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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RHONDA SCHERTZ, Derivatively on Behalf of CARVANA CO., Plaintiff Below, Appellant, v. ERNEST GARCIA II, Defendant Below, Appellee, and CARVANA CO., Nominal Defendant Below, Appellee.	No. 446, 2024 Court Below: Court of Chancery of the State of Delaware C.A. No. 2023-0600-KSJM

ANSWERING BRIEF OF DEFENDANT-APPELLEE ERNEST GARCIA II AND NOMINAL DEFENDANT-APPELLEE CARVANA CO.

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NATURE OF PROCEEDINGS

In this appeal, Plaintiff Rhonda Schertz seeks to revive a dismissed insider trading claim under *Brophy v. Cities Service Co.*, 70 A.2d 5 (Del. Ch. 1949), that, as the Court of Chancery recognized, rests on conclusory allegations and unexplained inferences. Plaintiff appeals the dismissal of her *Brophy* claim against Ernest Garcia II ("Garcia Senior"), the controlling stockholder of Carvana Co. ("Carvana" or the "Company")—an online platform for buying and selling used cars. Plaintiff's theory is that, for the entirety of a nearly ten-month trading window—October 30, 2020 to August 23, 2021—Garcia Senior sold shares of Carvana stock based on material, nonpublic information ("MNPI") he obtained regarding issues experienced by some Carvana customers in receiving their vehicle title and registration ("T&R").

The *Brophy* claim against Garcia Senior is one of several claims Plaintiff asserted in her amended complaint against thirteen different Carvana-affiliated individuals. The Court of Chancery dismissed all of them under Rule 12(b)(6). Plaintiffs' attempt to salvage her single *Brophy* claim against Garcia Senior on appeal goes nowhere: That claim, like the others, was properly dismissed, as Plaintiff's complaint lacks well-pleaded facts necessary to state a *Brophy* claim.

First, Plaintiff does not allege facts to support her assertion that Garcia Senior possessed any MNPI concerning Carvana's T&R issues. Garcia Senior is not a traditional corporate "insider." Although he owns a majority of Carvana's voting

stock, he has never occupied any position at Carvana—be it an officer, director, or employee. Plaintiff surmises that Garcia Senior must have obtained the alleged MNPI from someone else, and Plaintiff hints at his son, Ernest Garcia III ("Garcia Junior"), who is Carvana's President, CEO, and Chairman of the Board.

This theory crumbles at every step. In lieu of well-pleaded facts, Plaintiff relies entirely on unsupported speculation and innuendo to suggest that Garcia Junior (or some other Carvana director) disclosed corporate MNPI to Garcia Senior. Indeed, Plaintiff spends pages describing Garcia Senior's past dealings and entities that have absolutely nothing to do with Carvana's T&R compliance, all apparently in an effort to paint Garcia Senior as a perpetually "shady" businessman with insider "cronies" who provided him with MNPI. But inflammatory rhetoric cannot substitute for well-pleaded facts, and Plaintiff's amended complaint is devoid of any allegations giving rise to an inference that Garcia Senior even received information about Carvana's alleged T&R deficiencies.

Moreover, Plaintiff fails to identify any T&R-related information Garcia Senior could have possessed that the market did not. As the Court of Chancery explained, during the time period at issue, Carvana was reporting the same information both internally and externally—that it faced risks and issues with title and registration, that delays associated with these issues were affecting customer satisfaction, and that it was working to alleviate them.

Second, even if Plaintiff had alleged that Garcia Senior possessed T&R-related MNPI, Plaintiff fails to adequately plead that Garcia Senior's trades were improperly motivated by that MNPI. All but one of Garcia Senior's stock sales during the trading window were non-discretionary, predetermined transactions executed pursuant to a Rule 10b5-1 trading plan. Though Plaintiff tries to undermine the efficacy of the trading plan by observing that Garcia Senior modified it during the trading window, Plaintiff fails to identify a single well-pleaded fact to suggest that his modifications had anything to do with the alleged MNPI. Nor does Plaintiff allege well-pleaded facts showing that these stock sales—which occurred on *every trading day* in the nearly ten-month trading window—were suspicious in timing or amount. Indeed, while Plaintiff emphasizes the only sale not executed pursuant to a Rule 10b5-1 trading plan, a sale of $478 million worth of stock on December 2, 2020, she does not allege any specific facts that this trade (or any other) coincided with an undisclosed event at Carvana or disclosure of MNPI within the Company.

All told, the Court of Chancery correctly dismissed the *Brophy* claim against Garcia Senior, and its judgment should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly dismissed Plaintiff's *Brophy* claim against Garcia Senior because Plaintiff failed to adequately allege that Garcia Senior possessed material nonpublic information and that he was improperly motivated to trade shares of Carvana stock based on that information.

a. Denied. Plaintiff's allegations do not demonstrate that the claimed inside information—concerning registration delays and Carvana's ability to comply with state T&R laws—constituted material nonpublic information. This same type of information was disclosed in public filings, earnings calls, and media reports. Plaintiff failed to allege any material differences between the information known internally and the information that was known in the market.

b. Denied. Plaintiff failed to allege well-pleaded facts showing that Garcia Senior possessed the alleged MNPI. Garcia Senior is not a Carvana officer, director, or employee. And while he is the controlling stockholder, there are no non-conclusory allegations in the amended complaint suggesting that he received *any* information (let alone MNPI) regarding Carvana's T&R compliance.

c. Denied. Plaintiff failed to allege well-pleaded facts supporting the reasonable inference that Garcia Senior's daily trades between October 30, 2020 and August 23, 2021, which constituted more than 2,500 trades in total, were motivated by knowledge of MNPI. All but one of Garcia Senior's trades at issue

were executed pursuant to a predetermined trading plan established well in advance of the trades. And despite the trades, Garcia Senior still retained a significant majority ownership interest in Carvana and thus a massive personal stake in ensuring its continued success.

STATEMENT OF FACTS

A. Factual Background

1. Carvana's Innovative Business Model Operates In A Patchwork Of State Regulatory Regimes

Founded in 2012, Carvana is a tech company with a disruptive, innovative business model in the used car industry. Unlike traditional brick-and-mortar used car dealerships, Carvana allows customers nationwide to use its web-based platform to buy, sell, and trade used cars from their homes. A0039, A0044-45 (¶¶ 4, 17). Carvana's model also enables customers to drop off or pick up vehicles at Carvana's patented vehicle vending machines, and to obtain financing and warranty coverage for vehicles purchased from Carvana. *Id.* Carvana acquires vehicles through many sources, including directly from consumers, wholesale auctions, and other retailers.

