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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

NATURE OF PROCEEDINGS

This action alleges breaches of fiduciary duty against Defendants[1] for knowingly and intentionally violating unambiguous provisions of a merger agreement. Those alleged breaches indisputably cost Anaplan stockholders $400 million and Plaintiff Pentwater Capital Management LP $11 million, but the trial court found that stockholders released those claims by voting in favor of the Transaction and thus have no recourse.

Plaintiff's opening brief established that the threshold question presented by this appeal is a pure legal one: whether a stockholder vote in favor of a merger releases claims that do not challenge the economic merits of the merger and that exist independent of the merger's fairness (*i.e.*, claims that can be sustained even if the merger is fair). Defendants cite no case that has ever held that it does, and Plaintiff is aware of none. To the contrary, cases have consistently held that a vote in favor of a merger releases only (i) challenges to the merger (ii) based on breaches of fiduciary duty inherent in the merger, such as failure to run an informed process, negotiation by self-interested fiduciaries, or approval by a majority-conflicted board.

Limiting the ratifying effect of a stockholder vote in favor of a merger to challenges to the economic merits of that merger is consistent with how this Court

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[1] Unless otherwise defined herein, capitalized terms have the same meaning as in Plaintiff's opening brief ("OB").

has always interpreted ratifying votes. In *Investors Bancorp*, for example, this Court held that the scope of a ratifying vote is limited to the specific "acts submitted to the stockholders for approval." *In re Invs. Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1211 (Del. 2017). Here, Anaplan stockholders were specifically asked to choose between the Revised Merger Agreement and remaining a standalone company. Under *Investors Bancorp*—and other cases addressing the scope of a ratifying vote, including in the merger context—the stockholder vote (if informed and uncoerced) foreclosed challenges to the economic merits of the Revised Merger Agreement. It did not foreclose the claims asserted in this action, which do not challenge the economic merits of the Revised Merger Agreement.

The gravamen of Defendants' argument is that the scope of *Corwin* is broader than the scope of a ratifying vote in other contexts. But the purpose of this Court's *Corwin* decision was to clarify the opposite—that the term "ratification" applies to a non-statutorily required vote, but that a statutorily required vote (*e.g.*, a merger vote) has the same legal effect. In adopting Defendants' view that the *Corwin* doctrine is broader than all other ratification doctrines—so broad, in fact, that it releases claims not even challenging the economic merits of the merger that stockholders approved—the trial court extended the *Corwin* doctrine beyond any precedential application. That was legal error.

Plaintiff's opening brief posited a hypothetical to highlight the extrinsic nature of the claims asserted here, and why the trial court erred in holding that they were ratified. (OB 26.) It imagined a scenario in which Defendants committed the same breaches of duty, but Thoma Bravo walked away and, months later, Anaplan sold itself instead to Company A for $63.75 per share. As Plaintiff argued in its opening brief, (i) in that scenario, it could not reasonably be argued that a vote in favor of the merger with Company A cleansed Defendants' breaches, and (ii) the result should be no different merely because the Company re-traded the deal with the same buyer on a more expedited timeline. Defendants tellingly have no response.

Nor do Defendants dispute that: (i) the claims asserted here can proceed even if the Transaction is fair; (ii) the agency problem addressed by *Corwin* is not implicated here; or (iii) the trial court will never be asked to second-guess the decision of disinterested stockholders to support the Transaction.

Instead, Defendants hyperbolically claim that Plaintiff "want[s] this Court to refine *Corwin*." (Appellees' Answering Brief ("AB") 27.) The opposite is true. Plaintiff asks this Court to apply the same limiting principle that it applies to all ratifying votes—limit the ratifying effect of the Anaplan stockholder vote to what stockholders were specifically asked to approve. Defendants, by contrast, ask this Court to eliminate that limiting principle and endorse the trial court's application of *Corwin* as a "massive eraser," exonerating Defendants for alleged breaches of fiduciary duty unrelated to what stockholders were specifically asked to approve (the economic merits of the Transaction). The Court should reject Defendants' invitation to extend *Corwin* and, instead, should reinforce its holding in *In re Santa Fe Pacific Corp. Shareholder Litigation* that the claims alleged here were not ratified because the "stockholders did not vote in favor of the precise measures under challenge in the complaint." 669 A.2d 59, 68 (Del. 1995).

