EFiled: Mar 06 2025 09:10AM EST
Filing ID 75778180
Case Number 499,2024

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-Below, Appellants, v. AKADEMOS, INC., KOHLBERG VENTURES, LLC, BAY AREA HOLDINGS, INC., JOHN EASTBURN, GARY SHAPIRO, JAMES KOHLBERG, RAJ KAJI, BILL YOUSTRA and BURCK SMITH, Defendants-Below, Appellees.	No. 499, 2024 Appeal from the Court of Chancery of the State of Delaware C.A. No.: 2021-0346-JTL PUBLIC VERSION

APPELLEES' ANSWERING BRIEF

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Akademos, Inc. ("Akademos"), Kohlberg Ventures, LLC ("KV"), Bay Area Holdings, Inc. ("BAHI"), John Eastburn, Gary Shapiro, James Kohlberg, Raj Kaji, Bill Youstra, and Burck Smith (collectively, "Appellees"), through undersigned counsel, respectfully submit this Answering Brief in opposition to the Opening Brief of 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 (collectively, "Appellants") and state as follows:

NATURE OF THE PROCEEDINGS[1]

Appellants filed this case for appraisal, breach of fiduciary duties, and aiding and abetting breach of fiduciary duties in April of 2021. Following a four-day trial, the Court of Chancery issued an October 30, 2024 Post-Trial Opinion (the "Opinion")[2] finding for Appellees on all Counts of Appellants' Complaint. The record at trial proved, according to the Court of Chancery, that the Appellees fulfilled their fiduciary duties to the Company's stockholders. Appellees conducted an entirely fair process. The fair price received by Akademos's stockholders was less

[1] Citations to Appellants' Appendix are referred to as "A__" and citations to Appellees' Appendix are referred to as "B__."

[2] Attached to Appellants' Opening Brief as Exhibit A.

than the Company's contractual obligations to its debtholders and preferred stockholders. Therefore, the value to Akademos's common stockholders was $0.

On Appellants' Count I for appraisal, the Court of Chancery held that "[Appellees] proved that the fair value of the Jacobs Group's shares at the time of the Merger was zero."[3]

On Appellants' Counts II and III for breach of fiduciary duties, the Court of Chancery held:

> Taking the evidence as a whole, the [Appellees] proved the Merger was entirely fair. The Company did not have a reasonable prospect of generating value for the common stockholders by operating as a going concern . . . In light of this reality, the directors breached no duty to the common stock by agreeing to a Merger in which the common stock received nothing. The common stock had no economic value before the Merger, and the common stockholders received in the Merger the substantial equivalent in value of what they had before.[4]

On Appellants' Count IV for aiding and abetting breach of fiduciary duties, the Court of Chancery held that "[b]ecause the [Appellees] did not breach their fiduciary duties, [Appellants'] aiding and abetting claim fails."[5]

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[3] Opinion at 66.

[4] *Id*. at 85 (internal citation and quotation marks omitted).

[5] *Id*. at 92.

"The court did not find the founder [Brian Jacobs] credible . . . Where the company was concerned, he was too close to his creation to be objective."[6] The same goes for this litigation, which Jacobs has pursued for nearly four years despite clear evidence that Akademos's common stock was without value at the time of the challenged transactions. This appeal has no prospect of changing the practical outcome of the Court of Chancery's decision— that the value of Appellants' stock was zero and Appellants are not entitled to any damages.

On appeal, Appellants argue:[7]

1. The Court of Chancery erred in its determination that the Appellees did not breach their fiduciary duties by treating the merger as a Deemed Liquidation Event because the vested accrued dividend and mandatory redemption rights associated with KV and BAHI's preferred stock rendered the common stock valueless.[8]

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[6] *Id*. at 5.

[7] Notably, Appellants do not appeal the Court of Chancery's holdings regarding (i) their appraisal claim, or (ii) their breach of fiduciary duty claim concerning the BAHI Financings. *See* B2259-2362; *see also, generally*, Op. Br.

[8] *See* Op Br. at 5.

2. Because the Court of Chancery erred as stated above, it also erred in holding that the KV Defendants did not aid and abet those breaches.[9]

3. The Court of Chancery erred by "declining to consider fair dealing as part of its entire fairness analysis."[10]

Appellants' arguments are meritless. None of Appellants' arguments alter the Court of Chancery's ruling, nor the reality that Appellants received the substantial equivalent of what they had before the KV/BAHI Acquisition— shares worth nothing— and that this fair price was the result of an entirely fair process. Nothing in the trial record or in the Court of Chancery's Opinion indicates that Appellees breached their fiduciary duties and the court clearly considered fair dealing as part of its entire fairness analysis.

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[9] *See Id*.

[10] *Id*.

SUMMARY OF ARGUMENT

1. **Appellants' Question Presented:** Whether the Court of Chancery erred by "rely[ing]" on speculation about common stockholder value rather than assessing [Appellees]' conduct against the reality that the common stockholders were entitled to distributions under the actual merger transaction approved by [Appellees]?"[11]

Appellees' Answer: No. The Court of Chancery did not err in holding that the BAHI Acquisition was entirely fair and the Appellees, therefore, uphled their fiduciary duties. The Court of Chancery properly applied the entire fairness standard as a unitary standard and correctly determined that the BAHI Acquisition was entirely fair because "[t]he common stockholders received nothing in the Merger, but that was the substantial equivalent of what they had before."[12] The Court of Chancery also did not err in finding that Akademos's common stock was without value due to the non-speculative accrued dividend and mandatory redemption rights afforded to Akademos's preferred stock under Akademos's Charter.

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[11] Opinion at 21.

[12] *Id*. at 84.

2. **Appellants' Question Presented:** Did the Court of Chancery err by finding that Appellants' aiding and abetting claim failed?

Appellees' Answer: No. Where there is no underlying breach of fiduciary duty, there can be no aiding and abetting. Here, the Court of Chancery correctly held that Appellees upheld their fiduciary duties. Therefore, Appellants' aiding and abetting claim fails. Additionally, regardless of an underlying breach of fiduciary duties, Appellants' aiding and abetting fails because Appellants have not, and cannot, prove (1) knowing participation or (2) damages, which are requisite elements of their aiding and abetting claim.

3. **Appellants' Question Presented:** Did the Court of Chancery err by making an entire fairness determination purportedly without considering fair dealing?

Appellees' Answer: No. Appellants are wrong. The Court of Chancery *did* consider fair process, making approximately 12 pages of factual findings in its Opinion, and correctly applied entire fairness *as a unitary standard of review* when rendering its decision that the transaction was entirely fair, and that Appellees upheld their fiduciary duties.

STATEMENT OF FACTS

I. Company Background

Founded in 1999 by Brian Jacobs, Akademos is an education-technology company offering virtual bookstore and marketplace services for educational institutions.[13] As of 2018, Niraj Kaji ("Kaji") served as the Company's CEO, and the Company's Board of Directors was comprised of seven individuals: Kaji, three affiliates of KV/BAHI (John Eastburn, Jim Kohlberg and Bill Youstra), and three disinterested directors (Gary Shapiro, Burck Smith, and Brian Jacobs).[14]

A. Akademos Was Never Profitable, Failed to Generate Sufficient Revenue to Fund Operations, and Required Near-Annual Capital Infusions to Continue as a Going-Concern

Akademos never turned a profit during its entire existence.[15] From its inception, Akademos failed to generate sufficient net revenue to cover its costs, resulting in regular cash shortfalls.[16] In addition, Akademos's business was highly seasonal with short-term cash flow mismatches, exacerbating the cash requirements, and, as a result of this seasonal shortfall, and the fact that Akademos was never

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[13] *See* A339 (¶33); B1142 (¶2); B1284-1285.

