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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 FRANDSEN, BRANDON GAYLE, STEVE JOHNSON, HILARIE KOPLOW-MCADAMS, and THOMAS SZKUTAK, Defendants-Below/Appellees.	**No. 75, 2024** COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 2023-1139-JTL

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs-Appellants ("Plaintiffs") filed three successive complaints trying to identify a theory of wrongdoing in connection with the take-private acquisition of Zendesk (the "Transaction"). The Court of Chancery ultimately dismissed their claims under *Corwin* because an uncoerced, fully informed majority of stockholders approved the Transaction. That decision should be affirmed.

The stockholders that approved the Transaction included JANA Partners ("JANA"), a well-known, economically rational actor who was running a proxy fight against the Zendesk board of directors (the "Board"). In connection with that proxy fight, JANA purchased Zendesk shares well above the deal price just months prior to the stockholder vote. JANA then issued open letters demanding "significant board change" or a sale, and spurred news articles in the *Wall Street Journal* reporting that Zendesk's CEO would step down in connection with a potential settlement. During settlement negotiations with Zendesk, JANA signed a confidentiality agreement to discuss the terms of the Transaction, after which JANA withdrew its proxy fight and supported the Transaction. All of these facts were part of the total mix of information available to Zendesk stockholders.

Now, Plaintiffs seek to second-guess JANA and the rest of Zendesk stockholders who voted in favor. On appeal, Plaintiffs raise two theories suggesting that the stockholder vote was not fully informed. Neither works.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly dismissed Plaintiffs' claims under *Corwin* because the stockholder vote was uncoerced and fully informed.

a. Denied. Plaintiffs say that Zendesk should have disclosed that the Board approved a "nearly-finalized" settlement agreement with JANA that would have required the removal of Zendesk's CEO and three directors. But Plaintiffs' theory makes little sense for multiple reasons, not least because Plaintiffs fail to allege that a single director was beholden to the CEO or that a majority of the Board was impugned by any potential conflict. Regardless, as Plaintiffs acknowledged below, Zendesk's public disclosures adequately informed stockholders that the Board was under activist pressure when it approved the Transaction, such that Zendesk disclosed all material information relating to the Board's potential conflicts of interest. The incremental details in the draft settlement agreement between JANA and Zendesk were not material because they would not have altered the total mix of information available to stockholders.

b. Denied. Plaintiffs misconstrue settled law to suggest that Zendesk needed to disclose overly optimistic projections based on a new business strategy that was "preliminary" and had "not been tested." Disclosing projections based on an unprecedented business strategy would have been misleading in its own right. But in any event, Zendesk did disclose earlier, more optimistic projections

that the Board considered during the sale process. If stockholders believed Plaintiffs' theory that management wrongfully revised projections downwards at the last minute to justify the Transaction, they had all the information to vote based on such a conclusion.

STATEMENT OF FACTS

A. Zendesk and Its Managers.

Zendesk is a Delaware corporation with its principal executive offices in San Francisco, California. A51-52 ¶ 36. Zendesk provides software-as-a-service (SaaS) products related to customer support, sales, and other customer communications. *Id.* As a SaaS company, Zendesk books contracts with its customers and recognizes revenue ratably over the life of a contract. Gross bookings reflect the amount of new recurring revenue "booked" in a month. Net bookings reflect gross bookings minus any customers that discontinued their subscriptions. A487. Bookings are "a primary leading indicator and a measure of Zendesk's business momentum," and bookings—not top-line revenue—were the focus of diligence by arm's-length, third-party bidders. A501; *see also* A495; A572; A598.

At all relevant times, the Board comprised 10 individuals: Defendants-Below/Appellees Mikkel Svane, Carl Bass, Archana Agarwal, Michael Curtis, Michael Frandsen, Brandon Gayle, Steve Johnson, Hilarie Koplow-McAdams, Thomas Szkutak, and nonparty Michelle Wilson. A41-42 ¶¶ 18, 19; A46-51 ¶¶ 25-34; A53 ¶ 43. The Board collectively owned 2.7 million shares in Zendesk worth $209 million at the deal price. A373. Svane served as Zendesk's CEO and Chairman of the Board until he resigned from the Company in November 2022—six days after the Transaction closed. A41-42 ¶ 18. John Geschke

served as Zendesk's Chief of Staff after joining in 2012, and left Zendesk in June 2023. A43-44 ¶ 21. Shelagh Glaser served as Zendesk's CFO from May 2021 until December 2022. A45-46 ¶ 23. Norman Gennaro served as Zendesk's President of Worldwide Sales from January 2018 to June 2024. A46 ¶ 24.

B. JANA Commences a Proxy Fight.

On October 28, 2021, Zendesk announced a proposal to acquire Momentive Global (f/k/a SurveyMonkey) ("Momentive"). A54-55 ¶ 46. Goldman Sachs & Co. LLC ("Goldman Sachs") acted as Zendesk's financial advisor. JANA expressed opposition to the Momentive transaction in an open letter to the Board and began acquiring a significant stake in the Company. A290. From Q4 2021 through February 10, 2022, JANA acquired approximately 3.5 million shares at prices near or above $100 per share. *See* A657-58.

