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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 June 11, 2025

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INTRODUCTION

Nothing in Defendants' Answering Brief undermines the materiality of the challenged disclosures, or otherwise supports the application of *Corwin*[1] cleansing.

Defendants have failed to show that the JANA settlement, through which the Board agreed to terminate Zendesk's CEO and three directors, was not material. Disclosure of that settlement would have filled an informational gap with which stockholders and market commentators were struggling, providing a much-needed explanation for why the Board suddenly abandoned its standalone strategy and instead agreed to a Transaction price lower than the one it rejected just days earlier. Defendants declare this omission permissible because a Board majority was purportedly independent and disinterested, but that is irrelevant to whether Zendesk's disclosures were sufficient to secure *Corwin* cleansing.

Defendants have also failed to justify their omission of the Upside Case, which should have been disclosed for two independent reasons. *First*, it was part of the material circumstances surrounding—and undermined the reliability of—the simultaneously created Baseline Case that Defendants used to justify the new and substantially decreased Transaction price. *Second*, it was reliable, because it assumed the same drastic revenue reductions as the Baseline Case, but *also* included

[1] *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015).

planned and imminent expense reductions, an eminently reasonable expectation given Zendesk's purportedly dire financial outlook.

Defendants' arguments largely rely on inapplicable cases and improper inferences in their favor, and should be rejected.

Because stockholders were not adequately informed regarding the JANA settlement or the Upside Case, the trial court's dismissal under *Corwin* was error. This Court should reverse that decision.

ARGUMENT

I. THE STOCKHOLDER VOTE WAS UNINFORMED BECAUSE THE PROXY FAILED TO DISCLOSE THE JANA SETTLEMENT

Defendants concede that the Proxy only generally disclosed "settlement discussions" with JANA and that Zendesk stockholders were unaware that the Board had agreed to terminate Svane as CEO and replace three directors. Ans. Br. at 19-20. Stockholders were thus uninformed regarding management and the Board's motivations to suddenly abandon the Company's standalone strategic plan, slash the Company's projections by *$13 billion* (around 25%), and support a sale price materially lower than an offer the Board rejected as unfairly low just days earlier. *See* Op. Br. at 28-29.

Defendants first argue that the Board's agreement to terminate Zendesk's CEO and replace three directors was not material because, according to Defendants, a majority of the Board was not conflicted. Ans. Br. at 19-20. Even if that were true (it is not), board composition is irrelevant to whether information is material or a vote is fully informed such that *Corwin* cleansing applies. Rather, "the doctrine applies only to fully informed, uncoerced stockholder votes," and if facts "were not disclosed that would have been material to a voting stockholder, then the business judgment rule is not invoked." *Corwin*, 125 A.3d at 312. *Corwin* applies specifically to enhanced scrutiny claims involving change-of-control transactions,

like this one, and the only relevant consideration is whether the vote was fully informed. *See id.* at 312-13.

Even if it was a relevant consideration (and it is not), Defendants are also wrong that Plaintiffs "concede" that Zendesk's Board was majority disinterested and independent. Ans. Br. at 19. Defendants ignore the Complaint's allegations that the Board—fatigued from the failed Momentive Transaction, JANA's activist campaign, and the unsuccessful sale process—violated its duties by failing to act reasonably in connection with the Transaction. *See* A56-58, ¶¶49-52; A61-64, ¶¶58-65; A103-38, ¶¶130-89. And the Board's agreement to settle with JANA hardly shows independence or disinterestedness—after that agreement, the Board swiftly blessed management's sudden and massive cuts to Zendesk's projections, approved millions of dollars in retention payments for management, and supported a sale, all to *avoid* the settlement and an embarrassing public ouster. *See* A110-13, ¶¶142-45; A115-17, ¶¶151-53. Those facts give rise to an inference that the Board lacked independence from Svane and others and acted disloyally.