[14] *See* A347 (¶69); B1148 (¶¶24–29).

[15] *See* A340 (¶41); B1381-1383, 1430-1431, 1504-1505.

[16] *See* A340 (¶43); B1389, 1392-1393, 1499, 1587.

profitable, Akademos faced insolvency on a near-yearly basis.[17] In late spring, Akademos would run out of cash and be unable to pay its bills unless it received an outside infusion of capital to continue as a going concern.[18]

From 1999 to 2009, Jacobs funded Akademos's operating losses and seasonal cash shortfalls through outside angel investors, many of whom were family members or friends of Jacobs.[19]

In 2009, Jacobs sought venture capital financing in order to grow Akademos's business and to cover the Company's accrued cash shortfalls and avoid insolvency.[20] That year, BAHI invested $2.5 million in Akademos.[21] BAHI, an affiliate of KV, and was an investor in Akademos since 2009.[22] Until 2020, BAHI owned approximately 33% of Akademos on a fully diluted basis. BAHI's ownership was comprised of Series B preferred stock and warrants, Series A preferred stock, Series

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[17] *See, e.g.*, B1381-1383, B1389, 1392-1393, 1499, 1587.

[18] *See* B1389, 1392-1393, 1499, 1587.

[19] *See* A340 (¶44); B1286.

[20] *See* A340 (¶45); B1286-1287.

[21] *See* A340 (¶46); B1287-1288.

[22] *See* A336 (¶19); B1287-12889; B1535-1536.

A-1 preferred stock and warrants and common warrants.[23] KV is a private equity company that has been an investor in Akademos since 2015.[24] Until 2020, KV owned approximately 27% of Akademos on a fully diluted basis, comprised of Series A-1 preferred stock and warrants.[25]

Article Fourth of the Company's Certificate of Incorporation (the "Charter") provides certain rights to the holders of Akademos preferred stock. Specifically, *inter alia*, (i) Section B, Subsection 1 governs the dividend rights with respect to Akademos's preferred stock,[26] (ii) Section B, Subsection 2 governs the liquidation preferences of Akademos's preferred stock,[27] and (iii) Section B, Subsection 6.1 governs the redemption rights of Akademos's preferred stock.[28]

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[23] *See* A337 (¶20); B411-419.

[24] *See* A336 (¶18); B411-419; B1287.

[25] *See* A337 (¶20); B411-419; B1535-1536.

[26] A61-62.

[27] A62-66.

[28] A82. The redemption rights afforded to KV and BAHI's preferred stock had triggered by December 2019. Therefore, KV and BAHI could have called the redemption right and required the Company to buy back its preferred stock once "legally available funds" became available to honor the redemption right. *See Id*.; *see also* B1394-1396, 1537.

Following the 2009 investment and through 2016, BAHI and KV entered a series of preferred equity purchases or debt financings with Akademos in order to keep the Company operating as a going concern. Each of these investments was approved unanimously by the Company's directors, including Jacobs, and separately by its stockholders, also including Jacobs.[29] From 2010 to 2020, KV and/or BAHI funded Akademos, through debt financings or preferred equity purchases, in an amount totaling over $25 million.[30] Until 2019, all financings were approved unanimously by Akademos's Board, including Jacobs.[31]

By June 2019, the preferred stock's accumulated preference, including principal and accrued dividends, was $29.7 million.[32] By the time of the BAHI Acquisition, the preferred stock's accumulated preference, including principal and

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[29] *See* A341 (¶47); B1389-1391; *see also* B608-609.

[30] *See* A341 (¶47); B411-419; *see also* B1389-1391.

[31] A341 (¶47). In their Complaint and at trial, Appellants challenged certain debt financings between Akademos and KV/BAHI that occurred in May of 2019 and May of 2020. *See, e.g.,* B1151-1161, 1165-1166. In the Opinion, Vice Chancellor Laster held that Appellees proved that these debt financings were both necessary, and entirely fair. *See* Opinion at 90-92. Appellees omit an in-depth factual background with respect to these debt financings because Appellants do not challenge the Court of Chancery's holding concerning them on appeal. *See generally*, B2259-2362; *see also, generally*, Op. Br.

[32] B143-144.

accrued dividends, was $31.5 million.[33] Including obligations associated with third-party debt and KV/BAHI's 2018-2020 debt financings, including accrued interest, the total enterprise valuation required for the common stockholders to be "in the money" was in excess of $40 million.[34]

II. In Late 2019, the Company, with Proper Oversight from Its Board, Initiated A Dual Track Process to Obtain Additional Financing or Find a Buyer

Under Kaji's leadership, Akademos explored numerous plans to turn the Company around. Starting in late 2018, Akademos's management presented the Board with various strategic alternatives, including the acquisition of or combination with other companies.[35] With the Board's support, Akademos's management contacted numerous firms and, in late 2019, received interest for a merger or acquisition from Nebraska Book Company ("NBC") and Ambassador Education Solutions ("Ambassador").[36] Specifically:

- On November 24, 2019, NBC proposed to acquire Akademos for approximately $10.3 million net equity (that is, approximately

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[33] *See* B436; B496-497; B557; B575; B998-999.

[34] *See* B1275; *see also* B411-419; B1869, 1871, 1932.

[35] *See* B96-131; B192-241; *see also* B1457-1459, 1690-1691, 1700-1702, 1811.

[36] *See* A343 (¶55); A234; B1466-1467, 1599-1600, 1726-1732.

$17 million in total enterprise value less assumed debt) – paid, however, in shares of NBC's private, illiquid securities.[37]

- On November 5, 2019, Ambassador proposed a stock-for-stock merger transaction which would ascribe Akademos a notional value of between $5,400,000 and $17,200,000, depending on the assumptions used.[38] In all circumstances where Akademos is acquired by Ambassador, Ambassador indicated that "all convertible debt will be converted to equity at close" which represented a significant reduction of value relative to headline enterprise value from the term sheet ($4.25 million in face value at the time of this term sheet submission). In the proposed deal structure that was closest to all cash (75% cash/25% equity), Akademos would have received $10.4 million in consideration, of which $7.8 million would have been paid in cash on a delayed two-year basis, with a paltry $1.6 million being paid upon closing, $1.9 million in a year and $4.3 million being paid two years after closing.[39]

As structured in the term sheets, each of these offers would have entailed a Deemed Liquidation under the terms of Akademos's Charter, resulting in no consideration payable to the common stockholders.[40]

Based on this interest (and out of options to grow the business organically), the Akademos Board voted to initiate a dual-track, banker-led process to raise capital

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[37] *See* A343 (¶55); B248; B249; A234; B1467.

[38] *See* A343 (¶55); A234; B291; B1466-1467.

[39] B250-252.

[40] *See* A63-64; *see also* B248; B250-252.

or sell Akademos.[41] Ultimately, Parchman, Vaughan & Company ("PVC") was the only investment banker willing to run a dual-track process for Akademos.[42] The Akademos Board, including Jacobs,[43] voted on, and unanimously approved, the retention of PVC to run a dual-track process.[44]

A. The Company Conducted the Dual Track Process with a Reputable Banker Familiar with the Industry, Who Contacted Well Over 100 Potential Interested Parties.

