EFiled: Oct 16 2024 04:18PM EDT
Filing ID 74768382
Case Number 284,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE ANAPLAN, INC. STOCKHOLDERS LITIGATION	)	**PUBLIC VERSION**
	)	**FILED: October 16, 2024**
	)	
	)	No. 284, 2024
	)	
	)	Case Below:
	)	The Court of Chancery of the
	)	State of Delaware,
	)	C.A. No. 2022-1073-NAC

APPELLEES' ANSWERING BRIEF ON APPEAL

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DATED: October 4, 2024

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NATURE OF PROCEEDINGS

Anaplan stockholders overwhelmingly approved a $10.4 billion transaction through which Thoma Bravo acquired Anaplan in an arm's-length, 41% premium cash deal. The vote was fully informed, and not coerced, as stockholders had the choice to accept the deal or remain with the status quo. Plaintiffs concede that they do not challenge the merger price or process, or the Anaplan Board's independence or disinterestedness. Using well-settled Delaware law, the Court of Chancery found that *Corwin* applied and necessitated dismissal.

Plaintiffs now argue on appeal that *Corwin* does not apply because this situation involved one where the Board – which ran a singular transaction process involving multiple bidders before presenting the deal to stockholders for a vote – exercised its judgment to renegotiate the original merger price to ensure certainty and swiftness of closing. Having no real answer as to why *Corwin* would not apply in this context, Plaintiffs are boldly asking this Court to wholesale disregard or re-write *Corwin* to reach their intended result. This Court should decline that invitation.

Plaintiffs claim two legal errors on appeal: (i) that *Corwin* does not apply because Anaplan stockholders were not asked to ratify alleged breaches of fiduciary duty that led to the renegotiation and (ii) even if *Corwin* did apply, it is unavailable because the vote was both coerced and uninformed. (OB 5) As the

Court of Chancery found, Plaintiffs waived or abandoned many of the arguments underlying these claims, and neither has merit.

First, Plaintiffs admitted below that the alleged breaches were inherent to the transaction and, thus, the stockholder vote. As the Vice Chancellor noted: "Even Plaintiff itself asserts, in responding to Defendants' standing arguments, that 'Defendants' breaches were *part and parcel to the merger process*[.]'" (Op. 15) (citation omitted) The stockholders knew what they voted on, and they overwhelmingly approved the Revised Merger Agreement. *Corwin*, as the Court of Chancery properly found, applies, and Plaintiffs' attempt to parse the merger process and isolate and attack only one aspect of it, and ignore the rest, should be rejected.

Second, the stockholder vote was both fully informed and uncoerced. The Original Proxy contained extensive details about the process leading to the Original Merger Agreement, and the Supplement (as the Vice Chancellor described it) contained 12 single-spaced pages of "excruciating" details about the events leading up to the Revised Merger Agreement, including the alleged provision that had been breached, Anaplan's and Thoma Bravo's views of the alleged breach, the subsequent negotiations, the Board's reasons to renegotiate, and fairness opinions from Anaplan's two financial advisors. Faced with this, and with Defendants' Opening Brief below demonstrating why each disclosure claim failed, Plaintiffs chose not to respond. Thus, as the Vice Chancellor found, Plaintiffs waived below any claim that the vote was uninformed. Moreover, Plaintiffs further conceded at argument that there were no disclosure violations and that stockholders had what they needed to approve the Revised Merger Agreement. And, to the extent there are any non-waived disclosure claims, Plaintiffs' claims amount to nothing more than immaterial disclosures.

Lastly, the vote was not coercive because the stockholders could choose whether to approve the Revised Merger Agreement or maintain the status quo. Under well-settled Delaware law, that is not coercion. Plaintiffs' claims boil down to an argument that the Revised Merger Agreement offered too good a deal to stockholders, and that *Corwin* can never apply any time a merger agreement is modified. That is not Delaware law, and this Court should decline Plaintiffs' invitation to wholesale re-write or narrow *Corwin*.

In short, Plaintiffs ask for a re-do. In doing so, they want this Court to do something it has never done: weaken *Corwin*'s application. They call *Corwin* a "broad eraser" designed to supersede the maxim that "equity will not suffer a wrong without a remedy." (OB 4) They are wrong, and provide absolutely no basis to alter the *Corwin* doctrine or its progeny on this record.

The Court of Chancery's opinion should be affirmed for additional reasons. While the Vice Chancellor dismissed on *Corwin* grounds, Defendants raised numerous other alternative arguments supporting dismissal, including that Plaintiffs fail to state a claim for breach of fiduciary duty, in part because they concededly do "not challenge the economic merits of the Transaction relative to remaining a standalone entity." (OB 22) As such, they have abandoned any direct claim for breach of fiduciary duty. Alternatively, Plaintiffs' claims could be considered derivative by numerous existing Delaware cases, and thus extinguished by the merger.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly found that the Complaint "fails under ordinary *Corwin* principles." (Op. 1) The Vice Chancellor rejected Plaintiffs' assertion "to demarcate artificially Defendants' actions here in the handful of weeks between signing the Original Merger Agreement and negotiating and signing an amendment to that agreement." (Op. 15) Thus, *Corwin* properly applied.

2. Denied. The Court of Chancery correctly concluded that the stockholder vote was both (i) fully informed and (ii) uncoerced. As the court noted, Plaintiffs themselves "essentially abandoned the field" regarding their alleged disclosure violations and found that "the disclosures satisfy *Corwin*[.]" (Op. 19) And the Vice Chancellor found that there was neither situational coercion (Op. 22) nor structural coercion. (Op. 24)

3. Alternatively, this Court should affirm for two independent reasons: (i) the Complaint fails to state a direct claim for breach of fiduciary duty and (ii) the Complaint brings derivative claims that were extinguished when the merger closed.

STATEMENT OF FACTS

A. Anaplan, The Parties, And The Non-Parties.

Anaplan, Inc. ("Anaplan" or the "Company") is a corporate performance management software company headquartered in San Francisco, California. Defendants Frank Calderoni, Vikas Mehta, and Gary Spiegel are former Anaplan officers. (Op. 2-3) Calderoni served as Chief Executive Officer, President, and Chairman of Anaplan's board of directors (the "Board"), Mehta served as Chief Financial Officer and Spiegel served as General Counsel and Senior Vice President. (Op. 2-3)

Calderoni personally voluntarily forfeited $9.5 million of equity awards in connection with the Revised Merger Agreement (Op. 8; A038 ¶72) and left the Company upon closing. (A053 ¶117) Mehta personally voluntarily forfeited $4.5 million in connection with the Revised Merger Agreement (A038 ¶72) and is no longer with Anaplan. Spiegel is no longer with the Company.

