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,

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.

No. 499, 2024

Court Below: Court of Chancery of the State of Delaware, C.A. No. 2021-0346-JTL

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APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

In their opposition brief, Defendants levy five retorts—some in defense of the Chancery Court's decision, and some in opposition to it. None are persuasive:

First, Defendants argue that the preferred stock's mandatory redemption and accrued dividend rights rendered the common stock valueless. But the preferred stock was never redeemed, and Akademos' board never declared accrued dividends, rendering those rights irrelevant. Regarding what *actually* happened, Defendants do not dispute that the common stockholders would have received a pro rata portion of the nearly $5.7 million merger consideration had Director Defendants not treated the merger as a Deemed Liquidation Event. The common stockholders unfortunately never saw that value, however, because Director Defendants gifted the entirety of the consideration to the preferred stockholders (who were not entitled to receive it all), using Akademos' charter as a pretext to shield their actions. *See infra* 3–6.

Second, Defendants assert that the Chancery Court wrongly concluded that the merger was a Deemed Liquidation Event. Defendants' interpretation of that provision, which the Chancery Court properly characterized as "overly technical to the point of non-sensical," Op. at 88, runs counter to the provision's plain language and purpose. *See infra* 7–10.

Third, Defendants contend that Plaintiffs are attempting to shoehorn a breach of contract claim into their breach of fiduciary duty claims. Though Defendants do not disclose it in their brief, the Chancery Court addressed and rejected that very argument. Plaintiffs challenge Director Defendants' decision to gift the entirety of the merger consideration to the preferred stockholders by way of the liquidation preference, elevating the preferred stockholders' interests over the common stockholders' interests. The preferred stockholders were not entitled to that gift, and Director Defendants' attempt to misuse the charter does not convert what is an example of a fiduciary duty breach into a breach of contract. *See infra* 11–13.

Fourth, Defendants are wrong to suggest that Plaintiffs did not satisfy the knowing participation and damages elements of their aiding and abetting claim. KV cannot claim it legitimately believed the merger was a Deemed Liquidation Event and, again, the common stockholders would have received value through the merger but for Director Defendants' breach. *See infra* 14–16.

Fifth, Defendants accuse Plaintiffs of "disingenuously" arguing that the Chancery Court declined to engage in a fair dealing analysis, Ans. Br. at 51[1]—but *Defendants* do not even acknowledge the court's statement that the entire fairness determination could be made "without any inquiry into fair dealing," Op. at 85. Under Delaware law, including the cases Defendants cite, failing to conduct a fair dealing analysis is error. *See infra* 17–20. At minimum, then, remand is necessary.

[1] "Ans. Br." refers to Defendants' answering brief and "Op. Br." refers to Plaintiffs' opening brief.

ARGUMENT

I. DIRECTOR DEFENDANTS BREACHED THEIR FIDUCIARY DUTIES

Much of Section I.C of Defendants' argument does not respond to Plaintiffs' position. *See* Ans. Br. at 22–31. Defendants instead state the entire fairness standard, *id.* at 23–24, list certain factual findings the Chancery Court made relating to the merger's process, *id.* at 25–28, and list certain factual findings the Chancery Court made relating to the merger's price, *id.* at 29–31. Defendants do not address the crux of Plaintiffs' argument—whether Director Defendants breached their fiduciary duties by gifting KV with merger consideration it was not entitled to, at the expense of the common stockholders who would otherwise have received a portion of that consideration—until page 32 of their answering brief. Only then do Defendants raise three defenses: (1) the common stock was valueless because of the preferred stock's mandatory redemption and accrued dividend rights; (2) the Chancery Court erred in holding that the merger was a Deemed Liquidation Event; and (3) Plaintiffs are trying to convert their fiduciary claims into breach of contract claims. Each of these arguments are unavailing and should be rejected by this Court.