From January 2020 through September 2020, PVC and Akademos's management, in consultation with the Board, ran a dual-track process (seeking funding or acquisition) in which nearly 120 different parties were contacted.[45] Akademos held Board meetings relevant to the dual-track process on at least sixteen occasions.[46] PVC attended, presented, and was available for question and comment regarding the dual-track process at nine (9) of the twelve (12) Board meetings held

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[41] A235; B1469, 1474-1475.

[42] B1469, 1474-1475.

[43] B1480-1481.

[44] *See* A343 (¶56); B1480-1481.

[45] *See* A343-344 (¶57); B393-401; *see also* B1502-1503, 1889.

[46] *See* B257-261; B242-247; B253-254; B255-256; B286-287; B288-290; B338-349; B351-352; B361-363; B364-368; B369-371; B372-373; B374-377; A109-112; B391-392; B427-430; B406-410.

following PVC's retention. In addition to PVC, the Company was represented throughout the dual-track process by Akademos's regular corporate counsel, as well as Delaware counsel, Morris, Nichols, Arsht & Tunnell LLP, to ensure that all appropriate steps were taken.[47]

B. None of the Offers Received Would Have Resulted in the Common Stockholders Receiving Any Value for Their Shares.

During the process, Akademos received several proposals:[48]

- On March 26, 2020, eCampus submitted an indication of interest proposing an acquisition of Akademos for $6 million, comprised of 50% cash and 50% private company stock. This IOI was revised on April 7, 2020 to reflect a $7 million enterprise value;[49]
- On May 22, 2020, Invictus Global Management submitted a letter of intent for $5 million in senior-secured super-priority debtor-in-possession financing in event of bankruptcy;[50]
- On July 13, 2020, BAHI submitted a letter of intent for an acquisition of Akademos (the "BAHI Acquisition") reflecting a $12.5 million enterprise value.[51]

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[47] *See* B1752, 1960-1961.

[48] *See* B393-401; *see also* B1889-1890.

[49] *See* A343-344 (¶57); B393-401; B350; B360; A235; B1497.

[50] *See* A343-344 (¶57); B421-426; A237; B1895.

[51] *See* A343-344 (¶57); B393-401; A93-100; B1896.

- On July 21, 2020, Ames Watson submitted a letter of intent proposing payment of $500,000 for a 75% stake in Akademos, plus funding Akademos's losses on a going-forward basis;[52]

Akademos's common stockholders were not "in the money" under any of these proposals.[53] In fact, the common stockholders were not "in the money" under *any* proposals received by Akademos from 2015 to the present.[54]

C. The Board Considered Each of the Offers, and After Additionally Testing Whether an Offer Superior to the One Offered by KV/BAHI was Available, the Board Accepted KV/BAHI's Offer.

On July 15, 2020, after considering all offers received, the Akademos Board voted to proceed with negotiating the BAHI proposal, believing it to be the best offer received in the PVC dual-track process and in the best interests of the Company and its stockholders.[55]

The BAHI letter of intent was revised, through negotiation in consultation with PVC and counsel, on July 29, 2020 from the "go-shop" provision originally proposed by KV/BAHI. In the revised go-shop provision, KV/BAHI (i) recused

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[52] *See* A343-344 (¶57); B393-401; B378-382; A237; B1973-1974

[53] *See* B1512-1513.

[54] *See* B1400, 1512-1513; *see also* B830-837. The members of the Akademos Board affiliated with KV/BAHI did not participate in this vote.

[55] *See* A344 (¶58); B374-377; *see also, e.g.*, B1752-1753.

themselves from any discussion of offers derived from the go-shop, (ii) permitted disclosure of the details (but not the name of the potential acquiror) of the KV/BAHI offer to prospective bidders, (iii) permitted the disinterested directors to determine whether a bid was deemed superior and (iv) agreed to vote their shares in favor of any deemed superior offer without the right to match or "top" such a superior offer.[56]

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[56] *See* B383-390. The go-shop was comprised of two provisions in the BAHI Term Sheet, titled "Solicitation of Alternatives Permitted" and "Buyer Support of Superior Proposal" which read:

> The Company will be permitted to solicit strategic alternatives and to terminate the Merger Agreement at any time prior to closing to accept an alternative transaction the Board (with Messrs. Eastburn, Kohlberg and Youstra recusing themselves) believes offers superior value to stockholders so long as when it does so the Company reimburses Buyer's legal and other expenses in connection with this proposal and the Merger Agreement simultaneously with terminating the Merger Agreement.

and:

> Buyer and its affiliates will agree as stockholders to vote in favor of a transaction deemed by the Board (excluding Messrs' Eastburn, Kohlberg and Youstra) to be a superior proposal that results in aggregate proceeds payable to the Company's debt holders (other than AvidBank, the Connecticut DECD and DR Bank, the PPP lender) and stockholders not less than the aggregate proceeds payable in this transaction and provides that the proceeds payable to stockholders are distributed in accordance with the provisions of the Company's certificate of incorporation applicable to distribution of proceeds in a Deemed Liquidation Event.

B385, 386-387.

Akademos also negotiated the BAHI letter of intent (i) to include an upward working capital adjustment as part of the proposed transaction and (ii) to base the Company's representations and warranties in the merger agreement on those found in the NVCA model stock purchase agreement.[57]

Given the go-shop provision in the BAHI term sheet, PVC re-engaged four target parties who had previously shown the strongest interest in a transaction: eCampus, Ambassador, Ames Watson, and Red Shelf.[58] Akademos did not receive any superior offers during the go-shop period.[59] Therefore, Akademos's Board directed management to proceed with due diligence and closing of the BAHI Acquisition.[60]

When presented with the final transaction documentation, all Akademos directors except Jacobs approved the BAHI Acquisition.[61] Akademos also held a separate vote of its disinterested directors — Jacobs, Smith, and Shapiro.[62] Smith

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[57] *See* A344 (¶58); A238; B1618-1619.

[58] *See* A345 (¶59); B393-401; B1758-1759, 1848-1850.

[59] *See* A345 (¶59); B1758-1759.

[60] A240; B1905-1906. The disinterested directors formally voted to accept the revised BAHI term sheet. *See* A109-112.

[61] *See* B1169-1170 (¶99); *see also* A242; B1906.

[62] *See* A242; B1645-1646.

and Shapiro voted in favor, and Jacobs voted against.[63] In Q4 of 2020, the BAHI Acquisition closed.[64]

In November 2020, after the September 2020 approval of the BAHI Acquisition, BAHI's counsel identified a defect in the original transaction— the stockholders of the Original Merger Sub inadvertently failed to properly approve the final Agreement. As a result, the original transaction was defective and void pursuant to DGCL § 251(c).[65] BAHI's counsel also identified unintended, material tax consequences to BAHI and KV.[66] Akademos's counsel reviewed and analyzed the purported defect, and agreed that the original transaction was void.[67] At the request of Akademos's disinterested directors, Smith and Shapiro, BAHI sent Akademos an assurance letter on December 14, 2020, which (i) confirmed the defect, (ii) extended the maturity date on the KV/BAHI debt to December 31, 2020 and waived any interest accruing thereon since the original transaction, (iii) confirmed that the new transaction would be on the same economic terms as the

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[63] *See Id*.
[64] *See* B1143-1144 (¶¶5-6); B1378-1379.
[65] *See* A242; B1621-1622.
[66] *See* A242; B1622.
[67] *See* A243; A345 (¶61); B1621.

original, and (iv) agreed to cover all Company legal, accounting and other third party expenses related to the transaction redo.[68] The Company determined to fix the defect.[69] On December 22, 2020, the Board convened a special meeting in which it, again, held two separate votes.[70] In the disinterested director vote, the BAHI Transaction was, again, approved two to one.[71] From the entire Board, only Jacobs voted against.[72] The KV/BAHI-affiliated directors did not participate in the portions of the meeting that involved the review of the transaction and the merger agreement, and left the room during the disinterested director vote.[73]

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[68] *See* A242; B1761-1762, 1908; B420.