Defendants Robert Beauchamp, Susan Bostrom and Suresh Vasudevan are former members of the Board and its Compensation Committee, which oversaw the issuance of equity grants. (Op. 3) The Compensation Committee delegated many of its grant-issuing responsibilities to the Equity Administration Committee, which in turn reported to the Compensation Committee and Calderoni. (*Id.*) Mehta and Spiegel were on the Equity Administration Committee. (*Id.*)

B. Anaplan Engages In A Strategic Review Process And Enters Into An Arm's-Length, Premium Merger With Thoma Bravo.

In November 2021, the Board engaged financial and legal advisors. (Op. 4) The Board also formed a subcommittee to consider strategic alternatives. (B161-63) In February 2022, with assistance from its financial advisors, the Board approached 14 potential strategic and financial parties, and ten meaningfully engaged in preliminary diligence, including Thoma Bravo. (Op. 4)

On March 8, at Anaplan's request, interested suitors provided indications of interest. Four firms responded, proposing transaction prices with initial bids ranging from $51 per share to $68 per share. (*Id.*) Thoma Bravo's then-offer of $63 per share in cash was the only fully financed bid that did not require additional equity partners or debt financing and had the most certainty. (B173-74) The Board, with assistance from its financial and legal advisors, determined to focus on Thoma Bravo's bid and indicated to Thoma Bravo that it needed to improve its offer. (B175) Subsequently, on March 11, Thoma Bravo conveyed a "best and final" offer of $66 per share. (A026 ¶39; B176)

Later that day, the Board and the Compensation Committee determined that, "given the possibility that Anaplan may enter into a definitive agreement with a prospective acquirer," it was advisable to delay the regularly scheduled equity award refresh grant cycle. (Op. 4; B176)

The Board continued to meet and evaluate alternatives. (B176-79) No topping bid came, leaving Thoma Bravo's $66 per share offer as the highest bid. During this time, Anaplan and Thoma Bravo negotiated various aspects of a proposed merger. (*Id.*) Once Thoma Bravo emerged as the leading bidder, the Board determined that "it would be appropriate for management to engage with Thoma Bravo to discuss appropriate mechanisms to facilitate employee retention during the interim period between signing of a definitive agreement and closing of a transaction, including making regularly scheduled equity refresh grants and providing for partial acceleration of unvested equity awards upon closing." (B178; *see also* A030 ¶51)

On March 20, "Anaplan and Thoma Bravo entered into a merger agreement, whereby Thoma Bravo would acquire Anaplan for $66 per share (the 'Original Merger Agreement')." (Op. 4-5) Anaplan "stockholders were slated to receive approximately $10.7 billion in the transaction." (Op. 5) The price represented a 46% premium to the five-day volume weighted average price of Anaplan stock before the Original Merger Agreement was announced and was reported as one of the highest SaaS company valuations. (B131)

The Original Merger Agreement contained commonplace deal protection devices, including a standard no-solicitation provision with a fiduciary out and an approximately 2.7% termination fee. (B187) It also contained a significant reverse termination fee, where if Thoma Bravo terminated, it would have to pay Anaplan approximately 5.5% of the deal price. (B189) Anaplan stockholders were also afforded appraisal rights. (*Id.*)

On May 2, Anaplan issued its proxy statement (the "Original Proxy"). The Original Proxy was 120 pages long, with 37 single-spaced pages devoted to the strategic review process, Anaplan's interactions with various bidders, Anaplan's negotiations with Thoma Bravo, the Board and Advisory Committee meetings, the Board's reasons for recommending the Original Merger Agreement, the analyses underlying Goldman Sachs' and Qatalyst's fairness opinions and detailed financial projections. (B160-219) In the Complaint and on appeal, Plaintiffs fail to challenge any aspect of the Board's process, including the decision to enter into the Original Merger Agreement.

C. Post-Signing, Anaplan Continues To Operate In The Ordinary Course, Including As To Employee Compensation.

The Original Merger Agreement contained provisions regarding the operation of Anaplan's business between signing and closing, several of which were contained in a confidential disclosure schedule (the "Disclosure Schedule"). (Op. 5; A031-33 ¶¶53-56)

Section 5.1, titled "Conduct of the Business Pending the Merger," contained several interim operating covenants. (Op. 5) One such covenant limited the equity awards Anaplan could issue between signing and closing. (*Id.*) Section 5.1(b)(ii)(1) provided:

> **As part of its customary annual review cycle, the Company may make its ordinary course merit-based equity award grants to employees, directors, officers or independent contractors** in the form of Company 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 [Change in Control] … and Severance Agreement or Executive Offer Letter.

(Op. 5-6 (emphasis added)) The Disclosure Schedule was silent as to equity awards for new hires.

After signing the Original Merger Agreement, Anaplan continued its operations in the ordinary course. (B543) This included making compensation decisions, with respect to both equity grants for existing employees and equity awards to new hires. (*Id.*) Because the Original Merger Agreement was silent about whether equity could be issued to new hires, Anaplan interpreted it as not restricting awards to new hires. (B683)

Between April and May, the Compensation Committee and the Equity Administration Committee met to review and approve equity grants. The Compensation Committee, with its compensation consultant, Compensia, considered equity grants for new hires, as well as equity grants for existing employees. (Op. 7) One grant included $22 million to executives for FY2023. (*Id.*) Because this exceeded the Disclosure Schedule's $20 million limit for executive grants, Anaplan sought Thoma Bravo's consent. (Op. 8) On April 8, Thoma Bravo consented to the $22 million equity grants. As Anaplan understood it, that increased the total equity awards permitted under the agreement from $105 million to $107 million. (*Id.*)

At a May 19 meeting, the Compensation Committee considered approximately $50 million of equity grants that had been issued to new hires, as well as ongoing/refresh grants to existing employees and grants to executives. (*Id.*) Although those grants were well within the Company's internal budget, when combining the ongoing/refresh grants with existing employee, executive, and new hire grants, the Company had arguably issued in excess of the Disclosure Schedule's $105 million limit. (*Id.*)

D. Anaplan Requests Thoma Bravo's Consent To Issue Additional Equity; Thoma Bravo Refuses.

Upon realizing the potential issue concerning the $105 million limit, Anaplan took action. On May 23, Calderoni contacted Thoma Bravo (Op. 9) and "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." (A042-43 ¶85 (quoting B542)) "Calderoni then indicated that, on a net basis (after giving effect to the forfeiture of approximately $20 million of equity awards outstanding at signing due to employee departures), 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." (*Id.*)

That day, Thoma Bravo responded, stating that $105 million was more than enough, any equity awards beyond that effectively represented a purchase price increase, and certain equity awards were not permitted by the Original Merger Agreement's terms. (Op. 9; *see also* B543)

Anaplan did not expect Thoma Bravo's reaction for several reasons:

- *First*, the Original Merger Agreement required Anaplan to operate in the ordinary course, and the fiscal year 2023 operating plan furnished to Thoma Bravo before signing specifically contemplated that Anaplan would continue to hire employees and continue to grant them equity awards.

- *Second*, all new hire and merit-based equity grants since signing the Original Merger Agreement were in accordance with Anaplan's pre-existing equity grant guidelines regarding grant size and vesting.