A. KV's mandatory redemption and accrued dividend rights are irrelevant and did not render the common stock valueless.

Defendants begin by asserting that Akademos' common stock was valueless because of the mandatory redemption and accrued dividend provisions of the company's charter. *See* Ans. Br. at 32–36. Implicit in this argument is the idea that

Plaintiffs cannot succeed on their breach of fiduciary duty claims if the common stock was valueless. But, as Plaintiffs explained in their opening brief (and as Defendants do not dispute in their answering brief), a transaction is not entirely fair simply because a company's common stock has no value. *See* Op. Br. at 30 (citing *In re Nine Systems Corporation Shareholders Litigation*, 2014 WL 4383127, at *46 (Del. Ch. Sept. 4, 2014), *aff'd sub nom. Fuchs v. Wren Holdings, LLC*, 129 A.3d 882 (Del. 2015)). In any event, Defendants are wrong—the common stock had value pursuant to the merger that *actually* took place: Had the merger not been wrongly treated as a Deemed Liquidation Event, Plaintiffs would have been entitled to a pro rata portion of the nearly $5.7 million merger consideration. *See* A63 (distribution provision); A228–29 (calculating the merger consideration). The unexercised rights afforded to Akademos' preferred stock are therefore irrelevant.

First, Defendants assert that the mandatory redemption right rendered the common stock valueless. Ans. Br. at 33–34. But Defendants entire argument is framed in the hypothetical. *See, e.g.*, *id.* at 33 ("KV . . . *could* have called the redemption right and required the Company to buy back its preferred stock . . . ." (emphasis added)); *id.* ("KV . . . *could* even have called to redemption right with respect to the BAHI Acquisition . . . ." (emphasis added)); *id.* at 36 ("KV . . . *could* have redeemed their preferred stock at any time . . . ." (emphasis added)). While it is true that KV could have exercised its mandatory redemption right as early as

December 2019, KV made a strategic decision not to do so. And for good reason: redemption would have required KV to redeem its shares in the company in exchange for payments (spread across three annual installments) that were not guaranteed. A82–83. KV's objective was complete ownership of Akademos, not redemption of its shares, so there was an obvious reason to forgo exercising the mandatory redemption right.

Second, Defendants contend that the accrued dividend rights rendered the common stock valueless. Ans. Br. at 34–35. But, they also recognize that the board had to declare accrued dividends in order for such dividends to be paid. *Id.* at 34; *see also* A61–62 ("Accruing Dividends shall be payable . . . only when, as, and if declared by the Board of Directors . . . ."). Defendants do not dispute that there is no record evidence that Akademos was planning on declaring accrued dividends. *See* Op. Br. at 26. For this reason, the accrued dividend rights are just as irrelevant as the mandatory redemption right, in that they have no bearing on the value the common stockholders were entitled to receive as a result of the merger.

Defendants further argue that the mandatory redemption and accrued dividend rights are not "speculative." Ans. Br. at 35.[2] While the rights themselves are not speculative, what *is* speculative is any impact on the common stock's value that those rights could have had in an alternative universe. KV did not redeem its preferred stock and Akademos' board did not declare accrued dividends. Instead, a merger was consummated (to KV's benefit) that would have provided value to the common stock, but for Defendants' breach of their fiduciary duties. What could have happened, but did not, is irrelevant. *See, e.g.*, *Hughes v. Trans World Airlines, Inc.*, 336 A.2d 572, 578 (Del. 1975) ("[I]n our view, it would elevate speculation over reality to now dispose of this case by theorizing about what might have been . . . .").[3]

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[2] Defendants' reliance on *Shiftan v. Morgan Joseph Holdings, Inc.*, 57 A.3d 928 (Del. Ch. 2012), is misplaced. *See* Ans. Br. at 36. *Shiftan* stands for the principle that redemption rights may be considered as part of an appraisal analysis. *Id.* at 932. It does not hold that unexercised redemption rights can factor, *post hoc*, into a breach of fiduciary duty analysis.

[3] Notably, Defendants offer no response to Plaintiffs' argument that, if it was proper to speculate, the Chancery Court should have recognized the scenarios in which tge common stock would have received value (such as a stock-for-stock transaction). *See* Op. Br. at 28–29. However, in discussing Ambassador's proposal, which contemplated a stock-for-stock deal, Defendants assert that the transaction "would have entailed a Deemed Liquidation [Event] under the terms of Akademos's Charter, resulting in no consideration payable to the common stockholders." Ans. Br. at 12. But that does not mean the common stockholders would not receive value from such a transaction. Indeed, application of the liquidation preference ensured only that preferred stockholders would be paid out of assets available for distribution, A63—it would have no impact on the common stockholders' receipt of Ambassador stock, which would have been valuable.