Following its IPO in 2017, Carvana undertook a business plan that invested in growth. *See, e.g.*, A0039 (¶ 5); *see also* B85. And particularly during the COVID-19 pandemic, Carvana grew tremendously. A0039 (¶ 5). In 2019 Carvana sold 177,549 cars; it sold 425,237 in 2021. *Id.* Carvana services about 81.1% of the United States' population, covering 316 geographic markets. A0044 (¶ 17).

Starting around the final quarter of 2021, and facing challenging macroeconomic factors, including rising interest rates and supply chain issues, and factors specific to Carvana, the Company's sales growth slowed. A0151 (¶ 210); *see also* B231 (detailing challenges for the first quarter of 2022, including that "[t]he

Omicron wave has impacted our supply chain deeply," "the fastest increase in interest rates in recent memory," and "historic vehicle price increases"); B256 (detailing macro-economic factors and other factors "specific to Carvana (e.g., reconditioning and logistics network disruptions)"). In 2022, Carvana sold 412,296 cars, slightly fewer than 2021. A0039, A0044-45 (¶¶ 5, 17). Carvana's financial results reflected the slower growth, and its stock price steadily declined—though Carvana continued to gain market share and achieved over $13.6 billion in revenue in 2022. A0044-45, A0180-87 (¶¶ 17, 263-73); B301.

Carvana is the first used car dealership of its kind and operates within a patchwork of disparate state laws concerning licensing and vehicle title and registration designed for traditional brick-and-mortar used car dealerships. *See* A0041 (¶ 9). State motor vehicle departments primarily issue tangible certificates of title. A0040, A0064-65 (¶¶ 8, 62, 65). Each state has its own rules and processes concerning certificates of title and registration, and what one state permits another may not. A0040, A0065-66 (¶¶ 8, 63-67). For example, state laws generally set requirements for transferring certificates of title within a specified time after a new owner purchases a vehicle. *See* A0065 (¶ 65). Differences between the buyer's and seller's jurisdictions, the involvement of lenders who often hold the certificate of title, and the Company's seven-day return policy further complicate the process of transferring certificates of title. A0041, A0065 (¶¶ 9, 64).

2. Carvana's Board Oversees And Publicly Discloses Title And Registration Issues

a. Carvana is helmed by a six-person Board of Directors chaired by Garcia Junior, who also serves as the Company's President and CEO. A0045 (¶ 19). His father, Garcia Senior, owns approximately 84% of Carvana's voting stock. A0056 (¶¶ 18, 45). But Garcia Senior has no role at Carvana: As the Court of Chancery recognized, "Garcia Senior is not and has never been an employee, officer, or director of Carvana." Telephonic Bench Ruling at 25-26 (Sept. 25, 2024) ("Ruling"); *see* A0055 (¶ 44).

As Plaintiff alleges, since July 2020, the Board has actively monitored and discussed registration delays and compliance with state T&R laws. A0125 (¶ 171); *see* Ruling at 20. The Board tracks T&R compliance in part using a customer satisfaction metric known as Net Promoter Score ("NPS"). A0125-27 (¶¶ 172-74). The "NPS system captured concrete data on customer experiences with vehicle registration and titling and kept the Board … informed of the relevant risks" and results regarding "T&R compliance." Ruling at 22.

Using the NPS system, the Board has consistently "discussed T&R compliance" at Board meetings. *Id.* at 21. During the July 2020 and October 2020 Board meetings, the directors learned of a risk of registration delays stemming largely from the COVID-19 pandemic disrupting DMV operations, that these registration issues were contributing to negative NPS metrics, and that the Company

was developing initiatives to reduce registration delays. A0125-30 (¶¶ 171-78); B626; B645; B659; *see also* A0079 (¶¶ 83-84) (alleging that Carvana hired "additional employees" to deal with increased T&R issues and "restructured" "Title Teams"). And in November 2020, the Corporate Governance Committee identified NPS as a "special topic" to be discussed with the full Board in 2021 and recognized that "Licensing and Title/Reg Processing" was among the NPS drivers to be discussed. A0130-31 (¶ 179); B678-80.

Consistent with that directive, the Board focused on improving NPS in 2021, including issues regarding title and registration. At the February 2021 Board meeting, the directors learned that NPS was "at a lower level post-COVID 19" and that the Company was expending additional resources to improve performance, including increased spending on T&R. A0131-32 (¶ 180). The Board also discussed the "root cause(s) of poor NPS," which included "Registration Delays," and understood management's intent to "identify near, mid and long term initiatives to address and reduce root cause issues at the source." A0131-32 (¶¶ 180-81); B726-27. Thereafter, the Board continued to monitor progress and received updates on T&R issues. *See, e.g.*, A0133 (¶ 183) (July 2021 Board meeting); A0134-35 (¶¶ 184-85) (October 2021 Board meeting); A0136-37 (¶¶ 186-87) (December 2021 Board meeting).

Garcia Senior had no alleged involvement with Carvana's T&R issues. Not only did he lack any position as "an employee, officer, or director of Carvana," but he did not exercise his majority "voting power in any way relevant to the T&R issues." Ruling at 25-26. Indeed, "the complaint lacks any allegations that Garcia Senior received information about Carvana's title and registration issues," "that anyone was obligated to report those things to him," or that he "exercised control over Carvana's T&R compliance." *Id.* at 26. These issues were handled exclusively by the Board and management.

b. The T&R issues being considered by the Board and management were also publicly disclosed. Carvana was consistently "warning its investors" about the "same general delays and constraints" related to T&R issues being discussed by the Board, including the uncertainties associated with Carvana's innovative business model and the impact on customer satisfaction. *Id.* at 30-31; *see* B812-15 (summarizing disclosures).

For example, on February 26, 2020, Carvana cautioned investors in its 2019 Form 10-K that it is subject to "a wide range of evolving federal state and local laws and regulations," including "requirements related to title and registration," and that many of those laws and regulations "may have limited to no interpretation precedent as it relates to our business model." A0139 (¶ 192). Carvana also disclosed that the "failure to comply" with these regulations "could have a material adverse effect on

[its] business." *Id.* Additionally, shortly after the Board discussed the registration delays at its July 22, 2020 meeting, Carvana's CEO explained during an August 5, 2020 earnings call that the Company faced "constraints" in clearing titles because of the pandemic and noted that the resulting delays have a negative impact on customer satisfaction: "[I]f customers would like to sell you their car and it takes longer, … to get their title cleared, et cetera, that's not a great experience." B776, B779 (cited at A0141-42 (¶ 196)).

