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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LABORERS' DISTRICT COUNCIL AND CONTRACTORS' PENSION FUND OF OHIO, ALEXEY MAKAROV, MATTHEW K. MCGINNIS, and SUZANNE RUDY, Plaintiffs-Below/Appellants, v. MIKKEL SVANE, CARL BASS, JOHN GESCHKE, SHELAGH GLASER, NORMAN GENNARO, ARCHANA AGARWAL, MICHAEL CURTIS, MICHAEL FRANSDEN, BRANDON GAYLE, STEVE JOHNSON, HILARIE KOPLOW-MCADAMS, and THOMAS SZKUTAK, Defendants-Below/Appellees.	No. 75, 2025 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2023-1139-JTL **Public Version filed** on April 23, 2025

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NATURE OF PROCEEDINGS

This is an appeal of the Court of Chancery's bench ruling and short-form order granting Defendants' motion to dismiss under the *Corwin* doctrine. The action concerns the take-private acquisition of Zendesk, Inc. ("Zendesk" or the "Company") by a consortium of private equity funds (the "Consortium") for $77.50 per share (the "Transaction"), a price significantly below acquisition offers that Zendesk's board of directors (the "Board") had repeatedly rejected—including just weeks prior to Transaction approval—in favor of pursuing its standalone strategy.

Two weeks before agreeing to the Transaction, the Board rejected substantially higher offers, including a fully diligenced $110 per share offer, and terminated its strategic review process upon determining that remaining a standalone company maximized stockholder value. The Board thereafter sought to resolve an ongoing activist attack from JANA Partners ("JANA"), leading to a nearly finalized settlement agreement requiring the Company to terminate Defendant Mikkel Svane as CEO and replace three directors on the Board. Then, to avoid an embarrassing public termination, and with millions of dollars in unvested equity awards at stake, Zendesk management quickly slashed Zendesk's long-range projections by $13 billion (approximately 25%) to justify an abrupt strategic reversal whereby the Board suddenly abandoned the standalone strategy and accepted the Consortium's $77.50 proposal.

The Court of Chancery determined that the applicable Proxy disclosures "did not contain material misstatements or omissions" and granted dismissal under *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015).[1] That was error for two reasons.[2]

First, the Proxy omitted that the Board had approved a "nearly-finalized" settlement agreement with JANA that required Svane's termination as CEO and the resignation of three directors. That information was plainly material because the settlement directly motivated management and the Board to facilitate and accept the unfair Transaction price after rejecting materially higher offers just weeks earlier.

The Court of Chancery reasoned that "JANA's quite public involvement and aggressive criticisms put stockholders on notice that management and the [B]oard could be agreeing to a deal out of self-interest." Order at 3. However, the Proxy only generally disclosed the existence of "settlement discussions" and stockholders were completely unaware of the Board's undisclosed agreement to terminate Svane

[1] *See Amethyst Arbitrage Int'l Master Fund v. Svane, et al.*, C.A. No. 2023-1139-JTL (Del. Ch. Jan. 22, 2025) (ORDER) (attached hereto as Exhibit B) (the "Order").

[2] This appeal raises only two points of error regarding the Court of Chancery's application of *Corwin* to dismiss the action below. The Court of Chancery did not reach any of Defendants' arguments for dismissal other than *Corwin*, including the merits of Plaintiffs' claims under Court of Chancery Rule 12(b)(6). Appellants/Plaintiffs-Below preserve and do not waive any claims, theories, or arguments opposing dismissal that the Court of Chancery did not decide.

and replace three directors. The settlement agreement with JANA constituted material undisclosed information necessary for stockholders to understand Svane's and management's true motivations to approve the Transaction (*i.e.*, avoiding an embarrassing public ouster and, for management, the potential loss of millions of dollars in unvested equity awards). The Transaction was highly criticized and was ultimately opposed by nearly 40% of Zendesk's stockholders. Zendesk investors and market commentators struggled to understand the Board's sudden reversal to accept a materially lower offer after twice confirming that remaining a standalone company was the value-maximizing option. Svane's imminent termination and the potential loss of millions of dollars in unvested equity for Svane and likely other members of Zendesk management if the JANA settlement moved forward provided critically important context explaining the Board's eleventh hour about-face.

Second, the Proxy omitted a more optimistic set of projections that management titled the "Upside Case."[3] The undisclosed Upside Case was prepared simultaneously with the disclosed (and more pessimistic) "Baseline Case" that was used to justify the Transaction price. Both sets of projections assumed the same massive revenue cuts to projections upon which the Board had relied weeks earlier to reject a materially higher offer, end its strategic review, and remain a standalone

[3] The Court of Chancery's bench ruling and short-form Order did not address the Upside Case.

company. The Upside Case's existence undercut the Baseline Case's reliability, and the circumstances under which both sets of projections were created—*i.e.*, on an expedited timeline to justify the Consortium's last-minute, lowball offer—mandated disclosure.

Moreover, the Upside Case should have been disclosed because it was reliable. The Upside Case used the same $13 billion (nearly 25%) revenue reduction as the Baseline Case. The only difference between the two rapidly developed sets of projections was that the Upside Case assumed improved operating margins by factoring in cost-cutting and related measures that were underway at the Company. Any company assuming a 25% loss of revenue would take steps to cut costs and improve operating margins, which is exactly what Zendesk did. The Upside Case was therefore *more* reliable than the Baseline Case, reflected a more accurate estimate of the Company's future performance, and should have been disclosed.

For these reasons, and the reasons discussed in more detail below, this Court should reverse the Court of Chancery's decision and remand the action for further proceedings.

SUMMARY OF ARGUMENT

1. The trial court erred in applying *Corwin* cleansing to the Transaction because the definitive Schedule 14A Transaction proxy (the "Proxy") failed to disclose material information, rendering the stockholder vote uninformed:

a. The Proxy failed to disclose that the Board had agreed to terminate Svane as CEO and replace three directors in connection with an undisclosed, nearly finalized settlement agreement with JANA to resolve JANA's activist campaign. That information was material because it would have revealed material conflicts of interest and helped explain Zendesk management and the Board's last-minute decision to support the Transaction.

b. The Proxy also failed to disclose the Upside Case, which was created simultaneously with the more pessimistic Baseline Case used to justify the $77.50 per share Transaction price. The Upside Case was material because it was created simultaneously on a rapid timeline and submitted to the Board with the Baseline Case, which management created at the last minute to justify a significantly lower Transaction price after the Board and management developed unique motivations to approve the Transaction. The Upside Case was also material because it was reliable and reflected a more accurate estimate of the Company's future performance. The Upside Case assumed the same revenue cuts as the Baseline Case,

and only differed from the Baseline Case by factoring in cost-cutting and other measures that were in the works at the Company.

STATEMENT OF FACTS

A. Parties

Plaintiffs were Zendesk common stockholders before the Transaction closed. A41, ¶13.

Defendant Svane was Zendesk's co-founder, CEO and Chairman of Zendesk's board of directors (the "Board"). A41-42, ¶18.

Defendant John Geschke was Zendesk's Chief of Staff (managing Zendesk's office of the CEO) and Chief Legal Officer. A43-44, ¶21. Geschke had a "close personal relationship with Svane." A44-45, ¶22.

Defendant Shelagh Glaser was Zendesk's CFO. A45-46, ¶23.