[69] *See* A242; B1763-1764.

[70] *See* A347-348 (¶¶74-75); PVC attended a portion of meeting and reiterated the process it undertook. Company counsel also attended and reviewed the Board's fiduciary duties. *See* A244; B1909-1911.

[71] *See* A245; A347 (¶74); B1911.

[72] *See* A245; A348 (¶75); B1911.

[73] *See* A245; A347-348 (¶¶ 74-75); B1909.

ARGUMENT

I. THE COURT OF CHANCERY DID NOT ERR IN FINDING THAT APPELLEES UPHELD THEIR FIDUCIARY DUTIES BECAUSE THE TRANSACTION WAS ENTIRELY FAIR.

A. Appellant's Question Presented

Whether the Court of Chancery erred by "rely[ing]" on speculation about common stockholder value rather than assessing [Appellees]' conduct against the reality that the common stockholders were entitled to distributions under the actual merger transaction approved by [Appellees]?"[74]

B. Scope of Review

The standard and scope of appellate review of the Court of Chancery's factual findings following a post-trial application of the entire fairness standard to a challenged merger is governed by *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972); *see also Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985). In *Levitt,* this Court stated:

> In exercising our power of review, we have the duty to review the sufficiency of the evidence and to test the propriety of the findings below. We do not, however, ignore the findings made by the trial judge. If they are sufficiently supported by the record and are the product of an orderly and logical deductive process, in the exercise of judicial restraint we accept them, even though independently we might have

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[74] Opinion at 21.

> reached opposite conclusions. It is only when the findings below are clearly wrong and the doing of justice requires their overturn that we are free to make contradictory findings of fact. When the determination of facts turns on a question of credibility and the acceptance or rejection of "live" testimony by the trial judge, his findings will be approved upon review. If there is sufficient evidence to support the findings of the trial judge, this Court, in the exercise of judicial restraint, must affirm.

Levitt, 287 A.2d at 673 (citations omitted).

Accordingly, this Court must 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. *Id*. That is the ordinary standard of review that applies across a wide range of appeals: clear error for factual findings and *de novo* for legal errors. *See, e.g., Dep't of Fin. v. AT&T Inc.*, 253 A.3d 537, 547 & n.33 (Del. 2021) (citing *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114 (Del. 1994) ["Lynch I"]). In addition, this Court must accord "a high level of deference" to Court of Chancery findings based on the evaluation of expert financial testimony. *Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 175 (Del. 1991).

The clear-error standard is highly deferential and applies broadly to "findings of historical fact that are based on physical or documentary evidence or inferences from other facts." *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016). When there are "two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id*. The deference due to the Court of

Chancery's findings is "enhanced" when those "factual findings are based on determinations regarding the credibility of witnesses." *Id*. "When [a trial court's] determination of facts turns on a question of credibility and the acceptance or rejection of 'live' testimony by the trial judge, those factual findings must be given great deference by an appellate court." *New Castle County v. DiSabatino*, 781 A.2d 687, 690 (Del. 2001).

In the context of "entire fairness," the "ultimate question" is whether the Court of Chancery "carefully analyze[d] the factual circumstances in the context of how the board discharged all of its fiduciary duties, appl[ied] a disciplined balancing approach to its findings, and articulate[d] the basis for its decision." *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 90 (Del. 1995) ["Lynch II"] (citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1179 (Del. 1995) ["Cinerama II"]). If so, this Court must affirm. *Id*.

C. Merits of Argument

1. The Court of Chancery Did Not Err Because the BAHI Acquisition Was Entirely Fair and Appellees, Therefore, Upheld Their Fiduciary Duties

The Court of Chancery did not err in holding that the BAHI Acquisition was entirely fair and Appellees, therefore, upheld their fiduciary duties. As explained in Section III, *infra*, the Court of Chancery properly applied the entire fairness standard

as a unitary standard and correctly determined that the BAHI Acquisition was entirely fair because "[t]he common stockholders received nothing in the Merger, but that was the substantial equivalent of what they had before."[75]

2. The Entire Fairness Standard

Review under the entire fairness standard consists of two overlapping considerations, fair process and fair price. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). The fair-process inquiry reviews the transaction's timing and initiation, structure, negotiations and approval. *Id*. The fair-price inquiry considers all relevant "economic and financial considerations" that "affect the intrinsic or inherent value of a company's stock." *Id*.; *see also Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 114 (Del. 1952) (The true test of financial fairness is whether "the minority stockholder shall receive the substantial equivalent in value of what he had before."). Although courts may address the two components separately, they must ultimately make a "single judgment that considers each of these aspects." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1139-40 (Del. Ch. 1994) ["Cinerama I"], *aff'd*, 663 A.2d 1156 (Del. 1995); *see Weinberger*, 457 A.2d at 711 ("All aspects of the issue must be examined as a whole since the question is one of

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[75] Opinion at 84.

entire fairness."). "[P]erfection is not possible, or expected." *Cinerama II*, 663 A.2d at 1179 (quoting *Weinberger*, 457 A.2d at 709 n.7); *Lynch I*, 638 A.2d at 1121; *Leal v. Meeks* (*In re Cornerstone Therapeutics Inc., S'holder Litig.*), 115 A.3d 1173, 1184 n.43 (Del. 2015).

The Court of Chancery correctly articulated and applied this entire fairness standard—as to process, as to price, and as a whole. Appellants' arguments are mere disagreement with the court's credibility determinations, factual findings, or consideration of the evidence. Calling these disputes "legal errors" does not make it so. The Court of Chancery's analysis was a textbook example of how to apply the entire fairness standard and its factual findings easily satisfy the deferential clear-error review.

a. The BAHI Acquisition Was the Result of an Entirely Fair Process

Appellees presented approximately 13 pages of fact and 12 pages of argument in Post-Trial Brief[76] and approximately 12.5 pages of argument in Post-Trial Reply Brief[77] on the transaction process. Appellants themselves presented approximately

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[76] *See generally*, B2115-2208.

[77] *See generally*, B2209-2258

10.5 pages of fact and 14.5 pages of argument in Post-Trial Brief[78] and approximately 7.5 pages of fact and 13.5 pages of argument in Post-Trial Reply Brief[79] on the transaction process. And, most notably, *the Court presented its factual findings regarding the transaction process in approximately 12 pages of its Opinion*, which are viewed by this Court under the deferential clear error review. *See, e.g., CDX Holdings*, 141 A.3d at 1041.