B. The Chancery Court correctly held that the Deemed Liquidation Event provision was inapplicable.

Defendants next urge that the Chancery Court erred in holding that the merger did not trigger the Deemed Liquidation Event provision of Akademos' charter. *See* Ans. Br. at 37–40; *see also* Op. at 86–89 (concluding that the merger did not trigger the Deemed Liquidation Event provision). In doing so, Defendants double down on an interpretation of the Deemed Liquidation Event provision that the Chancery Court rightfully held was "overly technical to the point of non-sensical." Op. at 88. This Court should affirm the Chancery Court's holding that the Deemed Liquidation Event provision was inapplicable to the merger.

Starting with the plain language, the charter defines "Deemed Liquidation Event," in relevant part, as follows:

> [A] merger or consolidation in which
>
> > (i) the Corporation is a constituent party or
> >
> > (ii) a subsidiary of the Corporation is a constituent party 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 . . . .

A63–64 (emphasis added).

There is no dispute that Akademos was a party to the merger, satisfying the first part of the definition. *See* Ans. Br. at 39. The issue before this Court is thus the meaning and application of the second part of the definition—the exception. Under the exception, a merger is not a Deemed Liquidation Event if the pre-closing shares of Akademos' stock "continue to represent, or are converted into or exchanged for shares of capital stock that represent, immediately following such merger . . . , at least a majority, by voting power, of the capital stock" of Akademos. A64.

That is precisely what took place here. KV structured the merger as a "reverse triangular merger," meaning that it created a subsidiary that merged into Akademos, with Akademos surviving as KV's subsidiary. *See, e.g.*, Op. at 88; B1279; *see also W. Standard, LLC v. Sourcehov Hldgs., Inc.*, 2019 WL 3322406, at *6 (Del. Ch. July 24, 2019). Before the merger, KV had a majority ownership stake in Akademos; after the merger, KV had a 100% ownership stake in Akademos. Put simply, KV gave up its pre-closing Akademos shares (and paid $12.5 million) in exchange for 100% of the company's equity, satisfying the Deemed Liquidation Event provision's exception. *Cf. W. Standard*, 2019 WL 3322406, at *6 ("[T]he effect of a reverse triangular merger is the same as the purchase of the outstanding stock of the target."); Kling & Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions*, § 1.02[4] (2024) (same).

This commonsense view of the merger is reinforced by KV's characterization of the transaction in the merger agreement. After KV decided to restructure the merger in a more tax advantageous way, Op. at 3, it added the following provision to the merger agreement clarifying that the merger involved an exchange of shares:

> With respect to the stock held by Purchaser, the Company and Purchaser intend the Merger to be treated for U.S. federal income tax purposes (and applicable, state, local and foreign tax purposes), *as an exchange by [KV] of the Company Stock held by KV . . . , for common stock of Surviving Corporation* in an exchange that qualifies as a tax-free recapitalization under Section 368(a)(1)(e) of the Code.

A138 (emphasis added). Defendants cannot plausibly assert that the merger was an exchange of shares for tax purposes but not for purposes of deciding the applicability of the Deemed Liquidation Event provision.

In addition to running contrary to the plain language of the Deemed Liquidation Event provision, Defendants' approach also flies in the face of that provision's "obvious" purpose. Op. at 88. As the Chancery Court rightfully noted, the purpose of the Deemed Liquidation Event provision is to "generally trigger the liquidation preference for purposes of a merger, *but not when the merger does not constitute a change of control*." *Id.* at 88–89 (emphasis added). This purpose is reinforced by the Series A preferred stock term sheet, which specifically excludes from the definition of a Deemed Liquidation Event transactions "in which stockholders of the Company own a majority by voting power of the outstanding shares of the surviving or acquired corporation"—like the merger here. A49; *cf. Cf. In re Explorer Pipeline Co.*, 781 A.2d 705, 720 (Del. Ch. 2001) (noting that, even where a charter can be interpreted "without resort to extrinsic evidence, a brief review of the extrinsic evidence presented to the Court, nevertheless, may lend comfort to the conclusions drawn"). That exception was negotiated specifically to protect the common stockholders from the application of the liquidation preference in transactions, as here, that do not involve a change of control.