Carvana's public disclosures continued into 2021. Following the Board's NPS-focused strategy discussion, Carvana explained in its 2020 Form 10-K, filed on February 25, 2021, that "maintaining the quality of our customer experience" is "a particularly difficult challenge" given Carvana's "high rate of growth, the operationally intensive aspect of our offering, and the nature of automotive retail"—which requires using "third-party vendors and systems" for "submitting title and registration paperwork to state entities." B456 (cited at A0143 (¶ 199)). And during the Company's August 5, 2021 earnings call, Garcia Junior reiterated the Company's focus on "alleviating [the Company's] constraints," including constraints associated with "registration delays," as the "most important" way to improve customer satisfaction. B616 (cited at A0146 (¶ 206)).

c. In addition to negatively affecting customer satisfaction, the issues associated with registration delays led to sporadic regulatory incidents under some

states' T&R laws. Starting in 2021, various state regulators began inquiring about Carvana's practices for processing T&R, and in some cases took the position that Carvana had run afoul of state regulations. Although Carvana operates in "316 geographic markets across 33 states," A0044 (¶ 17), Plaintiff identifies regulatory actions in only nine states over more than two years, A0090-109 (¶¶ 111-45).[1] And the incidents were all state-specific—the existence of an issue within one state or locality does not necessarily mean Carvana would face similar issues in others, as "[e]ach state has its own distinct process for vehicle titling" and "[t]he rules in one state do not always apply in a different state." A0065 (¶ 63).

Only two T&R-related regulatory actions occurred during Garcia Senior's trading window at issue in this appeal. On May 7, 2021, Michigan regulators imposed a $2,500 fine and placed Carvana on probation. A0094 (¶ 120 & n.68); B765. And in early August 2021, North Carolina regulators imposed a six-month suspension for one of Carvana's several North Carolina facilities—a suspension that was reported the in the media on August 10, 2021 and discussed the next day by

[1] Although Plaintiff counts "ten states" that have "taken action against Carvana," A0109 (¶ 145), her allegations about Arizona consist of customer "complaints" and a statement from regulators "declin[ing] to provide further details, citing open investigations," A0104-05 (¶ 139). Plaintiff also alleges isolated incidents of claimed T&R difficulties in various states through anonymous online Reddit posts and anecdotal customer accounts. A0109-24 (¶¶ 146-68).

Carvana during the J.P. Morgan Auto Conference. A0101-02, A0147-49 (¶¶ 135, 207).[2]

3. Garcia Senior Traded Carvana Stock Pursuant To A Predetermined Trading Plan

As a Carvana stockholder, Garcia Senior both buys and sells shares of Carvana stock from time to time. *See, e.g.*, A0063, A0158-59 (¶¶ 59, 224-25). As relevant here, Garcia Senior sold Carvana shares every trading day between October 30, 2020 and August 23, 2021. A0156 (¶ 219).

All of his sales, save one on December 2, 2020, were non-discretionary trades executed pursuant to a Rule 10b5-1 trading plan. A0159 (¶ 226). Rule 10b5-1 is a federal regulation promulgated under the Securities Exchange Act of 1934 that permits stockholders to implement written, pre-arranged stock trading plans when they are not in possession of material nonpublic information. 17 C.F.R. § 240.10b5-1(c). "[B]y ceding trading authority to third parties with exclusive discretion to execute trades under certain pre-determined parameters," Rule 10b5-1 plans "offer a safe harbor for corporate insiders to sell stock" without fear of facing allegations

[2] On August 3, 2021, Carvana publicly settled a civil action by four California counties for operating without a dealer's license between 2015 and 2019. A0100 (¶ 132 & n.86) (citing same-day press release). Plaintiff passingly references that action in her opening brief (and incorrectly suggests that it was not "publicly disclose[d]"). Opening Br. at 19. But that dealer licensing issue did not stem from T&R compliance, *see* B38, a point that Plaintiff did not dispute below. *See In re Oracle Corp. Deriv. Litig.*, __ A.3d __, 2025 WL 249066, at *10 (Del. Jan. 21, 2025) ("The plaintiffs did not directly raise the argument below. It is waived on appeal.").

that the trades were improperly motivated by MNPI. *Laborers' Dist. Council Constr. Indus. Pension Fund v. Bensoussan*, 2016 WL 3407708, at *2 (Del. Ch. June 14, 2016), *aff'd*, 155 A.3d 1283 (Del. 2017).

Here, all of Garcia Senior's trades between October 30, 2020 and August 23, 2021 (aside from one sale on December 2, 2020) were executed according to a valid Rule 10b5-1 plan that he modified twice during the trading window. A0156, A0158-59 (¶¶ 219, 224, 226); *see* B820 (timeline). Accordingly, Garcia Senior's alleged trades can be bucketed into four groups:

- On June 15, 2020, Garcia Senior signed the 10b5-1 plan authorizing the sale of 30,000 shares per day, starting on October 30, 2020. *See* A0156, A0158-60 (¶¶ 219, 224, 226-27); Carvana Co., Schedule 13D (Amend. No. 12) (filed June 16, 2020).[3]
- On November 4, 2020, Garcia Senior modified his 10b5-1 plan to authorize the sale of 50,000 shares per day, effective on December 4, 2020. *See* A0158, A0160 (¶¶ 224, 227 & n.157); Carvana Co., Schedule 13D (Amend. No. 13) (filed Nov. 6, 2020).[4]

[3] https://www.sec.gov/Archives/edgar/data/1017608/000119312520170259/d947228dsc13da.htm.

[4] https://www.sec.gov/Archives/edgar/data/1017608/000119312520288024/d715970dsc13da.htm.

- On December 2, 2020, Garcia Senior traded two million shares outside of his 10b5-1 plan. A0159 (¶ 226).
- On May 20, 2021, Garcia Senior modified his 10b5-1 plan to authorize the sale of 60,000 shares per day, effective on June 21, 2021. *See* A0158, A0160 (¶¶ 224, 227 & n.158); Carvana Co., Schedule 13D (Amend. No. 21) (filed May 26, 2021).[5] The trading under the plan ended on August 23, 2021. *See* A0156, A0159 (¶¶ 219, 226).

In total, Garcia Senior sold roughly $3.67 billion of Carvana stock over the course of 2,500 trades. A0156 (¶ 219). And while Plaintiff emphasizes the size of the trades, the modifications to the Rule 10b5-1 plan, and the December 2, 2020 off-plan trade, Plaintiff does not allege that any of the foregoing dates coincided with any particular undisclosed event or any new information learned by Carvana.