Defendant Norman Gennaro was Zendesk's President of Worldwide Sales. A46, ¶24.

Defendant Carl Bass was Zendesk's lead independent director. A42, ¶19. Bass had "longstanding personal relationship with Svane." A42-43, ¶20.

Defendants Archana Agarwal, Michael Curtis, Michael Frandsen, Brandon Gayle, Steve Johnson, Hilarie Koplow-McAdams, and Thomas Szkutak were Zendesk directors. A46-51, ¶¶25-35.

B. Zendesk Management's Unsuccessful Momentive Acquisition Proposal Leads to Takeover Offers and Stockholder Criticism.

Zendesk is a provider of customer support-focused software-as-a-service products. Svane founded Zendesk and served as its CEO and Board Chairman at all relevant times. A41-42, ¶18. The Company experienced exponential growth since its 2014 IPO, improving its operating margins every year and beating its guidance in 14 of 16 quarters through 2021. A53-54, ¶44.

In October 2021, Zendesk announced a stock-for-stock merger with software company Momentive that valued Zendesk at $124 per share (the "Momentive Transaction"). A54-55, ¶46. Investors roundly criticized the Momentive Transaction for undervaluing Zendesk. A54-55, ¶46. Among the loudest critics was JANA, an investment management firm that owned 2.5% of Zendesk stock. A52, ¶38. On January 3, 2022, JANA asked the Board to terminate the Momentive Transaction and accused the Board of using an "artificially depressed stock price" compared to the $176 per share midpoint value reflected in the fairness opinion provided by Goldman Sachs & Co. LLC ("Goldman"). A55-57, ¶¶48, 50.

On January 14, 2022, JANA told Zendesk management that Zendesk's continued support of the Momentive Transaction necessitated "broader change . . . at the Company." A57-58, ¶52.

JANA's campaign prompted unsolicited interest from private equity firms. A58, ¶53. On February 7, 2022, a consortium of private equity investors (the "Consortium") led by Permira Advisers LLC ("Permira") and Hellman & Friedman LLC ("H&F") submitted a $127 to $132 per share offer to acquire Zendesk. A58, ¶53. On February 9, 2022, the Board, including Svane, met and determined that the Consortium's offer—which was $50 to $55 higher than the ultimate Transaction price—"significantly undervalued Zendesk." A59-60, ¶55. On February 10, the Company publicly disclosed that it rejected the Consortium's proposal, stating that the Board "continues to believe strongly that the continued execution of its strategic plan . . . will generate substantial additional long-term value for shareholders." A61, ¶57.

C. JANA Launches a Proxy Contest and the Board Launches a Strategic Review Process.

On February 16, 2022, JANA submitted a letter to the Board opposing the Momentive Transaction and launching a proxy contest seeking to nominate four directors to the Board. A61-62, ¶58. The letter accused the Board of inflicting "lasting damage" on Zendesk by pursuing the Momentive Transaction, "all but assur[ing] that Zendesk will suffer a persistent discount to its intrinsic value" because of its "reckless disregard for shareholder capital." A61-62, ¶58. The letter further stated: "[W]e believe the board must either be replaced with capable

fiduciaries or reverse course and engage with interested strategic and financial buyers to sell the Company." A61-62, ¶58. The following day, executive search firm Spencer Stuart presented to Zendesk four potential Board nominees and sixteen other potential Board candidates. A64, ¶64.

On February 25, 2022, Zendesk stockholders rejected the Momentive Transaction with just 7.5% of eligible shares voting in favor. A64, ¶65. JANA stated: "Zendesk's board received the lowest level of support of any disclosed deal-related shareholder vote (buyer or seller) in the Russell 3000 in the last 20 years (and possibly ever)." A64, ¶65.

In a February 28, 2022 letter, JANA called for either "significant board change" or a sale process, accusing the Board of being "disengaged and totally out of touch with shareholder priorities." A64-65, ¶66.

On March 7, 2022, the Board met with management, financial advisor Qatalyst Partners LP ("Qatalyst"), and Wachtell, Lipton, Rosen & Katz to discuss the Company's strategic plan. A65, ¶67. Qatalyst presented on potential strategic transactions using "March 2022 Case" projections provided by management, which included a risk-adjusted "Operating Plan" mirroring the risk-adjusted forecast used in the Momentive Transaction. A65, ¶67. Qatalyst warned that JANA would likely secure Board representation if it proceeded with its proxy contest, and then push for

a sale of Zendesk. A66, ¶68. The Board agreed to prepare to engage with JANA. A66-67, ¶69.

Anticipating a strategic review process, the Board engaged Qatalyst and Goldman as financial advisors. Both firms were conflicted, including because they had recently earned significant fees from engagements with Permira and H&F and because Qatalyst's compensation was largely contingent upon the Transaction's consummation. A68-71, ¶¶72-79.

At a March 16, 2022 meeting, the Board formally launched a strategic review process and authorized management to engage with JANA regarding its proxy contest. A74-75, ¶84. Qatalyst recommended that the Board delay its annual stockholder meeting, which the Board did. A74, ¶83.

On March 23, 2022, the Board discussed that JANA had declined the Company's request for Spencer Stuart to interview JANA's director candidates. A75-76, ¶85. On March 28, JANA sent the Board another letter criticizing its failure to schedule the Company's annual stockholder meeting. A76, ¶86.

At a March 30, 2022 Board meeting, the Board, including Svane, approved use of the March 2022 Case for its strategic review process. A77-78, ¶88. Defendant Geschke, the Company's Chief of Staff, noted the March 2022 Case "reflect[ed] actual fourth quarter performance." A77-78, ¶88.

On April 7, 2022, JANA publicly demanded that the Board schedule its annual meeting and accused Defendants Svane and CFO Glaser of disparaging and ignoring stockholders. A78-79, ¶¶90-91. The same day, Zendesk management met with JANA and discussed JANA's "value expectations"—JANA expressed its belief that the Company's value was between $100 and $110 per share. A81-82, ¶96.

On April 15, the Board discussed settlement scenarios with JANA and determined to "continue to engage with potential director candidates who might be added to the Board, including as part of a settlement with JANA or as part of a Board nominated slate in the event of a proxy contest with JANA." A82-83, ¶98. However, to preserve "negotiation leverage," the Board did not want to change its composition until after finalizing the strategic review process. A84, ¶99.

D. Zendesk Management Increases Revenue Guidance for FY2022.

At an April 26, 2022 Board Meeting, Zendesk management, including Defendants Svane, Geschke, Glaser, and Gennaro, presented an overview of Zendesk's Q1 2022 performance. A85-86, ¶101. Although net bookings were lower than expected in April 2022, Glaser stated that the "Company is in line to meet the Board Plan for the year." A85-86, ¶101. Svane touted Zendesk's "continuing growth" and "continued opportunity for long-term differentiation against [Zendesk's] competitors." A86-87, ¶102 (alteration in original). Glaser reported that management was addressing the temporary attrition from the "Great

Resignation," which contributed to the lower bookings, and planned "to optimize expenses for improvement of operating margins for the remainder of the year." A86-87, ¶102.