- *Third*, the Original Merger Agreement required Thoma Bravo to not unreasonably withhold its consent to requests for relief from the interim operating covenants.
- *Fourth*, Anaplan believed that new hire grants were important to support its growth initiatives and immaterial given the size of the business and the purchase price being paid by Thoma Bravo, particularly after taking into account the amount of equity award grants forfeited because of employee departures and the voluntary forfeiture of equity award grants by certain Company executive officers.

(B543; *see also* A051 ¶111)

The following day, Anaplan provided materials to Thoma Bravo summarizing equity awards issued since the Original Merger Agreement. (A044 ¶90) Those materials showed that, since Anaplan had provided its equity budget to Thoma Bravo pre-signing showing the budget for new hires, and the Disclosure Schedule was silent as to new hires, "Anaplan intended the original $105M merit/refresh equity budget to cover the March/April standard annual review cycle, ***not all sign to close period grants***." (B630 (emphasis added); *see also* B543)

Ultimately, Anaplan took steps to address Thoma Bravo's concerns and reduced approximately $29.7 million of equity award grants between signing and closing. (B543) Calderoni, Mehta, and Anaplan's Chief Culture Officer voluntarily forfeited $15.5 million of equity grants, and Anaplan withdrew or deferred approximately $9 million of grants to other members of management. (B543-44)

Given these steps and that approximately $20 million of equity awards would be forfeited due to employee departures, Anaplan believed that Thoma Bravo's concerns regarding interim new hire equity grants would be fully addressed and result in approximately $105 million of equity awards between signing and closing on a net basis. (B544)

Despite Anaplan's efforts to resolve the matter, on May 27, Thoma Bravo asserted that "Anaplan had violated the interim operating covenants in the Original Merger Agreement as a result of … equity award grants to existing employees in excess of the $105 million limit" and "equity award grants to new hires," and raised concerns about other potential breaches of the Original Merger Agreement. (B544; Op. 9)

On May 30, Anaplan responded, denying that it breached the Original Merger Agreement. (B545; B640-42) Anaplan pointed to documents previously provided to Thoma Bravo and noted that "Anaplan's equity grant framework has been consistent from fiscal year 2022 to fiscal year 2023; Anaplan has only used 30% of its annual equity budget to date, as compared to 37% at the same point in time in the prior year" and that "there have been at least $19.6 million of forfeitures of equity grants to offset the amounts granted, and the amount of future forfeitures could further increase." (B641; *see also* B545)

E. The Board Discusses A Path Forward And Negotiates The Revised Merger Agreement.

In the beginning of June, representatives of Thoma Bravo and Anaplan spoke repeatedly. (Op. 10; B545-49) The Board leapt into action, meeting formally five times to review the equity grants, Thoma Bravo's claims, and potential next steps, along with numerous updates about Anaplan's interactions with Thoma Bravo. (B546-49) Among other concerns, the Board focused on whether Thoma Bravo might use this alleged breach as an excuse to walk away. (B546)

On June 2, Calderoni spoke with a Thoma Bravo representative, who relayed Thoma Bravo's concerns. On June 3, Calderoni and a Thoma Bravo representative had another call. (B545-46) Calderoni explained that the Board had determined there was no basis for Thoma Bravo to reprice or refuse to close. (B546.) Thoma Bravo stated that its financing sources remained concerned about the alleged breach and "resulting effects on Anaplan following the closing." (*Id.*) Thoma Bravo then explained that, in order to close, the price would need to be reduced to $61 per share. (*Id.*) Calderoni reiterated the Board's position that there was no basis to refuse to close or reprice the deal. (*Id.*)

On June 4, the Board met, and Calderoni discussed the June 3 phone call and Thoma Bravo's proposal to reduce the merger consideration. (B546-47) The Board discussed at length "the actions underlying the allegations made by

Thoma Bravo, the parties' respective obligations under the Original Merger Agreement, the potential impacts should there be a protracted dispute between the parties, the deterioration of conditions in the financial markets, the unlikelihood of consummating a similar transaction with an alternative bidder at a price comparable to the $66 per share purchase price specified in the Original Merger Agreement in light of recent significant declines in the trading prices of technology company stocks … and the importance of certainty of closing." (B547) After significant discussion, the Board directed management to engage with Thoma Bravo as to whether Thoma Bravo would agree to increased closing certainty and an expeditious path to closing in exchange for a modest purchase price reduction. (*Id.*)

Later that day, Calderoni held a call with Thoma Bravo representatives. (*Id.*) Calderoni repeated that there was no basis for a price reduction, but that the Board was willing to consider, at most, a modest price decrease only if Thoma Bravo provided substantially enhanced commitments for certainty and timing of closing. (*Id.*) Following further discussions that day, Thoma Bravo modified its proposal of $61 per share to $62 per share. (*Id.*) Calderoni indicated that would not be acceptable to the Board. (*Id.*) Calderoni repeatedly reiterated that Thoma Bravo's requested price reductions were excessive, but Thoma Bravo indicated that it could not agree to more than $63.50 per share. (*Id.*)

Later that same day, the Board met again. (B548) After receiving updates from management and its advisors, the Board directed management to seek a price greater than $63.50 per share. (*Id.*) Later that evening, Thoma Bravo offered a purchase price of $63.75 per share, with substantially increased closing certainty. (*Id.*)

The Board held a special meeting at night on June 5 to receive updates on the negotiations, as well as the current draft of a proposed revised merger agreement. (B549)

Early on June 6, the Board met again. (*Id.*) Goldman and Qatalyst opined that the revised price of $63.75 per share was fair to Anaplan stockholders and still a value for stockholders. (*Id.*, B555-61, B565-67) Among other things, the Board took into account the threat of protracted litigation and the unlikelihood that Anaplan could consummate a similar transaction with another bidder at a price comparable to the Original Merger Agreement, given the recent significant declines in the trading prices of technology company stocks, including for other cloud-based software companies. (B551) The Board ultimately determined that a revised price of $63.75 per share, with concessions from Thoma Bravo that increased closing certainty and timing, was in the best interests of Anaplan and its stockholders. (B549-50)

On June 6, Anaplan and Thoma Bravo entered into a revised agreement (the "Revised Merger Agreement"), pursuant to which Thoma Bravo would acquire Anaplan for $63.75 per share in cash, an approximate 3% reduction from the $66 per share price in the Original Merger Agreement, but still a significant 41% premium to Anaplan's five-day weighted average stock price before the Original Merger Agreement was announced. (Op. 10; A048 ¶100; B540) Further, "Anaplan obtained a host of concessions from Thoma Bravo, including waiving certain conditions, limiting the time period for assertion of other breaches, and … nearly doubling Thoma Bravo's reverse termination fee." (Op. 10, 24-25)

F. Anaplan Issues The Supplement Detailing All Of The Negotiations, Allegations And Discussions Leading Up To The Revised Merger Agreement.

