new hires were not permitted; and (iv) Thoma Bravo should not pay more than what was agreed upon under the Original Merger Agreement as a result of Anaplan's actions. (A043-A044, ¶¶87-88 (citing Supplemental Proxy at 8).)

Thoma Bravo also requested details about the equity that had been approved and/or granted since the signing of the Original Merger Agreement. (A044, ¶90.) In response, Anaplan provided Thoma Bravo a spreadsheet indicating that between signing and May 26, 2022, Anaplan granted or agreed to grant: (i) over $107 million in RSUs to existing employees; (ii) nearly $45 million in RSUs to new hires, $12.5 million of which had already been processed; and (iii) approximately $2.5 million in "Other" RSUs. (*Id.*) The spreadsheet conclusively demonstrated that Anaplan had violated both the $105 million cap on merit-based equity awards and the prohibition on granting equity to new hires.

Thoma Bravo threatened to walk away unless the Transaction price was reduced. (A046-A048, ¶¶96-99.) On May 27, 2022, Thoma Bravo wrote to Anaplan to reiterate, among other things, that Anaplan had violated the Original Merger Agreement's interim operating covenants by granting more than $105 million in equity to existing employees and granting equity to new hires. (A046-A047, ¶97.) Thoma Bravo asserted that the interim operating covenants were among the most important and heavily negotiated provisions; the $105 million cap was among the final issues resolved after intensive negotiation; and Anaplan (*i.e.*, Defendants) "treated its heavily negotiated operation commitments—constraints that it knew to be crucial to us—as if they did not exist." (A046-A048, ¶¶97, 99.)

Thoma Bravo successfully exploited Anaplan's contractual breaches to secure a meaningful price reduction. (A048-A049, ¶¶100, 102.) On June 6, 2022, the parties entered into a revised merger agreement (the "Revised Merger Agreement"). (A048, ¶100.) The Transaction price was reduced from $66 per share to $63.75 per share, which, as the *Financial Times* noted, "cost Anaplan shareholders more than $400mn." (A048-A049, ¶¶100, 102.)

F. The Proxies Omit Information Sufficient for Stockholders to Assess Defendants' Breaches of Duty

Having scuttled the Original Merger Agreement before stockholders could approve its terms, on June 10, 2022, Anaplan issued a supplemental proxy, soliciting a stockholder vote on the Revised Merger Agreement ("Supplemental Proxy") (A139-A192; A049, ¶103.) The Supplemental Proxy supplemented the Company's original definitive proxy statement dated May 2, 2022 ("Original Proxy," and together with the Supplemental Proxy, the "Proxies").

While the Supplemental Proxy disclosed Anaplan's and Thoma Bravo's views concerning whether Anaplan breached the Original Merger Agreement, it failed to disclose facts sufficient for stockholders to assess for themselves whether Defendants breached the Original Merger Agreement, including by:

- Failing to disclose Schedule 5.1, which would have informed stockholders that there was an unambiguous cap of $105 million on equity grants between signing and closing.
- Failing to disclose that Defendants received notice during the May 19, 2022 Compensation Committee meeting that the Company had exceeded the $105 million cap. (A051-A052, ¶¶112-113.)
- Misleadingly suggesting that the Original Merger Agreement allowed Anaplan to issue equity awards to new hires because that was consistent with the Company's past practices.[2]
    - The Company's ability to grant equity post-signing was heavily negotiated and the Company did not preserve the ability to grant equity to new hires. (A051, ¶110.)

[2] *Id.*; Supplemental Proxy at 8 ("[T]he Original Merger Agreement required Anaplan to operate in the ordinary course of business, and the fiscal year 2023 operating plan furnished to Thoma Bravo before signing specifically contemplated that Anaplan would continue to hire employees and would continue to grant them equity awards….").

- Misleadingly suggesting that Anaplan believed that Thoma Bravo had consented to increasing the equity cap to $107 million by stating that, on May 23, 2022, Calderoni asked Thoma Bravo to "confirm" that its "prior consent" to increase the pool for equity grants to certain executives to $22 million also increased the total pool to $107 million. (A052, ¶114.)
    - The undisclosed May 22 presentation shows that Defendants knew that the pool had not been increased to $107 million and, accordingly, planned to "[r]equest that the aggregate cap of equity awards" be increased to $107 million. (A052-A053, ¶115.)