If, however, the Court finds that stockholders were specifically asked to ratify Defendants' breaches (or that the *Corwin* doctrine should be extended), the Court should still reverse because the vote was both structurally coercive and materially uninformed, either of which requires reversal. If stockholders were specifically asked to ratify Defendants' breaches, then the choice for stockholders was (i) accept the Revised Merger Agreement and release valuable claims, or (ii) reject the Revised Merger Agreement and maintain those claims.

That vote was coerced because 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). Defendants argue that the choice for stockholders was the same as in a *Corwin* case. But, unlike in a *Corwin* case where stockholders can return to their pre-breach position by voting no—and thereby eliminate any harm from alleged fiduciary breaches—Anaplan stockholders could not return to their pre-breach position of a binding and enforceable merger agreement that entitled them to $66.00 per share.

If stockholders were specifically asked to release $400 million claims, that vote was also materially uninformed because the Proxies failed to disclose information sufficient for stockholders to assess the viability (or value) of the claims that they were being asked to release. Defendants contend that no alleged omission was material in and of itself. But the omissions were collectively material because without the undisclosed information, stockholders could not make an informed comparison of what they were getting in the Transaction ($63.75 per share) to what they were giving up (shares in the standalone entity with claims for breach of fiduciary duty).

Finally, if the Court chooses to reach Defendants' alternative bases for dismissal, it should reject them. Defendants' two-page argument that the complaint fails to state a claim does not even address Plaintiff's claim that Defendants acted in bad faith by knowingly and intentionally violating unambiguous provisions of the Original Merger Agreement. Thus, even if Defendants' argument that Plaintiff failed to state a *Revlon* claim had merit—and it does not—that would not alone support affirmance.

And although the trial court did not hold whether the claims were direct or derivative, it suggested in a footnote that it would have found them to be direct, and for good reason. Anaplan did not suffer $400 million of harm; only stockholders suffered $400 million of harm. Thus, the claims are direct under a straightforward application of *Tooley*. But the fact that Defendants maintain that the claims are derivative again underscores that the breaches were not inherent in the Transaction—they instead exist independent of the Transaction's fairness—and that they were therefore not ratified.

The Opinion should be reversed, and Plaintiff should be afforded discovery into whether Defendants knowingly, intentionally, or recklessly violated the Original Merger Agreement.

ARGUMENT

I. THE STOCKHOLDER VOTE IN FAVOR OF THE TRANSACTION DID NOT CLEANSE THE CLAIMS ASSERTED, WHICH DO NOT CHALLENGE THE ECONOMIC MERITS OF THE TRANSACTION

Plaintiff's opening brief established that the trial court erred in holding that the stockholder vote in favor of the Transaction cleansed the claims asserted in this litigation because stockholders were not specifically asked to ratify those claims. (OB 20-26.) Many cases have held in various contexts—including in the merger context—that stockholders can only be deemed to have ratified the specific acts that they are asked to approve. (OB 22-23 (collecting cases)). Anaplan stockholders were specifically asked to approve the Revised Merger Agreement and, therefore, if the vote was informed and uncoerced, Anaplan stockholders ratified the economics merits of the Revised Merger Agreement.[2] They did not ratify what they were not asked to approve, *e.g.*, the claims asserted in this litigation, which do not challenge the economic merits of the Revised Merger Agreement, and which instead exist independent of the Transaction's fairness.

Defendants strangely claim that Plaintiff waived its argument that "*Corwin* is the functional equivalent of *Gantler* ratification," AB 23, even though Plaintiff made

[2] *See Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 313 (Del. 2015) (discussing Delaware's "long-standing policy" of avoiding "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*") (emphasis added).

the precise argument below. (A245-47.) Defendants' position appears to rest on the false notion that *Corwin* rejected Plaintiff's contention here that the scope of a ratifying vote in the context of a merger is limited to the precise issue put to stockholders just as it is in all other contexts. (AB 23-24.) *Corwin* did not hold that "*Corwin* and *Gantler*-style ratification are separate concepts." (AB 24.) It held the opposite.