On June 10, 2022, Anaplan issued its Schedule 14A (the "Supplement") explaining the events leading to the Revised Merger Agreement and the Board's reasons for recommending that Anaplan stockholders approve it. (Op. 10; B536-87) The Supplement contained 12 single-spaced pages regarding the Revised Merger Agreement and the Board's recommendation, including the equity issuances behind the dispute, every email, letter and call that Anaplan had with Thoma Bravo over the dispute, including each side's position, every Board meeting during which the Board discussed the dispute and a path forward and the concessions the Board extracted from Thoma Bravo, including greater deal certainty and a $1 billion reverse termination fee. (B542-50) The Court of Chancery, which characterized the Supplement's level of detail as "excruciating" (A330 at 74:3-5), explained:

> ***Immediately up front in the Supplemental Proxy***, the Board set forth its position, which was readily understandable to any stockholder reading it—that the Board believed the Company and its directors and officers had acted in good faith and in compliance with the Original Merger Agreement, but that a *bona fide* dispute had arisen with Thoma Bravo on that issue. Stockholders would further understand that, rather than continue to dispute the issue and risk losing the deal, the Board made the business judgment that it was in the best interests of Anaplan and its stockholders to agree to a price reduction in return for securing the still-premium transaction and enhanced closing certainty. ***This explanation was followed by an additional eight pages laying out in substantial detail*** the Board's position, Thoma Bravo's position, the dispute between the counterparties, and the negotiations over an amended merger agreement over a roughly two-week period.

(Op. 17-18) (emphases added; internal citations omitted)

On June 21, 2022, Anaplan stockholders overwhelmingly voted in favor of the Revised Merger Agreement, with 98.9% of those stockholders present voting in favor. (B644-46; Op. 10) On June 22, 2022, the transaction closed. (Op. 10)

G. The Court Of Chancery Grants Defendants' Motion To Dismiss And Plaintiffs Appeal.

On June 21, 2024, the Court of Chancery issued the Opinion, granting Defendants' Motion to Dismiss. The court found that *Corwin* applied and that Plaintiffs' claims could "not survive the informed and uncoerced vote of Anaplan's stockholders approving the Merger." (Op. 13)

In discussing whether the stockholder vote was fully informed, the court concluded that Plaintiffs had "essentially abandoned" their disclosure claims. (Op. 19) Regardless, the court found that Anaplan stockholders had the material information they needed to make an informed decision. (Op. 18) The court noted that the Supplement contained the Board's "readily understandable" position that Anaplan's directors and officers "had acted in good faith and in compliance with the Original Merger Agreement, but that a *bona fide* dispute had arisen with Thoma Bravo on that issue." (Op. 17) The court further found that "[s]tockholders would … understand that, rather than continue to dispute the issue and risk losing the deal, the Board made the business judgment that it was in the best interests of Anaplan and its stockholders to agree to a price reduction in return for securing the still-premium transaction and enhanced closing certainty." (Op. 17-18)

The court also concluded that no situational or structural coercion impacted the vote. (Op. 22, 24) Among other findings, the Vice Chancellor determined that Anaplan stockholders' "opportunity to retain an interest in a multibillion-dollar company with significant revenue" was merely a "difference between good, better, and best," which "is not grounds for situational coercion." (Op. 22)

In dismissing Plaintiffs' waste claim, the court also found that Anaplan stockholders received adequate consideration for the price reduction in the Revised Merger Agreement.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DISMISSED THE COMPLAINT UNDER *CORWIN*.

A. Question Presented.

Whether the Court of Chancery correctly concluded that the Revised Merger Agreement was approved by a fully informed, uncoerced vote of disinterested stockholders, such that dismissal was proper under *Corwin*?

B. Scope Of Review.

This Court's review of the Court of Chancery's decision to dismiss the Complaint is *de novo*. *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

C. Merits Of The Argument.

When a transaction "not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies." *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 309, 314 (Del. 2015). When *Corwin* applies, it "gives rise to the *irrebuttable presumption of the business judgment rule*[.]" *Teamster Members Ret. Plan v. Dearth*, 2022 WL 1744436, at *10 (Del. Ch. May 31, 2022) (citation omitted and emphasis added), *aff'd*, 289 A.3d 1264 (Del. 2023) (ORDER); *Kihm v. Mott*, 2021 WL 3883875, at *10 (Del. Ch. Aug. 31, 2021) (same), *aff'd*, 276 A.3d 362 (Del. 2022) (ORDER). The Vice Chancellor found that "Anaplan stockholders, via an informed and uncoerced vote, overwhelmingly approved the renegotiated transaction." (Op. 2) Thus, the Court of Chancery properly dismissed the Complaint.

1. Plaintiffs' Ratification Argument Is A Red Herring.

Plaintiffs contend that the Court of Chancery erred by holding that the stockholder vote "ratified" the alleged breaches of fiduciary duty they claim occurred in connection with supposed breaches of the Original Merger Agreement and argue that *Corwin* is the functional equivalent of common law stockholder ratification. This is meritless.

First, Plaintiffs waived this argument. Although Plaintiffs cited *Gantler v. Stephens* below, they did not argue that *Corwin* is the functional equivalent of *Gantler* ratification. 965 A.2d 695 (Del. 2009). Indeed, the case they now rely on, *In re Santa Fe Pacific Corp. Shareholder Litigation*, was never cited below. 669 A.2d 59 (Del. 1995). This argument is waived and should not be considered. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review").

Regardless, this Court addressed and disposed of that precise issue in *Corwin*. There, this Court held that it "embrace[d] the … interpretation of *Gantler* as a ***narrow decision*** focused on defining a specific legal term, 'ratification,' and ***not*** on the question of what standard of review applies if a transaction not subject to the entire fairness standard is approved by an informed, voluntary vote of disinterested stockholders." 125 A.3d at 311 (emphases added). It is established that *Corwin* and *Gantler*-style ratification are separate concepts, and Plaintiffs have offered no reason to upset this Court's precedent.[1] Since *Corwin*, the Court of Chancery has continued to distinguish between *Corwin* cleansing and *Gantler* ratification, rejecting the same efforts Plaintiffs make here to conflate them. For example, in *In re Volcano Corp. Stockholder Litigation*, the court held that *Corwin* applied to acceptance of a first-step tender offer the same way a stockholder vote did in a merger. 143 A.3d 727 (Del. Ch. 2016). The court noted that, while under *Gantler*, "stockholder acceptance of a tender offer … does not constitute 'ratification,'" "the fact that a first-step tender offer in a two-step merger does not constitute 'ratification' *is not dispositive as to the cleansing effect of stockholder approval* as expressed through acceptance of such a tender offer" and to find otherwise would "contradict *Corwin*'s holding." *Id.* at 746-47 (emphasis added).

Second, Plaintiffs' argument fails because they have conceded its central premise. They contend that "Defendants' breaches that deprived

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1 The general cases Plaintiffs cite regarding principles of ratification have no application here and did not involve *Corwin*. *See, e.g.*, *Garfield ex rel. ODP Corp. v. Allen*, 277 A.3d 296, 354 (Del. Ch. 2022) (derivative case finding non-binding advisory "say on pay" vote was not ratification because non-binding votes do "not have any effect"); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *31 (Del. Ch. May 3, 2004, *as revised* June 4, 2004) (pre-*Corwin* case addressing whether minimum tender condition was the equivalent of ratification, when stockholders were asked to tender, not vote).

stockholders the ability to accept the Original Merger Agreement" were a separate transaction from the transaction stockholders voted on. (OB 24) According to them, because the alleged breaches regarding the Original Merger Agreement were separate from the Revised Merger Agreement, the vote on the Revised Merger Agreement had no effect on the standard of review applicable to those breaches.