These omissions, false statements, and half-truths prevented stockholders from assessing the viability (or value) of the claims against Defendants that the trial court found they were being asked to release.

On June 21, 2022, Anaplan stockholders approved the Transaction, which closed the following day. (*Id.*) At the time of the vote, the markets had deteriorated. (A049-A050, ¶¶104-105.) The Supplemental Proxy explained that the trading price of Anaplan's comparable companies had declined approximately 25% since the signing of the Original Merger Agreement. (A049-A050, ¶105.)

G. This Litigation

On November 23, 2022, following a Section 220 investigation, Plaintiff filed its three-count Verified Class Action Complaint. Counts I and II are for breach of fiduciary duty against the Officer Defendants and Compensation Committee, respectively, for (i) acting in bad faith by knowingly violating the Original Merger

Agreement[3] and (ii) breaching their *Revlon* duties—which run through closing[4]—by failing to act reasonably to maximize value after the Original Merger Agreement was signed. Count III is for waste against all Defendants.[5] The trial court did not reach the viability of Counts I and II, and this Court need not either to reverse.

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[3] When fiduciaries breach an unambiguous term, the trial court can infer at the pleading stage that the violation was knowing and deliberate. *See Garfield on behalf of ODP Corp. v. Allen*, 277 A.3d 296, 331-32 (Del. Ch. 2022) ("In the face of a plain and unambiguous restriction on the fiduciary's authority, it is reasonable to infer that the fiduciary violated the restriction knowingly."); *Pfeiffer v. Leedle,* 2013 WL 5988416, at *9 (Del. Ch. Nov. 8, 2013) ("[A] *prima facie* showing of such a clear violation supports an inference that the [b]oard either knowingly or deliberately exceeded its authority.").

[4] *See Firefighters' Pension Sys. of Kansas City, MO Tr. v. Presidio, Inc.*, 251 A.3d 212, 272 (Del. Ch. 2021) ("Directors must maintain an active and direct role in the context of a sale of a company from beginning to end.") (citation and internal quotations omitted).

[5] Plaintiff is not appealing the trial court's dismissal of its waste claim.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING STOCKHOLDER RATIFICATION WHERE STOCKHOLDERS WERE NOT SPECIFICALLY ASKED TO RATIFY DEFENDANTS' BREACHES OF DUTY

A. Question Presented

Whether the trial court erred in holding that a stockholder vote in favor of the Revised Merger Agreement ratified Defendants' breaches of fiduciary duty which deprived stockholders the ability to accept the Original Merger Agreement, and which exist independent of the Transaction's fairness. The question was raised below (A245-A247, A328-A338) and considered by the trial court. (Op. 14-15.)

B. Scope of Review

This Court reviews the application of *Corwin* on a motion to dismiss *de novo*. *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018).

C. Merits of Argument

"Ratification is a concept deriving from the law of agency which contemplates the *ex post* conferring upon or confirming of the legal authority of an agent in circumstances in which the agent had no authority or arguably had no authority." *Lewis v. Vogelstein*, 699 A.2d 327, 334-35 (Del. Ch. 1997). The agency problem at the heart of the *Corwin* doctrine arises when a conflicted board majority approves a transaction. Thus, "[i]n the classic *Corwin* case, fiduciaries ask stockholders via their votes to ratify an intrinsic element of the deal process, such as the alleged lack of independence of a majority of the directors." *Liberty Broadband*, 2017 WL 2352152, at *23.

Indeed, that was the relevant holding of the trial court in *Corwin*:

> [E]ven if plaintiffs had pled facts from which it was reasonably inferable that a majority of KFN's directors were not independent, the business judgment standard of review still would apply to the merger because it was approved by a majority of the shares held by disinterested stockholders of KFN in a vote that was fully informed.

