IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN JACOBS, ALAN JACOBS, THE BERNARD B. JACOBS AND SARA JACOBS FAMILY TRUST, JEAN-LOUIS VELAISE, DALE KUTNICK, TOREN KUTNICK, EDWARD B. ROBERTS, JOHN DENNIS, SHLOMO BAKHASH, and JOAN RUBIN, Plaintiffs, v. AKADEMOS, INC., KOHLBERG VENTURES, LLC, BAY AREA HOLDINGS, INC., JOHN EASTBURN, GARY SHAPIRO, JAMES KOHLBERG, RAJ KAJI, BILL YOUSTRA and BURCK SMITH, Defendants.	No. 499, 2024 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2021-0346-JTL **PUBLIC VERSION FILED - FEBRUARY 3, 2025**

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

Akademos Inc., an education-technology firm, sought financing in 2009 in order to achieve scale. Kohlberg Venture, LLC ("KV"), a venture capitalist firm, saw value in the company and began what would become a years-long relationship. Between 2009 and 2020, KV regularly invested in Akademos, often in exchange for preferred stock. And the results were promising—the company saw significant growth in the late 2010s, including increased EBITDA, record-setting contract acquisitions, and financials that would have rendered it operationally profitable (if not for growth-driven sales, marketing, and technology development investments).

After more than a decade of continued support, KV saw an opportunity to turn its majority stake in Akademos into a 100% ownership stake. In the early months of the COVID-19 pandemic, KV proposed buying Akademos for $12.5 million through a reverse triangular merger that would leave itself as the sole owner of the company. In response, Akademos' board—which was *admittedly* conflicted (as the majority of directors were KV partners or were beholden to KV)—took repeated steps to prefer KV's interests over the interests of the company's common stockholders.

For instance, the board appointed Akademos' CEO (a director himself who was controlled by KV) to negotiate the KV merger. But the CEO never attempted to negotiate the deal's price. And, during a fundamentally flawed go-shop process, the CEO withheld from the board two indications of interest from potential buyers. Most troublingly, however, the board treated KV's acquisition of Akademos as a "Deemed Liquidation Event" that triggered KV's liquidation preference on its preferred stock. This meant that KV's $12.5 million merger consideration went back in KV's pocket and was not distributed proportionally to Akademos' stockholders.

The problem? Treating the transaction as a Deemed Liquidation Event was an "obvious" (as the Chancery Court put it) violation of Akademos' charter. The charter only triggered the liquidation preference for purposes of a merger when there was a change of control of the company, not when a controlling stockholder exchanged its majority ownership stake for a complete ownership stake. Nevertheless, the board—at KV's bidding—ensured that KV would fully acquire Akademos *and* receive the benefit of the liquidation preference, all at the expense of the common stockholders.

Plaintiffs, who are the vast majority of Akademos' common stockholders,[1] brought suit in 2021 against the company, most of its directors, and KV,[2] asserting that the directors breached their fiduciary duties and KV aided and abetted those

[1] "Plaintiffs" refers to Brian Jacbos, Alan Jacobs, The Bernard B. Jacobs and Sara Jacobs Family Trust, Jean-Louise Velaise, Dale Kutnick, Toren Kutnick, Edward B. Roberts, John Dennis, Shlomo Bakhash, and Joan Rubin.

[2] Individuals John Eastburn, Gary Shapiro, James Kohlberg, Raj Kaji, Bill Youstra, and Burck Smith are referred to collectively as the "Director Defendants." Kohlberg Ventures, LLC and Bay Area Holdings, Inc. are referred to collectively as "KV." Together, Director Defendants, KV, and Akademos are referred to as "Defendants."

breaches.[3] After a bench trial, the Chancery Court issued a post-trial opinion on October 30, 2024 ("Op."). *See* Exhibit A. On November 4, the Chancery Court entered judgment in favor of Defendants. *See* Exhibit B. Plaintiffs now appeal.

At core, this appeal raises two significant issues. First, do corporate directors breach their fiduciary duties to common stockholders when they favor the controlling preferred stockholder over the common stockholders by violating the corporation's charter (at the direction of the controlling stockholder) and depriving the common stockholders of distributions they are entitled to under the charter? The Chancery Court held that Director Defendants facilitated a clear violation of Akademos' charter but did not breach their fiduciary duties because KV could have ensured that the common stock received no value through other means (none of which KV pursued, for self-interested reasons). That holding was error and based on speculation. Assessing Director Defendants' conduct against reality, the treatment of the merger as a Deemed Liquidation Event was clearly not entirely fair. Director Defendants put KV's interests above the common stockholders' interests by allowing KV to do what it could not under the charter—removing the common stockholders without providing any value in return. Director Defendants breached their fiduciary duties in doing so and KV aided and abetted those breaches.

[3] Plaintiffs also asserted a statutory appraisal claim, which is not at issue on appeal.

Second, must a court assess fair dealing as part of the entire fairness analysis? This Court has long held that procedural fairness is a fundamental dimension of the entire fairness standard—yet, the Chancery Court expressly declined to address fair dealing in concluding that the merger was entirely fair (despite the merger's many procedural deficiencies). This error runs contrary to well-established Delaware law and, at minimum, requires remanding to require the Chancery Court fulfill its duty.

This Court should reverse the Chancery Court's judgment with respect to Plaintiffs' breach of fiduciary duty and aiding and abetting claims. Alternatively, this Court should remand to require the Chancery Court to assess fair dealing as part of its entire fairness analysis.

SUMMARY OF ARGUMENT

1. The Chancery Court erred when it held that Director Defendants did not breach their fiduciary duties. Under Akademos' charter, KV's self-dealing merger was not a "Deemed Liquidation Event," meaning that it did not trigger the preferred stock's liquidation preference. The Chancery Court correctly interpreted the charter but determined that Director Defendants did not breach their fiduciary duties by treating the merger as a Deemed Liquidation Event (and distributing the merger's proceeds to KV through the liquidation preference) because KV could have ensured the common stock was valueless through other means. The Chancery Court's holding is speculative and ignores the reality that Director Defendants wrongfully treated the merger as a Deemed Liquidation Event to further KV's interests at the expense of the common stockholders. That decision constituted a breach of fiduciary duties.

2. Because the Chancery Court erred in holding that Director Defendants did not breach their fiduciary duties, it also erred in holding that KV did not aid and abet those breaches.