Defendants' approach would thwart the purpose of the Deemed Liquidation Event provision and allow the very type of transaction the term sheet's protections sought to prohibit. Under their approach, *any* merger could be manipulated to qualify as a Deemed Liquidation Event simply by ensuring that shares of Akademos were cancelled or converted into cash immediately before the transaction. *See* Op. at 88. So, while Defendants assert that "there is no dispute" that the Deemed Liquidation Event provision "clearly applied to the third-party proposals obtained through the Dual-Track Process," Ans. Br. at 40, it is not clear why that is so—any of those proposed transactions could have been structured, under Defendants' reading of the provision, to avoid triggering the liquidation preference. This Court should reject reading Akademos' charter to countenance such an unworkable and absurd result.

C. Plaintiffs' breach of fiduciary duty claims are not contract claims.

As a last-ditch effort to defend the Chancery Court's decision, Defendants claim that Plaintiffs seek to "restructure" their breach of fiduciary duty claims into breach of contract claims. Ans. Br. at 40–42. Not so.

To start, Defendants note that they moved *in limine* on this issue, *id.* at 41 (citing B1184–1198), but fail to disclose that their motion was *denied* by the Chancery Court, *see* AR018–39. And for good reason—the conduct Plaintiffs challenged was Director Defendants' decision to award the preferred stockholders with a benefit they were never entitled to receive. That decision, which put the preferred stockholders' interests above the common stockholders' interests, was a violation of Director Defendants' fiduciary duties—not a breach of contract. AR038 ("[T]he directors . . . acted to bestow a gift of liquidation preference on preferred stockholders who had no contractual or other right to it. That is classically a breach of fiduciary duty claim.").

Any number of hypotheticals demonstrate the fallacy of Defendants' position. Assume, for example, that a real estate brokerage has the following policy governing the awarding of commissions: An agent that secures a commission totaling $500,000 or more is solely entitled to half of the commission. One day, an agent secures a $475,000 commission on a home sale. The agent contacts the brokerage and asserts that her extraordinary marketing contributions should be specially rewarded under the policy. The brokerage agrees, determines that the agent has met the "spirit" of the policy, and awards the agent half of the $475,000 commission.

Under this hypothetical, the brokerage's decision to reward the agent is not a breach of the policy. It is instead better viewed as an extracontractual gift, disguised as a contractually mandated payment. Indeed, the policy *never applied* in the first place, because the triggering event (e.g., a commission totaling $500,000 or more) was never satisfied. The brokerage thus authorized a payment to the agent that the agent was not entitled to receive, using the inapplicable policy to shield its actions.

That is exactly what happened here. For the reasons discussed above, the merger was not a Deemed Liquidation Event. Yet, Director Defendants treated it as such to benefit KV at the common stockholders' expense. Director Defendants' treatment of the merger as a Deemed Liquidation Event (the conduct Plaintiffs challenge here) was not a breach of Akademos' charter, because the Deemed Liquidation Event provision never actually applied. As the Chancery Court put it, Director Defendants' action "was an act of munificence" because it "favored a class in the capital structure that was not entitled to a preference under the charter ahead of the common when their duties are to run to the common." AR037.

Defendants cite two cases in arguing that Plaintiffs' claim is a contract claim, but neither support its argument. *See* Ans. Br. at 41. In the first, *Nemec v. Shrader*, retired stockholders challenged a corporate board's redemption of their stock after their post-retirement put rights had expired. 991 A.2d 1120, 1123, 1125 (Del. 2010). But the at-issue stock plan "explicitly authorized the redemption's price and timing," so the Court of Chancery dismissed the stockholders' fiduciary claim because it "relat[ed] to the exercise of a *contractual* right—the Company's right to redeem the shares of retired nonworking stockholders." *Id.* at 1126, 1129. Here, in contrast, Defendants had no contractual authority to treat the merger as a Deemed Liquidation Event because the merger did not trigger that provision.

The second case equally does not help Defendants. In *Blue Chip Capital Fund II Limited Partnership v. Tubergen*, the plaintiff asserted *both* breach of fiduciary duty and breach of contract claims. 906 A.2d 827, 828 (Del. Ch. 2006). The issue in that case was not whether the plaintiff was precluded from bringing a fiduciary duty claim based on the underlying conduct, but instead whether the plaintiff could assert both fiduciary and contract claims simultaneously. *Id.* at 832. The court dismissed the plaintiff's fiduciary duty claims *without prejudice*, subject to later modification, recognizing that fiduciary claims could be asserted in the absence of the contract claims (or if the plaintiff would not receive a full remedy on the contract claims alone). *Id.* at 834. Plaintiffs here, of course, did not bring a breach of contract claim, rendering *Blue Chip*'s analysis inapposite.