In re KKR Fin. Hldgs LLC S'holder Litig., 101 A.3d 980, 1003 (Del. Ch. 2014). This Court affirmed. As this Court explained, "the long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves." *Corwin v. KKR Fin. Hldgs LLC*, 125 A.3d 304, 313 (Del. 2015).[6]

The long-standing policy of deference to disinterested stockholders and the agency problem addressed by the *Corwin* doctrine are not implicated here. This case

[6] *See also Morrison*, 191 A.3d at 274 ("The *Corwin* doctrine is premised on the view that, '[w]hen the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them.'") (quoting *Corwin*, 125 A.3d at 313).

does not challenge the economic merits of the Transaction relative to remaining a standalone entity; it is not premised on a conflicted board-majority (or other conflict that may have infected the negotiations); and the trial court will never be asked to second-guess disinterested stockholders' economic decision. Against that backdrop, the trial court's holding that the stockholder vote in favor of the Transaction ratified Defendants' breaches of duty was legal error. *See also In re Massey Energy Co. Deriv. & Class Action Litig.*, 160 A.3d 484, 507 (Del. Ch. 2017) (rejecting *Corwin* defense where policy underlying *Corwin* "is not implicated").

Nevertheless, the trial court applied *Corwin* because it did "not read our Court's *Corwin* decisions, or the policy rationale underlying *Corwin*, as intended to apply *Corwin* narrowly." (Op. 15.)[7] But this Court has cautioned that "[c]areful application of *Corwin* is important due to its potentially case-dispositive impact." *Morrison*, 191 A.3d at 274. Careful application of the ratification doctrine requires the court to focus "on the specificity of the acts submitted to the stockholders for approval." *Invs. Bancorp,* 177 A.3d at 1211. "Shareholders cannot be deemed to have ratified board action unless they are afforded the opportunity to express their

[7] As discussed in the preceding paragraph, the policy rationale underlying *Corwin* is not implicated at all.

approval of the precise conduct being challenged." *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *31 (Del. Ch. May 3, 2004).[8]

The transaction (or act) submitted to stockholders for approval was the Revised Merger Agreement. As the trial court correctly held, the choice for stockholders was whether "to accept the revised merger or to vote it down and thereby retain their shares in the standalone company." (Op. 21.) Under the *Corwin* doctrine, the stockholder vote in favor of the Revised Merger Agreement—assuming it was informed and uncoerced—ratified the Revised Merger Agreement relative to the standalone option, foreclosing argument that Anaplan's standalone value exceeded $63.75 per share even if it was the product of an uninformed sale process or negotiated by conflicted fiduciaries.[9]

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[8] *See also Gantler v. Stephens*, 965 A.2d 695, 713 (Del. 2009) ("[T]he only director action or conduct that can be ratified is that which the shareholders are specifically asked to approve."); *Garfield*, 277 A.3d at 355 (explaining that stockholders must specifically know what they are ratifying because "there has to be a meeting of the minds"); *Massey*, 160 A.3d at 507 (stockholders asked to approve merger "were *not* asked in any direct or straightforward way to approve releasing defendants" from prior liability).

[9] *See Liberty Broadband*, 2017 WL 2352152, at *21 ("Breaches of duty inherent in that transaction—failure to run an informed sales process, say, or negotiation by self-interested fiduciaries—are not themselves separate 'transactions' imbedded in the vote that render it coercive.").

But this case does not challenge the economic merits of the Revised Merger Agreement relative to the standalone option. Instead, it challenges Defendants' breaches that deprived stockholders the ability to accept the Original Merger Agreement. The question is whether stockholders can be said to have been "afforded the opportunity to express their approval" of those breaches, which exist independent of the Transaction's fairness. This Court considered a similar question in *Santa Fe*, and refused to find ratification. It should reach the same conclusion here.

In *Santa Fe*, the complaint challenged defensive actions taken by a board in the context of a contest for corporate control. *Id.* at 63. The disfavored suitor withdrew, and the stockholders were asked to approve the merger agreement that the board negotiated with its chosen bidder. *Id.* at 65. This Court refused to find that the vote approving the merger ratified the board's adoption of defensive measures against the disfavored bidder. As this Court explained, the proposal that stockholders approved (the merger agreement) was different than the claimed breaches of fiduciary duty (the defensive measures):

> In voting to approve the Santa Fe–Burlington merger, the Santa Fe stockholders were not asked to ratify the Board's unilateral decision to erect defensive measures against the Union Pacific offer. The stockholders were merely offered a choice between the Burlington Merger and doing nothing. The Santa Fe stockholders did not vote in favor of the precise measures under challenge in the complaint. Here, the defensive measures had allegedly already worked their effect before the stockholders had a chance to vote....