3. The Chancery Court further erred by expressly declining to consider fair dealing as part of its entire fairness analysis. Delaware law has long recognized that fair dealing is an integral aspect of the entire fairness test that must be assessed in addition to fair price. By abrogating its duty to consider fair dealing, the Chancery Court's entire fairness analysis is incomplete and inherently flawed.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. The Relationship Between Akademos and KV

Akademos is an education-technology firm founded in 1999 by Brian Jacobs that offers a virtual bookstore and marketplace services for educational institutions. Op. at 5; A339 at ¶33. Jacobs served as CEO of Akademos until 2011 and, until 2009, was the sole member of its board of directors. Op. at 5; A339 at ¶¶34–35.

Jacobs initially raised capital for Akademos from friends, family, and angel investors, all of whom received common stock. Op. at 5. In 2009, Jacobs expanded Akademos' search for financing sources and approached KV, a venture capital affiliate of Kohlberg & Company. *Id.* at 6. KV invested $2.5 million in Akademos in July of that year, and received preferred stock in return.[4] *Id.*; A340 at ¶46. This stock carried a liquidation preference, as reflected in the Series A term sheet:

> In the event of any liquidation, dissolution or winding up of the Company, the proceeds will be paid as follows: First pay one times the Original Purchase Price ($16.00 per share of Series A Stock) plus

[4] As the Chancery Court acknowledged, the funds were not technically invested by KV, but rather by Bay Area Holdings, Inc.—a personal investment vehicle of James Kohlberg, one of KV's co-founders. *See* Op. at 6 n.2. For the sake of simplicity, the Chancery Court treated KV as having provided funds to Akademos throughout their relationship, even if Bay Area Holdings, Inc. made some of the investments. *Id.* ("The distinction between KV Fund and Bay Holding is not important for purposes of this case, and it makes the factual account unnecessarily complex."). Plaintiffs follow the Chancery Court's approach in this brief and refer to both parties as "KV."

> declared and unpaid dividends on each share of Series A Stock. Thereafter, proceeds shall be distributed ratably to the Common Stock.
>
> A merger or consolidation (other than one in which stockholders of the Company own a majority by voting power of the outstanding shares of the surviving or acquired corporation) and a sale, lease, transfer or other disposition of all or substantially all of the assets of the Company will be treated as a liquidation event (a "**Deemed Liquidation Event**"), thereby triggering payment of the liquidation preferences described above unless the holders of 51% of the Series A Stock elect otherwise.

A49.

This liquidation preference guaranteed that KV would receive money before common stockholders in certain situations, including a liquidation, dissolution, or a merger qualifying as a "Deemed Liquidation Event." In the event of a merger where Akademos stockholders owned a majority of the voting power of the outstanding shares of the surviving or acquired corporation, KV would *not* be paid first—instead, proceeds would be paid proportionally between all stockholders. This provision of is consistent with Akademos' charter, discussed below. *See infra* 12–14

Throughout the next 11 years, KV invested in Akademos like clockwork. *See* A341 at ¶47. KV received preferred stock in exchange for many of its investments, including in 2010 (twice), in 2011, and in 2016. Op. at 7, 11. KV further exchanged capital for promissory notes in 2010, 2018, 2019, and 2020, and provided Akademos a loan in 2015 (most of which was converted into preferred stock in 2016, at 1.5 times the converted debt). *Id.* at 11. When Akademos needed money, KV provided it—and KV's investment strategy was working. Though Akademos never turned a profit, its management recognized that the company would have been operationally profitable by 2019 and 2020, if not for the significant investments being made in sales and marketing efforts and technology development. A340 at ¶¶41–42; *see also* Op. at 27 ("[I]n June 2020, [Akademos' CEO] reported to the Board that the Company had signed a record-high twenty-two new deals."); A92.

In return for its money, KV gained increasing control over Akademos. By 2011, KV had gained majority voting control. Op. at 7; A340 at ¶46. KV also used its financing to exert influence over Akademos' board and management:

- KV's initial $2.5 million investment in 2009 expanded Akademos' board from one seat to three, adding Bill Youstra (a KV partner who was appointed by KV) and Scott Eagle (who was mutually appointed). Op. at 6–7.

- KV conditioned its $1.83 million investment in 2011 on replacing Jacobs as CEO—KV and Jacobs' replacement, John Squires, then added Eric Fingerhut to the board. *Id.* at 7–8.

- In connection with KV's 2016 investment, Fingerhut and Eagle left the board, and John Eastburn (a KV partner) and Gary Shapiro joined it. *Id.* at 11.

- In 2018, the board terminated Squires and hired Raj Kaji, after a replacement process led by KV partners Eastburn and Youstra. *Id.* at 13–14. Kaji also sat on Akademos' board. A337 at ¶24.

- James Kohlberg (a co-founder of KV) joined the board in 2018, and Burck Smith (whom Kaji recruited) joined it in 2019. Op. at 16–17.

In sum, half of Akademos' board was made up of KV partners by 2020—of the remaining three directors, one was the CEO of Akademos (who was selected as a result of a KV-led replacement process), and another was picked by that CEO.

B. KV Acquires Akademos Through a Merger

In late 2019, Akademos began working on a potential strategic combination or acquisition that could justify raising new capital. Op. at 22. Two parties expressed interest: The first proposed to acquire Akademos for private, illiquid securities in a combined business that valued the company at 25–34% of the newly combined entity (which would ascribe Akademos a value of \$5.4 million to \$17.2 million, depending on the assumptions used). A343 at ¶55. The second proposed to acquire Akademos for \$17 million on a cash-free, debt-free basis (such that the purchase price would be reduced by the Akademos' outstanding indebtedness), with the purchase price also paid in shares of the buyer's private, illiquid securities. *Id.* While neither proposal came to fruition, most of the board maintained that a merger or sale of Akademos was the best outcome. Op. at 27.

In July 2020, KV proposed acquiring Akademos based on a cash-free, debt-free valuation of \$12.5 million. *Id.*; A343–44 at ¶57. KV's term sheet dictated that the acquisition would be treated as a "Deemed Liquidation Event" that would trigger the payment of the liquidation preference to the preferred shareholders (*i.e.*, KV):

> As [of] the effective time of the merger, all outstanding shares of company capital stock will be converted into the right to receive the amount of cash which, based on the aggregate closing merger consideration to equityholders, *is due to such holders in a Deemed Liquidation Event pursuant to the Company's Certificate of Incorporation*. Any vested options, warrants and other securities convertible into equity must be exercised by its holder prior to the

> Effective Date, or otherwise will be cancelled or extinguished as of the effective time of the merger.