In its factual findings the Court found, in relevant part, that:

- "In late 2019, management began working in earnest on a potential acquisition or strategic combination that could be used to justify raising new capital. . . [and] management reached out to potential strategic partners…"[80]
- Two potential strategic partners—Ambassador and NBC— showed interest.[81]
- The Board discussed the Ambassador and NBC proposals and voted to hire an investment banker to conduct a dual track process.[82]

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[78] *See generally*, B2046-2114.
[79] *See generally*, A375-456.
[80] Opinion at 22.
[81] *See Id*. at 22-23.
[82] *Id*. at 23.

- The Board approved engaging PVC to serve as banker for the dual track process. "[PVC] was both eager and qualified, having worked in the education space for over twenty years."[83]

- Akademos's management and PVC led a process that started in February 2020 and ended in September 2020. "In total, [PVC] contacted 120 different parties, including contacted 31 strategic buyers and 66 financial investors."[84]

- "[PVC] admittedly did not include a target valuation for the Company in its materials[,]" instead "emphasiz[ing] the Company's story and let[ing] the market set the valuation." The Court found that while, in hindsight, this may have been a mistake, it was "a reasonable approach."[85]

- "On July 13, 2024, [KV/BAHI] offered to acquire the Company based on a cash-free, debt-free valuation of $12.5 million."[86] While "[t]he term sheet did not condition the transaction on the twin *MFW* protections[,]"[87] the Court found that Appellees "explained persuasively that the company lacked the funds to support a full-blown *MFW* process."[88] The KV/BAHI-affiliated directors committed to recuse themselves from Board meetings discussing the proposal. And the term sheet contemplated a go-shop period, and the KV Fund committed to support any transaction that the non-KV Fund directors deemed superior.[89]

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[83] *Id*. at 24.

[84] *Id*.

[85] *Id*. at 25.

[86] *Id*. at 27.

[87] *Id*.

[88] *Id*. at 2.

[89] *Id*. at 27-28.

- Kaji, Smith, and Shapiro voted to have Kaji negotiate term sheet. Jacobs abstained. Between July 15, 2020 and July 28, 2020, Company management negotiated the term sheet with support from PVC and Company counsel.[90]

- The Board met on August 3, 2020. PVC reported that no one other than Ames Watson—who offered to buy a 75% stake in the Company for $500,000—had been responsive.[91] "The unaffiliated directors then voted two-to-one in favor of the KV Fund's term sheet, with Jacobs voting no."[92]

- "From August 4–25, 2020 [PVC] ran the go-shop. They did not recanvas everyone contacted during the 2020 Process. Instead, they contacted the four parties who had showed interest: eCampus, Ambassador, Ames Watson, and RedShelf."[93] While the Court noted that the go-shop had "shortcomings,"[94] it also found the go-shop to be "comparatively open" because "[t]he company could shop the offer freely, the fund would not have any match rights, and the fund would be obligated to sell into any bid that the unaffiliated directors deemed superior." The Court found that "[t]he only knock was the go-shop's duration." But, "on the other hand, the go-shop followed an exhaustive pre-signing outreach, and during the go-shop, the company focused on those few potential counterparties who had expressed some level of interest in a transaction."[95]

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[90] *Id*. at 29.

[91] *See Id*.

[92] *Id*.

[93] *Id*. at 30.

[94] *Id*. at 53.

[95] *Id*. 2-3.

- "On September 4, 2020, the non-KV Fund directors met to review the results of the go-shop. They determined that none of the counterparties had made a superior proposal."[96]

- "From August 25 through September 29, 2020, the Company and the KV Fund negotiated the final deal documents."[97]

- On September 29, 2020, "[t]he Board met … to consider the Merger. [PVC] reviewed the 2020 Process, summarized the expressions of interest the Company received, and flagged that none of the four parties contacted during the go-shop made a meaningful bid. The directors then discussed the proposed Merger. After some discussion, the KV Fund directors left the meeting. After additional discussion, the unaffiliated directors approved the Merger by a two-to-one vote, with Smith and Shapiro voting in favor and Jacobs voting against. The KV Fund directors then rejoined the meeting and held a second vote. Everyone except Jacobs voted in favor. Jacobs voted against."[98]

Upon reviewing the record and making approximately 12 pages of factual findings on process, including the above, the Court of Chancery made the unitary determination that the BAHI Acquisition was entirely fair.[99] The Court of Chancery's factual findings as to the process are wholly supported by the record, such that it did not clearly err.

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[96] *Id*. at 30.

[97] *Id*. at 31.

[98] *Id*. at 32.

[99] *Id*. at 85.

b. The BAHI Acquisition Resulted in an Entirely Fair Price

The Court of Chancery also correctly determined that the BAHI Acquisition resulted in an entirely fair price.[100]

The court's relevant factual findings, which are accorded deference under the clear error standard of review, are as follows:

- Akademos was never profitable in its entire 20+ year existence.[101]
- For five consecutive years, starting in 2015, Akademos' auditors expressed doubts as to the Company's ability to continue as a going-concern in their annual audits of the Company.[102]
- Akademos only remained in existence due to near-annual capital injections from KV/BAHI.[103]
- By 2020, given the preferences of the preferred stock and maturing debt, Akademos had to sell for more than $40 million for common stockholders to come "into the money."[104]
- Akademos, under the leadership of Kaji, proposed to increase the revenue of the Company through new lines of business, but those lines

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[100] *See Id*. at 84.

[101] *Id*. at 5; B1381-1383, 1429-1431, 1652.

[102] Opinion at 10; B1391, 1626, 1703-1704; *see also, e.g.,* B4, 12; B25, 32-33; B48, 56; B72, 79-80; B265, 272-273.

[103] Opinion at 6-7, 11-13, 18-20, 25-27; B1389-1391.

[104] Opinion at 2, 30, 82, 83; *See* B1275; *see also* B411-419; B1869, 1871, 1932.

of business required millions of dollars of additional investment which were not available to the Company at the time of the transaction.[105]

- In late 2019, the Board approved initiating a dual-track process to obtain additional financing or find a buyer.[106]

- The Company received four acquisition offers in the dual-track process, none of which would have resulted in the common stockholders receiving any value for their shares in the Company.[107]

- The Board considered each of the offers,[108] and after additionally testing whether an offer superior to the one offered by KV/BAHI was available *via* a binding go-shop in which they were required to vote in favor of a superior offer,[109] the disinterested members of the Akademos Board accepted KV/BAHI's offer.[110]

- KV/BAHI had redemption and accrued dividend rights on its investment that are not in question.[111]

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[105] Opinion at 17-18; *See* B1348, 1699-1700; *see also* B300.

[106] Opinion at 23; *See* B253-254.

[107] *See* Opinion at 24, 26, 29, 52; *See* B350; B360; B378-382; B421-426. In fact, the Company never received a written bid in excess of $30 million in the entire history of its existence, either before or after the 2020 transaction in question, which would have resulted in common stockholders receiving any value for their money. *See* B1400, 1512-1513; *see also* B830-837.

[108] *See* B1498-1499, 1750-1752; *see also, e.g.*, B361-363; B374-377; B939-401.

[109] Opinion at 30; *See* B383-390; B393-401; B1758-1759, 1848.

[110] Opinion at 31; *See* A109-112.

[111] Opinion at *See* B1394-1396, 1537; A82.