Zendesk continued to recommend that stockholders approve the Momentive transaction. In response, on February 16, JANA sent another open letter to the Board opposing the Momentive transaction, formally launching a proxy contest, announcing its intent to nominate four directors, and urging the Company to run a sale process. A1079. Roughly a week later, Zendesk stockholders voted down the Momentive transaction, and JANA sent a letter to the Board demanding either "significant board change" or, in the absence of such change, a sale of the Company. A64-65 ¶¶ 65-66; A1087.

C. Zendesk Explores a Potential Sale as Its Financial Performance Deteriorates.

On March 7, 2022, the Board met to discuss the Company's strategic plan and reviewed projections that were consistent with those disclosed to stockholders for the Momentive transaction (the "March 2022 Case"). A65 ¶ 67. Qatalyst Partners ("Qatalyst") was present to analyze the Company's standalone prospects and flagged that there was "[s]ignificant pressure on SaaS share prices and multiples." A662; *see also* A291 (from October 2021 to March 2022, the NASDAQ Composite Index had declined about 17%, IGV ETF had declined about 28%, and BVP Emerging Cloud Index had declined about 42%); A690. Against this deteriorating market backdrop, Qatalyst further advised that "[t]here is meaningful execution risk associated with [Zendesk's] standalone plan." A690. The Board engaged Qatalyst as its primary advisor for its strategic review process. A67 ¶ 71. Goldman Sachs also stayed on as a secondary financial advisor. *Id.*

On April 18 and April 19, Zendesk provided the March 2022 Case and a summary of its Q1 2022 financial performance to potential bidders. A77-78 ¶ 88. In Q1 2022, Zendesk recorded positive 30% year-over-year growth in top-line revenue, but gross and net bookings missed internal targets by 15% and 17%, respectively. A85-86 ¶ 101; A293.

On May 4, Zendesk management updated the March 2022 Case to account for "changes to unlevered free cash flow . . . driven by changes in depreciation and

amortization, purchase of property & equipment, net working capital and acquisition-related expenses." A92-93 ¶ 111. Plaintiffs refer to these updated projections as the "May 2022 Case." *Id.*

On May 5, Zendesk received a preliminary indication of interest from the Consortium at $120 per share, a small premium above Zendesk's trading price of $117.73 per share. A93 ¶ 112. The Consortium noted its belief that if Zendesk were trading in line with comparable companies and the NASDAQ, without the impact of public speculation regarding a potential sale after JANA's open letters to the Board, Zendesk's stock price would be between $75 to $88 per share. A294.

Zendesk's stock price then began to decline. On May 9, the stock price closed at $99.14 per share. A295. Even at that price, one investor cited "the inflated nature of Zendesk's trading price" when withdrawing from the Consortium. *Id.*

On May 13, Zendesk provided its April 2022 financial results to potential bidders. *Id.* April gross and net bookings missed internal targets again—this time by 19% and 20%, respectively. *Id.*; A824. Bidders requested additional bookings diligence, which Zendesk provided. A295.

On May 16, Qatalyst informed potential bidders that they should submit final, binding proposals by May 25. A94 ¶ 114. No firm could secure financing to make a bid. *See* A296 (firms withdrew from the Consortium on May 24 due to, among other things, "concerns with the declining business momentum of Zendesk,

persistent and potentially worsening market conditions and volatility as well as the inflated nature of Zendesk's trading price," which closed at $88.18 that day).

D. Zendesk Concludes Its Strategic Review Process as Its Market Price Continues to Decline.

On June 6, 2022, the Board "determined that concluding the strategic review process and continuing to execute on the Company's strategic plan . . . as a standalone public company would be in the best interests of the Company and its stockholders at this time." A102 ¶ 128. The Board also determined to begin negotiating a settlement with JANA. A103 ¶ 130.

On June 7, JANA declined to negotiate with Zendesk and instead issued a press release announcing that it would sue the Company to schedule its 2022 annual stockholder meeting. A103 ¶ 132. On June 8, the Board met to discuss continued outreach from the Consortium and Thoma Bravo. A104-05 ¶ 133; *see also* A843-44. Both potential bidders remained interested but had been unable to arrange financing for a bid. A104-05 ¶ 133. As a result, the Board determined that it would publicly announce the end of its strategic review process. *Id.* The Board also resolved to schedule its annual meeting for August 17, 2022. A844. Zendesk's stock closed at $80.52 on June 8. A298.

On June 9, Zendesk announced the date of its annual meeting and that no sale had materialized from the strategic review process. A106-07 ¶ 135. Zendesk's stock price fell to $69.04, and then to $64.97 the following day. A296.