A95 (emphasis added); A102 (same). No evidence demonstrated or suggested that Akademos' board ever formally considered or evaluated whether that term was authorized by the company's charter.

Just three weeks after KV proposed acquiring Akademos, each board member (other than Jacobs) approved KV's term sheet, A110–12, initiating an acquisition process led by Kaji (KV's hand-picked CEO) without a special committee or any other process protections. The term sheet included a "go-shop" provision allowing Akademos to seek and accept superior bids before the merger closed. A103. With certain exceptions, KV agreed to support, as a shareholder, any superior offer the board chose to accept—but the term sheet included no restrictions on KV's right as a bidder to match. A104–05.

In August 2020, Parchman, Vaughan & Company, L.L.C. (an investment banker) ran an abbreviated go-shop process during the middle of the COVID-19 pandemic, which the Chancery Court found had "shortcomings." Op. at 30, 53. The go-shop process lasted only three weeks long, and Parchman Vaughan reached out to only four parties (notably absent from that list were prior bidders Barnes & Noble Booksellers, Inc. and Follett Higher Education Group). Op. at 30. Moreover, Kaji never negotiated the price of the merger with KV, nor did he inform the board of additional proposals or indications of interest from potential buyers received during the go-shop process. *Id.* at 53; A372 at 568:17-20.

In September 2020, under KV's control and direction, Akademos merged with KV, through a merger transaction that first closed on September 29, 2020. *See* A129. KV acquired Akademos for a mere $12.5 million. A136. As directed by KV, the company took the position that the common shareholders were not entitled to any consideration because the merger was a Deemed Liquidation Event that triggered the preferred stock's liquidation preference. Immediately following the merger, Akademos announced new partnerships with at least eleven more colleges and universities. *See, e.g.*, A118–19; A120–22; A123–25; A126–28.

A few months after the first closing, KV scuttled that transaction before year-end to structure the deal in a more tax advantageous way for KV, which they were allowed to do because lawyers had neglected to follow proper procedure during the first merger. Op. at 3. Akademos then entered a second, similar merger with KV, again without consideration of the interests of any shareholder other than KV, that closed on December 23, 2020. A133 at 5. Akademos admitted that a majority of the board was interested in the merger. A347 at ¶70.

Just two years later, KV ran a sale process. Op. at 56. The process generated an expression of interest from Follett in a deal at $30 million and led to a sale of Akademos for $20 million to another buyer—markedly more than KV had spent. *Id.*

C. Relevant Provisions of the Charter

Akademos' charter governed the relationship between the company and its stockholders. *See generally* A60–86 ("Fourth Amended and Restated Certificate of Incorporation of Akademos, Inc."); *see also Shiftan v. Morgan Joseph Hldgs., Inc.*, 57 A.3d 928, 934 (Del. Ch. 2012). Four provisions of the charter are particularly relevant to this appeal.

1. The Liquidation Preference Provision

Akademos' charter provided that holders of preferred stock were to be paid before common stockholders in certain situations. Specifically, Section B.2.1 of the charter states:

> In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation (including a Deemed Liquidation Event . . .), the holders of shares of Preferred Stock then outstanding shall be entitled to be paid, on a *pari passu* basis, out of the assets of the Corporation available for distribution to its stockholders before any payment shall be made to the holders of Common Stock by reason of their ownership thereof, ...

A62–63.

Section B.2.2 confirms that preferred stockholders are paid first out of Akademos' assets available for distribution, and adds that common stockholders are paid ratably from the remaining proceeds of the triggering event:

> In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation (including a Deemed Liquidation Event), after the payment of all preferential amounts required to be paid to the holders of shares of Preferred Stock pursuant to Section 2.1, the

> remaining assets of the Corporation available for distribution to its stockholders shall be distributed among the holders of shares of Common Stock, pro rata based on the number of shares held by each such holder.

A63.

These provisions establish the preferred stock's liquidation preference. As a preferred stockholder, KV was thus entitled to be paid before common stockholders, but only when there was a triggering event, such as a Deemed Liquidation Event, and only out of assets available for distribution.

2. The Deemed Liquidation Event Provision

As noted above, Akademos' board never formally considered or evaluated whether the provision in KV's July 2020 merger term sheet requiring the transaction be treated as a "Deemed Liquidation Event"—in an attempt to trigger the preferred stock's liquidated preference—conflicted with Akademos' charter. *See* A95. Had it done so, it surely would have found that the merger KV was not a "Deemed Liquidation Event." That term is defined in Section B.2.3.1, for relevant purposes, to mean "a merger or consolidation" in which:

> the Corporation is a constituent party . . . ; except any such merger or consolidation involving the Corporation or a subsidiary in which the shares of capital stock of the Corporation outstanding immediately prior to such merger or consolidation continue to represent, or are converted into or exchanged for shares of capital stock that represent, immediately following such merger or consolidation, at least a majority, by voting power, of the capital stock of (1) the surviving or resulting corporation or (2) if the surviving corporation is a wholly owned subsidiary of another corporation immediately following such

> merger or consolidation, the parent corporation of such surviving or resulting corporation . . . .

A63–64.

The Chancery Court recognized that this provision "has an obvious purpose: generally trigger the liquidation preference for purposes of a merger, but not when the merger does not constitute a change of control." Op. at 88–89. Thus, a merger is not a Deemed Liquidation Event where, as here, Akademos is a party but the pre-merger controlling stockholder continues to have a controlling stake post-merger.

3. The Mandatory Redemption Provision

The charter grants the majority of preferred stockholders the right to demand redemption of their preferred stock for money. Section B.6.1 provides:

> Shares of Preferred Stock shall be redeemed, on a *pari passu* basis, by the Corporation out of funds lawfully available therefor . . . in three annual installments commencing not more than 60 days after receipt by the Corporation at any time on or after the third anniversary of the Original Issue Date, from the holders of at least a majority of the then outstanding shares of Preferred Stock, voting together as a single class and on an ad-converted to Common Stock basis, of written notice requesting redemption of all shares of Preferred Stock.

A82. If sufficient funds are not available:

> the Corporation shall redeem a pro rata portion of each holder's redeemable shares of such capital stock out of funds legally available therefor, based on the respective amounts which would otherwise be payable in respect of the shares to be redeemed if the legally available funds were sufficient to redeem all such shares, and shall redeem the

> remaining shares to have been redeemed as soon as practicable after the Corporation has funds legally available therefor.