- A majority of independent, disinterested directors voted to approve the transaction.[112]
- The transaction consideration was less than the sum of the Company's contractual obligations to debt holders and preferred stockholders.[113]

The Court of Chancery also analyzed the valuation reports of each of the parties' expert witnesses[114] and ultimately concluded that "[Appellants'] DCF valuation was not credible."[115] Given these factual findings, amply supported by the record at trial and afforded deference by this Court (*see CDX Holdings, Inc.*, 141 A.3d at 1041), and the court's findings regarding the expert valuations, which are afforded enhanced deference by this Court (s*ee Household Acquisition Corp.*, 591 A.2d at 175), the Court of Chancery correctly held that "[t]he common stockholders received nothing in the Merger, but that was the substantial equivalent of what they had before. The Merger therefore offered a fair price."[116]

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[112] *See* Opinion at 63-65; B427-430; B406-410; *see also* B1906, 1911.
[113] *See* B1668.
[114] Opinion at 43-49.
[115] *Id*. at 46.
[116] *See* Opinion at 84.

c. The Common Stock Was Valueless Because of the Preferred Stock's Mandatory Redemption and Accrued Dividend Rights

As Appellees argued below, and the Court of Chancery correctly confirmed in its Opinion, Akademos's common stock was valueless due to the mandatory redemption and accrued dividend rights afforded to Akademos's preferred stock under its Charter.

Article Fourth, Section B, Subsection 6.1 of the Charter governs the mandatory redemption rights of Akademos's preferred stock and reads, in relevant part:

> Shares of Preferred Stock shall be redeemed, on a pari passu basis, by the Corporation out of funds lawfully available therefor at a price equal to (i) with respect to the Series A Preferred Stock, the Series A Original Issue Price per share, (ii) with respect to the Series A-1 Preferred Stock, the Series A-1 Original Issue Price per share, and (iii) with respect to the Series B Preferred Stock, the Series B Original Issue Price per share, plus any Accruing Dividends, as applicable, accrued but unpaid thereon, whether or not declared, together with any other dividends declared but unpaid thereon (the "Redemption Price"), 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 [sic] to Common Stock basis, of written

> notice requesting redemption of all shares of Preferred Stock…[117]

At the time of the BAHI Acquisition, KV and BAHI held Series A, Series A-1, and Series B Akademos preferred stock, purchased between July of 2009 and December of 2016. The redemption rights afforded to this preferred stock had fully triggered by December 2019, in accordance with the terms of Charter Subsection 6.1.[118] Therefore, KV and BAHI could have called the redemption right and required the Company to buy back its preferred stock once "legally available funds" became available to honor the redemption right, which would have occurred in any merger or acquisition transaction. There is no language in Subsection 6.1 restricting the preferred stockholders' right to redemption in a transaction in which the preferred stockholders are the counterparty. Therefore, KV and BAHI could even have called to redemption right with respect to the BAHI Acquisition, and the $12.5 million in "legally available funds" derived therefrom would have gone toward redeeming KV

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[117] A82.

[118] *See* A82; *see also* B1394-1397.

and BAHI's preferred stock in accordance with Charter Subsection 6.1. The Court of Chancery correctly recognized this in its Opinion.[119]

Additionally, Article Fourth, Section B, Subsection 1 of the Charter governs the accrued dividend rights of Akademos's preferred stock and reads, in relevant part:

> From and after the date of the issuance of any shares of [Series A Stock], dividends at the Applicable Dividend Rate per share shall accrue on such shares of Series A Stock … (the "Accruing Dividends"). Accruing Dividends shall accrue from day to day, whether or not declared, and shall be cumulative …[120]

For the Series A Preferred, the Applicable Dividend Rate was $1.28 per year. For the Series A-1 Preferred, the Applicable Dividend Rate was $1.60 per year. Under the Charter, the Board could not declare any dividends unless (i) all Accrued

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[119] *See* Opinion at 64 ("The Mandatory Redemption Provision thus creates a binding obligation to redeem shares as funds that can be used legally for that purpose when they become available, until the Company has redeemed all shares for which redemption has been granted. The Original Issue Date was in December 2016. The KV Fund therefore could exercise the Mandatory Redemption Provision as early as December 2019. Jacobs Tr. 24–25, 115–17. Through the Mandatory Redemption Provision, the KV Fund could sweep up all of the funds that became legally available for making redemptions. The common stock would not be able to receive any cash flows until the Company had fully redeemed the Preferred Stock.")

[120] A61-62.

Dividends were paid first and (ii) all of the outstanding preferred stock participated in the dividend on an as-converted basis.[121] At the time of the BAHI Acquisition, Akademos owed approximately $32 million in accrued dividends and principal associated with the preferred stock.[122] Therefore, the Court of Chancery also correctly held that, before any dividends could be paid to the common stock, Akademos needed to first satisfy these $32 million in accrued dividends and principal associated with the preferred stock.[123]

And while Appellants frame their question presented to suggest that these mandatory redemption and accrued dividend rights are "speculative," the Court of Chancery has expressly held otherwise. The Court of Chancery has held that preferences of a company's preferred stock must be accounted for where their relevance is not speculative – *e.g.*, where, as here, the transaction at issue triggered them, as was the case in *In re Trados Inc. S'holder Litig.*, 73 A.3d 17 (Del. Ch.

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[121] *Id*.

[122] Opinion at 57.

[123] *Id*. at 65 ("As with the Mandatory Redemption Provision, the Accrued Dividend Provision affects the ability of the common stock to benefit from cash flows while the Company operates as a going concern. Before the Company can pay any dividends to the common stock, the Company must first satisfy any Accrued Dividends. As long as the dividends remained opposed, the common stock could not receive any value from the Company as a going concern.")

2013); or where the preferences were payable to the preferred shareholder at a date certain, as was the case in *Shiftan v. Morgan Joseph Holdings, Inc.*, 57 A.3d 928 (Del. Ch. 2012). Similarly to *Shiftan*, the Akademos Series A, Series A-1, and Series B preferred stock had a redemption right under Section 6.1 of Akademos's Charter. This Section 6.1 redemption right had already been triggered with respect to all of KV and BAHI's Series A, Series A-1 and Series B preferred stock, and, therefore, KV and BAHI could have redeemed their preferred stock at any time, subject to the notice provisions contained within Section 6.1. Likewise with the accrued dividend provision. It was not speculative at all. Rather, under the Charter, the Board could not declare any dividends unless (i) all Accrued Dividends were paid first and (ii) all the outstanding preferred stock participated in the dividend on an as-converted basis.[124]

There is simply no circumstance in which Akademos's common stockholders were entitled to any consideration.

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[124] A61-62.

d. The Deemed Liquidation Event Provision in the Akademos Charter Applied in All Relevant Circumstances

Additionally, however, the Deemed Liquidation Event provision in Akademos's Charter applied in all relevant circumstances. It certainly applied to any of the third-party proposals received in the dual track process. And, despite the Court of Chancery's ruling, Appellees assert that it applied to the Merger.

The Court of Chancery in this case held that "[t]he Merger did not automatically trigger the liquidation preference as a Deemed Liquidation Event."[125] Appellees, respectfully, disagree with the Court of Chancery.[126] The Court appears to have improperly replaced the actual words on the page of Akademos's Charter with its interpretation of what those words should have meant. "Contracts are to be interpreted as written, and effect must be given to their clear and unambiguous terms." *Shiftan*, 57 A.3d 928, 934–35 (Del. Ch. 2012) (quoting *Willie Gary LLC v.*

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[125] *Id*. at 89.