E. The Consortium Submits a New Offer While Zendesk Negotiates a Potential Settlement with JANA.

On June 11, 2022, the Board met and determined to "seek a settlement of the proxy contest with JANA." A107 ¶ 136; A846-47. Members of the Board (not Svane), along with representatives from Qatalyst and Wachtell, engaged with JANA over the next several days. A107 ¶ 136; A298; A855. On June 14, the *Wall Street Journal* reported that "Zendesk and JANA are discussing a truce that could involve Mikkel Svane stepping down as the software company's chief executive, as well as changes to the board, including the removal of director Carl Bass." A108 ¶ 138; A849-50.

On June 14, the Consortium contacted Qatalyst to express renewed interest at a price of up to $82 per share, subject to additional due diligence, including "actual results for gross and net bookings for May 2022 and an update on Zendesk's overall business momentum." A108 ¶ 139; A298.

On June 15, Geschke presented to the Board on the Company's recent performance, "including the negative trends in gross and net bookings, employee attrition, and plans to improve the Company's margins and cut expenses in light of such conditions." A108-09 ¶ 140; *see also* A855-56; A858. Also on June 15, Qatalyst provided Zendesk's May 2022 bookings data to the Consortium and Thoma Bravo. A299. The May bookings data was even worse than the Q1 or April data, as gross bookings and net bookings missed Zendesk's internal plan

(the March 2022 Case) by 31% and 48%, respectively. *Id.*; A858. On June 16, Zendesk's stock closed at $54.53 per share. A299.

On June 17, the Consortium submitted an offer to acquire Zendesk for $75.50 per share. A113 ¶ 147. The Consortium explained that its lowered bid accounted for "the actual gross and net bookings results for May 2022." A299. That same day, Wachtell transmitted a draft settlement agreement to JANA articulating the Board's willingness to remove Svane as CEO, accept the resignation of three current directors, and appoint two JANA nominees. A111-12 ¶ 144.

As the Board signaled its willingness to settle, the Board also proposed sharing the terms of the Consortium's $75.50 per share offer with JANA. A114 ¶ 148; A299. JANA agreed to enter into a confidentiality agreement. After reviewing the proposal, JANA expressed its support for a sale as opposed to Zendesk continuing as a standalone company with JANA's representatives on the Board. A299. Wachtell informed the Board that "further discussions with JANA regarding the cooperation agreement were on hold pending resolution of the proposal to acquire the Company received the day before from the [C]onsortium." A114 ¶ 149.

F. Zendesk Updates the March 2022 Case to Account for Material Deviations from Management's Prior Assumptions.

On June 19, 2022, management informed the Board that it was updating the March 2022 Case "to account for the significant changes in economic conditions and negative trends in gross and net bookings for Zendesk and deterioration in business

momentum that deviated materially from the assumptions underlying the March 2022 Case." A300; A115-16 ¶ 151; A860-61.

On June 21, the Consortium submitted its "best and final" offer to acquire Zendesk for $77.50 per share. A122 ¶ 165. Zendesk's stock price at the time was $56.04 per share. A300. After multiple conversations between June 17 and June 23, Thoma Bravo confirmed that it was unwilling to bid "in light of ongoing concerns around business momentum." *Id.*

Also on June 21, Geschke circulated a presentation to the Board with two sets of updated long-range projections, the "Baseline Case" and the "Upside Case." A120 ¶ 162; *see also* A863; A865-75. Geschke's transmittal email explains: "In our 'upside' case we presume our ability to increase efficiency and productivity, and rationalize expenses to accelerate margin improvement. As you know, we have commenced planning for certain expense reductions that we would hope can put us on the path of the upside case. However, as *those plans are preliminary and have not been tested*, we believe the appropriate plan to focus on for now is our 'baseline' case." A863 (emphasis added); A120-21 ¶ 163. That same day, Glaser transmitted both cases to Qatalyst and explained that "*we do not yet have the set of actions to achieve* [the Upside Case] which is why we are showing it as an upside opportunity." A122 ¶ 164 (emphasis added).

On June 22, the Board met to discuss the Consortium's "best and final" offer. A122-23 ¶¶ 165-66; A877-79. The Board reviewed a presentation containing the June 2022 Baseline Case (the "June 2022 Case"). A123-24 ¶ 167; A881-86. Management explained that the adjustments in the June 2022 Case accounted for, among other developments, "below-expectation actual gross and net bookings for the months of April and May 2022" and "significant changes in economic conditions facing Zendesk." A301; *see also* A877. The Board directed management to discuss the feasibility of the June 2022 Case and Upside Case with Gennaro and Jeff Titterton, Zendesk's Chief Operating Officer. A124-25 ¶ 169.

On June 23, Geschke informed the Board that he had "followed up with Norm [Gennaro] and Jeff [Titterton] on the Operating Plan," and that "[w]hile they . . . share[d] our enthusiasm to strive for greater operating margin performance, they confirmed their support for the [June 2022 Case] as achievable and prudent." *Id.* At a meeting later that day, the Board considered the Consortium's $77.50 per share offer and the June 2022 Case. A888-901. Glaser confirmed that she and Geschke had discussed the projections with Gennaro and Titterton, who "agreed that [the June 2022 Case] reflected a reasonable estimate of the Company's future prospects in light of the significant changes in economic conditions in the past months and recent negative trends in overall business momentum." A135 ¶ 184; A888.