A82.

Putting these provisions together, Akademos is obligated to redeem preferred stock, upon notice from the preferred shareholders, for cash in three annual installments, with the first being paid within 60 days of receiving notice of redemption, so long as three years has passed since the preferred stock was issued. If Akademos does not have sufficient funds within the 60-day window, it must use what it has to redeem preferred stocks pro rata and redeem the remainder as soon as it can once additional funds become available.

Here, because KV was issued preferred stock as early as December 2016, it could exercise its mandatory redemption right as early as December 2019. Op. at 64. At no point did KV do so.

4. The Accrued Dividend Provision

Lastly, the charter provides that dividends shall accrue on "Series A" and "Series A-1" (but not "Series B") preferred stock from the date of issuance. A62. Generally, such dividends are not automatically payable unless declared by Akademos' board, which was obligated to pay dividends accrued on preferred stock before common stock. A61–62. The board never made such a declaration.

II. PROCEDURAL HISTORY

A. Plaintiffs' Complaint

Plaintiffs (holders of Akademos' common stock[5]) filed suit against Defendants in April 2021. Plaintiffs filed an amended complaint on July 28, 2021, asserting a statutory appraisal claim and common law breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims. Am. Compl. (Docket Entry 13) ¶¶138–52.

B. Trial

After several years of litigation that included a motion to dismiss, fact and expert discovery, and a summary judgment motion, trial was held on September 18, 19, 20, and October 2, 2023. Op. at 4. The parties introduced 692 exhibits. *Id.* The following witnesses testified:

For Plaintiffs

- Brian Jacobs (September 18)
- Jesse Ultz (October 2) – Plaintiffs' valuation expert

For Defendants

- John Eastburn (September 18, 19)

[5] Until December 2020, Plaintiffs owned the following number of Akademos common stock shares: Brian Jacobs (104,140); Alan Jacobs (619); The Bernard B. Jacobs and Sara Jacobs Family Trust (19,500); Dale Kutnick (28,163); Jean-Louis Velaise (9,811); Edward B. Roberts (7,146); John Dennis (7,846); Shlomo Bakhash (3,446); and Joan Rubin (151). A336-A337 at ¶¶8–16.

- Raj Kaji (September 19)
- Burck Smith (September 20)
- James Rowan (September 20) – a Parchman Vaughan employee
- David Clarke (October 2) – Defendants' valuation expert

After trial ended, the parties filed post-trial briefing and presented argument at a hearing held in July 2024. The Chancery Court issued its post-trial opinion on October 30, 2024.

C. The Post-Trial Opinion

The opinion has three parts: (1) factual findings (Op. at 5–34); (2) analysis of Plaintiffs' appraisal claim (*id.* at 34–66); and (3) analysis of Plaintiffs' breach of fiduciary duty claims (*id.* at 67–92). This appeal focuses on errors made by the Chancery Court in the third part.

In assessing Plaintiffs' breach of fiduciary duty claims, the Chancery Court began by acknowledging that the claim requires proof of two elements—"that a fiduciary duty existed" and "that the defendant breached that duty." *Id.* at 67. Finding the first easily satisfied, the Chancery Court spent most of its analysis on the second.

The Chancery Court recognized that the second element has two dimensions under the entire fairness standard of review, which the parties agreed applied: (1) fair price and (2) fair dealing. *Id.* at 68. Both aspects "must be examined" since "the question is one of entire fairness." *Id.* (quoting *Weinberger v. UOP, Inc.*, 457 A.2d

701, 711 (Del. 1983)). The Chancery Court further noted that "[t]he two dimensions of the entire fairness test interact." *Id.* at 70. While "'[f]air price can be the predominant consideration in the unitary entire fairness inquiry' . . . the procedural dimension can take on significant importance" since "pricing and valuation are often contestable." *Id.* (quoting *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *34 (Del. Ch. Aug. 27, 2015)).

After discussing these legal principles, the Chancery Court addressed whether the merger was entirely fair, starting with fair price. *Id.* at 72–85. "Notwithstanding [the] stark result" of the common stockholders receiving no consideration in the merger, the Chancery Court held that the merger provided the common stockholders with a fair price because they "had no prospect of receiving value" from Akademos. *Id.* at 72. Reaching this conclusion, the Chancery Court emphasized KV's control over Akademos:

> That control meant that the KV Fund could veto any transaction that did not first satisfy the $6 million due on the KV Notes, then pay the $6 million repayment premium due on the KV Notes, and then attribute value to the Preferred Stock's liquidation preference of $32 million. Even setting aside the $6 million repayment premium, the common stockholders could not receive any value in a transaction priced below $40 million.

Id. at 82. Though the common stockholders "received nothing" in the merger, "that was the substantial equivalent of what they had before"—thus, the Chancery Court held, the merger offered a fair price. *Id.* at 84.

The Chancery Court ended its entire fairness analysis there. Despite accepting that "[t]he entire fairness test also contemplates an inquiry into the procedural aspects of the transaction or decision under challenge"—*i.e.*, fair dealing—"[h]ere, the fair price evidence is sufficiently strong to carry the day *without any inquiry into fair dealing*." *Id.* at 84–85 (emphasis added). Without having explored whether the merger was procedurally fair, the Chancery Court concluded that it satisfied the unitary entire fairness test. *Id.* at 85.

The Chancery Court turned next to Plaintiffs' argument that Director Defendants breached their fiduciary duties by treating the merger as a Deemed Liquidation Event. *Id.* at 85–90. Agreeing with Plaintiffs, the Chancery Court held that the merger *was not* a Deemed Liquidation Event because it was structured as a reverse triangular merger in which KV's pre-merger majority ownership stake in Akademos became a 100 percent post-merger ownership stake. *Id.* at 86–89. The Deemed Liquidation Event provision was "obvious[ly]" meant to trigger the preferred stock's liquidation preference only where a merger constituted a change of control—Defendants' contrary reading was "overly technical to the point of non-sensical." *Id.* at 88–89. Therefore, the merger was not a Deemed Liquidation Event that triggered the liquidation preference. *Id.* at 89.