On April 28, 2022, Zendesk announced that Q1 2022 revenue increased 30% year-over-year to $388.3 million, beating prior guidance. A90-91, ¶108. On an earnings call the same day, Zendesk announced that it was increasing 2022 revenue guidance from $1.685 billion to $1.710 billion, matching the March 2022 Case. A90-91, ¶¶108-09.

E. Zendesk Receives and Rejects Superior Proposals and Terminates the Strategic Review Process.

On May 4, 2022, Zendesk provided potential bidders with revised projections (the "May 2022 Case"). A92-93, ¶111. The May 2022 Case reflected reduced cash flow as compared to the March 2022 Case, resulting from "below-expectation actual gross and net bookings for the months of April and May 2022." A92-93, ¶111.

On May 5, 2022, Zendesk received indications of interest from the Consortium at $120 per share and from Thoma Bravo at $125-$135 per share. A93, ¶112. Svane provided his views on those offers during a May 6, 2022 Board meeting, and discussed "the impact of the strategic review process on management and the Company's employees." A93-94, ¶113. Qatalyst summarized the proposals

and "potential approaches for moving forward" with the bidders and with JANA. A93-94, ¶113.

Seemingly without the Board's authorization, Svane met with the Consortium on May 11 and 13—and with Thoma Bravo on May 16—to discuss their offers. A93-95, ¶¶113, 115. On May 24, 2022, the Consortium submitted a revised $96 per share offer and Thoma Bravo submitted a revised $110 per share offer. A96-97, ¶118.

On May 27, 2022, Qatalyst presented to the Board a DCF analysis based on the May 2022 Case that valued the Company between $87 and $146 per share, with a $116.50 per share midpoint. A97-98, ¶¶120-21. Qatalyst's valuation reflected short-term macroeconomic conditions that were contributing to lower bookings and a decline in Zendesk's share price, such as "increasing competition in the market" and "[s]ignificant [short-term] pressure on SaaS share prices and multiples." A100-01, ¶125 (first alteration in original).

Goldman also presented a DCF analysis based on the May 2022 Case, valuing Zendesk between $100 and $176 per share, with a $138 per share midpoint. A98-99, ¶122. Goldman told the Board that its valuation incorporated "macroeconomic and other changes." A100-01, ¶125. Thus, both DCF analyses reflected the Company's weaker than expected bookings in April and May 2022. A97-100,

¶¶121-23. No one at the meeting, including Svane, expressed concerns about Zendesk's existing projections. A99-100, ¶123.

On May 28, 2022, the Board requested that Thoma Bravo increase its offer to $115 per share. A101, ¶126. On June 6, 2022, Thoma Bravo informed Zendesk that it had failed to secure sufficient financing to make an appealing offer, citing market and macroeconomic conditions. A101, ¶127. The Board, chaired by Svane, resolved that "concluding the strategic review process and continuing to execute on [Zendesk's] strategic plan [as reflected in the May 2022 Case] . . . would be in the best interests of the Company and its stockholders at this time." A102, ¶128.

F. The Board Negotiates a "Nearly-Finalized" JANA Settlement That Would Terminate Svane and Bass; the Consortium Makes a Low-Ball Offer.

With the Company's strategic review process concluded, the Board turned its attention back to the possibility of a settlement with JANA. During a meeting on June 6, 2022, Qatalyst provided the Board with terms for settling with JANA and warned that JANA may "expand its demands beyond what it c[ould] achieve in a proxy fight," including by "[m]ak[ing] commitments to change in management a prerequisite for a settlement" and insisting on "majority board change." A103, ¶130 (alterations in original). The Board decided to continue negotiations with JANA and to request that JANA execute an NDA. A103, ¶130.

On June 7, 2022, JANA refused to execute an NDA. A104, ¶132. On June 8, JANA publicly announced that it would sue to force Zendesk to schedule an annual meeting. A104, ¶132.

On June 9, 2022, the Company publicly announced its intention to remain a standalone public company and that it would hold its annual stockholder meeting on August 17. A106-07, ¶135.

At a June 11, 2022 Board meeting, "Svane discussed feedback from [JANA] and other investors" following the Board's strategic review termination. A107, ¶136; A1302. The Board also discussed "the possibility of a settlement" with JANA and "potential changes to the composition of the Board and the management team" in connection therewith. A107, ¶136; A1302. The Board decided to "seek a settlement of the proxy contest with JANA" and designated Bass, Koplow-McAdams, and Szkutak to negotiate with JANA. A107, ¶136; A1302.

During the June 11 meeting, Svane also discussed Zendesk's "anticipated second quarter financial results." A108, ¶137. The minutes do not reflect any discussion of deteriorating bookings, negative outlooks, economic headwinds, or material changes in Zendesk's short- or long-term prospects. A108, ¶137.

On June 14, the *WSJ* reported that "Zendesk and JANA are discussing a truce that could involve Mikkel Svane stepping down . . . as well as changes to the board, including the removal of director Carl Bass[.]" A108, ¶138 (alteration in original).

The Consortium immediately offered to purchase Zendesk at "as high as $82.00 per share," exploiting the opportunity to save Svane and others from humiliating public ouster in exchange for a lower price. A108, ¶139.

During the Board's June 15, 2022 meeting, Geschke (Svane's Chief of Staff) suddenly painted a dire picture of Zendesk's outlook, discussing "management's current second quarter forecast" in the context of "current market forces" and "related changing conditions," including negative trends in bookings data, employee attrition, and other related expenses. A108-09, ¶140. Zendesk's operational performance had not materially changed since June 6 (when it cancelled its strategic review and determined to remain a standalone Company) or June 11 (when the Board last discussed Zendesk's financial condition). A109, ¶141. However, Svane and management learned two things in the interim: (i) the Board had determined to seek a JANA settlement, and (ii) the Consortium now sought to purchase Zendesk for a price unjustifiable under the already conservative May 2022 Case. A109, ¶141.

Geschke again presented to the Board "plans to improve the Company's margins and cut expenses in light of" the bookings reductions. A108-09, ¶140.

During the June 15 meeting, the Board and management also discussed "the proposal previously approved by the Board to JANA," "JANA's reaction and responses," and "potential committee composition if the Board were reconstituted in connection with settlement with JANA." A110, ¶142. The substance of the JANA

negotiations was not recorded in minutes or disclosed in the Proxy, nor were the settlement terms "previously approved by the Board." A111-12, ¶144; *see* A1308-25, at A1309-11.

On June 17, 2022, the Board sent JANA a "nearly-finalized" draft settlement agreement in which the Board agreed to, *inter alia*: (i) remove Svane as CEO; (ii) remove three Zendesk directors; and (iii) appoint two JANA nominees. A111-13, ¶¶144-45; A1309-11. Zendesk later confirmed the Board was "on the 1 yard line of bringing JANA on the board, changing management" and "ready to make sweeping changes at the board level," and admitted the settlement was in its "final stages." A112-13, ¶145.

G. Management Undercuts the Company's Valuation to Facilitate the Transaction.

On June 17, 2022, just as the Board was about to settle with JANA and remove Svane and Bass, the Consortium offered to purchase Zendesk for $75.50 per share. A113, ¶147.

On June 19, the Board held a special meeting with management, including Svane and Geschke, and determined to put "further discussions with JANA . . . on hold pending resolution of the proposal to acquire the Company." A114, ¶¶148-49. The Board told Qatalyst to "engage with the Consortium in an effort to improve on

the proposed price" but did not discuss making a counteroffer. A114-15, ¶150; A1328.