After receiving the June 2022 Case and Upside Case on June 21, meeting on June 22 and June 23 to discuss, and conferring with members of management in-between, the Board approved use of the June 2022 Case by Qatalyst and Goldman Sachs. A135-36 ¶ 185; A888-89. The Board then informed JANA that it was prepared to enter into the Merger Agreement and asked whether JANA would withdraw its proxy contest. *See* A889; 891. JANA assented to the $77.50 deal price despite having bought into Zendesk's stock at prices exceeding $100 per share and having made headway in settlement negotiations with Zendesk's Board. *See* A657.

Qatalyst and Goldman Sachs also opined that the Transaction was fair from a financial perspective, and the Board voted unanimously to approve the Transaction. A137 ¶ 187; A301. At $77.50 per share, the merger consideration represented a 33.7% premium to Zendesk's stock price of $57.95 on June 23. A302. On June 24, the parties executed the Merger Agreement with the Consortium, and the Company announced the Transaction. *Id.*

G. Zendesk Issues Public Disclosures regarding the Transaction and Rejects Light Street's Last-Minute Inferior Proposal.

The Company filed the definitive Proxy on August 8, 2022. A253-465. In response to federal strike suit complaints, Zendesk issued supplemental disclosures on September 9. A980-91. The stockholder vote was scheduled for September 19. A270.

On August 28, Light Street Capital Management, LLC ("Light Street") delivered an unsolicited alternative proposal to the Board. A149 ¶ 212. This last-minute proposal contemplated a $2 billion preferred equity investment and a $2 billion debt facility that would be used to conduct a tender offer for 50% of the Company's outstanding shares at $82.50 per share. *Id.* The proposal contained no details as to who would provide the necessary equity or debt financing. *See* A993-1019. The upshot was that Light Street and its undisclosed partners would emerge with "~66% of the fully diluted voting power" and the right to nominate five seats on the 10-member Board—i.e., control of the Company. A995-96. Meanwhile, the remaining 50% of the Company's shares would be subordinate to $4 billion of debt and preferred equity and retain only one-third of the voting power. *See* A999-1000.

On August 31, the Board determined that Light Street's alternative proposal was not superior. A152 ¶ 220. In disclosures affirming its recommendation that stockholders approve the Transaction, the Board also alerted stockholders that Zendesk's post-signing financial performance had missed the assumptions underlying the June 2022 Case (which Plaintiffs allege understated the Company's future value). A501-03. In June 2022, net bookings missed the June 2022 Case assumptions by 48%; in July 2022, net bookings missed by 99%; and in August 2022, net bookings missed by 52%. A501. The Company further explained that "[a]ttempting an operational restructuring and management transition, particularly

in the absence of any actionable plans, will only exacerbate the existing standalone risks related to Zendesk's business momentum, forward trajectory and macroeconomic conditions." A152 ¶ 220 (emphasis omitted).

Independent proxy advisory firms Institutional Shareholder Services ("ISS") and Glass Lewis both agreed that the Light Street proposal was inferior and unactionable. ISS explained that "Light Street admitted a lack of demonstrable experience with a campaign involving a recapitalization, identifying director and CEO candidates, and executing an organizational turnaround" and concluded that "it is not possible to view the proposal as an actionable alternative." A1060. ISS also tracked the earlier *Wall Street Journal* reporting that a settlement with JANA "could involve CEO Mikkel Svane stepping down." A1055. Meanwhile, Glass Lewis "share[d] the [B]oard's view that Light Street's contemplated alternative—which emerged more than six months after meaningful public pressure for Zendesk to explore a sale and more than two months after the Company's agreement with the Consortium—is highly preliminary, lacks critical supportive details (e.g. definitive commitments relating to a debt and equity financing, a meaningfully codified operating plan) and prospectively introduces a range of substandard corporate governance features." A1069.

On September 19, the Company's stockholders voted to approve the Transaction. A155 ¶ 225. On November 22, the Transaction closed. *Id.* Six days later, Svane resigned as CEO. A41-42 ¶ 18.

H. This Litigation.

Stockholders served Section 220 demands on the Company between August 5 and September 7, 2022, and the Company voluntarily produced 335 board-level documents totaling 5,281 pages. *In re Zendesk, Inc. Section 220 Litig.*, 2023 WL 5496485, at *7 (Del. Ch. Aug. 25, 2023). Certain of those stockholders then demanded electronic communications. Magistrate David denied inspection as to electronic communications but ordered that Plaintiffs were entitled to a supplemental production of Zendesk's bookings data for April, May, and June 2022. *Id.* at *15. Zendesk produced those documents, which confirmed that Zendesk's business momentum was declining. A501-03.