Nevertheless, the Chancery Court found that treating the merger as a Deemed Liquidation Event did not constitute a breach of fiduciary duty. *Id.* at 89–90. Rather than analyzing Director Defendants' actual conduct (*i.e.*, treating the merger as a Deemed Liquidation Event, at KV's direction, to allow the merger consideration to be distributed to the preferred stockholders through the liquidation preference), the Chancery Court reused the approach it used when analyzing the merger's fair price—because KV *could have* "ensure[d] that no value flowed to the common stock," the common stock "was not entitled to any value" from Akademos. *Id.* at 89. The Chancery Court accordingly rejected Plaintiffs' claim that Director Defendants breached their fiduciary duties.

Having held that Director Defendants did not breach their fiduciary duties, the Chancery Court subsequently held that KV did not aid and abet the breach of their fiduciary duties. *Id.* at 92.[6]

Plaintiffs filed a timely notice of appeal of the Chancery Court's post-trial opinion on December 3, 2024.

[6] The Chancery Court also addressed Plaintiffs' claim that Director Defendants breached their fiduciary duties when agreeing to the KV notes. Op. at 90–92. Plaintiffs do not challenge the Chancery Court's analysis of that argument.

ARGUMENT

I. DIRECTOR DEFENDANTS BREACHED FIDUCIARY DUTIES BY TREATING THE MERGER AS A DEEMED LIQUIDATION EVENT

A. Question Presented

Despite holding that Director Defendants improperly distributed the merger consideration to KV through its liquidation preference (in "obvious" violation of Akademos' charter), the Chancery Court held that Director Defendants did not breach their fiduciary duties because KV could have ensured that the common stock received no value under different circumstances. Op. at 89. Was it error for the Chancery Court to rely on speculation about common stockholder value rather than assessing Director Defendants' conduct against the reality that the common stockholders were entitled to distributions under the actual merger transaction approved by Director Defendants? *See* A410–13 (arguing that Director Defendants breached fiduciary duties by treating the merger as a Deemed Liquidation Event).

B. Scope of Review

This Court "will not ignore the findings of the Court of Chancery if they are sufficiently supported by the record and are the product of an orderly and logical deductive process," but its "review of the formulation and application of legal principles . . . is plenary and requires no deference." *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 698–99 (Del. 2023).

C. Merits of the Argument

1. Director Defendants breached their fiduciary duties because they barred the common stock from receiving its value.

Director Defendants accepted KV's condition that the merger be treated as a Deemed Liquidation Event that would trigger KV's liquidation preference. Director Defendants didn't need to agree to that provision of KV's term sheet—and, in fact, they *shouldn't* have agreed to it, because it plainly violated Akademos' charter. Yet, rather than consider the implications of treating the merger as a Deemed Liquidation Event, Director Defendants accepted the condition carte blanche. As a result, KV received the merger consideration through its liquidation preference and took full control of Akademos while the common stockholders received nothing. Director Defendants breached their fiduciary duties by allowing this to happen.

i. Director Defendants preferred KV's interests over the interests of the common stockholders by improperly denying value to the common stock under the merger.

The Chancery Court rightfully held that the merger "did not automatically trigger the liquidation preference as a Deemed Liquidation Event." Op. at 89. That is because the merger was structured as a reverse triangular merger whereby "KV Fund's pre-Merger majority ownership stake in [Akademos] became a 100% post-Merger ownership stake." *Id.* at 88; *see also W. Standard, LLC v. Sourcehov Hldgs., Inc. (Western Standard)*, 2019 WL 3322406, at *6 (Del. Ch. July 24, 2019) ("In a reverse triangular merger . . . the acquirer creates a subsidiary that merges into the target. The merger subsidiary (and its stock) disappear while the target (and its stock) survive as a subsidiary of the acquirer."). Because this type of reverse triangular merger with the Akademos' controlling stockholder did not result in a change of control, it was not a Deemed Liquidation Event under Akademos' charter. Op. at 88–89; *see also* A64.

But the Chancery Court held that the merger was nonetheless fair because KV could have precluded value from flowing to the common stock under separate theoretical transaction scenarios. Op. at 89. The Chancery Court's reasoning ignores the reality of what *actually* happened. KV proposed a reverse triangular merger transaction with itself and Director Defendants approved that type of merger. That merger was not a Deemed Liquidation Event, which means that the liquidation preference on KV's preferred stock was not triggered. *See* A63–64. Because the liquidation preference was not triggered, the merger proceeds should have been distributed proportionally between all shareholders after first allocating proceeds to KV's notes. Had Akademos' charter been faithfully applied, Plaintiffs would have received value—namely, their proportion of the remainder of the merger proceeds.

By treating the merger as a Deemed Liquidation Event, Director Defendants breached their fiduciary duties. Generally, corporate directors' conduct should be guided by the well-established principle that "the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). More specifically, Director Defendants were required to "focus on promoting the value of the corporation *for the benefit of the common stockholders*" and to prioritize the common stockholders' interests over KV's interests. *McRitchie v. Zuckerberg*, 315 A.3d 518, 549 (Del. Ch. 2024) (emphasis added); *see also Equity-Linked Invs., L.P. v. Adams*, 705 A.2d 1040, 1042 (Del. Ch. 1997) (recognizing the general duty "to prefer the interests of common stock . . . to the interests created by the special rights, preferences, etc., of preferred stock").

Director Defendants violated their duties by treating the merger as a Deemed Liquidation Event. *Cf. Lacey on behalf of S. Copper Corp. v. Mota-Velasco*, 2021 WL 508982, at *7 (Del. Ch. Feb. 11, 2021) ("A board's failure to cause the corporation to comply with its charter . . . may well create a breach of fiduciary duty claim."). There was simply no legitimate basis for Director Defendants to treat the merger that way. As the Chancery Court aptly put it, the purpose of the Deemed Liquidation Event provision was "obvious," and any interpretation to the contrary was "overly technical to the point of non-sensical." Op. at 88.

So, Director Defendants either simply uncritically furthered the interests of the controlling stockholder without any regard to the common stockholders—a possibility, given that the board apparently never formally considered or evaluated whether the merger was authorized by Akademos' charter—or, worse, *affirmatively* adopted a non-sensical reading of Akademos' charter in order to benefit KV. Either scenario is consistent with the fact that Akademos' board was *concededly* conflicted with respect to the merger. A347 at ¶70 ("Akademos acknowledged that a majority of the Board was interested in the [KV] Acquisition."). And, in either scenario, Director Defendants breached their fiduciary duties to the common stockholders.

ii. The Chancery Court improperly relied on speculation when assessing the value of the common stock.