Immediately after receiving the Consortium's reduced offer, management—including Defendants Svane, Glaser, Geschke, and Gennaro—began slashing the May 2022 Case. A115-16, ¶151 & n.182. Those were the same projections the Board and its advisors had relied on less than two weeks earlier when the Board cancelled its strategic review process and determined that continuing as a standalone Company was in "the best interests of the Company and its stockholders." A102, ¶128; A115, ¶151 n.182. Barely a week after Svane's uneventful June 11, 2022 report to the Board, Geschke reported to the Board on June 19 that Glaser was "updating the Company's long-range plan to account for the significant changes in economic conditions and negative trends in gross and net bookings [] and deterioration in business momentum that deviated materially from the assumptions underlying prior expectations." A115-16, ¶151.

Svane and Geschke met with the Consortium on June 20, 2022 to discuss "possible adjustments to Zendesk's cost structure to reflect changes in macroeconomic outlook and business momentum," assuring them that management planned to improve operating margins in the face of the drastic revenue cuts. A117, ¶154.

Management then created—and simultaneously presented to the Board—two sets of reduced long-range projections: the "Baseline Case"[4] and the "Upside Case." A117, ¶155. Geschke conceded that Glaser "and her team" had generated the projections "in very short order." A120, ¶162; A1330. Both sets of projections slashed Zendesk's long-term revenue projections by $13 billion. A118-19, ¶¶157-60. But the Baseline Case painted a much bleaker picture: it ignored expense reduction initiatives to improve operating margin growth initiatives that Zendesk had been developing since April, and which Geschke had presented to the Board just six days prior. A118-19, ¶¶157-60.

Geschke emailed both sets of projections to the Board on June 21, 2022. A120, ¶162. Geschke downplayed the Upside Case as "preliminary" and "not [] tested," but acknowledged that management had "commenced planning for certain expense reductions that we would hope can put us on the path of the [U]pside [C]ase." A120, ¶162; A1330. Geschke then told the Board that, "[i]n the interest of time," management would provide only the Baseline Case to Qatalyst and Goldman for their fairness analyses. A120-21, ¶163; A1330. The Board accepted management's decision without question or discussion. A120-21, ¶163; A1330. Later that day, Glaser sent Qatalyst the Baseline Case. A122, ¶164; A1332-33.

[4] The Proxy refers to the Baseline Case as the "June 2022 Case." A117, ¶155.

Also on June 21, the Consortium delivered its $77.50 per share "best and final" offer, which the Board considered during a meeting the next day. A122-23, ¶¶165-66. The advisors' presentations at the June 22 Board meeting incorporated only the Baseline Case. A122-24, ¶¶166-68.

There is no indication that the Board ever questioned the Baseline Case's reliability despite: (i) knowing it was created in a matter of days or even hours, (ii) that Gennaro and Zendesk's COO Jeff Titterton had reviewed and approved the Baseline Case in a matter of hours, and (iii) the Board's reliance on the higher May 2022 Case to, *e.g.*, reject Thoma Bravo's $110 per share offer and terminate its strategic review process in early June. A97, ¶120; A101-02, ¶¶126-28; A115-16, ¶151; A120-21, ¶¶161-63; A124-27, ¶¶168-73.

During the June 22, 2022 meeting, after Svane and Geschke shared their "perspectives," the Board finalized the Transaction at $77.50 per share. On June 23, with all Defendants except Gennaro present, the Board formally approved the Baseline Case. A135-36, ¶185.

The presentations by both Goldman and Qatalyst—which incorporated the Baseline Case and included other downward adjustments that were absent from their late-May 2022 valuations—still reflected that the $77.50 Transaction price was unfair. A129-32, ¶¶177-79. It was significantly below the midpoint of six of Goldman's seven valuation analyses and below the full range for precedent

transactions based on EV / NTM Revenue. A130-31, ¶178. The only valuation analysis with a midpoint below the Transaction price—"Precedent M&A Premia"—was based on Zendesk's then-current (and extremely depressed) share price. A130-31, ¶178. Qatalyst's presentation also showed that over twenty prominent financial institutions invested in the Transaction, confirming that $77.50 was an attractive buy-side price. A131-33, ¶¶179-80.

After the presentations, the Board approved a Retention Plan for Zendesk employees, which included $1.5 million and $2 million grants for Glaser and Gennaro, respectively. A136-37, ¶186. Those awards compensated Glaser and Gennaro for the loss of options due to the low Transaction price and rewarded them for preparing the slashed projections used to justify that price. A138-42, ¶¶190-97.

The Board then approved the Transaction and executed the Merger Agreement. A137, ¶187. On June 24, 2022, Zendesk announced the Transaction and filed a Q&A distributed to employees that stated: "We don't anticipate any changes to management as a result of this acquisition." A137-38, ¶¶188-89.

H. Post-signing Events Confirm the Transaction Price's Unfairness.

After the Merger Agreement was signed, a number of developments confirmed that the Board approved an unfair price.

First, on July 28, 2022, Zendesk announced Q2 2022 revenue of $407.2 million and operating income of $23.6 million. A142-43, ¶198. Rather than

decreasing as a result of the supposed business challenges, those results were at the high end of the guidance provided during Zendesk's Q1 2022 earnings call. A142-43, ¶198

Second, on August 28, 2022, Light Street Capital ("Light Street")—a technology-focused venture capital firm—proposed to the Board a recapitalization followed by a tender offer transaction that valued the Company at $82.50 per share. A149, ¶212. Light Street criticized the Transaction price as inadequate, attacked the pessimistic Baseline Case, and called for Svane and three directors to resign. A149-51, ¶¶212-16. On August 31, the Board summarily rejected Light Street's proposal. A151-52, ¶¶217, 219-20.

Third, on September 3, 2022, Glass Lewis recommended against the Transaction. A153-54, ¶222. Glass Lewis questioned the Board's decision to terminate the strategic review process and the adoption of the Baseline Case that was based only on "suboptimal gross and net booking trends over two months." A153-54, ¶¶222-23.

I. The Transaction Closes.

On August 8, 2022, Zendesk filed the Proxy. A143, ¶199. On September 19, 2022, the Company's stockholders voted to approve the Transaction, with only 62% of eligible shares voting in favor. A155, ¶225. The Transaction closed on November 22. A155, ¶225.

Svane resigned on November 28, 2022. A155-56, ¶226. Glaser resigned a few days later, and Geschke resigned in June 2023. A155-56, ¶226. Each received millions of dollars in "double trigger" cash awards they would not have received had the Board completed its settlement with JANA instead of accepting the unfair Transaction, as a settlement did not trigger change-in-control-based awards. A132-34, ¶¶180-82; A138-41, ¶¶190-95; A155-56, ¶226.

J. This Litigation.

Following a Section 220 investigation and trial, Plaintiffs filed a complaint on November 9, 2023, alleging that Defendants breached their *Revlon* duties by engineering an underpriced sale as an alternative to ouster through a settlement with JANA.[5] Plaintiffs amended that complaint on January 2, 2024.[6] After Defendants moved to dismiss, Plaintiffs amended a second time on May 31, 2024 (the "Complaint").[7] Defendants renewed their Motion to Dismiss, arguing that the Complaint should be dismissed under *Corwin* and that Plaintiffs failed to adequately allege that any alleged conflicts actually undermined the sales process sufficiently to state a claim under *Revlon*.[8]

[5] Trans. ID 71369603.