B. Procedural History

1. Plaintiff Files This Derivative Suit Several Months After Two Parallel Securities Actions Were Filed

In November 2022, Plaintiff, a Carvana stockholder, demanded to inspect certain Carvana books and records under 8 *Del. C.* § 220. *See* A0037. In response, Carvana produced over 1,400 pages of documents based on an agreed-upon scope of production. Plaintiff then filed this derivative action in the Court of Chancery on

[5] https://www.sec.gov/Archives/edgar/data/1017608/000119312521173977/d157706dsc13da.htm.

June 7, 2023 and filed the operative amended complaint on October 18, 2023. *See* Ruling at 16; A0022, A0028. Plaintiff did not make a pre-suit demand on the Board before filing suit. A0188 (¶ 280).

Spanning 185 pages, Plaintiff's amended complaint contains five breach-of-duty causes of action against thirteen defendants—Garcia Senior, Garcia Junior, the other five Carvana directors, and six other Carvana officers. *See* Ruling at 16-18. Only one claim against one defendant is at issue in this appeal: Plaintiff's *Brophy* claim against Garcia Senior. A0217 (¶¶ 341-42). According to Plaintiff, *all* of Garcia Senior's trades between October 30, 2020 and August 23, 2021—a nearly 10-month period that consists of more than 2,500 trades—were motivated by Garcia Senior's knowledge of MNPI concerning Carvana's T&R issues. A0155-56 (¶¶ 218-19). Plaintiff speculates that Garcia Senior obtained and traded on the alleged MNPI by virtue of his status as Carvana's controlling stockholder, *see* A0045, A0155 (¶¶ 18, 218); his relationship with his son and two other Carvana Board members, *see* A0054, A0156-57, A0195, A0200 (¶¶ 43, 221-22, 293, 299); and articles describing his past and current business ventures, *see* A0051-54, A0058-61, A0157-58 (¶¶ 37-42, 48-54, 223).

Plaintiff's amended complaint overlaps significantly with two other actions pending in other courts that were filed months before Plaintiff's Section 220 demand.

First, Plaintiff copies dozens of paragraphs from the operative complaint in *United Association National Pension Fund v. Carvana Co.*, No. 2:22-cv-02126 (D. Ariz.). In that case, Carvana stockholders assert claims under the federal securities laws against nine of the thirteen Defendants named in this action based largely on the same underlying allegations of delayed title and registration. The federal court has since dismissed many of the claims with prejudice, including (as relevant here) any "insider trading claim against Garcia Senior." *United Ass'n Nat'l Pension Fund v. Carvana Co.*, 2024 WL 5153343, at *20 (D. Ariz. Dec. 16, 2024). As that court explained, "to the extent Plaintiffs allege that Garcia Senior possessed MNPI based solely on his status as a controlling shareholder and the CEO's father, such bare assertions are insufficient to state a claim for relief." *Id.* at *21.

Second, Plaintiff's pleading overlaps with the complaint in *City of Warwick Ret. Sys. v. Carvana Co.*, No. CV 2022-13054 (Ariz. Super. Ct.). There, a Carvana stockholder asserted strict-liability claims under the Securities Act of 1933, alleging that the defendants' failure to comply with various state T&R laws caused Carvana to prematurely recognize revenue and misrepresent its revenue recognition practices on vehicle sales. The plaintiff relied on many of the same reported investigations and regulatory actions, and many of the same theories regarding undisclosed operational constraints and T&R challenges, as Plaintiff does here. The Arizona state court dismissed all of the claims with prejudice. The court explained that

"Carvana disclosed the fact that there were delays in processing title and registration," and that the plaintiff failed to identify "what additional information about the difficulties in processing title was required to be disclosed" that would have been "important to a reasonable investor given the totality of the information available." Under Advisement Ruling at 22, *City of Warwick Ret. Sys. v. Carvana Co.*, No. CV 2022-13054 (Ariz. Super. Ct. Oct. 26, 2023) (reproduced at B757).

2. The Court Of Chancery Dismisses All Of Plaintiff's Claims

On December 18, 2023, Defendants moved to dismiss all of the claims in Plaintiff's amended complaint under Court of Chancery Rules 12(b)(6) and 23.1. As to the *Brophy* claim against Garcia Senior, Defendants argued that Plaintiff failed to allege any non-conclusory facts showing that Garcia Senior possessed the alleged MNPI. B53-58. Defendants also argued that Plaintiffs failed to adequately allege that Garcia Senior acted with scienter in trading his shares. B58-64.

On September 25, 2024, the Court of Chancery granted the motion to dismiss in full, dismissing all claims against all defendants under Rule 12(b)(6). As relevant here, the court concluded that Plaintiff "fails to adequately allege" that Garcia Senior "possessed and traded on material nonpublic information" for purposes of stating a *Brophy* claim. Ruling at 27; *see id.* at 26-32. The court held that "conclusory allegations that [a fiduciary] must have known material nonpublic information by virtue of their positions generally are insufficient," which disposed of Plaintiff's

"conclusory assertion that Garcia Senior must have known about [MNPI] by virtue of his controller status." *Id.* at 26-27. Indeed, the court observed, Plaintiff's allegations are not only conclusory but entirely "unexplained." *Id.* at 27.

The court also held that the alleged "inside information"—derived from the Board presentations discussing Carvana's "registration delays and constraints that might cause customer success scores to be lower"—does not constitute MNPI because the "same general type of information" had been publicly disclosed to the market at the time of the trades. *Id.* at 30; *see id.* at 27-30. The court walked through Carvana's disclosures in public filings, earnings calls, and media reports to illustrate that "[t]he Board presentations covered the same general delays and constraints Carvana was warning its investors about through the relevant period." *Id.* at 31; *see id.* at 28-32. Because "the fact that the company faced notable risks and issues with its T&R practices 'was already known to the market'" at the time of the trades, the court concluded that such information does not constitute "material nonpublic information." *Id.* at 32.

Because the court concluded that Plaintiff failed to allege that Garcia Senior possessed material nonpublic information, the court did not need to reach Defendants' alternative argument that Plaintiff failed to allege scienter.

ARGUMENT

THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFF'S *BROPHY* CLAIM AGAINST GARCIA SENIOR

A. Question Presented

Whether the Court of Chancery correctly concluded that Plaintiff failed to adequately allege facts to state a claim against Garcia Senior for breach of fiduciary duty under *Brophy v. Cities Service Co.*, 70 A.2d 5 (Del. Ch. 1949). A0395-99; B53-64.