Plaintiffs filed their initial plenary complaint on November 9, 2023. That complaint alleged that Svane, Bass, Geschke, Glaser, and Gennaro concealed the Upside Case from the Board. This allegation was false, and Plaintiffs amended their complaint to remove it. Defendants moved to dismiss the amended complaint, and Plaintiffs amended again in response.

After full briefing and argument, the Court of Chancery granted Defendants' motion to dismiss under *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304

(Del. 2015) on January 22, 2025. OB Ex. B at 3 ("The defendants have shown that the disclosures did not contain material misstatements or omissions, enabling stockholders to make a fully informed vote on the merger."). Plaintiffs timely appealed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED THE COMPLAINT UNDER *CORWIN*.

A. Question Presented.

Whether the Court of Chancery properly dismissed Plaintiffs' claims under *Corwin* where Plaintiffs failed to plead a materially misleading or omissive disclosure. *Id.* This issue was preserved. A200-11.

B. Scope of Review.

The standard of review for a motion to dismiss under *Corwin* is de novo. *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018). At this stage, a complaint should be dismissed if the plaintiffs cannot "recover under any reasonably conceivable set of circumstances susceptible of proof." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011). When conducting this inquiry, the Court accepts all well-pleaded allegations as true, but it need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party." *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011), *overruled in part on other grounds by Ramsey v. Ga. S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255 (Del. 2018). A complaint should also be dismissed if the "allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law." *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

C. Merits of Argument

Plaintiffs focus exclusively on two allegedly material omissions in Zendesk's public disclosures: (1) a draft settlement agreement with JANA that called for the resignation of Svane and three directors and (2) the Upside Case projections. OB 26. Information is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (citation omitted). An omitted fact is not material unless it is "inconsistent with, or otherwise significantly differs from, the disclosed information." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000). Neither of Plaintiffs' alleged omissions is material.

1. The Stockholder Vote Was Fully Informed Because Zendesk Disclosed All Material Facts concerning Potential Conflicts of Interest.

The Court of Chancery correctly held 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." OB Ex. B. Plaintiffs now say that the Proxy was misleading because it did not specifically disclose that the Board's potential settlement with JANA contemplated the resignation of Svane and three directors. OB 28. Plaintiffs are wrong.

As an initial matter, Plaintiffs concede that the draft settlement agreement did not compromise the disinterestedness or independence of a Board majority. *Id.* The

Board comprised 10 directors, such that six directors remained indisputably disinterested and independent. In fact, according to Plaintiff, the Board made the disinterested and independent decision to "terminate members of management and the Board." *Id.* at 36. That reveals a Board acting free from conflict—not one dominated by Svane—to negotiate with JANA and with the Consortium. A1418-20.[1] Plaintiffs may disagree with the Board's decision to recommend a deal with the Consortium, but they cannot avoid the fact that Zendesk disclosed all the relevant material information for stockholders to make their own decision when they approved it.

Indeed, Plaintiffs concede that the Proxy disclosed the existence of settlement discussions with JANA. OB 29, 33, 37. In their brief below, Plaintiffs also conceded that "Zendesk stockholders were informed generally about 'activist pressure.'" A1153-54. Thus, "stockholders with any degree of sophistication will recognize that the board is responding to the presence of activists." *Butler v. Leavitt*, C.A. No. 2020-0343-JTL, at 60 (Del. Ch. Feb. 9, 2021) (TRANSCRIPT); *see also In re ZAGG, Inc. S'holder Litig.*, C.A. No. 2021-0982-NAC, at 23 (Del. Ch. Aug. 16,

[1] *See* A57 ¶ 51 (January 4); A59 ¶ 54 (February 8); A65 ¶ 67 (March 7); A68 ¶ 72 (March 16); A74 ¶ 84 (March 16); A75 ¶ 85 (March 23); A76-77 ¶ 87 (March 30); A82 ¶ 97 (April 13); A93-94 ¶ 113 (May 6); A105 ¶ 134 (June 8); A107 ¶ 136 (June 11); A110 ¶ 142 (June 15); A114 ¶ 148 (June 19); A117 ¶ 154 (June 20); A123-24 ¶ 167 (June 22).

2023) (TRANSCRIPT) (applying same reasoning where board changed compensation plan in response to activist demand but did not disclose reason for doing so in proxy); *In re JCC Hldg. Co., S'holders Litig.*, 843 A.2d 713, 721 (Del. Ch. 2003) (Delaware law assumes that stockholders are "reasonably sophisticated investor[s]").

Butler is instructive. In that case, an activist advocated for a sale of the company in an open letter to the company's board, and the board ultimately recommended a sale. *Butler* Tr. at 9. Even though the company's disclosures were "light on the role of activist involvement in prompting the sale," the proxy disclosed that the activist letter was publicly available, and the Court of Chancery concluded that "the reasonable inference to draw from how things transpired, as described in the background of the merger, is that the board was responding to activist pressure." *Id.* at 58-59. Here, Zendesk disclosed the existence of JANA's public letters demanding "significant board change" or a sale of the Company, as well as that the Board was negotiating a settlement with JANA. A1075-88. Under *Butler*, no additional information was required for Zendesk stockholders to conclude that certain Zendesk directors might have approved the Transaction in response to pressure from JANA.