[6] Trans. ID 71716126.

[7] A28-165.

[8] A166-233.

After full briefing, the Court of Chancery heard Defendants' Motion to Dismiss on January 22, 2025.[9] In a short bench ruling, the Court of Chancery dismissed the Complaint under *Corwin*,[10] stating that "the stockholders received all the material information they needed to make a decision on the merger" and that the business judgment rule therefore applied.[11] The Court subsequently issued a short-form Order that, in relevant part, provided the Court's reasoning in finding Svane's conflict (*i.e.*, the Board's planned termination of him) immaterial:

> JANA's quite public involvement and aggressive criticisms put stockholders on notice that management and the board could be agreeing to a deal out of self-interest. There is also a policy issue involved in judging the point at which of a potential CEO termination should be disclosed. That type of disclosure could be viewed as having a coercive effect on the stockholder vote, because if stockholders vote down the deal, they would be left as investors in a company without a CEO. On the alleged facts, the disclosure about a deal with JANA that could involve the termination of the Company's CEO does not state a claim.[12]

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[9] Trans. ID 75492640.

[10] The Transcript Ruling ("Tr. at __") is attached hereto as Exhibit A. Following this ruling, the trial court granted former plaintiff Amethyst Arbitrage International Master Fund's Motion to Withdraw on February 20, 2025. Trans. ID 75676369.

[11] Tr. at 79.

[12] Order at 3.

ARGUMENT

I. THE TRIAL COURT ERRED IN APPLYING *CORWIN* CLEANSING BECAUSE THE PROXY OMITTED MATERIAL INFORMATION

A. Question Presented

Whether the trial court erred in holding that Defendants met their burden of establishing application of the business judgment rule under *Corwin* where the Proxy failed to disclose (i) a Board-approved and "nearly[] finalized" Cooperation Agreement with JANA that required Svane's termination as CEO and termination of three directors; and (ii) the Upside Case projections, which were created and submitted to the Board simultaneously with the Baseline Case just days before the Board approved the Consortium's drastically reduced offer.

These questions were raised below (A1152-67) and considered by the trial court (Order at 3).

B. Scope of Review

This Court reviews the application of *Corwin* on a motion to dismiss *de novo*. *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018). At the pleadings stage, all well-pleaded allegations are accepted as true, and the Court must draw all reasonable inferences in Plaintiffs' favor. *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002). Dismissal is inappropriate unless Plaintiffs "would not be entitled to

recover under any reasonably conceivable set of circumstances susceptible of proof." *Id.* at 897.

C. Merits of Argument

Corwin holds that business judgment review may apply to a merger only if it "has been approved by a fully informed, uncoerced majority of the disinterested stockholders." *Corwin*, 125 A.3d at 306.

Corwin cleansing is not available if plaintiffs plead facts "support[ing] a rational inference that material facts were not disclosed or that the disclosed information was otherwise materially misleading." *Morrison*, 191 A.3d at 282. Materiality "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote[,]" but only that the omitted fact would "alter[] the 'total mix' of information made available." *Id.* at 283. "Partial disclosure, in which some material facts are not disclosed or are presented in an ambiguous, incomplete, or misleading manner, is not sufficient to meet a fiduciary's disclosure obligations." *Appel v. Berkman*, 180 A.3d 1055, 1064 (Del. 2018); *see also Morrison*, 191 A.3d at 272 ("[P]artial and elliptical disclosures cannot facilitate the protection of the business judgment rule under the *Corwin* doctrine." (internal quotations and citations omitted)).

The trial court erred by dismissing the Complaint under *Corwin* because the Proxy failed to disclose (i) that the Board authorized and nearly finalized a settlement

with JANA that required terminating Svane (as CEO) and three directors; and (ii) the Upside Case, which was simultaneously created and submitted to the Board with the Baseline Case just days before the Board approved the Consortium's drastically reduced offer. A1152-67; Order at 3.

1. The Stockholder Vote Was Uninformed Because the Proxy Failed to Disclose Svane's and Three Directors' Imminent Termination

The Proxy failed to disclose that the Board was "on the 1 yard line" of a settlement with JANA that required Svane's termination as CEO and three director resignations in a "nearly[] finalized" Cooperation Agreement. A112-13, ¶145; A1180; A1309-11. The omission of that material conflict—which it is reasonably conceivable caused Svane, the management team, and the Board to do an immediate about-face and favor a sale—rendered the Proxy materially misleading and incomplete. *See In re Xura, Inc. S'holder Litig.*, 2018 WL 6498677, at *13 (Del. Ch. Dec. 10, 2018) (requiring full disclosure of a CEO's "self-interested motivation[s] for pushing an allegedly undervalued [t]ransaction on the [c]ompany and its stockholders"); *see also In re Mindbody, Inc. S'holders Litig.*, 2020 WL 5870084, at *27 (Del. Ch. Oct. 2, 2020) ("Facts that shed light on the depth of a lead negotiator's commitment to the acquirer and personal economic incentives are generally deemed material[.]").

As alleged in the Complaint, on June 9, 2022, after rejecting materially higher offers and deciding that "execut[ing] on [Zendesk's] strategic plan . . . would be in the best interests of the Company and its stockholders," the Board announced it had "unanimously determined that the right path to sustainably grow stockholder value lies in advancing Zendesk as an independent business." A102, ¶128; A106-07, ¶135. Less than a week later, on June 15, 2022, the Board approved terms of a settlement with JANA and, on June 17, sent JANA a "near final[]" Cooperation Agreement that required, *inter alia*, (i) Svane's resignation as CEO, (ii) three director resignations, and (iii) two JANA board appointments. A111-13, ¶¶144-45; A1309-11. Company management then immediately slashed Zendesk's long-term revenue projections by $13 billion (nearly 25%), and, on June 23, the Board approved the Consortium's substantially reduced offer of $77.50.

The Proxy generally disclosed the existence of "settlement discussions" with JANA but did not disclose Svane's and three directors' imminent terminations, the Cooperation Agreement, or its Board-approved terms. A298-99. The imminent termination of Svane and three directors, as required by the JANA settlement, was material because it motivated management and the Board's last-minute "one-eighty" to support the Consortium's drastically reduced offer after slashing Zendesk's projections to justify it. *See Xura*, 2018 WL 6498677, at *13 (finding material "self-interested motivation[s] for pushing an allegedly undervalued [t]ransaction").

Materiality is also confirmed by the contemporaneous reactions of numerous market participants. Investors, analysts, and proxy advisors all questioned Zendesk's rationale for recommending a sale given the failure of the Momentive Transaction and the Board's recent termination of its formal strategic review process.

Glass Lewis recommended against the Transaction, questioning the Board's decision to terminate the sale process only to reverse course and pursue a bid at "a value substantially worse than previously contemplated terms." A153-54, ¶222. Another market commentator opined, in view of Zendesk's release of positive Q2 2022 financial results, that: "Given the continued strong operational performance with revenue growing nearly 30% and margins continuing to improve, one must think ZEN may possibly be regretting accepting such a low takeout offer." A1147. And sophisticated technology investor Light Street publicly decried the Transaction, stating: "There is no justifiable reason to sell the Company at a price more than 40% below the offer initially rejected by the Board." A1148. Disclosure of Svane's imminent termination and Board overhaul would have explained management's sudden reversal.