However, the Original Merger Agreement and the Revised Merger Agreement were part of the same process, and the stockholders only ever voted on and approved the Revised Merger Agreement. Indeed, Plaintiffs ***conceded*** below that the alleged breaches were "part and parcel to the merger process" leading to the Revised Merger Agreement, and, thus, subsumed within the stockholder vote. (A241) The Vice Chancellor explicitly recognized this concession and its fatality to Plaintiffs' claim:

> So long as a stockholder vote under *Corwin* applies to cleanse the deal process leading to a merger that equity owners choose to accept, I see no basis to demarcate artificially Defendants' actions here in the handful of weeks between signing the Original Merger Agreement and negotiating and signing an amendment to that agreement. Even Plaintiff itself asserts, in responding to Defendants' standing arguments, that "Defendants' breaches were *part and parcel to the merger process* and caused the reduction in the [t]ransaction consideration that [Thoma Bravo] otherwise agreed to pay.

(Op. 15)[2]

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[2] Plaintiffs posit that, if the claims were "derivative as Defendants incorrectly argued," "such claims would not be ratified by a vote in favor of the merger."
(cont'd)

Indeed, it is hard to see how the alleged breach of the Original Merger Agreement could be a "separate" transaction from the Revised Merger Agreement. Anaplan was a party to the Original Merger Agreement and operating under its confines. Anaplan made ordinary course compensation decisions based on the Original Merger Agreement. Thoma Bravo then claimed that there were breaches, and the parties intensely negotiated modifications that resulted in the Revised Merger Agreement. To say that this series of events was "separate transactions" defies logic.

The fully informed stockholder vote dictates the irrebuttable business judgment rule's application to the Revised Merger Agreement, including the events leading up to it. *See Teamsters Loc. 677 Health Servs. & Ins. Plan v. Martell*, 2023 WL 1370852, at *9 (Del. Ch. Jan. 31, 2023) (noting that "*Corwin*'s version of the business judgment rule has been described as 'irrebuttable'") (citation omitted).

Plaintiffs ignore their concession, pull a bait and switch and set forth a doomsday argument about *Corwin*. They say that "[t]he long-standing policy of deference to disinterested stockholders and the agency problem addressed by the

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(OB 26) Again, ratification and the irrebuttable business judgment deference under *Corwin* are not the same. But, even if they were not "ratified," and to the extent the court had considered the claims as derivative, they would be extinguished by a stockholder-approved merger.

Corwin doctrine are not implicated here." (OB 21) But Plaintiffs' ratification argument takes direct aim at *Corwin*. They want this Court to refine *Corwin* and limit its application by segregating out certain alleged breaches of fiduciary duties from the singular transaction in which those alleged breaches occurred. Under Plaintiffs' logic, if a board breached its fiduciary duties in connection with the process leading up to a merger – for, by example, favoring one bidder over another – those breaches could never be cleansed by a fully informed stockholder vote aware of all of the facts regarding bidder favoritism because they are a "separate transaction" from the merger agreement being voting on. That is not Delaware law.

In arguing that the challenged breaches here are different from the approved transaction, Plaintiffs rely on one case – never raised below – issued by this Court two decades before *Corwin*: *Santa Fe*, 669 A.2d 59. They assert that this case mirrors *Santa Fe* and that, as there, this Court should find ratification unavailable. However, this case and *Santa Fe* are wholly distinct, and this Court's holding there has no bearing on the claims here.

Santa Fe is a *Unocal* case. Santa Fe entered into a merger agreement with Burlington. A few months later, a third party, Union Pacific, contacted Santa Fe and proposed a transaction. Santa Fe "expressed reservations based on its contractual commitments" under its agreement with Burlington and threatened suit against Union Pacific "if it advanced an unsolicited merger proposal." 669 A.2d at 63. After Santa Fe rejected Union Pacific's offer and entered into a revised agreement with Burlington, Union Pacific launched a series of hostile tender offers. Santa Fe responded with defensive measures: (i) a rights plan if any entity other than Burlington acquired at least 10% of Santa Fe's outstanding shares; (ii) a joint tender offer with Burlington, wherein Burlington would own 16% of Santa Fe's outstanding shares; (iii) a repurchase plan, wherein Santa Fe would repurchase up to ten million shares before the merger's consummation; and (iv) a $50 million termination fee to Burlington if Santa Fe accepted a different, higher offer. *See id.* at 64-65.

Stockholders filed suit, alleging that the Santa Fe board took unreasonable and disproportionate measures. This Court held that the ratification doctrine did not apply to *Unocal* claims because, "in a contest for corporate control," it "would frustrate the purposes underlying *Revlon* and *Unocal*." *Id.* at 68. The stockholder vote concerned approval of the merger with Burlington. The board's defensive mechanisms, however, had been adopted and put in place long before the vote. Thus, this Court found that the stockholders "did not vote in favor of the precise measures under challenge in the complaint," and, therefore, ratification was not available to cleanse the *Unocal* claims. *Id.*

This case is not *Santa Fe*.[3] Plaintiffs contend that *Sante Fe*'s rationale "applies here with equal force" because, "[a]s in *Santa Fe*, the challenged transaction and the approved merger were distinct." (OB 25) They go even further: "[i]f 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." (OB 25) (emphases added) That contention belies the record and what actually happened here. Plaintiffs conceded that "Defendants' breaches were ***part and parcel to the merger process***." (A241) (emphasis added) Plaintiffs' statements now, therefore, mischaracterize their own admissions below. The Court of Chancery properly rejected Plaintiffs' argument to segregate the alleged breaches from the transaction and found that *Corwin* squarely applies.

3 *In re Investors Bancorp, Inc. Stockholder Litig.*, 177 A.3d 1208 (Del. 2017), does not apply. That was not a *Corwin* case. Rather, this Court addressed "the affirmative defense of stockholder ratification of director self-compensation decisions." *Id.* at 1217. The court held that a stockholder vote on an executive compensation plan did not ratify directors' discretionary awards because the stockholders had not voted on the discretionary awards in question (or even knew about them). This case involves *Corwin*, not an affirmative defense of ratification of self-interested compensation. Moreover, the issue being voted on here – the Revised Merger Agreement and all of the allegations leading up to it – was squarely presented to stockholders.

2. The Stockholder Vote Was Fully Informed.

After properly determining that *Corwin* applies, the Court of Chancery, in a detailed analysis, found that the vote was fully informed. Plaintiffs once again change course and argue a contention that they conceded – and, thus, waived – below. According to Plaintiffs, "[t]he trial court did not meaningfully engage" with whether the vote was informed. (OB 33) However, Plaintiffs' "brief [is] built upon an inaccurate premise … of the trial court's opinion" and is not helpful to this Court. *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 698 n.112 (Del. 2023).