In relevant part, *Corwin* resolved uncertainty that arose after this Court's decision in *Gantler* regarding the effect of a statutorily required vote. Chancellor Bouchard held that the distinction drawn in *Gantler* between a statutorily required vote and a non-statutorily required vote was merely one of taxonomy, *i.e.*, that *Gantler* should be read "as a decision solely intended to clarify the meaning of the precise term 'ratification.'" *Corwin*, 125 A.3d at 309. This Court agreed, holding that *Gantler* was "focused on defining a specific legal term, 'ratification'" and that the ratifying effect of a statutorily required vote is the same as a non-statutorily required vote. *Id.* at 311. Courts routinely use the term "ratification" to refer to *Corwin* votes because the legal effect is the same. *See, e.g.*, *Morrison v. Berry*, 191 A.3d 268, 275, 283 (Del. 2018).[3]

[3] Defendants rely on *In re Volcano Corp. Stockholder Litigation* for the proposition that *Corwin* cleansing and ratification are different, but *Volcano* likewise makes the point that the legal effect of a non-statutorily required vote ("ratification") and a statutorily required vote is the same. 143 A.3d 727, 746 (Del. Ch. 2016).

After misconstruing *Corwin*'s holding, Defendants attempt to distract the Court from the infirmities of their position. Defendants never directly confront Plaintiff's argument that *Corwin* cannot cleanse claims that exist independent of a merger's fairness. Defendants cite no case holding that *Corwin* has ever been applied to cleanse claims that exist independent of a merger's fairness. Defendants do not dispute that the claims asserted here can proceed even if the Transaction is fair. Defendants do not dispute that the agency problem addressed by *Corwin* is not implicated here. Defendants do not dispute that the claims asserted will never require the trial court to second-guess the decision of disinterested stockholders with skin in the game.

Instead, Defendants misrepresent Plaintiff's use of the phrase "part and parcel to the merger process" below, suggesting that Plaintiff somehow conceded that the alleged breaches were inherent in the process even though Plaintiff explicitly argued the opposite in its brief and at oral argument. (*Compare* AB 25-27 *with* A245-47, A329-38.) That phrase was used in the direct-derivative section of Plaintiff's brief and in the context of distinguishing *Kramer v. Western Pacific Indus.*, 546 A.2d 348, 352 (Del. 1988), which held that the claims were derivative because they were "largely unrelated" to the merger (and instead harmed the company). (A241.) The phrase "part and parcel to the merger" was used to highlight that, unlike in *Kramer*, Defendants' breaches of duty here impacted the Transaction consideration (not

Anaplan's value) and are thus direct. The use of that phrase had nothing to do with whether the claims were inherent in the Transaction and thus ratified by the vote.

Defendants then claim that Plaintiff "want[s] this Court to refine *Corwin* and limit its application by segregating out certain alleged breaches of fiduciary duties…." (AB 27.) The opposite is true. Plaintiff asks the Court to hold that the scope of a *Corwin* vote is the same as the scope of any other ratifying vote, *i.e.*, it is limited to the specific issue approved by stockholders.[4] Defendants, by contrast, offer no limiting principle. Instead, they ask this Court to hold for the first time that *Corwin* cleansing is far broader than ratification in all other contexts, and that a vote in favor of a merger extinguishes claims that do not even challenge the economic merits of the merger that was approved.

Outside of the merger context, this Court has repeatedly rejected Defendants' argument that a vote can ratify conduct not specifically presented to stockholders and, in *Santa Fe*, this Court rejected that argument within the merger context. In *Santa Fe*, this Court addressed whether a stockholder vote in favor of a merger cleansed claims that did not challenge the economic merits of the merger. As Vice Chancellor Lamb explained in *In re Lukens Inc. Stockholders Litigation*, the

[4] Defendants incorrectly assert that, by Plaintiff's logic, favoritism of one bidder over another would not be cleansed. (AB 27.) A claim alleging that fiduciaries favored one bidder would be a challenge to the economic merits of a transaction and thus subject to cleansing.