B. Scope Of Review

This Court "review[s] dismissals under Court of Chancery Rule 12(b)(6) *de novo*," *Pfeffer v. Redstone*, 965 A.2d 676, 683 (Del. 2009), and may affirm on any ground raised below and supported by the record, *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012). To survive a motion to dismiss, a complaint must contain sufficient "well-pleaded allegations," accepted as true, to show that the plaintiff is "entitled to relief under any set of provable facts supporting his claims." *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 100 (Del. 2013). The Court does not "credit conclusory allegations that are unsupported by specific facts or draw unreasonable inferences in the plaintiff's favor." *Id.*

C. Merits Of Argument

Despite bringing a litany of claims against a host of defendants, Plaintiff's appeal is limited to the dismissal of her claim that Garcia Senior breached his

fiduciary duty under *Brophy* by engaging in improper insider trading. That claim is as meritless as the others, and the Court of Chancery correctly dismissed it.

By virtue of his majority ownership interest in Carvana's voting stock, Garcia Senior owes certain fiduciary duties to Carvana and its other stockholders. *See In re Oracle Corp. Deriv. Litig.*, __ A.3d __, 2025 WL 249066, at *11 & n.86 (Del. Jan. 21, 2025). The general rule is that corporate fiduciaries "may purchase and sell [company] stock at will, and without any liability to the corporation." *Brophy*, 70 A.2d at 8. Indeed, Delaware law encourages "corporate insiders [to] own company stock"—which gives them "'skin in the game'" and thus "align[s] their interests with those of the public stockholders"—and recognizes that such insiders will at times buy or sell their shares. *In re Oracle Corp.*, 867 A.2d 904, 930 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005); *see also In re Clovis Oncology, Inc. Deriv. Litig.*, 2019 WL 4850188, at *15 (Del. Ch. Oct. 1, 2019) (similar). *Brophy*, however, recognized an exception to that general rule grounded in the "duty of loyalty": corporate fiduciaries "cannot use confidential corporate information for [their] own benefit" in trading their shares. *Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 837-38 (Del. 2011) ("*KKR*") (citing *Brophy*, 70 A.2d at 7-8).

To avoid discouraging corporate fiduciaries from purchasing and selling company stock, the "bar for stating a [*Brophy*] claim" is "very high." *In re Camping World Hldgs., Inc. S'holder Deriv. Litig.*, 2022 WL 288152, at *9 (Del. Ch. Jan. 31,

2022) (citation omitted), *aff'd*, 285 A.3d 1204 (Del. 2022). The plaintiff must allege facts showing that the fiduciary (1) "possessed material, nonpublic company information"; and (2) "used that information improperly by making trades because [the fiduciary] was motivated, in whole or in part, by the substance of that information." *KKR*, 23 A.3d at 838 (quoting *Oracle*, 867 A.2d at 934). Plaintiff failed to allege facts satisfying either element, let alone both. The Court of Chancery's dismissal of this claim should be affirmed.

1. Plaintiff Failed To Adequately Allege That Garcia Senior Possessed Material Nonpublic Information

As the Court of Chancery correctly held, Plaintiff's allegations fail to satisfy the first *Brophy* element—that Garcia Senior "possessed material, nonpublic company information" at the time of the challenged trades. *Oracle*, 867 A.2d at 934. To satisfy this element, Plaintiff had to allege well-pleaded facts showing that Garcia Senior "possessed information about [Carvana's] actual performance that was materially different than existed in the marketplace at the time [he] traded." *Guttman v. Huang*, 823 A.2d 492, 505 (Del. Ch. 2003). Plaintiff's allegations fall short in several respects.

a. Most fundamentally, Plaintiff failed to offer non-conclusory allegations about Garcia Senior's possession of *any* information, let alone MNPI. Indeed, Plaintiff's theories about Garcia Senior's knowledge of Carvana's MNPI are "unexplained." Ruling at 27. "Garcia Senior is not and has never been an employee,

officer, or director of Carvana," *id.* at 25-26, and Plaintiff does not allege that he attended any Board meetings where MNPI would be discussed. Instead, Plaintiff points to Garcia Senior's status as Carvana's controlling stockholder and his "close" relationships with his son and other Carvana directors, and asks the Court to "infer" that Garcia Senior obtained MNPI from Garcia Junior or someone else on the Board. Opening Br. at 36-37.

As the Court of Chancery explained, such supposition is "insufficient" to allege possession of MNPI. Ruling at 27. Indeed, Plaintiff herself agrees that "conclusory allegations that Garcia Senior 'must have known' of Carvana's confidential information by virtue of his position" do not suffice. Opening Br. at 36; *see, e.g.*, *Tilden v. Cunningham*, 2018 WL 5307706, at *19 & n.200 (Del. Ch. Oct. 26, 2018) (same point); *Camping World*, 2022 WL 288152, at *11 (same). And this Court has made clear that a plaintiff cannot allege a defendant's "knowledge" of information by baldly asserting that *someone else* "knew this information and would have told [the defendant]." *Pfeffer*, 965 A.2d at 687. Rather, the plaintiff must identify "'well-pleaded facts from which [the defendant's knowledge] can be reasonably inferred.'" *Id.* (citation omitted). Unsupported allegations that the defendant "would (or must) have been told th[e] information" are insufficient. *Id.*; *see also, e.g.*, *In re Zimmer Biomet Hldgs., Inc. Deriv. Litig.*, 2021 WL 3779155, at *20 (Del. Ch. Aug. 25, 2021) (rejecting conclusory allegations that directors "must

have shared with the [controlling stockholders] the information about … compliance challenges that they learned during [board] meetings"), *aff'd*, 279 A.3d 356 (Del. 2022); *In re Vaxart, Inc. S'holder Litig.*, 2022 WL 1837452, at *19 n.183 (Del. Ch. June 3, 2022) (allegation that insiders "must have been told" MNPI "amounts to surmise, speculation, and conjecture").