Rather, it was *Plaintiffs* who did not meaningfully engage on disclosure claims – not the Vice Chancellor. In four pages of analysis, the Vice Chancellor evaluated the contentions and determined that the vote was fully informed. (Op. 15-19) The Court of Chancery succinctly summarized the disclosure arguments:

> Plaintiff's Complaint alleges disclosure deficiencies. Defendants address these *at length* in their opening brief. *Plaintiff chooses not to engage with Defendants' arguments in its answering brief.*

(Op. 18) (emphases in original and added) The Vice Chancellor then quoted Defendants' reply brief, which noted that rather than respond, Plaintiffs "regurgitate[d] the allegations in the Complaint." (B690-91) Because Plaintiffs failed to litigate their disclosure claims, the Vice Chancellor reached the only conclusion:

> With *Plaintiff having essentially abandoned the field*, it is not this Court's responsibility to tilt at windmills. Defendants have amply shown why the disclosures satisfy *Corwin*, and *Plaintiff does not provide a basis to conclude otherwise*.

(Op. 19) (emphases added)

Plaintiffs take umbrage with the Vice Chancellor's recognition that they waived their disclosure claims by failing to brief them. They contend that a party "is not required to respond to every inapposite argument raised or decision cited in a defendants' opening brief." (OB 34 n.16) Below, Defendants addressed each of Plaintiffs' alleged disclosure deficiencies and why they lacked merit. (B063-70) Plaintiffs chose "not to engage with Defendants' arguments in [their] answering brief." (Op. 18) This Court has spoken clearly: "[i]ssues not briefed are deemed waived." *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999). Plaintiffs not only waived their disclosure argument by failing to brief it – they conceded it at oral argument. When asked about their strongest disclosure claim, Plaintiffs pointed to none and conceded that they had no disclosure claims, but that their only real argument against *Corwin* was coercion:

> [Plaintiffs' counsel]: But, again, I would -- frankly, I think that the stronger point is that the stockholders didn't really care that much -- and this is defendants' point -- that the stockholders didn't really care

> that much exactly what happened that necessitated the renegotiation because they couldn't do anything about it.
>
> * * *
>
> [The Vice Chancellor]: Well, it seems like that essentially is an argument that what I need to decide here is whether *Corwin* applies. But if I decide it does apply, then I think what I'm hearing is you're saying stockholders had the information that they needed. That they didn't really, to use your words, really care about this additional information.

(A342) Plaintiffs waived any disclosure argument they had by failing to brief it and then conceding it at argument. This is fatal to Plaintiffs' claims below and on appeal.

Plaintiffs now attempt to resurrect their disclosure claims. (OB 33) Plaintiffs, who argue that "[t]he viability (and value) of the claims that stockholders were supposedly ratifying was material," do not get a second bite of the apple. (OB 34) In fact, Plaintiffs' four alleged disclosure violations are the same ones that they mentioned briefly below, but that the Vice Chancellor found they had abandoned. (*Compare* OB 33-34 *with* A251-52)

Even if their disclosure claims were not waived, the vote was fully informed. The Supplement, described by the Vice Chancellor as containing "excruciating detail," contained 12 pages of information about the dispute between Thoma Bravo and Anaplan and the events underlying it. (A330 at 74:3-5) Those disclosures included the Board's position that the Company and its directors and officers had acted in good faith and in compliance with the Original Merger Agreement (B542), but that a *bona fide* dispute had arisen with Thoma Bravo on that issue. (*Id.*) Stockholders were also fully informed of Thoma Bravo's position, including their view that a breach had occurred. (*Id.*) Stockholders were further informed that, rather than risk losing the premium deal, the Board had made the business judgment that a modest price reduction in return for securing a value-maximizing transaction with enhanced closing certainty was in the best interests of Anaplan and its stockholders. (*Id.*)

Plaintiffs argue that there are four areas of misleading disclosure: (i) the Original Proxy and the Supplement did not disclose the full Disclosure Schedule, which included the equity grant limitation; (ii) the Supplement failed to disclose that "Defendants received notice that the Company had exceeded the equity grant cap" because they received materials that supposedly should have alerted them to that fact; (iii) the Supplement "misleadingly suggested that Calderoni sought prior consent to exceed the equity grant"; and (iv) the Supplement "misleadingly suggested that Calderoni asked Thoma Bravo to 'confirm' that it had increased the equity grant 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." (OB 33-34)

Although the full Schedule 5.1 was not appended to the Original Proxy or the Supplement, its substantive terms were. The Supplement clearly disclosed that there was an "interim operating covenant in the Original Merger Agreement governing the amount of equity awards Anaplan was permitted to issue following signing without Thoma Bravo's approval" (B542), that there was a "$105 million pool of merit-based equity grants permitted under the Original Merger Agreement" (*id.*) and that Thoma Bravo believed that Anaplan "had violated the interim operating covenants in the Original Merger Agreement as a result of (x) equity award grants to existing employees in excess of the $105 million limit, (y) equity award grants to new hires and (z) senior-level employee hires made after the Original Merger Agreement was signed, in each case, without Thoma Bravo's prior consent." (B544) This more than amply disclosed the interim operating covenant and Thoma Bravo's belief that it had been violated.

Plaintiffs' claim that Defendants supposedly received notice that the Company had exceeded the equity grant cap does not state a disclosure claim. Plaintiffs would require Anaplan (and this Court) to adopt their characterization of events and interpretation of the Original Merger Agreement, requiring Anaplan to admit that it had violated that agreement. Delaware law does not require adoption of Plaintiffs' characterizations or self-flagellation in disclosures. *See In re Essendant, Inc. S'holder Litig.*, 2019 WL 7290944, at *12 (Del. Ch. Dec. 30, 2019) (dismissing disclosure claim where the board "declin[ed] to adopt Plaintiffs' characterization of its behavior" because it amounts to self-flagellation); *City of Miami Gen. Emps.' & Sanitation Emps. Ret. Tr. v. Comstock*, 2016 WL 4464156, at *13 n.55 (Del. Ch. Aug. 24, 2016) (dismissing disclosure claim because plaintiff's characterization "would amount to self-flagellation that is not required under Delaware law"), *aff'd on other grounds*, 158 A.3d 885 (Del. 2017).

Further, Plaintiffs nitpick the disclosure that Calderoni asked Thoma Bravo to "'*confirm*' the prior consent that Anaplan received … resulted in an increase of the $105 million pool to $107 million" (A052 ¶114 (quoting B542) (emphasis added)) and argue that it is inconsistent with an internal Anaplan presentation stating that Anaplan would "[*r*]*equest*" that the aggregate cap of equity awards be increased to $107 million. (A052-53 ¶115 (citation omitted) (emphasis added)) Arguing semantics does not create a disclosure violation. *In re Cyan, Inc. S'holders Litig.*, 2017 WL 1956955, at *14 (Del. Ch. May 11, 2017); *Brown v. Perrette*, 1999 WL 342340, at *10 (Del. Ch. May 14, 1999). Further, the consent (or request) that Plaintiffs take semantic issue with is not even material because they do not allege that it was the basis for the alleged breach.