"Supreme Court [in *Santa Fe*] refused to find that the vote approving the merger ratified the board's conduct in erecting defensive measures against the other bidder" because of the "incongruity between the proposal voted on (the merger agreement) and the subject matter of the claimed breaches of fiduciary duty (defensive measures that precluded stockholder consideration of a competing bid)." 757 A.2d 720, 737 (Del. Ch. 1999).

Defendants say that *Santa Fe* is distinguishable because it was a "*Unocal* case," AB 27, but that misses the point. In *Santa Fe*, this Court refused to find that a stockholder vote in favor of a merger ratified the claims because "[t]he Santa Fe stockholders did not vote in favor of the precise measures under challenge in the complaint." 669 A.2d at 68. The Anaplan stockholders also did not vote in favor of the precise measures under challenge in the complaint. *Santa Fe* thus requires reversal.

II. IF STOCKHOLDERS WERE SPECIFICALLY ASKED TO RELEASE $400 MILLION CLAIMS, THE VOTE WAS STRUCTURALLY COERCED AND NOT FULLY INFORMED

A. The Vote Was Structurally Coerced

If the trial court correctly determined that stockholders were asked to ratify Defendants' breaches (it did not), then the choice for stockholders was whether to (i) reject the Revised Merger Agreement and maintain the claims asserted in this action, or (ii) accept the Revised Merger Agreement and ratify breaches of fiduciary duty that cost them $400 million. (OB 28.) That vote was structurally coercive 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.

Plaintiff's opening brief explained that the rationale of *Liberty Broadband* and *In re USG Corp. Stockholder Litigation*, 2020 WL 5126671 (Del. Ch. Aug. 31, 2020), support a finding of structural coercion in the following scenario, which is doctrinally indistinguishable from this case: (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 (iv) stockholders approve the amended merger agreement aware of the side payment. (OB 30.)

Defendants say that hypothetical has "no application" because no fiduciary received a side benefit, but they have again missed (or purposefully ignored) the point. (AB 39-40.) As Plaintiff's opening brief explained, there is no principled basis to distinguish between that fact pattern and the one at issue here from a *Corwin* perspective merely because the $400 million in damages resulting from Defendants' breach went to the acquiror rather than a sell-side fiduciary. (*Id.*). Put differently, if the Court adopts Defendants' (and the trial court's) position, a stockholder vote in favor of a merger would cleanse the misconduct in the hypothetical.

Defendants assert that the vote was not structurally coercive because the choice put to stockholders here was the same put to stockholders in a *Corwin* case, and that Plaintiff is therefore effectively arguing that the premium was too good to turn down. (AB 37-38.) That is incorrect. In a *Corwin* case, a stockholder vote in favor of a merger does not release valuable claims and a vote against a merger does not preserve valuable claims because (i) if stockholders approve a merger, they have determined that the merger is in the best interest of the corporation (*i.e.*, a claim challenging the merger would be valueless), and (ii) if stockholders vote against a merger, they have averted any harm from the alleged breaches of duty. (OB 29-31 and n.13.) That's the very reason that a stockholder vote eliminates agency problems. Contrast that with this case where, as Defendants do not contest, stockholders would have maintained the claims asserted in this litigation by voting down the Transaction and, according to Defendants, released the claims by approving the Transaction. Thus, the vote here packaged the Transaction and the claims in a coercive way that is not present in a *Corwin* case.

Finally, Defendants tacitly concede that if stockholders could not return to the pre-breach status quo by voting "no," then the Transaction would be structurally coercive. (*Compare* OB 31-32 *with* AB 41-42.) But, Defendants argue, the pre-breach status quo was not the Original Merger Agreement because, "[a]s 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." (AB 41.) That argument is hard to follow. While that was the choice for stockholders, the pre-breach status quo was unquestionably a signed and enforceable merger agreement that entitled stockholders to $66.00 per share. The fact that stockholders could not return to that position by voting no underscores the distinction between the choice put to stockholders in a *Corwin* case and the choice put to stockholders here.[5]

[5] Defendants say that "Plaintiffs [*sic*] argue on appeal solely that the vote was structurally coercive," but then say in the next sentence that Plaintiff "did not brief their [*sic*] structural coercion argument raised below and, thus, waived it." (AB 36-37.) It appears that the word "structural" in the second sentence is a typographical error and should be "situational." There can be no dispute that Plaintiff raised its structural coercion argument below. (*See* A247-50.)