For these reasons, this Court should reject Defendants' attempt to convert Plaintiffs' fiduciary duty claims into contract claims that Plaintiffs never asserted.

II. KV AIDED AND ABETTED THE DIRECTOR DEFENDANTS

As set forth in Plaintiffs' opening brief, if this Court agrees with Plaintiffs that Director Defendants breached their fiduciary duties, 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.").

"The 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). While Defendants attempt to argue that there is not sufficient evidence for the third or fourth elements, the record suggests otherwise.

Regarding the third element, KV's knowing participating in the breach, KV knew that it was prompting Director Defendants to breach their fiduciary duties when it directed Director Defendants to treat the merger 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. As described above, a "Deemed Liquidation Event" is defined to exclude transactions with a controlling shareholder like the merger. A63–64. That term is consistent with Akademos and KV's intent, as reflected in the Series A term sheet, which KV's counsel prepared and which provides that a "Deemed Liquidation Event" includes 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." A49.

Further demonstrating KV's knowledge is that, in December 2020, KV required that Akademos redo the merger agreement for tax reasons. *See* B342–23 at 342:5–343:6. As discussed above, KV required Akademos to add language to the merger agreement characterizing the transaction as an exchange of shares for tax purposes. A138. KV's position, on the one hand, that the merger is tantamount to a third-party acquisition, and, on the other hand, that the merger is an exchange of shares that qualifies as a tax-free recapitalization, is disingenuous. By aiding and abetting the violations of the charter by Director Defendants, KV was able 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.

Finally, regarding the fourth element, Defendants argue that Plaintiffs cannot show any damages due to KV's aiding and abetting the breach of fiduciary duty. This misses the entire premise of Plaintiffs' argument: Had KV not aided and abetted Director Defendants' decision to distribute the merger's proceeds pursuant to the inapplicable liquidation preference, the common stockholders would have received value from the merger on a pro rata basis. Because they did not receive such value, the common stockholders were tangibly harmed by Director Defendants' conduct.

Though this Court should reverse the Chancery Court's judgment with respect to Plaintiffs' aiding and abetting claim, at minimum this Court should remand so that the Chancery Court can address the merits of Plaintiffs' claim in the first instance. *See Fletcher v. Feutz*, 246 A.3d 540, 552 (Del. 2021) (remanding for the lower court to resolve issues that had not yet been addressed).

III. THE CHANCERY COURT EXPLICITLY DECLINED TO CONSIDER FAIR DEALING

Defendants assert that the Chancery Court considered fair dealing as part of its entire fairness analysis, Ans. Br. at 48, but conspicuously ignore the actual words used by the Chancery Court. In the section of its opinion titled "Fair Dealing," the Chancery Court could not have been clearer: "Here, the fair price evidence is sufficiently strong to carry the day *without any inquiry into fair dealing*." Op. at 84–85 (emphasis added). The only reasonable interpretation of this language is that the Chancery Court chose not to conduct a fair dealing inquiry. This reading is supported by the next section of the opinion, titled "The Unitary Determination of Fairness," in which the Chancery Court concluded that the merger was entirely fair solely based on its perception of the common stock's economic value—without any discussion of the merger's procedural weaknesses or strengths. Op. at 85.

Defendants do not even attempt to grapple with the Chancery Court's opinion. Instead, they conclusory state that the Chancery Court "*did* consider fair dealing," Ans. Br. at 48 (emphasis in original), but fail to identify where in its opinion the Chancery Court did so. Instead, Defendants note that *the parties* "spent a total of approximately 83.5 pages in post-trial briefing on the issue of fair dealing or process," *id.* at 49—an irrelevant point. And they emphasize that the Chancery Court "spent approximately 12 pages of its 34 pages . . . of factual findings regarding the transaction process," *id.* (emphasis omitted)—but factual findings are not legal conclusions, and Defendants' conflation of the two is improper. *See, e.g.*, *Schnell v. Dep't of Servs. for Child., Youth & Their Fams.*, --- A.3d ----, 2025 WL 271785, at *3 (Del. Jan. 23, 2025) (recognizing challenges to a lower court's "legal conclusions rather than its factual findings"); *Ravindran v. GLAS Tr. Co. LLC*, 327 A.3d 1061, 1077 (Del. 2024) (applying separate standards of review to factual findings and legal conclusions). In short, Defendants cannot escape the reality that the Chancery Court declined to incorporate a fair dealing inquiry into its entire fairness analysis.