Plaintiff recognizes that she cannot rely on Garcia Senior's "position" to create a "must have known" inference, and simply declares that "[t]his is not a case resting on conclusory allegations that Garcia Senior 'must have known' of Carvana's confidential information by virtue of his position." Opening Br. at 36. But Plaintiff's own argument belies her *ipse dixit*. After her assertion, Plaintiff immediately seeks precisely that "must have known" inference by launching into an extended description of Garcia Senior's position as Carvana's controlling stockholder. *Id.* at 36-37 (citing A0054-57, A0063 (¶¶ 43, 45, 46, 59)). Plaintiff does not allege facts showing that Garcia Senior, as controlling stockholder, regularly received MNPI (let alone MNPI related to T&R issues, *see infra* at 26-27), such that his position alone would create a reasonable inference that he possessed MNPI in this circumstance. *See Pfeffer*, 965 A.2d at 687. Instead, Plaintiff's allegations amount to nothing more than a "conclusory assertion that Garcia Senior must have known about [MNPI] by virtue of his controller status," which is "insufficient." Ruling at 25-26; *accord United Ass'n Nat'l Pension Fund v. Carvana*

Co., 2024 WL 5153343, at *21 (D. Ariz. Dec. 16, 2024) (allegations that "Garcia Senior possessed MNPI based solely on his status as a controlling shareholder and the CEO's father" amount to "bare assertions [that] are insufficient to state a claim for relief").

Beyond that, Plaintiff musters only speculation and innuendo, identifying allegations that Garcia Senior and Garcia Junior "are exceptionally close," "live[] next door to" one another, share a "web of business interests," and have engaged in various "related-party transactions" with Carvana over the years. Opening Br. at 10, 13, 37. But these allegations have nothing to do with MNPI. They instead seek, based on Garcia Senior being a father and businessman in the used car industry, the same kind of "must have known" inference that Plaintiff disclaims. Nor is there any merit to Plaintiff's speculation that Garcia Senior might have obtained MNPI from two other Carvana directors merely because they allegedly "lack independence from Garcia Senior." *Id.* at 11-12, 37. Even crediting these allegations as true, none remotely creates an inference that Garcia Junior, or any other Carvana director, failed to safeguard Carvana's MNPI by disclosing it to Garcia Senior. *Cf. Beam v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004) ("[D]irectors are entitled to a presumption that they were faithful to their fiduciary duties." (emphasis omitted)); *In re Match*

Grp., Inc. Deriv. Litig., 315 A.3d 446, 461 (Del. 2024) ("[H]aving a 'conflict of interest' is not something one is 'guilty of.'" (citation omitted)).[6]

b. Moreover, Plaintiff makes no effort to connect her theory to the specific MNPI alleged in this case, which concerns Carvana's "compliance with state T&R laws." Opening Br. at 30. Instead, the most Plaintiff can say is that her allegations permit the "infer[ence] that the Garcias talk about the Company" and "matters affecting its business." *Id.* at 37; *see also id.* at 13-14, 37 (referring to allegations about "related party transactions" that have nothing to do with T&R issues).

Even if that were true, Plaintiff offers no facts to support the inference that those matters would have included nonpublic information about Carvana's T&R practices. As the Court of Chancery observed, "the complaint lacks *any* allegations that Garcia Senior received information about Carvana's title and registration issues or that anyone was obligated to report those things to him." Ruling at 26 (emphasis added). Thus, even assuming Garcia Senior discussed "the Company" with his son

[6] Realizing the weakness of her allegations, Plaintiff suggests that whether "Garcia Senior knew Carvana's confidential information" and whether he was "motivated to sell" based on that information are "effectively the same scienter analysis." Opening Br. at 32. That is not the law—possession of MNPI and scienter are separate elements. *See KKR*, 23 A.3d at 838; *Guttman*, 823 A.2d at 505. Plaintiff cannot paper over her failure to plead Garcia Senior's possession of MNPI with allegations about scienter.

(or anyone else), the complaint lacks any well-pleaded facts suggesting that they discussed the T&R issues underlying Plaintiff's claim.

c. Finally, even crediting Plaintiff's unsupported theory that Garcia Senior possessed information about Carvana's T&R issues, Plaintiff's claim also fails because that information was already disclosed to the market—and thus not "material [and] nonpublic"—at the time of his trades. *Oracle*, 867 A.2d at 934.

The analysis for determining whether information is material and nonpublic is straightforward: identify the alleged "information in [the fiduciary's] possession" at the time of each challenged trade, "compare it to what the market knew" at that time, and determine whether "any of the non-disclosed information would have been of consequence to a rational investor, in light of the total mix of public information." *Id.* at 940. Undertaking that analysis here, the Court of Chancery compared the alleged inside information about Carvana's T&R issues with the information that Carvana publicly disclosed to the market and concluded that Plaintiff failed to identify any "material … problems with T&R compliance" that were "undisclosed." Ruling at 27-28; *see id.* at 30-32.

That analysis is correct. The alleged inside information primarily comes from Board presentations discussing "registration delays and constraints that might cause customer success scores to be lower." *Id.* at 30; *see* Opening Br. at 15-16 (citing A0125, A0127-36 (¶¶ 171, 174-75, 177-80, 183-85)). As the Court of Chancery

explained, the "Board presentations covered the same general delays and constraints" that Carvana repeatedly disclosed to investors "throughout the relevant period." Ruling at 31; *see supra* at 8-11. Even before Garcia Senior's trading commenced in October 2020, Carvana had explained (i) that its business model was untested against the complex patchwork of T&R regulations and that regulators may disagree with Carvana's application of those regulations, A0139 (¶ 192); (ii) that as a result there could be material adverse effects on the business, *id.*; and (iii) that pandemic-related "constraints" in clearing titles and the resulting delays have a negative impact on customer satisfaction, B776, B779. Carvana continued these disclosures in 2021, acknowledging that operational complexities and customer expectations associated with state "title and registration" requirements created a "particularly difficult challenge," B456, and reiterating that the "constraints" associated with "registration delays" negatively impact customer satisfaction, B616.

Plaintiff also alleges that one nonpublic regulatory action occurred during Garcia Senior's trading period—the $2,500 fine and probation imposed by Michigan regulators in May 2021. A0094 (¶ 120 & n.68); B765. Plaintiff does not even allege that the Board was aware of this isolated T&R incident when it happened, let alone that Garcia Senior was somehow aware of it. And even if Plaintiff could overcome those pleading defects, Plaintiff does not argue that this incident—with an insubstantial fine and no suspension of business—would itself be "material" to a

reasonable investor "in light of the total mix of public information." *Oracle*, 867 A.2d at 940. Indeed, this incident is fully consistent with what the market "'already kn[ew]'"—that Carvana "faced notable risks and issues with its T&R practices" and was "working to address [them]." Ruling at 32. Thus, like the Board presentations, this regulatory incident does not reflect "material nonpublic information." *Id.* at 31.[7]

Rather than engaging with this analysis, Plaintiff's brief bypasses it entirely. Instead, she lists a series of allegedly nonpublic documents and events concerning T&R issues that span from July 2020 to October 2021, *see* Opening Br. at 14-16; lumps them all together to create a singular unit of "confidential information" about Carvana's "inability to fix" its "persistent failure to adequately comply with state T&R laws," *id.* at 32; and insists that Garcia Senior somehow possessed this confidential information during the entire ten-month trading period from October 2020 to August 2021, *id.* at 33-34.