B. The Vote Was Not Fully Informed

The Proxies failed to disclose information sufficient for stockholders to assess the viability (or value) of the claims asserted in this litigation. (OB 33-34.)[6] If stockholders were asked to release the claims, then that information was material to stockholders in deciding whether to (i) accept the Revised Merger Agreement and release the claims or (ii) reject the Revised Merger Agreement and maintain the claims. (OB 34 (citing *Eisenberg v. Chicago 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")).

Defendants devote three pages to arguing that Plaintiff waived its disclosure arguments before admitting that, in fact, Plaintiff's disclosure arguments "are the same ones that they mentioned briefly below." (*See* AB 30-32; *see also* A250-53 (raising the same arguments below).)

Defendants then resort to outright misrepresentations in asserting that Plaintiff conceded its disclosure claims at oral argument. (AB 31-32.) Plaintiff was not "asked about their strongest disclosure claim" and did not "concede[] that they had no disclosure claims." (AB 31.) Rather, in the paragraphs preceding and following

[6] Defendants argue that stockholders knew that the claims were worth $400 million. AB 36 n.4. The value of the claims is a function of the strength of the claims and potential damages. Stockholders might have known the latter, but the Proxies omitted information sufficient to assess the former.

the block quote in Defendants' brief, Plaintiff's counsel explained that (i) if stockholders were specifically asked to ratify Defendants' breaches, then the Proxies were required to disclose information sufficient to assess those breaches, but that (ii) stockholders had not actually been specifically asked to ratify Defendants' breaches so the Court need not reach the issue. (A341-42.)

Defendants then devote most of the remainder of their argument to explaining why each of Plaintiff's alleged omissions is immaterial in and of itself. (AB 34-36.) That is a red herring. Plaintiff's position is not that any single omission was material, but that the omissions are material because, collectively, they preclude a stockholder from assessing the viability of the claims. Defendants did not need to engage in self-flagellation or adopt Plaintiff's characterization of Defendants' actions. (AB 34-35.) Rather, Defendants needed to disclose the facts underlying the alleged breaches of duty, just as a director asserting a ratification defense in response to claims premised on a majority-conflicted board would have to disclose the facts underlying the directors' conflicts. (OB 33 n.15.)

Defendants' only argument that directly engages with the issue is that "disclosures are not required to give stockholders 'all the … data they would need if they were making an independent determination of fair value.'" (AB 35-36 (quoting *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000).)) In *Skeen*, appellants' disclosure argument failed because the complaint alleged "no facts suggesting that the undisclosed information is inconsistent with, or otherwise significantly differs from, the disclosed information." 750 A.2d at 1174. Here, as Defendants concede, the Proxies disclosed "Anaplan's and Thoma Bravo's views of the alleged breach," AB 36, leaving stockholders uncertain as to whose version of events to believe (and, in turn, uncertain about the viability of the claims). The omitted information would have revealed that Defendants knowingly violated unambiguous provisions of the Original Merger Agreement, and was therefore "inconsistent with," and "significantly differ[ed] from," Anaplan's version of events.

In a *Corwin* case, it would have been enough that the Proxies disclosed information sufficient for stockholders to make an informed judgment as to whether to approve the Revised Merger Agreement or reject it and remain stockholders in a standalone company. (AB 36 (citing OB 18.)) But if the trial court was correct that stockholders were also being asked to release valuable claims, the Proxies were required—but failed—to disclose the facts underlying those claims.

III. THE COURT SHOULD REJECT DEFENDANTS' ALTERNATIVE BASES FOR AFFIRMANCE THAT WERE NOT REACHED BY THE TRIAL COURT AND THAT ARE MERITLESS

While this Court sometimes declines to consider arguments not decided by the trial court,[7] the Court can and should reject Defendants' alternative bases for dismissal.