The cases Defendants cite confirm that the Chancery Court's decision to bypass the fair dealing inquiry was error. In *Weinberger v. UOP, Inc.*, for example, this Court held that the "concept of fairness has two basic aspects: fair dealing and fair price," and that "*[a]ll aspects of the issue* must be examined" as part of the entire fairness analysis. 457 A.2d 701, 711 (Del. 1983); *see also Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2 1134, 1139–40 (Del. Ch. 1994) (recognizing that courts are required to "consider[] *each* of these aspects"), *aff'd*, 663 A.2d 1156 (Del. 1995). The Chancery Court's decision not to address fair dealing violated these principles.

In a final attempt to defend the Chancery Court's decision, Defendants assert that "[t]here 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." Ans. Br. at 50. But that argument is a straw man—nobody would dispute that there can be cases where the entire fairness test is satisfied even when some procedural issues exist. The Chancery Court did not err by misbalancing the fairness factors, it erred by declining to consider one of the factors in its entirety. Each case Defendants relies on for this argument is thus easily distinguishable, *see* Ans. Br. at 50–51, as each contains the fair dealing inquiry that is lacking here:

- In *In re Tesla Motors, Inc. Stockholder Litigation*, the court devoted a significant portion of its opinion to a "Fair Process" analysis, in which it identified "Process Flaws" and "Process Strengths." 2022 WL 1237185, at *33–39 (Del. Ch. Apr. 27, 2022), *aff'd*, 298 A.3d 667 (Del. 2023). Crucially, the court then recognized the impact its fair dealing analysis had on unitary entire fairness conclusion. *Id.* at *48.

- Similarly, in *In re BGC Partners, Inc. Derivative Litigation*, the court extensively considered fair dealing, ultimately drawing the legal conclusion that the challenged transactions were, in fact, the product of fair dealing. 2022 WL 3581641, at *18–28 (Del. Ch. Aug. 19, 2022), *aff'd*, 303 A.3d 337 (Del. 2023). The court then incorporated its fair dealing analysis into its entire fairness judgment. *Id.* at *42 (considering fair dealing and recognizing its duty to render a "single judgment that considers" both price *and* process).

- And in *Dieckman v. Regency GP LP*, the court recognized its obligation to "examine[] all aspects" of a transaction—including fair dealing—as part of its entire fairness analysis. 2021 WL 537325, at *26 (Del. Ch. Feb. 15, 2021), *aff'd*, 264 A.3d 641 (Del. 2021). True to this mandate, the court's entire fairness determination relied on its fair dealing analysis, which was supported by extensive factual findings. *Id.* at *27–33.

Unlike each of these cases, which analyzed fair dealing and incorporated those analyses into their respective unitary entire fairness determinations, the Chancery Court simply stated that no inquiry into the merger's process was necessary. At minimum, therefore, this Court should remand to allow the Chancery Court the opportunity to cure its error. *See Emerald Partners v. Berlin*, 787 A.2d 85, 98 (Del. 2001); *see also Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1172 (Del. 1995) (affirming where, on remand, the Court of Chancery "was cognizant that an entire fairness analysis required it to consider . . . *each* aspect of the non-bifurcated components of entire fairness: fair dealing *and* fair price" (emphasis added)).[4]

[4] As Plaintiffs described in their opening brief, the merger's process was laden with shortcomings that are fatal to a finding of entire fairness, regardless of the common stock's value. *See* Op. Br. at 39–41; *see also In re Nine Systems*, 2014 WL 4383127, at *46.

CONCLUSION

For these reasons, and for the reasons contained in Plaintiffs' opening brief, 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 the Chancery Court's judgment with respect to Plaintiffs' fiduciary duty claims and remand for further proceedings with instructions for the Chancery Court to fully complete an entire fairness analysis.

Date: March 21, 2015

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