[126] *See Winshall v. Viacom International Inc.*, 76 A.3d 808, 815 n.13 (Del. 2013), *as corrected* (Oct. 8, 2013) ("Although that ruling did not affect the outcome of the *Gerber* appeal, it could be read as requiring that, to challenge an adverse subsidiary ruling by the trial court, an appellee must cross appeal from that ruling, even though the appellee ultimately prevailed. To the extent that *Gerber* [*v. Enterprise Products Holdings, LLC,* 67 A.3d 400 (Del. 2013)] lends itself to that reading, it conflicts with our prior case law and is incorrect.").

James Jackson LLC, 2006 WL 75309, at *5 (Del.Ch. Jan. 10, 2006), *aff'd*, 906 A.2d 76 (Del.2006)).

Under the Charter, the preferences associated with Series A, Series A-1, and Series B preferred stock are triggered upon "any voluntary or involuntary liquidation, dissolution or winding up of the Corporation (including a Deemed Liquidation Event…"[127] The Charter, in turn, defines "Deemed Liquidation Event" triggering the liquidation preference to include:

> [A] merger or consolidation in which (i) the Corporation is a constituent party or (ii) a subsidiary of the Corporation is a constituent part and the Corporation issues shares of its capital stock pursuant to such merger or consolidation; 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…[128]

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[127] A62-63.

[128] *See* A63-64.

The BAHI Acquisition qualifies as exactly that. Under the Merger Agreement, each share of Akademos's stock issued and outstanding before the transaction was cancelled and ceased to exist and converted into the right to receive a portion, if any, of the transaction consideration.[129] Accordingly, the exception to a Deemed Liquidation Event in Charter Section 2.3.1(a) did not apply. The KV and BAHI shares held immediately prior to the closing did not "continue to represent" a majority of the post-closing stock, nor were they "converted into or exchanged for shares of capital stock" in the post-closing company. To the contrary, the KV and BAHI shares, like the shares of all other stockholders, were cancelled in return for the right to receive the merger consideration in the form of cash. No pre-closing shares were continued or converted into stock of Akademos post-closing. Further, absent treatment of the transaction as a deemed liquidation event, and KV and BAHI being paid the preferences that they had bargained for, KV and BAHI would not have proceeded with the BAHI Acquisition, as was their right, and Akademos would have been thrust into insolvency.[130] Both KV/BAHI and Akademos retained competent Delaware counsel (Richards, Layton & Finger, PA and Morris, Nichols,

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[129] *See* A133 (Section 2.1), A134-135 (Section 2.6(a)(i)); B1621.

[130] B1616, 1620-1621.

Arsht & Tunnell LLP, respectively) in addition to their ordinary corporate counsel, none of whom advised of any issue with respect to the BAHI Acquisition constituting a Deemed Liquidation Event. Of note, neither Jacobs nor his attorneys, who he had retained over a year prior to the BAHI Acquisition, raised any issue with the BAHI Acquisition constituting a Deemed Liquidation Event at the time of the transaction either.

And while there may be dispute as to whether the Section 2.3.1(a) Deemed Liquidation Event provision in Akademos's Charter should have applied to the BAHI Acquisition, there is no dispute that it clearly applied to the third-party proposals obtained through the Dual-Track Process. Had Akademos taken any of these deals, rather than the BAHI Acquisition, the Deemed Liquidation Event provision certainly would have applied, and Akademos's common stockholders certainly would have received nothing out of any such transaction.

e. Appellants Are Trying to Restructure Their Flawed and Failed Case into a Breach of Contract Case, Despite Not Having Brought a Breach of Contract Claim

It also appears that Appellants seek to restructure their flawed and failed case into a breach of contract case. But Appellants did not bring a breach of contract claim, and it is too late to do so now. In essence, Appellants assert that by structuring

the BAHI Acquisition as a Deemed Liquidation event, when it was not one (they argue) according to the Charter, Appellees breached their fiduciary duties. If there was a breach, and appellees disagree there was one, it would have been a breach of contract claim, not a breach of fiduciary duty claim. *See Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010); *see also Blue Chip Capital Fund II Limited Partnership v. Tubergen*, 906 A.2d 827, 833-34 (Del. Ch. 2006) (Court held that contract, not fiduciary, principles governed because the plaintiffs' claim arose from "contractual rights and obligations under the certificate of incorporation, a binding contract between the company and its preferred stockholders."). In fact, Appellees moved *in limine* on this very point.[131] Appellants' attempts to reform their failed breach of fiduciary duties, aiding and abetting breach of fiduciary duties, and accounting claims into a breach of contract claim on appeal must fail.

Additionally, the Court of Chancery plainly considered the Deemed Liquidation Event issue in the context of the Charter and concluded that it was not a breach of fiduciary duty. Rather, in considering whether "treating the Merger as a Deemed Liquidation Event constitute[d] a breach of fiduciary duty," the Court held

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[131] *See generally,* B1184-1198.

that Appellants' argument was simply "another way of arguing that the Merger was an interested transaction such that the [Appellees] had to prove that its terms were entirely fair."[132] Appellees did so.[133] There is simply no breach of fiduciary duty with regard to the manner in which Appellees treated the transaction under Akademos's Charter.

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[132] Opinion at 89.

[133] *See Id*. at 85.

II. THE COURT OF CHANCERY DID NOT ERR IN FINDING THAT PLAINTIFF'S AIDING AND ABETTING CLAIM FAILED.

A. Question Presented

Whether the Court of Chancery erred by "find[ing] that [Appellants]' aiding and abetting claim failed?"[134]

B. Scope of Review

See Section I.B., *supra*.

C. Merits of Argument

1. The Court of Chancery Correctly Held That Appellants' Aiding and Abetting Claim Fails Because Appellees Upheld Their Fiduciary Duties

First and foremost, aiding and abetting claims fail where, as here, there is no underlying breach of fiduciary duty. *See, e.g., In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 374 (Del. Ch. 2008), *as revised* (June 24, 2008). For reasons set forth in Sections I, *supra*, and Sections III, *infra*, the transaction was entirely fair and, therefore, Appellees upheld their fiduciary duties. Because there is no underlying breach of fiduciary duties, there can be no aiding and abetting liability.

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[134] Opinion at 34.

2. Appellants Cannot Meet the Elements for their Aiding and Abetting Claim

Regardless of an underlying breach of fiduciary duties, however, Appellants' aiding and abetting fails because they have not, and cannot, prove (1) knowing participation or (2) damages, which are requisite elements of their aiding and abetting claim.

"Under Delaware law, a successful claim for aiding and abetting a breach of fiduciary duty requires proof of four elements: '(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary.'" *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1125 (Del. Ch. 2008) (citing *Globis Partners, L.P. v. Plumtree Software, Inc.,* 2007 WL 4292024, at *15 (Del.Ch. Nov. 30, 2007)).

First, Appellants have not, and cannot, prove that KV "knowingly participated" in any breach of fiduciary duties. Knowing participation requires that the third-party act with the knowledge that the conduct advocated or assisted constitutes a breach. *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001); *see also RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 862 (Del. 2015). Knowing

participation is a "stringent" standard. *See Binks v. DSL.Net, Inc*., 2010WL 1713629, at *10 (Del. Ch. Apr. 29, 2010). "Conclusory statements of knowing participation will not suffice." *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *24 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006).