This reasoning is as flimsy as it sounds. Plaintiff never identifies what information Garcia Senior allegedly knew at any specific point in time during the

[7] Plaintiff also mentions August 2021 regulatory actions in California and North Carolina. Opening Br. at 19-20. Not only does Plaintiff fail to argue that either of these incidents satisfies the standard for materiality, but both incidents were publicly disclosed. *See* A0100 (¶ 132 & n.86) (citing press release of California action); A0101-02 (¶ 135) (citing news coverage of North Carolina action). And the California action, which concerned dealer licensing, was not related to T&R. *See supra* at 13 n.2.

trading window, nor does she compare it to what the public knew at that time. That makes it impossible to determine what information, if any, was not disclosed. And obfuscation seems to be the point, as Plaintiff uses it to concoct the asserted "confidential information" out of thin air. Indeed, Plaintiff does not allege that a single internal document stated that Carvana faced a "persistent failure to adequately comply with state T&R laws" that was beyond its "[]ability to fix." *Id.* at 32. To the contrary, the internal documents that Plaintiff relies on say the opposite—that Carvana faced sporadic T&R issues that it was working to resolve. *See supra* at 8-9.[8] And while Plaintiff believes that these efforts were ultimately "ineffective" or "unsuccessful," Opening Br. at 16, 30, that conclusory hindsight view has nothing to do with ascertaining the information possessed by Garcia Senior at the time of his trades. Plaintiff cannot simply invent her own "confidential information" by retrospectively rewriting—indeed, contradicting—what the underlying internal documents actually say. And she certainly cannot simply assume that Garcia Senior

[8] *See also, e.g.*, B626 (discussing in a July 2020 Board presentation the relaunch of a "Top 5 Initiative" to reduce registration delays); B659 (discussing in an October 2020 Board presentation a workstream to address T&R with the expectation of "near-term (Q4) traction with Customer Service and Registration Delays"); B726-27 (discussing in a February 2021 Board presentation "Title & Reg Delays" and Carvana's "Q1 Objective: Identify near, mid and long term initiatives to address and reduce root cause issues at the source").

possessed this information despite having no alleged involvement with T&R. *See* Ruling at 26.

2. Plaintiff Failed To Adequately Allege Scienter

Plaintiff's allegations also fail to satisfy the second *Brophy* element, which requires allegations of "scienter"—i.e., that "each sale" by Garcia Senior "was entered into and completed on the basis of, and because of, adverse material non-public information." *Guttman*, 823 A.2d at 505; *see KKR*, 23 A.3d at 838 ("The plaintiff must show that … the corporate fiduciary used [MNPI] information improperly by making trades because she was motivated, in whole or in part, by the substance of that information." (citation omitted)). As with the first *Brophy* element, allegations of "scienter" must rest on well-pleaded "facts, not speculation" or "conclusory" allegations. *Tilden*, 2018 WL 5307706, at *19-20; *see Pfeffer*, 965 A.2d at 687.[9] Although the Court of Chancery did not reach this issue, it was raised below and is an independent ground for affirmance. *See Cent. Laborers*, 45 A.3d at 141.[10]

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[9] Although "state of mind may be pled generally," Opening Br. at 23-24, that does not relieve Plaintiff of the obligation to "plead *facts* to support a reasonable inference" of scienter. *Tilden*, 2018 WL 5307706, at *20 (emphasis added); *see Pfeffer*, 965 A.2d at 687.

[10] To be clear, the Court of Chancery did not need to reach scienter to dismiss Plaintiff's *Brophy* claim against Garcia Senior, and this Court need not address scienter to affirm. Plaintiff's failure to adequately plead scienter, however, is an alternative ground upon which the Court of Chancery's decision can be affirmed.

a. Plaintiff's effort to allege scienter cannot square with the fact that all but one trade made by Garcia Senior were non-discretionary transactions executed pursuant to a Rule 10b5-1 trading plan. A0158-59 (¶¶ 224, 226); *see* 17 C.F.R. § 240.10b5-1(c).

In the insider trading context, Rule 10b5-1 plans create a "safe harbor" from inferences of scienter based on trades alone. *Laborers' Dist. Council Constr. Indus. Pension Fund v. Bensoussan*, 2016 WL 3407708, at *2 (Del. Ch. June 14, 2016), *aff'd*, 155 A.3d 1283 (Del. 2017); *see supra* at 13-14. Indeed, Rule 10b5-1 is designed to "provide appropriate flexibility to those who would like to plan securities transactions in advance at a time when they are not aware of material nonpublic information, and then carry out those pre-planned transactions at a later time, even if they later become aware of material nonpublic information." *Selective Disclosure and Insider Trading*, 65 Fed. Reg. 51,716, 51,728 (Aug. 24, 2000). Implementing a Rule 10b5-1 plan therefore guards against allegations that pre-planned trades were motivated by MNPI. *See, e.g.*, *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 891 (4th Cir. 2014).[11]

[11] Rule 10b5-1's safe harbor applies to *Brophy* claims just as it applies to federal insider-trading claims. *See Oracle*, 867 A.2d at 934 (noting that *Brophy* "track[s] the key requirements to recover against an insider under federal law").

Garcia Senior executed his trading plan on June 15, 2020—months before his trading began on October 30, 2020. A0160 (¶ 227); *see* B820. Accordingly, June 15—the date he entered into the plan irrevocably committing to the trades—is the relevant date for assessing whether Garcia Senior's trades were conceivably motivated by MNPI. Plaintiff ignores this reality, perhaps because she alleges that the Board first "learned of Carvana's difficulty in ensuring adequate compliance with state T&R laws" in "July 2020," Opening Br. at 29 (citing A0125, A0127-29 (¶¶ 171, 174-75))—a month *after* Garcia Senior had already executed the trading plan.