Defendants next argue that the vote was fully informed because stockholders were generally aware of "activist pressure." Ans. Br. at 20-21. But there is a significant difference between (i) generalized "activist pressure," and (ii) the Board's *agreement* to terminate the CEO and replace three directors. Defendants do not attempt to argue otherwise. Nor do Defendants address the argument that the

JANA settlement was particularly material in the context of *this* transaction, where stockholders and market commentators publicly questioned *why* management and the Board suddenly decided to accept a price materially lower than the one they rejected mere days earlier. *See* Op. Br. at 30-32. Disclosure of the JANA settlement would have answered that question.

In support of their argument, Defendants primarily rely on two transcript rulings, *Butler v. Leavitt*, C.A. No. 2020-0343-JTL (Del. Ch. Feb. 9, 2021) (TRANSCRIPT) and *In re ZAGG, Inc. Stockholder Litigation*, Consol. C.A. No. 2021-0982-NAC (Del. Ch. Aug. 16, 2023) (TRANSCRIPT). Both cases involve different circumstances that render them inapposite. In *Butler*, the proxy disclosed an activist's demand for a company sale and that the board immediately launched a sale process, and the Court of Chancery concluded that an additional statement that the sale process was launched in response to the activist's demand "would [not] add anything." *Butler* Tr. at 59-60. Similarly, in *ZAGG*, the proxy disclosed an activist's demand for a compensation change and the execution of a cooperation agreement requiring that change, and the court concluded that an additional statement that the board "changed its compensation in response to" the activist's demand was not necessary. *ZAGG* Tr. at 23-24.

Here—unlike in *Butler* and *ZAGG*—the Proxy failed to disclose the Board's *actions* in response to activist pressure. There is no dispute that stockholders—while

generally aware of "activist pressure" and "settlement discussions"—were unaware that the Board had agreed to terminate Svane as CEO and replace three directors. Defendants euphemize this as an "additional detail,"[2] but that information was critical as it directly informed management's and the Board's motivations to support a sale at a substantially reduced price, *i.e.*, to avoid imminent and embarrassing public ouster (and, for management, the loss of millions in unvested equity). *See* Op. Br. at 28-32 (citing *e.g.*, *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.")). Disclosing that information also would have undermined—or, at minimum, permitted stockholders to assess the reliability of—management's and the Board's claim that their sudden agreement to the sale resulted from a few months of declining net bookings, of which market commentators were highly skeptical. *See* A92-100, ¶¶110-24; A119, ¶160; A128-29, ¶176; A142-43, ¶198; A149-51, ¶¶212-16; A153-55, ¶¶222-24.

Defendants attempt to distinguish *Xura* on the basis that Svane was purportedly not a "domineering, self-interested CEO." Ans. Br. at 22-23. But the *Xura* court's materiality ruling was not dependent upon the CEO's "domineering"

[2] Ans. Br. at 21-22.

behavior. The Court of Chancery expressly held that the Xura board chairman's undisclosed private conversation with the CEO that the Board "was considering" replacing him absent a sale was an independent basis to reject *Corwin* cleansing. *Xura*, 2018 WL 6498677, at *12-13.

Moreover, it is beyond dispute that Svane was heavily involved in the sale process, including the last-minute decision to slash Zendesk's projections and support a sale at a reduced price after he learned the Board had agreed to terminate him. A107-10, ¶¶136-42; A114-19, ¶¶148-60; A122-24, ¶¶165-68; A126-27, ¶¶171-73; A135-38, ¶¶184-89. Again, Defendants' reliance on the JANA settlement as evidence of Svane's lack of influence and/or Board independence[3] is self-defeating. The Board swiftly *reversed course* by blessing conflicted management's massive revenue cuts, millions of dollars in management retention payments, and a materially lower sale price, all to *avoid* a settlement that would terminate Svane and three directors.

Xura is distinguishable only in ways that help Plaintiffs. Whereas Xura's CEO learned only that he "fac[ed] a genuine risk that he would lose his job" absent a sale, Svane knew the Board had *already agreed* to terminate him as CEO. *Compare Xura*, 2018 WL 6498677, at *8, *with* A107-13, ¶¶136-46. And *Xura* did

[3] Ans. Br. at 19-20.

not involve the board's rejection of a materially higher offer just days before agreeing to a reduced sale price, or massive last-minute cuts to projections in response to a reduced offer. *See* A93-101, ¶¶112-26; A113-16, ¶¶147-52.[4] If the Xura CEO's *potential* termination was material in the context of that sale process, Svane's *certain* termination was material in the context of this one.