Appellants' evidence in of knowing participating comes woefully short of meeting this standard against KV/BAHI. In their Opening Brief, Appellants assert that knowing participation is met because "KV knew that it was prompting [Appellees] to breach their fiduciary duties when it directed [Appellees] to treat the merger so as to trigger the liquidation preference."[135] This is entirely conclusory and cannot support the element of knowing participation. *See In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *24. Appellants point to no factual record citations in support of this assertion. Appellants also wholly ignore that KV/BAHI engaged sophisticated counsel to advise them in this transaction, and KV/BAHI at all times executed the transaction in accordance with that guidance.[136] Therefore, Appellants' aiding and abetting claim fails because they cannot prove knowing participation.

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[135] Op. Br. at 35.

[136] B1613-1614.

In addition, Appellants have not, and cannot, prove damages resulting from their aiding and abetting claim. As to damages, Appellants assert that the "common stockholders saw their value in Akademos reduced to nothing because of [Appellees]' breach."[137] This is, again, conclusory. It also ignores that there are *no* circumstances under which the common stockholders would have received *anything* out of *any* transaction, and, therefore, would be entitled to *any* damages. First and foremost, Appellants do not appeal the Court of Chancery's ruling on their appraisal claim.[138] On Appellants appraisal claim, the Court of Chancery held that "the fair value of [Appellants'] shares at the time of the Merger was *zero*."[139]

Additionally, however, the Court of Chancery's factual findings, which are afforded deference by this Court, confirm that:

- "Taking those claims [of the preferred stockholders and debtholders] into account, the company's valuation would have to reach $40 million before the common stockholders

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[137] Op. Br. at 35.

[138] *See generally*, B2259-2362. Rightfully so. The Court of Chancery's appraisal valuation is given deference and is reviewed under an abuse of discretion standard. *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 35 (Del. 2005). In addition, this Court accords "a high level of deference" to the Court of Chancery's findings based on the evaluation of expert financial testimony, as was performed here. *Household Acquisition Corp.*, 591 A.2d at 175.

[139] Opinion at 66 (emphasis added).

would receive anything. There was no market evidence that anyone believed the company was worth that much.";[140]

- The Company's dual track process resulted in only four acquisition proposals;[141]

- "Each of these third-party transactions would have triggered the Preferred Stock's liquidation preference. The common stock would have been out of the money in every one of them.";[142]

- At the time of the transaction, without an acquisition or "an additional capital infusion, the Company's next stop was insolvency," in which "[t]he common stock would not receive anything…"[143]

In sum, there was simply *no circumstance* at the time of the transaction under which Appellants were entitled to *any* value by virtue of their common stock. Therefore, Appellants cannot prove damages to support their aiding and abetting claim.

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[140] *Id*. at 2.

[141] *Id*. at 24.

[142] *Id*. at 84.

[143] *Id*. at 89.

III. THE COURT OF CHANCERY DID NOT ERR IN ITS ENTIRE FAIRNESS ANALYSIS IN THIS CASE

A. Appellants' Question Presented

Whether the Court of Chancery erred by "mak[ing] an entire fairness determination without considering fair dealing?"[144]

B. Scope of Review

See Section I.B., *supra*.

C. Merits of Argument

1. The Entire Fairness Standard

See Section I.C.2, *supra*.

2. The Court of Chancery Did Not Clearly Err in Finding That the Transaction Was Entirely Fair

In their third basis for appeal, Appellants assert that the Court of Chancery "declined to engage in [a fair dealing] analysis."[145] Appellants are wrong. The Court *did* consider fair process, and correctly applied entire fairness *as a unitary standard of review* when rendering its decision that the transaction was entirely fair, and that Appellees upheld their fiduciary duties.

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[144] *Id*. at 37.

[145] Op. Br. at 37-38.

First, Appellants are simply wrong in stating that the Court did not consider fair dealing or process in its entire fairness review. As noted in Section I.C., *supra*, the parties spent a total of approximately 83.5 pages in post-trial briefing on the issue of fair dealing or process.[146] *The Court spent approximately 12 pages of its 34 pages (over one-third) of factual findings regarding the transaction process*.[147] These findings are entitled to deference in this Court *See CDX Holdings, Inc.*, 141 A.3d at 1041. The notion that the Court failed to consider fair dealing or process in its entire fairness determination, as asserted by Appellants, is simply incorrect.

Furthermore, Appellants operate under the mistaken premise that the entire fairness standard of review is two separate inquiries— fair price and fair process. To be sure, price and process are both considered, but ultimately entire fairness is a "single judgment that considers each of these aspects." *Cinerama I*, 663 A.2d at 1139-40.

"Although the two aspects may be examined in turn, they are not separate elements of a two-part test." *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *17 (Del. Ch. July 21, 2017), *aff'd*, 184 A.3d 1291 (Del. 2018). "[T]he test for

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[146] *See generally*, A375-456, B2046-2114, B2115-2208, B2209-2258.

[147] *See generally*, Opinion.

fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness." *Id*. (citing *Weinberger*, 457 A.2d at 711). "Fair price can be the predominant consideration in the unitary entire fairness inquiry." *In re Dole Food Co., Inc. Stockholder Litig.*, 2015 WL 5052214, at *34 (Del. Ch. Aug. 27, 2015). There are numerous examples where the Court held that a transaction is entirely fair, despite issues with process, because the price aspect of the analysis was so abundantly fair. *See, e.g., In re Tesla Motors, Inc. Stockholder Litigation*, 2022 WL 1237185 (Del. Ch. Apr. 27, 2022), *aff'd*, 298 A.3d 667 (Del. 2023) (holding transaction entirely fair despite that process "was far from perfect."); *see also, e.g., In re BGC Partners, Inc. Derivative Litigation*, 2022 WL 3581641 (Del. Ch. Aug. 19, 2022) (same); *Dieckman v. Regency GP LP*, 2021 WL 537325 (Del. Ch. Feb. 15, 2021), *aff'd*, 264 A.3d 641 (Del. 2021) (same). In fact, the Court of Chancery in *In re Dole* noted that "[e]ven a controller that has effected a squeeze-out unilaterally with no process at all conceivably could prove at trial that the transaction was entirely fair." 2015 WL 5052214, at n.26.

In the case at hand, like in *In re Tesla, In re BGC,* and *Dieckman*, among others, the Court noted certain deficiencies in the Company's process, but determined that the price was so abundantly fair given the circumstances, that the

transaction was entirely fair. *Compare* Opinion at 85 *with In re Tesla*, 2022 WL 1237185, at *2, *In re BGC*, 2022 WL 3581641, at *42, and *Dieckman*, 2021 WL 537325. In short, and as explained more thoroughly in Section I.C., *supra*, while the Court ultimately held that "[e]ven if the KV Fund had implemented the Merger unilaterally, without any process whatsoever, the [Appellees] proved that the common stock was so far out of the money that the Merger was entirely fair[,]"[148] it did not "declined to engage in [a fair dealing] analysis[,]"[149] as Appellants have disingenuously asserted. The Court of Chancery made approximately 12 pages of factual findings regarding the process implemented, and properly made the unitary decision that the BAHI Acquisition was entirely fair.

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[148] Opinion at 85.

[149] Op. Br. at 37-38.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the Court of Chancery's Opinion and the stipulated Final Order.[150]

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DATED: February 27, 2025

[150] The stipulated Final Order is attached to Appellants' Opening Brief as Exhibit B.