Rather than assess Director Defendants' conduct in light of the KV merger, the Chancery Court treated the mischaracterization of the merger as a harmless foul because KV theoretically "could ensure that no value flowed to the common stock as a going concern or in any transaction" through other means. Op. at 89. But that conclusion was speculative. While it may have been possible for KV, in an alternative reality, to take steps to deprive the common stock of value, KV took none of those steps—and had self-interested incentives not to do so.

For example, the Chancery Court first opined that KV could have rendered the common stock valueless by redeeming its shares via the mandatory redemption provision in Akademos' charter. Op. at 63–64; *see supra* 14–15. But that option had an obvious downside: it would have required KV to redeem its shares in Akademos in exchange for intermittent payments that were not guaranteed. A82–83 (requiring preferred stockholders to surrender their stock certificates on or before the date of redemption and to inconveniently receive payment, dependent on the availability of funds, in three annual installments). KV wanted to *expand* its majority control of the company into total control. Redeeming its shares in Akademos would have been antithetical to that objective.

The Chancery Court next highlighted the accrued dividend provision in Akademos' charter. *See supra* 15. But there was no evidence in the record that Akademos was planning on or had ever contemplated declaring an accrued dividend, as was required for such dividends to be paid. A61–62. More importantly, that provision also would not have gotten KV what it wanted. It had no direct impact on KV's control of Akademos or its ability to get rid of the common stockholders. Nothing about the accrued dividend provision would have allowed KV to usurp the common stockholders' minority interest in Akademos or achieve the value it received by selling the company to itself and keeping the distributions that belonged to common shareholders under the company's charter.

Finally, KV's majority voting control would have allowed it to approve a sale of Akademos to a third party that would have triggered the liquidation preference, but KV did not choose that option either, even though the record shows that third parties made offers at valuations above KV's acquisition price both immediately before and during the company's investment baking process. That is because, in any of those proposed transactions, KV would have given up control of Akademos without receiving full compensation for its liquidation preference.

None of these hypothetical methods for reducing the value of the common stock are relevant to the breach of fiduciary duty analysis. It is pure speculation as to what KV would have done if KV hadn't taken an option it could not lawfully take. What actually happened is that KV proposed—and Director Defendants approved—a reverse triangular merger with itself, turning KV's majority ownership of Akademos into a full 100% ownership stake. When the dust settled, KV was free of the common stockholders, but it attempted to receive the best of both worlds. Rather than distributing proceeds from the merger to the common shareholders, KV directed Akademos to pay the full amount to itself in violation of the company's charter.

Put simply, the scheme concocted by KV and facilitated by Director Defendants gutted the common stockholders' value in Akademos completely, in exchange for nothing, and without paying a premium for the common shareholders' consent to allow Akademos to disregard the requirements of its charter. For KV, in contrast, the maneuvering paid off. Just two years later, KV received pre-negotiated expressions of interest to purchase Akademos for $30 million (240% of the price KV paid in the merger), and ultimately sold the company for significantly more than it spent to acquire it. Op. at 56; A272–78; *see also Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 697 (Del. Ch. 1996) (considering post-merger events as part of a fiduciary duty breach analysis), *aff'd*, 693 A.2d 1082 (Del. 1997). This Court should not condone the Chancery Court's decision to ignore this reality.

Moreover, to the extent it was proper for the Chancery Court to speculate in assessing Director Defendants' conduct, it should have recognized that the most likely alternatives to the KV merger were *also* scenarios that afforded value (or potential value) to the common stock. First, absent KV's self-dealing merger, it was very possible Akademos could have entered into a transaction with a third party in which Akademos' stockholders received stock in the acquiring company (or a mix of stock and cash). Take, for example, the proposal from Ambassador—made in December 2019 and repeated during the go-shop process in 2020—in which Ambassador would have acquired Akademos in exchange for Ambassador stock. *See* A113–17.[7] This type of transaction could have provided value to all Akademos' stockholders, including the common stockholders.

Second, absent the KV merger or any other third-party transaction, it is likely that KV would continue funding Akademos. KV had consistently focused on growth

[7] The Chancery Court stated that Ambassador's proposed stock-for-stock transaction valued Akademos at $10.3 million. Op. at 22. In reality, Ambassador had previously offered a valuation as high as $18.3 million, which was itself low because it was based on June 2019 financials (and so did not account for Akademos' strengthened 2019–20 financials). A87–91. Indeed, Akademos said it was open to "tweaking" its offer. A114. Kaji never shared Ambassador's reiteration of its December 2019 proposal with the board. Op. at 53.

over profitability and funded Akademos for more than a decade. There is no reason to think that it would have stopped funding Akademos in 2020, particularly given the company's improving financials in the late 2010s. Specifically, Akademos' EBITDA increased from negative \$2.2 million in 2017 to negative \$567,000 in the last-12-month period ending on August 31, 2020. A304. The company's growth was not lost on its management, which projected significant positive earnings—going so far as to tell potential customers that the company would have been operationally profitable by 2019 and 2020, if not for the significant investments being made in sales and marketing efforts and technology development. A340 at ¶¶41–42; *see also* Op. at 27 (noting that Akademos signed a record-high number of deals in 2020). Had KV continued to fund Akademos, the common stock would have survived with the potential to see value (either after the company continued to become profitable or in a transaction that afforded the common stockholders value—for example in a stock-for-stock or stock-for-stock-and-cash transaction).

Under either of these alternate scenarios, the common stock stood to receive value. Director Defendants' decision to forego those possibilities in favor of a transaction that destroyed the common stock's value and disregarded Akademos' charter was a violation of their fiduciary duties to the common stockholders.

2. Director Defendants breached their fiduciary duties whether or not KV could have rendered the common stock valueless.

Even if the Chancery Court were correct in speculating that KV would have prohibited the common stock from receiving value under any alternative to a self-dealing transaction, that alone is insufficient to find Director Defendants' conduct entirely fair. As explained at length below, *infra* 37–38, the entire fairness test cannot be satisfied by the fair price aspect alone, *see, e.g.*, *Weinberger*, 457 A.2d at 711 (holding that the test "is not a bifurcated one as between fair dealing and price"). Therefore, the fact that a controlling shareholder *can* hypothetically render common stock valueless does not end the inquiry.