The Board's undisclosed agreement to terminate Svane and three directors was particularly material to stockholders in the context of this Transaction. As reflected below, management's decision to slash the Company's projections and the

Board's decision to support an offer meaningfully lower than offers rejected days earlier perfectly coincides with the Board's approval of the Cooperation Agreement:

- **May 27, 2022**: Qatalyst and Goldman value Zendesk between $87-$146 and $100-$176 per share, respectively (A97-99, ¶¶119-22);

- **May 28, 2022**: The Board rejects Thoma Bravo's fully diligenced offer of $110 per share (A101, ¶126);

- **June 9, 2022**: The Board announces the termination of the strategic review in favor of its standalone plan, supported by the May 2022 Case (A106-07, ¶135);

- **(*Undisclosed*) June 15, 2022**: The Board approves the Cooperation Agreement terms, including Svane's termination as CEO (A110-11, ¶¶142-43; A1140-41);

- **(*Undisclosed*) June 17, 2022**: The Board transmits the "nearly-finalized" Cooperation Agreement to JANA (A111-13, ¶¶144-45; A1140-41; A1308-25);

- **June 17, 2022**: The Consortium offers $75.50 per share (A113, ¶147);

- **June 19, 2022**: Management slashes the May 2022 Case by $13 billion (nearly 25%) (A114-16, ¶¶150-51); and

- **June 23, 2022**: The Board accepts the Consortium's $77.50 per share offer (A135-37, ¶¶184-87).

The Consortium's dramatically reduced bid provided key Zendesk decisionmakers—CEO Svane, management, and at least three other Board members—a last-minute lifeline to avoid embarrassing public ouster (and, for

management, the potential loss of millions of dollars in unvested equity).[13] The failure to disclose the Cooperation Agreement or its terms deprived stockholders of critical information regarding the motivations of those tasked with negotiating and approving the Transaction.

Xura supports Plaintiff's argument. There, an activist announced its "inten[t] to launch a proxy contest" and "made clear to both [the CEO] and the Board its view that Xura should find a new CEO." 2018 WL 6498677, at *8. Xura's chairman then "privately advised [the CEO] that the [b]oard was considering major changes if there was no deal, including [replacing him]." *Id.* at *8 & n.91. The Court of Chancery rejected *Corwin* cleansing because, although the proxy disclosed activist pressure, it failed to disclose that the chairman notified the CEO that the board was likely to replace him absent a company sale. *Id.* at *8 n.91, *13. The *Xura* court reasoned that stockholders were not fully informed of the CEO's "self-interested motivation for pushing an allegedly undervalued Transaction on the Company and its stockholders." *Id.* at *13.

Despite acknowledging *Xura*'s holding that the failure to disclose the CEO's self-interested motivations was an independent disclosure failure that precluded

[13] Each of Svane, Glaser, and Geschke received millions of dollars in "double trigger" cash awards they would not have received had the Board completed its settlement with JANA, as the settlement would not have triggered change-in-control-based awards. A72-74, ¶¶80-82; A138-42, ¶¶190-97; A155-56, ¶226.

Corwin cleansing,[14] the trial court distinguished *Xura* by reasoning that "JANA's quite public involvement and aggressive criticisms put stockholders on notice that management and the board could be agreeing to a deal out of self-interest." Order at 3. But mere activist pressure, on the one hand, and a formal Board decision to terminate a CEO, on the other, are fundamentally different things. Indeed, in *Xura*, stockholders were likewise aware of activist pressure and large stockholders' dissatisfaction with the CEO's performance.[15] The *Xura* Court nonetheless found material the Xura board chairman's "confidential message to [the CEO] regarding his dim future with the Company [that] was not disclosed to shareholders."[16] Likewise here, it is undisputed that Zendesk's Proxy only generally described the Board's "settlement discussions" with JANA and omitted JANA's desire to replace Svane as CEO, the Board's agreement to do so, and the replacement of three directors. A298-99. And none of JANA's public letters called for Svane's

[14] *See Xura*, 2018 WL 6498677, at *12 (holding that "[o]ne disclosure violation is sufficient to prevent application of *Corwin*" and "Plaintiff has adequately pled seven," including that stockholders lacked material information that the CEO "received word from [the chairman] during negotiations with Siris that his position at Xura was in jeopardy if the Company was not sold" (internal alterations and citations omitted)).

[15] *See Xura*, 2018 WL 6498677, at *8 & n.91 (noting stockholders' awareness of "major stockholders' dissatisfaction and the proxy contest rumblings").

[16] *Id*.

termination—they called *only* for changes to the Board. A61-62, ¶58; A64-65, ¶66; A78-79, ¶¶90-91; A1158.

The trial court further discounted *Xura* by reasoning that disclosure of Svane's imminent termination "could be viewed as having a coercive effect on the stockholder vote, because if stockholders vote down the deal, they would be left as investors in a company without a CEO." Order at 3. That reasoning—which Defendants never asserted below—was erroneous for at least two reasons.

First, the Complaint alleges (accurately) that Svane was deeply unpopular with Zendesk's stockholders, only 7.5% of whom had voted in favor of Svane's proposed Momentive Transaction, and that a prominent mutual fund had called for Svane's ouster. A62, ¶59; A64, ¶65. Wrongful coercion exists only where "stockholders are induced to vote *in favor* of the proposed transaction for some reason other than the economic merits of that transaction."[17] Here, Plaintiffs are

[17] *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *14 (Del. Ch. Mar. 31, 2017) (internal quotations omitted; emphasis added).

entitled to the opposite inference:[18] that stockholders would have *voted against* the Transaction *because* doing so would have resulted in Svane's firing.[19]

Second, even assuming the facts of Svane's potential termination, and a Board shakeup, were substantively coercive, those facts should have nonetheless been disclosed. The trial court cited no authority (and Plaintiffs are aware of none) supporting the proposition that a fiduciary is alleviated of its disclosure obligations if material information in its possession is potentially coercive. Respectfully, such a rule would set bad policy, and even arguably incentivize coercion at the board level, because the coercion would not require disclosure. For example, a fiduciary could presumably "negotiate" a self-interested merger by threatening to go hostile, but then withhold the fact of its threats from stockholders on the basis that disclosing the information could be coercive. That is not the law. To the contrary: "The duty of disclosure requires that *all material information must be disclosed* when seeking

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[18] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011) ("When considering a defendant's motion to dismiss, a trial court should . . . draw all reasonable inferences in favor of the plaintiff[.]").

[19] In addition, in reasoning that voting down the Transaction would leave stockholders as "investors in a company without a CEO" (Order at 3), the Court of Chancery either failed to consider or misapprehended the provision in the JANA settlement agreement that contemplated "an orderly transition," whereby Svane would remain as CEO during a "CEO succession and selection process" and remain a director on the Board (including potentially as Chairman) after a new CEO's appointment. A1311, §3(f).

stockholder action,"[20] and Delaware courts have repeatedly held that stockholders are entitled to know about conflicts that may have affected a sale process.[21] Moreover, "*Corwin* was never intended to serve as a massive eraser . . . ." *Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152, at *20 (Del. Ch. May 31, 2017) (internal quotations omitted).