A. Defendants Do Not Even Argue That the Complaint Fails to State a Bad Faith Claim

As discussed in Plaintiff's opening brief, Plaintiff alleges that Defendants (i) acted in bad faith by knowingly violating the Original Merger Agreement and (ii) breached their *Revlon* duties by failing to act reasonably to maximize value through closing. (OB 18-19.) As to the former, the complaint adequately pleads both that Defendants knowingly violated the Original Merger Agreement, OB 12-14, and that Defendants violated unambiguous provisions of the Original Merger Agreement, which supports a pleading stage inference that the violations were knowing and intentional and thus in bad faith. (OB 19 n. 3.) Defendants do not argue that the complaint fails to state a bad faith claim. Defendants' argument that the complaint fails to state a *Revlon* claim, therefore, is not an independent basis for affirmance.

[7] *See BitGo Hldgs., Inc. v. Galaxy Digital Hldgs., Ltd.*, 319 A.3d 310, 333 (Del. 2024).

Setting that aside, Defendants' *Revlon* argument fails. While Defendants cite cases for various irrelevant propositions, it appears that their arguments are that (i) *Revlon* does not require fiduciaries to act reasonably to maximize value between signing and closing, and (ii) Plaintiff cannot state a *Revlon* claim without naming a majority of the board. (AB 44.) Both are incorrect statements of law.[8]

B. Defendants' Argument that the Claims are Derivative Fails Based on a Straightforward Application of *Tooley*, But Highlights that the Claims Were Not Released

Although the trial court did not definitively hold whether Plaintiff's claims are direct or derivative, it suggested in a footnote that it would have found that the claims are direct. (*See* Op. 12-13 n.54.) As that footnote discusses, where a tort causes a reduction in merger consideration, the claim must be direct because "[t]he breach is the harm to your stockholders." (*Id.*)

A claim is direct if stockholders, rather than the company, "suffered the alleged harm" and would "receive the benefit of any recovery." *Tooley v.*

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[8] *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*.'") (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 368 (Del. 1993)) (emphasis added); *In re Fam. Dollar Stores, Inc. S'holder Litig.*, 2014 WL 7246436, at *15-19 (Del. Ch. Dec. 19, 2014) (assessing reasonableness of board's post-signing determination not to exercise fiduciary out); *Kahn v. Stern*, 183 A.3d 715, 2018 WL 1341719, at *1 (Del. 2018) (ORDER) ("To the extent … that the Court of Chancery's decision suggests that it is an invariable requirement that a plaintiff plead facts suggesting that a majority of the board committed a non-exculpated breach of its fiduciary duties in cases where *Revlon* duties are applicable, … we disagree with that statement.").

Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004). Here, Defendants' breaches caused $400 million of harm to Anaplan's stockholders, but did not cause $400 million of harm to Anaplan. Thus, only stockholders suffered the harm and only stockholders could receive the benefit of any recovery.

Defendants say that the claims are derivative because Plaintiff challenged "ordinary course compensation decisions." (AB 45.) That is false. Plaintiff challenges breaches of unambiguous merger agreement provisions, which caused $400 million of harm to stockholders. That the breaches of duty related to compensation that was strictly limited by the Original Merger Agreement—not "ordinary course compensation decisions"—does not transform obvious direct claims into derivative claims.

Defendants' claim that "Plaintiffs [*sic*] tried to argue that because a merger was pending, their claims were automatically direct" is also false. (AB 46.) Again, Plaintiff argued that the claims were direct because only stockholders suffered the harm. As explained above, Defendants' reliance on *Kramer* is misplaced because, in *Kramer*, the challenged executive compensation was "largely unrelated" to the merger and 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." 546 A.2d at 352. Here, Defendants' breaches did not cause $400 million of harm to the

Company and, therefore, the injury to stockholders was separate and distinct from harm to Anaplan.

Finally, although the claims that caused $400 million of harm to stockholders (not Anaplan) are clearly direct, Defendants' argument that they are derivative further underscores that stockholders were not specifically asked to release the claims. As Plaintiff explained in its opening brief—and as Defendants concede—if the claims were derivative, the law is settled that the claims would not be ratified by a vote in favor of the merger. (OB 26.) That Defendants' breaches happened to harm stockholders directly does not change whether stockholders were specifically asked to release the claims (they were not) and, therefore, does not change whether the claims were ratified (they were not).

CONCLUSION

For the foregoing reasons and those set out in Plaintiff's opening brief, this Court should reverse the Opinion and remand for further proceedings.

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