> Since the stockholders of Santa Fe merely voted in favor of the merger and not the defensive measures, we decline to find ratification in this instance.[10]

Thus, in *Santa Fe*, this Court limited the scope of ratification to the precise issue put to a stockholder vote, just as it did in *Investors Bancorp* and *Gantler*.[11]

The rationale of *Santa Fe* applies here with equal force. As in *Santa Fe*, Anaplan stockholders were offered a choice between the Revised Merger Agreement and doing nothing. As in *Santa Fe*, Defendants breaches "had already worked their effect before the stockholders had a chance to vote." And, as in *Santa Fe*, the challenged transaction and the approved merger were distinct. If anything, Defendants' breaches here were less attendant to the merger than in *Santa Fe*; the only relationship between Defendants' breaches and the merger is that they caused a reduction in Transaction consideration.

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[10] *Id.* at 68. In *Gantler*, this Court reaffirmed this aspect of its *Santa Fe* holding. 965 A.2d at 713 n.53; *see also Solomon v. Armstrong*, 747 A.2d 1098, 1113 (Del. Ch. 1999) ("[T]he Delaware Supreme Court has made it clear that ratification of one board action does *not* extend to any other actions which are not necessarily attendant to that approved action.").

[11] In *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720 (Del. Ch. 1999), Vice Chancellor Lamb distinguished *Santa Fe* on the basis that, "[u]nlike the situation in *Santa Fe*, the proposition voted on by the Lukens stockholders fairly framed the question whether or not to ratify the job done by the Lukens directors in managing the bidding process." *Id.* at 737. In other words, unlike in *Santa Fe*, the challenged conduct was subsumed within the fairness of the merger. Here, like in *Santa Fe* and unlike in *Lukens*, the breaches exist independent of the merger's fairness.

The following hypothetical helps illustrate why the challenged conduct is properly viewed as distinct from the ratified Transaction. Imagine that (i) Thoma Bravo walked away from the deal after Defendants' breach; (ii) stockholders sued, alleging the same claims at issue in this case; (iii) months later, Anaplan agreed to sell to Company A for $63.75 per share; and (iv) stockholders approved the deal with Company A. In that scenario, it could not reasonably be argued that stockholders ratified Defendants' breaches of fiduciary duty by approving the transaction with Company A. The result should be no different here simply because the Company re-traded the deal with the same buyer on a more expedited timeline.

Or imagine that the claims were derivative as Defendants incorrectly argued below. (*See* Op. 12.) The law is settled that such claims would not be ratified by a vote in favor of the merger.[12] The result should be no different merely because, in this unique circumstance, Defendants' breaches harmed stockholders directly.

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[12] *See generally Lewis v. Anderson*, 477 A.2d 1040 (Del. 1984); *see also Massey*, 160 A.3d at 507 (rejecting argument that merger vote ratified breaches that harmed the company and that existed independent of the merger's fairness).

II. IF STOCKHOLDERS WERE SPECIFICALLY ASKED TO RELEASE $400 MILLION CLAIMS, THE TRIAL COURT ERRED IN HOLDING THAT THE VOTE WAS UNCOERCED AND FULLY INFORMED

A. Question Presented

Whether the trial court erred in holding that Defendants met their burden for triggering application of the business judgment rule under *Corwin* where stockholders: (i) could not accept the Transaction without releasing valuable claims or return to where they were before Defendants breaches of duty by voting no; and (ii) were not provided information sufficient to assess the viability (or value) of the claims that they were being asked to release. The question was raised below (A247-A253, A328-A343) and considered by the trial court. (Op. 15-24.)

B. Scope of Review

This Court reviews the application of *Corwin* on a motion to dismiss *de novo*. *Morrison*, 191 A.3d at 282.

C. Merits of Argument

Corwin applies only if "a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders." *Corwin*, 125 A.3d at 306. *Corwin* cleansing is unavailable even if stockholders were specifically asked to release their $400 million claims because the vote was coerced and materially uninformed, either of which necessitates reversal.