Finally, none of Defendants' counter-authorities support the application of *Corwin*. Defendants below principally relied on *Butler v. Leavitt*[22] and *In re ZAGG, Stockholder Litigation*[23] for the proposition that the Proxy was sufficient because it disclosed facts "from which stockholders could deduce that the Board was under activist pressure." A202-03. But activist pressure—*i.e.*, the *potential* for board or management changes—is fundamentally different form an *actual* board decision to terminate members of management and the Board. Indeed, in *Butler* and *ZAGG*, the proxies disclosed both activist pressure *and*, unlike here, specific board actions in response to that pressure. The *Butler* proxy disclosed an activist's sale demand and

[20] *Unanue v. Unanue*, 2004 WL 2521292, at *10 (Del. Ch. Nov. 3, 2004) (emphasis added).

[21] *See, e.g.*, *City of Dearborn Police & Fire Revised Ret. Sys. (Chapter 23) v. Brookfield Asset Mgmt*, 314 A.3d 1108, 1135 (Del. 2024); *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114 (Del. Ch. 2007) (requiring disclosure of a CEO's conflict in a sale process).

[22] C.A. No. 2020-0343-JTL (Del. Ch. Feb. 9, 2021) (TRANSCRIPT) ("*Butler* Tr.").

[23] Consol. C.A. No. 2021-0982-NAC (Del. Ch. Aug. 16, 2023) (TRANSCRIPT) ("*ZAGG* Tr.").

that the Company immediately launched a sale process. *Butler* Tr. at 59-60. The court merely determined that a disclosure expressly stating what was apparent from the chronology—*i.e.*, that the sale process was launched in response to activist pressure—"would [not] add anything." *Id.* Likewise, in *ZAGG*, the proxy disclosed an activist demand for a compensation change and the execution of a cooperation agreement requiring that change. *ZAGG* Tr. at 23-24. The *ZAGG* court similarly deemed unnecessary an express disclosure that "the Board changed its compensation in response to 'activist pressure.'" *Id.*

Here, by contrast, the Proxy disclosed activist pressure and "settlement discussions" generally, but failed to disclose material facts regarding the Board's actions—*i.e.*, agreeing to a Cooperation Agreement that required Svane's termination and the resignations of three directors. A298-99. At best, the Proxy made partial disclosures of JANA's activism and "settlement negotiations" that failed to adequately alert stockholders to management and the Board's self-interested motivations to facilitate and approve the Transaction. Once Defendants "traveled down the road" of disclosing JANA's activism and settlement discussions, they were required to "provide the stockholders with an accurate, full, and fair characterization" of that activism and its results. *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994); *see also Appel*, 180 A.3d at 1064.

2. The Stockholder Vote Was Uninformed Because the Proxy Failed to Disclose the Upside Case

The trial court ruled—without analysis or discussion—that the Proxy need not disclose the Upside Case.[24] That was error for two reasons: (i) the Upside Case was a material part of the "circumstances" surrounding "preparation" of the Baseline Case used to justify the Transaction, and (ii) the Upside Case was not only reliable but reflected management's best estimate of Zendesk's future prospects. *See Chester Cnty. Emps.' Ret. Fund v. KCG Hldgs., Inc.*, 2019 WL 2564093, at *14 (Del. Ch. June 21, 2019) (requiring disclosure of the "circumstances of the preparation [surrounding] Revised Projections" where those circumstances created "sufficient . . . doubt [as to the Revised Projections'] reliability."); *Goldstein v. Denner*, 2022 WL 1671006, at *26 (Del. Ch. May 26, 2022) (finding that in cash-out mergers, "reliable management projections of the company's future prospects are of obvious materiality to the electorate" (citation and internal quotations omitted)); *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 203 (Del. Ch. 2007) (ordering disclosure of projections that reflected "management's inside view of the company's prospects.").

[24] The trial court's order briefly addressed Plaintiffs' other two disclosure claims and said nothing about the Proxy's failure to disclose the Upside Case. Order at 3.

"[T]he same day the [JANA] settlement agreement was prepared,"[25] the Consortium communicated to the Board a significantly decreased offer, exploiting the "opportunity to provide a lifeline to Bass and Svane (and other members of senior management)[.]" A108, ¶139. "In response, management significantly cut the Company's long-range forecasts"[26] and, "in very short order" provided the Board with two sets of projections: the Baseline Case and Upside Case. A120, ¶162. Both included identical—and massive—cuts to Zendesk's long-term revenue. The Upside Case included better operating margins based on expense reductions (a reasonable expectation given Zendesk's purportedly dire outlook and already-planned cost-cutting measures in response to lower bookings). In contrast, the Baseline Case left the Company's operating margins unchanged, painting a bleaker picture of Zendesk's financial prospects that failed to account for Zendesk's planned and imminent expense reduction measures, which Zendesk management was planning to implement. A117-19, ¶¶155-58.

The Proxy disclosed the Baseline Case but omitted any mention of the Upside Case. A117, ¶155; A128, ¶174. That omission was material: Delaware law requires disclosure of "the circumstances surrounding the preparation" of last-minute

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[25] *In re Zendesk, Inc. Section 220 Litig.*, 2023 WL 5496485, at *1 (Del. Ch. Aug. 25, 2023) ("*220 Opinion*").

[26] *220 Opinion*, 2023 WL 5496485, at *9.

projections created to support a lower offer price like the Baseline Case if those circumstances—like the Upside Case's creation here—cast doubt on the reliability of the disclosed projections. *KCG*, 2019 WL 2564093, at *14; *see also Goldstein*, 2022 WL 1671006, at *27 (finding material the circumstances surrounding projections "created . . . at the last-minute" that "reduced the [c]ompany's internal estimate of standalone value by one third"); *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *37 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (finding material omissions where the proxy failed to fully disclose "the circumstances surrounding the[] preparation" of last-minute projections created by management to support a low-ball offer).

In *KCG*, like here, conflicted management hastily created "more pessimistic" "Revised Projections" to justify a lower offer immediately before the board approved it and after the CEO—like Svane here—developed unique motivations to approve a lower transaction price. 2019 WL 2564093, at *8, *14. The *KCG* court held that "if the circumstances surrounding the preparation of final projections relied upon by the Board and disclosed to stockholder[s] cast doubt on their reliability, then those circumstances should be disclosed." *Id.* at *14. Here, the circumstances surrounding the Baseline Case's creation indisputably include the Upside Case, which was prepared in tandem with the Baseline Case, had the same revenue assumptions, and was simultaneously submitted to the Board. A117-18, ¶¶155-56;

A120, ¶162. It is also not reasonably disputable that the Upside Case "cast[s] doubt on [the] reliability" of the Baseline Case, which "[was] significantly more pessimistic concerning [Zendesk's] standalone value than [the Upside Case]." *KCG*, 2019 WL 2564093, at *14. Thus, the Upside Case should have been disclosed.