Despite this conclusion being available to stockholders, Plaintiffs say that Zendesk was required to disclose the additional detail that Svane's potential

resignation was part of a potential settlement. OB 28. This argument first fails because the alleged omission was not "inconsistent with" Zendesk's disclosures about JANA, from which stockholders understood that JANA demanded significant Board change absent a sale. *Skeen*, 750 A.2d at 1174; A1153-54. In other words, stockholders could already conclude from the Proxy that the Board recommended the Transaction in response to pressure from JANA; no further disclosure would have changed that discernible conclusion.

Plaintiffs' argument also fails because Svane's potential resignation was publicly reported in the *Wall Street Journal* and thus available to reasonable stockholders in the total mix of information. A108 ¶ 138. In fact, ISS noted in its report recommending the Transaction that Svane would likely be removed as CEO in any settlement with JANA. A1055. Thus, contrary to Plaintiffs' argument, OB 32, market participants deciding how to vote had access to the relevant facts. *GAF Corp. v. Heyman*, 724 F.2d 727, 729 (2d Cir. 1983) (*Wall Street Journal* print version of article part of total mix of information); *New Enter. Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 154 (Del. Ch. 2023) (stockholders have access to "news articles" and "market coverage" about public companies).

Plaintiffs try to avoid this conclusion by equating Svane with the domineering, self-interested CEO in *Xura*. OB 28, 32. But unlike Svane, the *Xura* CEO single-handedly negotiated the sale of the company and allegedly engaged in "unauthorized

discussions" with the buyer, which allowed him to negotiate a "long-term incentive plan that could have paid him over $25 million." *In re Xura, Inc., S'holder Litig.*, 2018 WL 6498677, at *7-8, *13 (Del. Ch. Dec. 10, 2018). The Court of Chancery in *Xura* held that the CEO's domineering role in the sale process required a disclosure specific to the CEO's self-interested motivation for avoiding an ouster by an activist stockholder. *Id.* at *12. In this case, not only did stockholders already know from the total mix of information that Svane's job was at risk in any settlement with JANA, *supra* p. 22, but there are also no well-pled allegations that Svane was able to dominate the Board and push through a transaction like the CEO in *Xura*. Quite the opposite: the Board had expressed willingness to settle with JANA and conduct an "orderly transition process" to identify Svane's successor. OB 35 n.19. Because Svane was not a domineering CEO like the CEO in *Xura*, a disclosure specific to JANA's potential impact on his job was not material.

In sum, Zendesk stockholders understood from the total mix of information available to them the extent of potential conflicts facing the Board as it approved the Transaction. Delaware law does not mandate any further disclosure.

2. The Stockholder Vote Was Fully Informed Because Zendesk Disclosed All Material Facts concerning the Projections.

The Court of Chancery correctly adopted Defendants' reasoning below that the Upside Case was not material. It is well-settled that not "every extant estimate of a company's future results, however stale or however prepared, is material." *In*

re PNB Hldg. Co. S'holders Litig., 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006); *see also Wayne Cnty. Emps.' Ret. Sys. v. Corti*, 954 A.2d 319, 332 (Del. Ch. 2008) ("[T]he fact that something is included in materials that are presented to a board [] does not, ipso facto, make that something material." (citation omitted)). "Rather, because of their essentially predictive nature, our law has refused to deem projections material unless the circumstances of their preparation support the conclusion that they are reliable enough to aid the stockholders in making an informed judgment." *PNB*, 2006 WL 2403999, at *16; *accord Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1282 (Del. 1994) ("Goldman's share valuation was too unreliable to be material.").

When determining which projections to disclose, the "board of directors must balance potential benefit versus harm." *See Arnold*, 650 A.2d at 1282. Disclosing "overly optimistic" projections "may be harmful because it might induce stockholders to hold out for an elusive, higher bid," and "[t]his risk cannot be reduced significantly by attempting to qualify the figure[s]." *See id.* at 1282-83 (citation omitted); *accord Goodwin v. Live Ent., Inc.*, 1999 WL 64265, at *13 (Del. Ch. Jan. 25, 1999) ("The risk that an unreliable analysis could lead stockholders to reject a good deal based on the false hope that a better deal was around the corner is one a board must consider in assessing whether to disclose."), *aff'd*, 741 A.2d 16 (Del. 1999) (TABLE).

Plaintiffs say that the Upside Case was sufficiently reliable to merit disclosure. As explained below, the documents incorporated by reference into Plaintiffs' complaint negate any inference in Plaintiffs' favor. Plaintiffs next say that the Upside Case should have been disclosed because it was created contemporaneously with the June 2022 Case. That argument also fails.

a. The Upside Case Was Not Sufficiently Reliable to Merit Disclosure.