1. If Stockholders Were Specifically Asked to Ratify Defendants' Breaches, the Vote Was Coerced Because Receipt of the Transaction Consideration Was Conditioned on the Release of Valuable Claims

Although the Proxies never disclosed that a vote in favor of the Transaction would ratify Defendants' breaches of duty that deprived them of the ability to accept the Original Merger Agreement, the trial court found that the vote had that effect. If that is correct—if stockholders had to (i) reject the Revised Merger Agreement to maintain the claims asserted in this action or (ii) ratify breaches of fiduciary duty that cost them $400 million to enter into the Transaction—then the vote was coerced because "[f]iduciaries cannot interlard such a vote with extraneous acts of self dealing, and thereby use a vote driven by the net benefit of the transactions to cleanse their breach of duty." *Liberty Broadband*, 2017 WL 2352152, at *3. Indeed, *Corwin* cleansing is unavailable where structural dynamics such as cross-conditioning one transaction on acceptance of another "call into question the inference to be drawn from the stockholder vote." *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *29 (Del. Ch. June 11, 2020).

In *Liberty Broadband,* Plaintiffs alleged that the "Defendant directors achieved value for the stockholders in the Acquisitions," and "then conditioned receipt of those benefits on a vote in favor of transactions extraneous to the Acquisitions"—equity issuances to the company's largest stockholder and an agreement to grant that stockholder greater voting power. *Id.* at *22-23. "In other words, the stockholders were told that if they refused to approve certain transactions, themselves potentially not in the corporate interest, they would lose out on other, beneficial, transactions." *Id.* at *22. The Court held that the vote was structurally coercive because stockholders "were not able to 'easily protect themselves at the ballot box by simply voting no.' If they voted one way, they would forgo two lucrative deals. If they voted another way, they would transfer value to an insider (and, should *Corwin* apply, release a potentially valuable fiduciary duty claim)." *Id.* (citation omitted). So too here, where, according to the trial court, receipt of the beneficial Revised Merger Agreement was contingent on release of valuable claims.[13]

Similarly, in *In re USG Corp. Stockholder Litigation*, the court posited a hypothetical in which stockholders approved a transaction despite disclosure that company directors had received a kickback from the buyer in exchange for cutting short the sale process. 2020 WL 5126671, at *2 (Del. Ch. Aug. 31, 2020), *aff'd sub nom. Anderson v. Leer*, 265 A.3d 995 (Del. 2021). The court readily "concede[d] th[e] likelihood that any vote in such a scenario would be coercive." *Id.* at *2 n.5.

[13] Contrast that with a *Corwin* case, where a vote in favor of the merger does not release a potentially valuable claim because stockholders have determined that the transaction is in the best interest of the corporation.

The rationale of those cases would also support a finding of structural coercion in the following scenario: (i) Anaplan and Thoma Bravo agree to the Original Merger Agreement; (ii) an Anaplan fiduciary decides that it will oppose the transaction unless it receives a side benefit; (iii) Thoma Bravo, Anaplan, and the fiduciary re-trade the transaction, providing the fiduciary a $400 million side benefit and Anaplan's remaining stockholders $400 million less; and (iv) stockholders approve the amended merger agreement while aware of the side payment.

From a *Corwin* perspective, there is no principled basis to distinguish between that fact pattern and the one at issue here merely because the $400 million went to the acquiror rather than a sell-side fiduciary. In both cases, stockholders are being asked to vote in favor of a transaction that is $400 million worse than it would otherwise be but-for breaches of duty. In both cases, stockholders lack the ability to accept the lucrative transaction without releasing valuable claims. And in both cases, *Corwin* is unavailable because "the favorable stockholder vote only implies that the transaction as a whole is relatively better than the status quo, not that the challenged aspect of the transaction is in the corporation's best interest." *Dell*, 2020 WL 3096748, at *29. Indeed here, no reasonable stockholder would have voted yes if afforded the opportunity to vote solely whether to release Appellant's claims.

The trial court's concern that a finding of structural coercion would "provide 'a license for plaintiffs to pick apart factors in stockholder votes to nullify ratification'" was unfounded. (Op. 22 (quoting *Liberty Broadband*, 2017 WL 2352152, *at 21)). As the *Liberty Broadband* Court explained, in a *Corwin* case, stockholders cannot "pick apart" the transaction because "[b]reaches of duty inherent in th[e] transaction—failure to run an informed sales process, say, or negotiation by self-interested fiduciaries—are not themselves separate 'transactions' imbedded in the vote that render it coercive." *Liberty Broadband*, 2017 WL 2352152, at *21. Here, unlike in a *Corwin* case, the breaches of duty were not subsumed within a process that resulted in a value maximizing deal price, but instead exist independent of the Transaction's fairness.