The trial court also erred to the extent it credited Defendants' efforts to distinguish *KCG* and *Goldstein* only on reliability grounds. A1369 (citing *Denner*'s and *KCG*'s discussion regarding the reliability of the undisclosed projections in those cases and stating that "*Denner* and *KCG* do not hold that a company must disclose every case of projections.").[27] Defendants failed to directly address—let alone refute—Plaintiff's argument that the Upside Case required disclosure because it was part of the "circumstances surrounding the preparation" of the Baseline Case. *See* A206-07 (arguing that the "Upside Case was speculative and thus immaterial"); A1367-70 (arguing that "the circumstances surrounding the creation of the Upside Case show that it was unreliable and thus not required to be disclosed.").

The trial court also erred to the extent it credited Defendants' argument that stockholders "had all the information to draw [] a conclusion" that "management wrongfully revised projections downwards at the last minute to justify the Merger."[28]

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[27] As discussed *infra*, Defendants' challenge to the Upside Case's reliability also fails.

[28] A1361.

That argument is wrong and misses the point. Stockholders were entitled to all material information to enable them to assess the Baseline Case projections on which the directors relied in approving the Transaction. Simultaneously created, more-optimistic Upside Case projections were critical to that assessment. "What [D]efendants were not free to do was to take the position that the stockholders had no right to know this information because they, the defendants, had determined it was not important." *Tornetta v. Musk*, 310 A.3d 430, 523 (Del. Ch. 2024) (quoting *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 18-19 (Del. Ch. 2002)); *see also Appel*, 180 A.3d at 1064 ("[S]tockholders should not be expected to speculate about facts any reasonable board advisor or director would find to be of importance.").

The trial court's ruling that the Upside Case did not require disclosure was also error because the Upside Case was reliable. *See Goldstein*, 2022 WL 1671006, at *26; *KCG*, 2019 WL 2564093, at *13-14. The Upside Case included the same $13 billion (*i.e.*, nearly 25%) revenue reduction from the May 2022 Case (upon which the Board had relied just two weeks prior to the Upside Case's creation). A117-18, ¶156. The Upside Case was still significantly more pessimistic than the May 2022 Case, and more optimistic than the Baseline Case, only because the Upside Case included improved operating margins based on reduced expenses, which the Company was already undertaking. A117-19, ¶¶156-58. It was a

reasonable expectation that Zendesk would institute cost-cutting initiatives in response to its apparently sudden financial challenges "that deviated materially from the assumptions underlying prior expectations"[29] and which (apparently) triggered Zendesk's slashed revenue projections.

And that is precisely what Zendesk did upon receiving lower bookings. As the Complaint details: (i) in April 2022, in response to "lower [Q1] net bookings," Glaser presented the Board plans to "optimize expenses for improvement of operating margins for the remainder of the year;"[30] (ii) on June 15, Geschke presented the Board "plans to improve the Company's margins and cut expenses in light of" the bookings reduction;[31] and (iii) on June 21 Geschke stated: "[A]s [the Board] know[s], we have commenced planning for certain expense reductions that we would hope can put us on the path of the [U]pside [C]ase." A120, ¶162 (second and third alterations in original). Zendesk was so committed to those expense-cutting measures that after receiving the Consortium's revised offer in late June, Company management presented the Consortium with "adjustments to Zendesk's cost structure to reflect changes in the macroeconomic outlook and business momentum." A117, ¶154. And by August 17, 2022, Zendesk had engaged Bain to

[29] A115-16, ¶151.

[30] A85-87, ¶¶101-02.

[31] A108-09, ¶140.

execute expense-cutting and margin-improvement measures. A146, ¶206; A149, ¶212.

Thus, the Upside Case included reasonable assumptions regarding Zendesk's future performance. Conversely, the Baseline Case unreasonably assumed that, in the face of a 25%, long-term and sudden reduction in Zendesk's revenue caused by "significant changes in economic conditions,"[32] management would do nothing and continue under the same cost structure for the next 10 years. Thus, at minimum, it is reasonably inferable that the Upside Case was equally reliable as the Baseline Case and should have been disclosed. *See Goldstein*, 2022 WL 1671006, at *26 (deeming reliable—and thus material—more-optimistic projections when the proxy only disclosed conservative projections in justifying a new, reduced offer).

The trial court erred to the extent it credited Defendants' argument that the Upside Case was unreliable because Zendesk's plans to improve its operating margins were "speculative," "preliminary" and "ha[d] not been tested." A205-06 (alteration in original); A1368. Defendants relied on cherry-picked, self-serving statements—made by conflicted management after slashing Zendesk's existing projections to justify the Consortium's lowball offer[33]—and, as described above, the

[32] A115-16, ¶151.

[33] *See* A2006-07; A1368.

pleading-stage record is full of evidence that contradicts those statements, showing that the Upside Case rested on reasonable and expected improvements to Zendesk's operating margins. Reasonable inferences must be drawn in Plaintiffs' favor at the pleadings stage, and crediting Defendants' factual assertions "regarding the weight of the . . . projections would require drawing an impermissible inference in favor of Defendants." *City of Warren Gen. Emps.' Ret. Sys. v. Roche*, 2020 WL 7023896, at *21 (Del. Ch. Nov. 30, 2020); *see also KCG*, 2019 WL 2564093, at *10 (finding materiality inquiry "fact-intensive" and ill-suited to pleading stage resolution).

The trial court also erred to the extent it credited Defendants' argument below that disclosing the Upside Case "would have risked misleading stockholders into holding out for a better alternative that would not have arrived." A178; *see also id.* at A205-06. That counterfactually assumes the Transaction was value-maximizing (including relative to a no-deal scenario) and defies fundamental principles underlying Delaware disclosure law. *See, e.g.*, *Tornetta*, 310 A.3d at 522-23 (requiring "accurate, full, and fair characterization" of events and prohibiting exclusion of material information because defendants "determined it was not important"); *Maric Cap. Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010) (finding misleading a proxy that "selectively disclosed projections relating to [the company's] future performance"). Had Defendants disclosed all material information regarding the Upside Case (including Zendesk's

expense reduction plans and the Board's statements regarding the Upside Case's reliability), stockholders could have made their own determination about which projections better predicted Zendesk's future performance.

Finally, Defendants' counter-authorities are inapplicable. Unlike here, *Arnold* and *In re Micromet, Inc. Shareholders Litigation*, 2012 WL 681785 (Del. Ch. Feb. 29, 2012) involved significantly more uncertain undisclosed information,[34] and the courts in those cases relied on discovery records, including "several affidavits and deposition testimony," in making factual findings of unreliability. *Arnold*, 650 A.2d at 1283; *Micromet*, 2012 WL 681785, at *13. In *Sciannella v. AstraZeneca UK Ltd.*, 2024 WL 3327765 (Del. Ch. July 8, 2024), the court distinguished *KCG* and *Goldstein* on the same basis that distinguishes *AstraZeneca* from this case: the circumstances surrounding the creation of the disclosed projections in *AstraZeneca*—unlike the circumstances surrounding Baseline Case's creation here—"d[id] not cast doubt on their reliability" and "d[id] not support a reasonable inference that the [undisclosed] Projections were material." *AstraZeneca*, 2024 WL 3327765, at *33-35.

[34] *See Arnold*, 650 A.2d at 1282 (finding unreliable a single per-share value in an advisor presentation that was contingent on numerous uncertain asset values); *Micromet*, 2012 WL 681785, at *13 (finding unreliable "very, very optimistic" projections "intended by management solely as an internal tool").

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Chancery's decision and remand for further proceedings.

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