The Upside Case was indisputably a "preliminary" case that had "not been tested." A120-21 ¶ 163; A863. Zendesk's CFO told Qatalyst that management did "not yet have the set of actions to achieve [the Upside Case] which is why we are showing it as an upside opportunity." A122 ¶ 164; *accord* A124-25 ¶ 169 (Zendesk's head of sales and COO agreeing with the CFO). Thus, the Upside Case was a "'best case' projection predicated on an interplay of several, uncertain variables," which "need not be disclosed because it is too speculative and thus immaterial." *Arnold*, 650 A.2d at 1282 (citation omitted). The risk that the Upside Case could mislead stockholders into holding out for a nonexistent alternative was especially significant here, where Zendesk's business momentum was dimming by the day, and Zendesk's post-signing results significantly underperformed even the June 2022 Case. A501 (monthly bookings in June, July, and August 2022 missed the June 2022 Case assumptions by 48%, 99%, and 52%, respectively). Thus,

disclosing the Upside Case would have been more likely to mislead stockholders. *Arnold*, 650 A.2d at 1282-83.[2]

Plaintiffs try to avoid this conclusion by saying that the June 2022 Case assumed "management would do nothing and continue under the same cost structure," OB 44, even though Zendesk was supposedly "already undertaking" cost-cutting plans in April 2022, *id.* at 42. Plaintiffs are wrong.

Management did not "do nothing" to Zendesk's cost structure in the June 2022 Case. Rather, management explained that the June 2022 Case "assume[d] increased efficiency that is relatively consistent with the scaling of profitability that we have presumed in our current plan." A1330. Because the June 2022 Case assumed the same historical profitability, it necessarily assumed that management projected reduced expenses in line with any reductions to revenue.

Moreover, Zendesk was not "already undertaking" cost-cutting plans in June. To support their erroneous contrary narrative, Plaintiffs say that in April 2022,

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[2] Plaintiffs cite *Tornetta* and *Maric Capital* in response to Defendants' reliance on *Arnold*. OB 45. But *Tornetta* concerned potential director conflicts of interest, not projections, and the company in *Maric Capital* omitted free cash flow estimates that were actually relied upon by the company's financial advisor (unlike the Upside Case here). *Tornetta v. Musk*, 310 A.3d 430, 521-23 (Del. Ch. 2024); *Maric Cap. Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010). Neither case is responsive to the proposition that a company should avoid disclosing overly optimistic projections that would encourage stockholders to hold out for an alternative unlikely to arrive.

Zendesk's CFO "presented the Board plans 'to optimize expenses for improvement of operating margins for the remainder of the year.'" OB 43 (quoting A86-87 ¶ 102). But Plaintiffs misquote their own allegation, which is that "Zendesk was conducting '*further reviews* to optimize expenses for improvement of operating margins for the remainder of the year.'" A86-87 ¶ 102 (emphasis added). In other words, there were only reviews, not plans, relating to potential cost-cutting in April.

There were also no cost-cutting plans in June. Rather, management told the Board on June 21 that it 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 (emphases added). Thus, what Plaintiffs refer to as a sufficiently reliable "plan" as early as April was still no more than a "hope" in June.[3]

Even by August 2022, there were still no actionable cost-cutting plans. Plaintiffs point out that Zendesk engaged Bain on August 17, OB 43-44, but hiring a consulting firm nearly two months after considering the projections does not

[3] Plaintiffs cite *Roche* to argue that "Defendants' factual assertions" regarding the projections cannot be credited at the pleadings stage. OB 45. But Zendesk voluntarily produced over 300 documents in response to Plaintiffs' Section 220 demand, which were incorporated by reference into the Complaint. A245 ¶ 2(g); A32. And it is well established that the Court should dismiss a claim where documents incorporated by reference into the complaint negate it. *Malpiede*, 780 A.2d at 1083; *Sciannella v. AstraZeneca UK Ltd.*, 2024 WL 3327765, at *32 (Del. Ch. July 8, 2024) (dismissing projections disclosure claim based on information found in Section 220 documents), *aff'd*, --- A.3d ----, 2025 WL 946148 (Del. 2025) (TABLE).

suggest that management had actionable cost-cutting plans in June. Rather the opposite: it suggests that Zendesk had not formulated actionable cost-cutting plans in June and needed outside help to do so. *Cf. City of Warren Gen. Emps.' Ret. Sys. v. Roche*, 2020 WL 7023896, at *21 (Del. Ch. Nov. 30, 2020) (projections assuming future M&A growth were reliable where company historically engaged in growth-by-acquisition strategy, was actively considering new acquisitions, and had "a full range of options to finance an aggressive M&A strategy").

In short, the Upside Case was premised on an entirely new business strategy that was preliminary and had not been tested. They were thus not sufficiently reliable to be material, and disclosing them would have risked misleading stockholders.

b. The Circumstances Surrounding the June 2022 Case Do Not Require the Disclosure of the Upside Case.