The conclusion that Defendants' breaches were extrinsic to, rather than inherent in, the Transaction put to a stockholder vote is further confirmed by stockholders' inability to return to the pre-breach status quo by voting no. "If a transaction is negotiated and structured in a particular way, and presented to the stockholders such that they may ratify it, or reject it and retain the status quo, such a vote is not structurally coercive." *Liberty Broadband*, 2017 WL 2352152, at *21.[14]

[14] *See also Dell*, 2020 WL 3096748, at *25 ("[I]f stockholders can reject the transaction and maintain the status quo, then the transaction is not coercive."). *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 621 (Del. Ch. 1999) ("The

Conversely, if stockholders cannot return to the pre-breach status quo by rejecting the transaction, the vote *is* structurally coercive.

In a *Corwin* case, the pre-breach status quo for stockholders is as stockholders of a standalone entity. If stockholders determine that the deal price was infected by conflict (or fiduciary misconduct), they can vote down the deal and return to that pre-breach position, eliminating any potential harm from fiduciary conflict or misconduct. The pre-breach status quo for Anaplan stockholders, by contrast, was as stockholders in a company with a signed merger agreement that entitled them to $66 per share. A vote against the Transaction could not return Anaplan stockholders to that position, further underscoring the distinction between Defendants' breaches and the Transaction that was put to a vote.

2. If Stockholders Were Specifically Asked to Ratify Defendants' Breaches, the Vote Was Not Fully Informed

Materiality is context specific. When assessing the materiality of disclosures, the Court must do so "with respect to the shareholder action being sought." *Dohmen v. Goodman*, 234 A.3d 1161, 1167 (Del. 2020). According to the trial court, the shareholder action being sought included ratification of Defendants' breaches of

GMH stockholders had the freedom to choose between the status quo and the deal consideration. Having had that freedom, they must live with their decision.").

duty. The question therefore is whether the Proxies omitted material information regarding the claims being ratified.[15]

The trial court did not meaningfully engage with that question. The trial court focused on the ratification of the Revised Merger Agreement, finding that "Anaplan stockholders had the material information they needed—including, most importantly, about the price—to make an informed decision whether or not to vote in favor of the Revised Merger Agreement." (Op. 18.) As to breaches at the heart of this case, the trial court found it sufficient that the Proxies disclosed the Board's and Thoma Bravo's views of the alleged breaches. (Op. 17-18.)

But the Proxies failed to disclose information sufficient for stockholders to make their own assessment of the viability (and value) of the claims that they were ratifying. As discussed in Statement of Facts § F, the Proxies, *inter alia*: (i) failed to disclose Schedule 5.1, which included the express limitation on equity grants; (ii) failed to disclose the fact that Defendants received notice that the Company had exceeded the equity grant cap; (iii) misleadingly suggested that Calderoni sought prior consent to exceed the equity grant cap; and (iv) misleadingly suggested that Calderoni asked Thoma Bravo to "confirm" that it had increased the equity grant

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[15] Similarly, if the ratified claims were premised on a majority-conflicted board, the proxy would have to disclose the facts underlying the directors' conflicts. *See, e.g.*, *In re Orchard Enterprises, Inc. S'holder Litig.*, 88 A.3d 1, 21 (Del. Ch. 2014).

cap to $107 million—implying that he believed Thoma Bravo had done so—when, in fact, he "request[ed]" it after Defendants had knowingly violated the limitation.

The viability (and value) of the claims that stockholders were supposedly ratifying was material to their comparison of the value of what they were giving up to what they were getting. According to the trial court, stockholders were asked to (i) approve the Transaction and release the claims or (ii) reject the Transaction and maintain the claims. If that is correct, stockholders could not make an informed comparison without information sufficient to assess the viability (and value) of the claims. The omitted and misleading information was thus material. *See Eisenberg v. Chi Milwaukee Corp.*, 537 A.2d 1051, 1059 (Del. 1987) (stockholders "are entitled to be informed of information in the fiduciaries' possession that is material to the fairness of the price"); *see also Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 ("[O]nce defendants traveled down the road of partial disclosure…, they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events.").[16]

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[16] The Opinion could be read to suggest that Plaintiff waived its disclosure argument. (Op. 19.) Plaintiff's answering brief below, however, devoted several pages to the disclosure argument. (A250-A253.) A plaintiff is not required to respond to every inapposite argument raised or decision cited in a defendants' opening brief.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's Opinion and remand for further proceedings.

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