In re Nine Systems Corporation Shareholders Litigation is instructive on this issue. 2014 WL 4383127 (Del. Ch. Sept. 4, 2014), *aff'd sub nom. Fuchs v. Wren Holdings, LLC*, 129 A.3d 882 (Del. 2015). There, the Chancery Court rejected the "broad proposition that a finding of fair price, where a company's stock had no value, forecloses a conclusion that the transaction was not entirely fair." 2014 WL 4383127, at *46. The Chancery Court further recognized that a "grossly unfair process can render an otherwise fair price, even when a company's common stock has no value, not entirely fair." *Id.* at 47 (quoting *Weinberger*, 457 A.2d at 711).

Director Defendants' blatant violation of Akademos' charter at KV's direction was grossly unfair to the common stockholders.[8] By treating the merger as a Deemed Liquidation Event, Director Defendants allowed KV to do what it could not do otherwise—sell Akademos to itself, get rid of the common stockholders, and pocket the merger consideration without providing a dime to the common stockholders. It doesn't matter whether KV could have rendered the company's common stock effectively valueless. What matters is that Director Defendants infringed Akademos' charter to benefit KV without giving any value to the common stockholders for a transaction that KV could not accomplish without the approval of the common stockholders (and a premium paid to common stockholders for such approval).[9] That violation is inconsistent with a finding that the treatment of the merger as a Deemed Liquidation Event was entirely fair.

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[8] Of course, this was far from the only procedural deficiency associated with the merger. As discussed in further detail below, *infra* 39–40, Akademos did not appoint a special committee to negotiate with KV. Rather, the company's conflicted CEO conceded that he merely accepted KV's proposed transaction terms and did not share bidder interest with the board during the merger's abbreviated go-shop process.

[9] In order to accomplish KV's preferred transaction, Akademos would have needed to amend its charter—a process that would have allowed the common stockholders opportunity to negotiate for value in exchange for such an amendment.

3. This Court should not incentivize controlling stockholders and conflicted directors to violate corporate charters.

If this Court affirms the Chancery Court's judgment with respect to Plaintiffs' fiduciary duty claims, it will set a dangerous precedent that will undermine bedrock principles of corporate governance and erode the sanctity of corporate charters.

Corporate charters are not mere formalities—they serve as the foundational contracts between a corporation and its shareholders, embodying the essential rights and obligations of directors, officers, and shareholders. *Cf. Farahpour v. DCX, Inc.*, 635 A.2d 894, 897 (Del. 1994) ("A Delaware corporation can make fundamental changes in its structure and purposes through amendments to its certificate of incorporation." (quotation marks omitted)). Permitting a corporation's directors to disregard and violate its charter when a controlling stockholder shows that it has the ability, in certain situations, to preclude other stockholders from receiving value, would effectively nullify the protections afforded by the charter. Such a precedent would create perverse incentives for directors and controlling stockholders to break a stalemate with the company's common stockholders by circumventing charter provisions whenever they believe their actions can be justified through theoretical financial assessments of common stockholder value.

Affirming will also abrogate decades' worth of Delaware law concerning the entire fairness standard. As explained above, *supra* 30, and below, *infra* 37–38, the entire fairness test requires courts to analyze fair price *and* fair dealing. The test is not bifurcated, and there are situations where a transaction is not entirely fair to common stockholders even where the common stock is valueless. *See, e.g.*, *Nine Systems*, 2014 WL 4383127, at *46. But under the Chancery Court's decision, a determination that the common stock is valueless—or could be made valueless by a controlling stockholder—is sufficient to find any transactions affecting common stockholders entirely fair, no matter how unfair the process. Such a precedent runs contrary to blackletter Delaware law and risks the widespread erosion of trust in corporate governance. This Court should avoid such a result.

II. KV AIDED AND ABETTED DIRECTOR DEFENDANTS' BREACH OF THEIR FIDUCIARY DUTIES

A. Question Presented

The Chancery Court held that KV did not aid and abet breaches of fiduciary duties by Director Defendants because Director Defendants did not breach their fiduciary duties. Op. at 92. Was it error for the Chancery Court to find that Plaintiffs' aiding and abetting claim failed? *See* A426–29 (arguing that KV aided and abetted Director Defendants' breach of their fiduciary duties).

B. Scope of Review

This Court reviews questions of law, "including the Court of Chancery's 'formulation and application of legal principles,'" *de novo*. *Sunder Energy, LLC v. Jackson*, --- A.3d ----, 2024 WL 5052887, at *6 (Del. Dec. 10, 2024) (quoting *Reddy v. MBKS Co.*, 945 A.2d 1080, 1085 (Del. 2008)).

C. Merits of the Argument

At the threshold, the Chancery Court's wrongful conclusion that Director Defendants did not breach their fiduciary duties undermines its conclusion that KV could not have aided and abetted those non-existent breaches. As discussed above, Director Defendants *did* breach their fiduciary duties. If this Court agrees, Plaintiffs are entitled to relief on their aiding and abetting claim against KV. *Cf. O'Malley v. Boris*, 742 A.2d 845, 851 (Del. 1999) ("With the restoration of the breach of fiduciary duty claims, the aiding and abetting claims also must be reinstated.").

On the merits, "[t]he basic four-part test for proving an aiding and abetting claim is well-settled under Delaware law," and requires: (1) "the existence of a fiduciary relationship"; (2) "a breach of the fiduciary's duty"; (3) "knowing participation in that breach by the defendants"; and (4) "damages proximately caused by the breach." *In re Mindbody, Inc.*, 2024 WL 4926910, at *31 (Del. Dec. 2, 2024). Here, the Chancery Court correctly held that the first element was easily satisfied and, for the reasons explained, should have held the same with respect to the second element.

The third element is satisfied by the fact that KV directed Director Defendants to treat the merger as a Deemed Liquidation Event. A95; *see also In re Columbia Pipeline Grp.*, 299 A.3d 393, 470–71 (Del. Ch. 2023) (finding that the third element is met where the aider and abettor "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself"). KV knew that it was prompting Director Defendants to breach their fiduciary duties when it directed Director Defendants to treat the merger so as to trigger the liquidation preference. KV cannot plausibly argue otherwise—as the Chancery Court explained, the purpose of the charter was "obvious," and any contrary interpretation was "non-sensical." Op. at 88.

The fourth and final element is satisfied because common stockholders saw their value in Akademos reduced to nothing because of Director Defendants' breach.

This Court should thus reverse the Chancery Court's judgment with respect to Plaintiffs' aiding and abetting claim against KV. At minimum, it should vacate the Chancery Court's judgment and remand so that the Chancery Court can conduct a revised aiding and abetting analysis.