Plaintiffs' argument that they need information to independently assess the "viability (and value) of the claims" is contrary to Delaware law, which holds that disclosures are not required to give stockholders "all the … data they would need if they were making an independent determination of fair value." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000). Anaplan stockholders had all of the information they needed. They had Anaplan's and Thoma Bravo's views of the alleged breach and the reduction in merger consideration that was renegotiated.[4] They also had the Board's reasons for renegotiating the price, its negotiation efforts and both fairness opinions with underlying financial analyses.

As the Vice Chancellor correctly held, "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) The vote was fully informed, and *Corwin* applies.

3. There Was No Coercion.

Plaintiffs cannot show that the stockholder vote was coerced because Anaplan's stockholders had a free choice: maintain the status quo or accept the merger with Thoma Bravo. Plaintiffs argue on appeal solely that the vote was

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4 Plaintiffs contend stockholders need information about the "value" of the potential claims and that such information was not disclosed. But Plaintiffs have placed an exact number on the value of such claims – the amount of the reduction in merger consideration, so clearly sufficient information was disclosed to do so. *See Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *11 (Del. Ch. Nov. 30, 2007) (no disclosure claim where the proxy "enabled [Plaintiff] to make the substantive criticisms it did in the Complaint").

structurally coercive. They did not brief their structural coercion argument raised below and, thus, waived it. *See* Supr. Ct. R. 8.

Plaintiffs' structural coercion argument fails because it runs counter to *Corwin.* They contend that the "stockholders lack the ability to accept the lucrative transaction without releasing valuable claims." (OB 30) They argue that this creates structural coercion since "no reasonable stockholder would have voted yes if afforded the opportunity to vote solely whether to release Appellant's claims." (*Id.*) Once again, Plaintiffs ask this Court do what it has never done: separate out the deal process to nullify the vote overall. That is not how *Corwin* works.

The Vice Chancellor aptly characterized Plaintiffs' arguments: "Plaintiff's beef here seems to be *with the notion of Corwin-cleansing itself.* Plaintiff asserts the Anaplan stockholders' overwhelming vote to approve the Merger should not be accorded any cleansing effect because it was *bound up in the stockholders' desire to receive a premium for their shares*." (Op. 22-23) (emphases added). "[I]t is not enough for an offer to be economically too good to resist to constitute wrongful coercion." *Smart Local Unions & Councils Pension Fund v. BridgeBio Pharma, Inc.*, 2022 WL 17986515, at *20 (Del. Ch. Dec. 29, 2022) (citation omitted), *aff'd*, 303 A.3d 51 (Del. 2023); *see also Ivanhoe P'rs v.*

Newmont Min. Corp., 533 A.2d 585, 605 (Del. Ch. 1987), *aff'd*, 535 A.2d 1334 (Del. 1987).

Plaintiffs want this Court to trim back *Corwin* and permit Delaware courts to excise out from a stockholder vote certain aspects of the deal process that Plaintiffs find questionable. If adopted, their position would neuter *Corwin* and improperly place the courts in a position to question not just the business judgment of directors, but the decisions by stockholders to approve corporate transactions.

Plaintiffs' hypothetical based on *Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152 (Del. Ch. May 31, 2017), fails here, as it did below. Citing to *Sciabacucchi*, they contend that *Corwin* cannot apply because "receipt of the beneficial Revised Merger Agreement was contingent on release of valuable claims." (OB 29) This is not *Sciabacucchi*. There, stockholders voted on multiple cross-conditioned proposals that required them to accept insider transactions. As the Vice Chancellor recognized, "[u]nlike the stockholders in *Sciabacucchi*, Plaintiff does not allege self-dealing or other extraneous factors that might warrant calling upon the principle of structural coercion." (Op. 22) The Vice Chancellor noted another key distinction: "the attenuated nature of the transaction that stockholders [in *Sciabacucchi*] had to approve cross-conditionally to receive the merger consideration" versus the transaction here, where Plaintiffs conceded that "Defendants' breaches were part and parcel to the merger process[.]" (Op. 23

n.96) (citations omitted) Indeed, *Sciabacucchi* rejected the same premise Plaintiffs argue here, noting: "[b]reaches of duty inherent in [a] transaction—failure to run an informed sales process . . . or negotiation by self-interested fiduciaries—are not themselves separate 'transactions' imbedded in the vote that render it coercive." 2017 WL 2352152, at *21.

Plaintiffs' other cases are equally inapplicable. In *Dell*, the court held that the choice between the proposed transaction – which was subject to entire fairness review *ab initio* – and the status quo was coercive because: (i) Dell threatened to complete a charter-based "Forced Conversion" of shares if the transaction was rejected and (ii) returning to the status quo "meant enduring" a persistently depressed share price caused by Dell's controller. *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *5, *34-35 (Del. Ch. June 11, 2020). Contrary to *Dell*, Anaplan had no controlling stockholder, and Plaintiffs fail to allege any threats to force an unattractive alternative if stockholders rejected the transaction. In *In re USG Corp. Stockholder Litigation* (which Plaintiffs did not cite below), the court, in dicta, posited a hypothetical wherein directors received kickbacks from a buyer and cut short a sales process as a result. 2020 WL 5126671, at *2 (Del. Ch. Aug. 31, 2020), *aff'd sub nom. Anderson v. Leer*, 265 A.3d 995 (Del. 2021). There is no such allegation here. Plaintiffs' reliance on *USG* and their hypothetical that a vote would be structurally coercive if an

"Anaplan fiduciary decides that it will oppose the transaction unless it receives a side benefit" and the transaction was re-traded to include such a side benefit have no application. (OB 30) Here, the fiduciaries were concededly disinterested and independent, there was no allegation that any fiduciary received a side benefit in the renegotiation and stockholders voted on the deal while in full possession of both Anaplan's and Thoma Bravo's arguments and rationale.[5]

Plaintiffs' arguments recycle those previously rejected by the Court of Chancery. The court has distinguished *Sciabacucchi*, *Dell*, and other cases, explaining that "stockholders were not coerced into approving the Transaction because they had other acceptable alternatives to a deal," which included stockholders electing "to go it alone." *BridgeBio*, 2022 WL 17986515, at *21.

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[5] *In re Massey Energy Co. Derivative & Class Action Litigation* is likewise inapplicable. 160 A.3d 484 (Del. Ch. 2017). The court there did not apply *Corwin* because the complaint "challenge[d] defendants' allegedly conscious disregard of safety laws over a period of several years and the harm it caused to the Company well *before* the Merger and the sale process that led to the Merger." 160 A.3d at 507 (emphasis in original). Here, the stockholder vote was fully informed through robust disclosure about the equity-related matters that Plaintiffs allege were "part and parcel to the merger process." (A241) Indeed, this case reflects the "fundamental policy underlying *Corwin*" – "to avoid 'judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction themselves.'" *Massey*, 160 A.3d at 507 (citation omitted). *Solomon v. Armstrong* likewise supports *Corwin*'s application here because Plaintiffs allege that Defendants' actions were "part and parcel" of the Revised Merger Agreement. 747 A.2d 1098, 1113-14 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000).