Plaintiff attacks Garcia Senior's Rule 10b5-1 plan because he modified it twice during the trading period at issue, both times "to increase his daily trading limit." *Id.* at 33-34. But modifications to a 10b5-1 plan are not inherently suspect, *see* 17 C.F.R. § 240.10b5-1(c)(1)(iv), and the amended complaint lacks any allegations substantiating the idea that Garcia Senior modified his trading plan to exploit his knowledge of MNPI. *See, e.g.*, *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 585 (S.D.N.Y. 2014) (treating 10b5-1 plan entered into during class period as safe harbor where the complaint "pleads no facts that even remotely suggest that [defendant] entered into the Plan 'strategically' so as to capitalize on insider knowledge"), *aff'd*, 604 F. App'x 62 (2d Cir. 2015); *Ark. Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 356 & n.4 (2d Cir. 2022) (similar).

Nothing about these modifications helps Plaintiff show scienter. The first modification occurred on November 4, 2020 and took effect on December 4, 2020. *See* A0160 (¶ 227 & n.157). Accordingly, Plaintiff's modification argument has no bearing on any of the trades occurring before December 4, 2020. And the only MNPI that allegedly existed by that time—information in July 2020 and October 2020 Board presentations discussing the risks and issues associated with Carvana's T&R compliance, Opening Br. at 29 (citing A0125, A0127-30 (¶¶ 171, 174-75, 177-78))—had already been disclosed to the public. *See supra* at 10-11, 28. Because Plaintiff does not even try to identify what nonpublic information Garcia Senior possessed when he modified his 10b5-1 plan, she is certainly not entitled to any inference that his modification was motivated by such information.[12]

The same is true for the second modification, which occurred on May 20, 2021 and took effect on June 21, 2021. *See* A0160 (¶ 227 & n.158). Again, this modification has no bearing on any of the trades occurring before June 21, 2021. And again, Plaintiff fails to pinpoint what MNPI Garcia Senior knew at the time of the May 20, 2021 modification that the public did not. The only alleged

[12] The same problem plagues Plaintiff's reliance on Garcia Senior's lone sale outside his 10b5-1 plan, which occurred on December 2, 2020. Opening Br. at 34-35 (citing A0159 (¶ 226)). Plaintiff does not attempt to connect that trade to any piece of inside information that had been disclosed to Garcia Senior but not the public.

developments internal to Carvana between the November 2020 modification and the May 2021 modification were a Board presentation in February 2021 reiterating the same T&R issues disclosed to the public, A0132 (¶ 181); and the Michigan regulatory action on May 7, 2021 that resulted in a $2,500 fine and probation, A0094 (¶ 120 & n.68); B765. Even assuming that Garcia Senior was somehow aware of these developments (*but see supra* at 28), Plaintiff offers no reason to suspect that they would have motivated him to slightly increase the trading volume for his 10b5-1 plan from 50,000 shares per day to 60,000 shares per day—particularly given the massive number of shares he owned.[13]

What is more, Garcia Senior's 10b5-1 plan and the two modifications identified by Plaintiff each contained a cooling-off period. As the SEC recently explained in amending Rule 10b5-1, "[t]he purpose of a cooling-off period is to provide a separation in time between the adoption of the plan and the commencement of trading under the plan so as to minimize the ability of an insider to benefit from any material nonpublic information." *Insider Trading Arrangements and Related*

[13] Garcia Senior is not alleged to have modified his 10b5-1 plan again after May 20, 2021. Accordingly, the various events mentioned by Plaintiff occurring *after* that date—such as the July 2021 and October 2021 Board presentations, the August 2021 settlement with California regulators, and the August 2021 suspension in North Carolina (*see* Opening Br. at 16, 19)—are irrelevant. Those events could not have motivated Garcia Senior's trades, because all of his trades during those months were dictated no later than May 20, 2021.

Disclosures, 87 Fed. Reg. 80,362, 80,369 (Dec. 29, 2022). And "for persons other than officers and directors," like Garcia Senior, a "30-day cooling-off period" is sufficient to "help ensure that a trade is not on the basis of material nonpublic information." *Id.* at 80,371. Here, all of the trades executed under Garcia Senior's 10b5-1 plan followed a cooling-off period of at least 30 days: The June 15, 2020 plan did not take effect until October 30, 2020; the November 4, 2020 modification did not take effect until December 4, 2020; and the May 20, 2021 modification did not take effect until June 21, 2021. *See supra* at 14-15. These cooling-off periods further weaken Plaintiff's already-strained attempt to circumvent the safe harbor provided by Rule 10b5-1.[14]

b. In addition to attacking the 10b5-1 trading plan, Plaintiff belabors the size of Garcia Senior's collective trading activity, repeatedly emphasizing that he sold "$3.67 billion worth of Carvana stock" during the 10-month trading window. Opening Br. at 33 (emphasis omitted); *see also id.* at 4, 20, 38. In the context of this case, these allegations are not probative of scienter. As Plaintiff acknowledges, Garcia Senior retained most of his Carvana shares. *Id.* at 33 n.4. He still owned a

[14] The SEC's amendments to Rule 10b5-1 did not take effect until February 27, 2023—long after the trades at issue in this case. *See* 87 Fed. Reg. at 80,362. For those trades, Garcia Senior operated his 10b5-1 plan under the prior version of Rule 10b5-1, which notably did not contain *any* cooling-off period requirements. Garcia Senior's decision to voluntarily implement cooling-off periods underscores the absence of any improper motive in this case.

significant majority of Carvana's voting stock and thus still "remained the person with more equity at stake … than anyone anywhere" in the Company. *Oracle*, 867 A.2d at 955.

Additionally, while Plaintiff emphasizes that the total value of the trades is "$3.67 billion," Opening Br. at 33, that figure lumps together more than 2,500 trades over the course of nearly ten months, *id.* at 20. That lengthy trading window itself undermines the conceivability of Plaintiff's scienter theory. *See, e.g.*, *In re Hertz Glob. Hldgs. Inc*., 905 F.3d 106, 120 (3d Cir. 2018); *cf. Rattner v. Bidzos*, 2003 WL 22284323, at *10 (Del. Ch. Sept. 30, 2003) (holding that the failure to "pinpoint the timing of the challenged sales" within a one-month trading window "detracts" from scienter). And Garcia Senior's pattern of trading within that lengthy window undermines any inference of scienter: He consistently traded *every single trading day* for nearly ten months, regardless of Carvana's stock price, Carvana's public disclosures, or market events.

Ultimately, Plaintiff's attempt to plead scienter rests on "a hunch that [Garcia Senior] engaged in 'improper' trades" due to the "size of the trades"—a speculative theory that is "insufficient as a matter of law." *Tilden*, 2018 WL 5307706, at *20. Particularly given Garcia Senior's use of a 10b5-1 plan, these trades do not support an inference of scienter.

CONCLUSION

For the foregoing reasons, the Court of Chancery's judgment should be affirmed.

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