Left without a basis to argue that the Upside Case was sufficiently reliable, Plaintiffs offer the novel theory that the Upside Case should have been disclosed as a "circumstance[] surrounding the preparation" of the June 2022 Case. OB 39-40. This is nothing more than a backdoor effort to avoid Delaware's settled law that a company need not disclose every extant case of projections where doing so would risk misleading stockholders. *Supra* pp. 23-24.

Plaintiffs chiefly rely on two Court of Chancery decisions, *KCG* and *Denner*, for their new take on Delaware law. In both of those cases, the company argued that

it need only disclose the "final projections relied upon by the [b]oard and its financial advisor." *Chester Cnty. Emps.' Ret. Fund v. KCG Hldgs., Inc.*, 2019 WL 2564093, at *13 (Del. Ch. June 21, 2019); *see also Goldstein v. Denner*, 2022 WL 1671006, at *14, *26 (Del. Ch. May 26, 2022). In *KCG*, the company concealed earlier, higher projections relied upon by the board while disclosing only lower projections that were created by management after (1) the CEO negotiated a separate compensation package with the buyer and (2) the board approved the merger. 2019 WL 2564093, at *13. In *Denner*, the company concealed earlier, higher projections relied upon by the board while disclosing only lower projections that were created after the parties agreed on price. 2022 WL 1671006, at *27. This case is different. Zendesk disclosed its earlier, higher projections as well as the circumstances surrounding the June 2022 Case, including that it was developed amidst the Board's settlement negotiations with JANA. A293; A300. The Proxy thus allowed stockholders to "readily track the changes and reasonably infer the rationale that went into the changes from one [projection] to another." *Denner*, 2022 WL 1671006, at *27 (citation omitted).[4]

[4] Plaintiffs try to diminish the Board's latitude in determining what projections are material to stockholders by relying on *Appel* and *Tornetta*. OB 42. But *Appel* did not concern projections disclosures, and the quote Plaintiffs include from *Tornetta* related to director conflicts. *Appel v. Berkman*, 180 A.3d 1055, 1063-64 (Del. 2018) (requiring disclosure that director objected to the timing of the proposed
(…continued)

Plaintiffs cannot take this case law relating to the omission of earlier, higher projections and distort it for their argument that every set of projections must be disclosed regardless of its reliability. The commercial reality is that companies may prepare multiple sets of projections recognizing that not each case is sufficiently reliable to be material. *See In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *13 (Del. Ch. Feb. 29, 2012) (declining to require disclosure of "Upside Case" projections not relied upon by financial advisor); *In re Orchid Cellmark Inc. S'holder Litig.*, 2011 WL 1938253, at *11 (Del. Ch. May 12, 2011) (same); *In re Formica Corp. S'holders Litig.*, 1989 WL 25812, at *9 (Del. Ch. Mar. 22, 1989) (same). Requiring disclosure of these kinds of overly optimistic upside cases would have the unintended side effect of hampering a board's discretion to motivate and incentivize management when compensation targets are tied to an upside case. *See, e.g.*, *Tornetta*, 310 A.3d at 491 ("Tesla developed and updated one-year and three-year internal projections on a regular basis. They were not the product of bottom-up forecasting. They were used to drive and motivate rather than plan, and Tesla frequently missed its projections." (footnotes omitted)).

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sale of the company and abstained from the board's vote); *Tornetta*, 310 A.3d at 523 (requiring disclosure of directors' potential conflicts of interest). Both cases are thus non sequiturs to the reasoning in *Arnold* that a board is charged with "balanc[ing] potential benefit versus harm" when disclosing valuation-related information. 650 A.2d at 1282.

Plaintiffs' remaining cases do not save their claim. For example, the company in *Netsmart* failed to disclose the actual projections that its financial advisor used to render its fairness opinion, which was a material omission. *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 202-03 (Del. Ch. 2007). In *PLX*, the company disclosed that its projections were prepared "in the ordinary course of business" when, in fact, they were prepared after the parties had agreed on a price and were not based on any new information. *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *35-36 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (TABLE). By contrast, Zendesk disclosed the projections that Qatalyst relied upon for its fairness opinion—the June 2022 Case (not to mention the earlier, higher March 2022 Case). And Zendesk disclosed the exact day that the June 2022 Case was adopted in the context of other contemporaneous events, including incoming offers from the Consortium, settlement discussions with JANA, and "changes in the internal and external business environment" that prompted the June 2022 Case's creation. A299-301. Stockholders had sufficient information regarding Zendesk's projections to draw their own conclusions. No further disclosure was required.

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In sum, Plaintiffs failed to plead a disclosure violation sufficient to avoid the irrebuttable business judgment rule under *Corwin*. Their claims were properly dismissed.

CONCLUSION

For the reasons set forth above, the Court should affirm the decision of the Court of Chancery.

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