Like here, the stockholder vote was uncoerced because "realistic alternatives existed in the absence of approval of the Transaction." *Id.*

In an attempt to end-run *Corwin*, Plaintiffs next argue that stockholders could not "return to the pre-breach status quo by voting no." (OB 31) According to Plaintiffs, the "pre breach status quo" was the Original Merger Agreement. But that is not correct. As with any merger, the options on the table were (i) the merger being presented to stockholders or (ii) the Company continuing as a standalone entity.

Plaintiffs contend that *Corwin* can never apply whenever there are modifications to a merger agreement's terms before a stockholder vote because the "status quo" of the original agreement will never be available. That is an impermissible narrowing of *Corwin* that this Court must reject. Indeed, in *Dell*, the Court of Chancery held that "[t]he status quo need not be precisely identical to the stockholders' former position." 2020 WL 3096748, at *25 n.12. "If all that defendants have done is to create an option for shareholders, then it can hardly be thought to have breached a duty" such that a vote is coercive. *Id.* at *25 (citation omitted). That is exactly what the Board did – create an option for stockholders to accept a premium transaction or remain a standalone entity. That is not coercive and is protected under *Corwin*.

Plaintiffs' attempt to water down *Corwin* must be rejected because it runs counter to this Court's precedent and its faithful application by the Court of Chancery. As the Vice Chancellor framed it:

> Plaintiff's argument seems to suggest that corporations, and our courts, have been missing structural coercion inherent in merger votes for nearly a decade. *Corwin*, however, established a framework in which our law respects equity owners' fully informed decision to cash out their share for a premium via a merger and accords that decision cleansing effect rather than labeling it coercion. That is a very deliberate feature, not a bug, of the system.

(Op. 23-24) Anaplan stockholders had full disclosure of the dispute between Thoma Bravo and Anaplan that led to the Revised Merger Agreement. Armed with that knowledge, stockholders were free to reject the transaction and continue with Anaplan as a vibrant stand-alone entity. That is the classic example of where *Corwin* cleansing applies. *See In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2011 WL 227634, at *3 (Del. Ch. Jan. 14, 2011) (stating that coercion "cannot be premised on the threat of simply maintaining the status quo").

II. THIS COURT SHOULD AFFIRM ON THE INDEPENDENT BASIS THAT PLAINTIFFS FAILED TO ALLEGE A DIRECT CLAIM.

A. Question Presented.

Did the Complaint plead a direct claim for breach of fiduciary duty?

B. Scope Of Review.

Although the Court of Chancery did not decide this issue because it dismissed the Complaint on *Corwin* grounds, this Court's *de novo* review may be based on "any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court." *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012).

C. Merits Of The Argument.

As Defendants explained below, the Complaint did not state – or even attempt to allege – a *Revlon* claim or other direct claim for breach of fiduciary duty. (B047-51) Thus, dismissal would have been appropriate for that independent reason. Indeed, Plaintiffs now explicitly admit that "[t]his case ***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." (OB 21-22) (emphasis added)

Even if Plaintiffs did not make that concession, they still failed to state a claim. A *Revlon* claim challenges a board's process or decisions to enter into a merger. Plaintiffs, however, never challenged the Board's process, or even named a majority of the Board as Defendants. Plaintiffs concede that the Board negotiated and approved the merger and focused on value maximization to secure the best price reasonably available. *See, e.g.*, *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239-40 (Del. 2009); *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *16 (Del. Ch. May 20, 2011) (dismissing *Revlon* claim where transaction approved by disinterested and independent board because "reasonableness, and not perfection, is what *Revlon* requires").

Plaintiffs ignored the issues typical in a *Revlon* claim. They also failed to challenge the modest deal protection provisions. *See McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000). At bottom, the Complaint evinces mere disagreement with the Board's decision to enter into the merger. "That does not state a claim under Delaware law." *Martell*, 2023 WL 1370852, at *24.

For this independent reason, the Court of Chancery's dismissal should be affirmed.

III. THIS COURT SHOULD AFFIRM ON THE INDEPENDENT BASIS THAT PLAINTIFFS' CLAIM IS DERIVATIVE.

A. Question Presented.

Did the Complaint's challenges to Defendants' ordinary course compensation decisions state a derivative, not direct, claim?

B. Scope Of Review.

Although the Court of Chancery did not decide this issue because it dismissed the Complaint on *Corwin* grounds, this Court's *de novo* review may be based on "any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court." *Cent. Laborers Pension Fund*, 45 A.3d at 141.

C. Merits Of The Argument.

The Court of Chancery properly dismissed the Complaint under *Corwin*. But if this Court concludes that *Corwin* does not apply, it should, in the alternative, affirm the dismissal because the Complaint brought quintessential derivative claims, all of which were extinguished by the closing. (B037-46) Plaintiffs challenge ordinary course compensation decisions. Those claims are derivative and cannot survive.

Two decades ago, this Court created a two-part test to determine whether a claim is direct or derivative: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or any other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). Plaintiffs challenge the decisions of certain corporate officers and directors who awarded equity-based compensation to new and existing employees. They contend that such issuance violated the Original Merger Agreement's terms. Their claims—which are claims of corporate mismanagement—are "paradigmatic derivative claim[s]." *Albert v. Alex. Brown Mgmt. Servs. Inc.*, 2005 WL 2130607, at *13 (Del. Ch. Aug. 26, 2005); *see also Akins v. Cobb*, 2001 WL 1360038, at *6 (Del. Ch. Nov. 1, 2001) (classifying a "claim of excessive compensation" as a "garden-variety derivative claim").

Plaintiffs tried to argue that because a merger was pending, their claims were automatically direct. This Court has held otherwise. In *Kramer v. Western Pacific Industries, Inc.*, a stockholder challenged the issuance of stock options and golden parachute agreements during a sale process. 546 A.2d 348, 350 (Del. 1988). This Court held that the complaint did not allege "an injury to the common shareholders that is *separate and distinct* from that sustained by the corporation as a whole," nor were the allegations a "direct attack on the fairness of the terms of the merger." *Id.* at 352 (emphasis added). So too here.

As in *Kramer*, Plaintiffs allege only that the consideration was reduced. They do not challenge the underlying fairness of the merger. (OB 21-22

("This case does not challenge the economic merits of the Transaction relative to remaining a standalone entity.")) And, like *Kramer*, the claims here are classically derivative: they focus on ordinary course employment compensation decisions. If there is any harm here – there is not – it was felt by the Company, not its stockholders. Thus, this Court should affirm the dismissal on the independent basis that the Complaint brought derivative claims for which Plaintiffs lost standing after the merger closed.

CONCLUSION

For all of the foregoing reasons, the opinion of the Court of Chancery should be affirmed.

Respectfully submitted,

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DATED: October 4, 2024