III. THE CHANCERY COURT ERRED BY FAILING TO CONSIDER FAIR DEALING AS PART OF ITS ENTIRE FAIRNESS ANALYSIS

A. Question Presented

In its entire fairness analysis, the Chancery Court abrogated its obligation to consider whether the merger was procedurally fair. Op. at 84–85 (making an entire fairness determination "without any inquiry into fair dealing"). Was it error for the Chancery Court to make an entire fairness determination without considering fair dealing? *See* A409 (arguing that the fair dealing inquiry weighs against finding that the merger was entirely fair).

B. Scope of Review

This Court reviews questions of law, "including the Court of Chancery's 'formulation and application of legal principles,'" *de novo*. *Sunder Energy*, 2024 WL 5052887, at *6 (quoting *Reddy*, 945 A.2d at 1085).

C. Merits of the Argument

1. The Chancery Court erred as a matter of law by failing to consider fair dealing.

When the Chancery Court stated the legal principles applicable to the entire fairness test, it correctly acknowledged that fair dealing is a core aspect of the entire fairness standard that "must be examined." Op. at 68; *see also id.* at 84 (recognizing that the entire fairness test includes "an inquiry into the procedural aspects of the transaction or decision under challenge"). Yet, just moments later, it affirmatively declined to engage in that very analysis, holding that "the fair price evidence is sufficiently strong to carry the day without any inquiry into fair dealing." *Id.* at 84–85. This was error.

Though the Chancery Court's *application* of the entire fairness test was faulty, its understanding of the significance of fair dealing was not. This Court held more than 50 years ago that "fairness has two basic aspects: fair dealing and fair price." *Weinberger*, 457 A.2d at 711; *see also Kahn v. Tremont Corp.*, 694 A.2d 422, 430 (Del. 1997). The fairness test "is not a bifurcated one as between fair dealing and price," but instead requires that "[a]ll aspects of the issue" be examined. *Weinberger*, 457 A.2d at 711. That means that the defendants must establish that the challenged transaction "was the product of both fair dealing *and* fair price." *Cede*, 634 A.2d at 361 (emphasis in original); *see also Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1172 (Del. 1995) (affirming that entire fairness requires consideration of how fiduciary duties were discharged "*with regard to each aspect* of the non-bifurcated components of entire fairness: *fair dealing* and fair price" (emphasis added)).

The Chancery Court violated these principles. Rather than assess fair price *and* fair dealing, it treated entire fairness as a bifurcated test that could be satisfied exclusively by fair price—exactly as this Court has prohibited. *Cf. Nine Systems*, 2014 WL 4383127, at *46 (holding that a transaction was unfair even where the common stock was valueless).

2. This Court should, at least, remand to require the Chancery Court to remedy its entire fairness analysis.

This Court should remand to allow the Chancery Court the opportunity to cure its error. *Cf. Emerald Partners v. Berlin*, 787 A.2d 85, 98 (Del. 2001) (requiring the Chancery Court to conduct an entire fairness inquiry on remand, which included "apply[ing] a disciplined balancing test to *its findings on the issue of fair dealing* and fair price" (emphasis added)).

By expressly disclaiming any consideration of fair dealing and determining entire fairness on fair price alone, the Chancery Court failed to account for the many procedural infirmities that plagued the merger. This brief has already discussed how the merger violated Akademos' charter by funneling the merger proceeds to KV pursuant to a liquidation preference that was never applicable. *See supra* 22–25. But that was far from the only issue.

To start, the merger was not conditioned on approval from an independent special committee. Op. at 2. This was particularly problematic given that, as discussed above, Akademos' board was concededly conflicted. A347 at ¶70; *see also* A247–48 (letter from Akademos to stockholders disclosing that the board was conflicted with respect to the KV merger). Three of the seven directors—Eastburn, Kohlberg, and Youstra—were affiliated with KV, the purchasing entity; and Kaji stood to receive options and continue as Akademos' CEO under the merger. A248.

Moreover, Akademos *did not negotiate the merger price* with KV. That would be concerning even if Akademos' board was disinterested in the merger—but here, the board authorized Kaji to negotiate with KV (the very party that controlled Kaji's compensation and position at Akademos). Op. at 29. This clear conflict was not lost on Kaji. *See* A369 at 518:8–24 (testifying that KV "absolutely" had influence over him and that someone else should have probably negotiated on behalf of Akademos instead). Unsurprisingly, but not any less troublingly, Kaji accepted KV's offer at face value, without any attempt to obtain more value for the company he ran. A372 at 568:17–20. Of course, just a couple of years later, Akademos was receiving offers valuing the company at 240% the price KV paid. A272-A278.

Adding insult to injury, Kaji never told the board that he received a proposal from Ambassador or an indication of interest from another potential buyer during the go-shop process. Op. at 53. And that was just the tip of the iceberg—the go-shop process was riddled with deficiencies from its very inception. For one, it was only three weeks long (a short period, even for a larger company). *Id.*; *cf. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 29 (Del. 2017) (finding that a go-shop process that lasted more than seven weeks "afforded potential bidders enough time to decide whether to continue to explore a transaction" by submitting a non-binding indication of interest). For another, only four parties were contacted during the go-shop process, A345 at ¶59—a woefully inadequate effort.

The Chancery Court bypassed its duty to assess these procedural infirmities, and any others, when deciding whether the merger was entirely fair. *See Weinberger*, 457 A.2d at 711 (holding that the fair dealing inquiry "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained"). To be sure, the Chancery Court acknowledged some of the merger's procedural problems in its valuation analysis. *See, e.g.*, Op. at 53 (characterizing the go-shop process as having "shortcomings" and referring to Kaji's withholding of offers from the board as "missteps"). But with respect to its entire fairness analysis, the Chancery Court could not have been clearer: entire fairness could be established "without *any* inquiry into fair dealing." *Id.* at 85.

Though this Court should reverse the Chancery Court's breach of fiduciary claims for the reasons stated above, *supra* 22–33, if it doesn't, it should nonetheless vacate the Chancery Court's judgment as to those claims and remand for further proceedings consistent with this Court's entire fairness jurisprudence.

CONCLUSION

For the forgoing foregoing reasons, this Court should reverse the Chancery Court's judgment with respect to Plaintiffs' breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims. Alternatively, this Court should vacate such judgment and remand for further proceedings.

Date: January 17, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2025, I caused a true and correct copy of the foregoing document to be served via File & Serve*Xpress* upon the following counsel of record:

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