Defendants concede the JANA settlement was neither disclosed nor otherwise known to stockholders, but argue that a *Wall Street Journal* article that speculated a settlement with JANA "could involve CEO Mikkel Svane stepping down"[5] and ISS's subsequent reference to the article, rendered Svane's "potential resignation . . . available to reasonable stockholders in the total mix of information." Ans. Br. at 22; A849-50; A1055. That is both legally and factually wrong. Under black letter law, stockholders are "entitled to be told all material information when considering [a] Merger, without having to extract it from publicly available information." *In re Pattern Energy Grp. Inc. S'holders Litig.*, 2021 WL 1812674, at *72 (Del. Ch. May 6, 2021); *Tornetta v. Musk*, 310 A.3d 430, 523 (Del. Ch. 2024) (same). And the

[4] In their Statement of Facts, Defendants tellingly omit (but do not refute or otherwise address) the Board's rejection of Thoma Bravo's fully-diligenced $110 per share offer and "prepar[ation] to march expeditiously toward a signing as soon as practically possible," *i.e.*, within "ten business days." *See* Ans. Br. at 7-8; *compare to* Op. Br. at 14-15 & A96-101, ¶¶118-26.

[5] Ans. Br. at 15, 22; A849-50.

Wall Street Journal's speculation of what a settlement potentially *might* include is a far cry from the Board's *agreement* to terminate Svane and replace three directors. Further, (i) both the *Wall Street Journal* article and ISS reports are hidden from ordinary investors behind paywalls and (ii) the Proxy itself specifically instructed Zendesk stockholders to "rely only on the information contained in this proxy . . . ." A143, ¶199.

Finally, Defendants notably do not defend (or even address) the trial court's conclusion that disclosure of Svane's imminent termination might be construed as coercive. Order at 3. As discussed in Plaintiffs' Opening Brief, that conclusion is erroneous and would set bad policy. *See* Op. Br. at 34-36. Nor do Defendants address the argument that knowledge of Svane's termination could plausibly have made Zendesk stockholders more likely to vote *against* the Transaction. *See* Op. Br. at 34-36. Material information may make stockholders "less likely" or "more likely" to support a transaction, and also includes "just information that a reasonable stockholder would generally want to know in making the decision . . . ." *Morrison v. Berry*, 191 A.3d 268, 286-87 (Del. 2018). It is reasonable to infer that stockholders unhappy with Svane's performance would have rejected the Transaction in favor of Zendesk remaining a standalone company with a new management team if they knew that Svane would be terminated absent a sale. *See* Op. Br. at 34-36.

II. THE STOCKHOLDER VOTE WAS UNINFORMED BECAUSE THE PROXY FAILED TO DISCLOSE THE UPSIDE CASE

The trial court erred in ruling—without analysis or discussion—that the Proxy need not disclose the Upside Case.

First, Delaware law requires disclosure of "the circumstances surrounding the preparation" of last-minute projections created to support a lower offer price, like the Baseline Case, if those circumstances cast doubt on the reliability of the disclosed projections. *Chester Cnty. Emps.' Ret. Fund v. KCG Hldgs., Inc.*, 2019 WL 2564093, at *14 (Del. Ch. June 21, 2019); *see also, e.g.*, *Goldstein v. Denner*, 2022 WL 1671006, at *26-27 (Del. Ch. May 26, 2022); *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) (Table). The Upside Case required disclosure because it cast doubt upon the simultaneously prepared (and more bearish) Baseline Case used to justify the reduced Transaction price.

Defendants fail to meaningfully engage with this argument because—like they did below[6]—they conflate the rulings in *KCG* and *Goldstein* concerning reliability of projections with the rulings in those cases that the "circumstances surrounding the preparation" of last-minute projections are material. *See* Ans. Br.

[6] Op. Br. at 41 ("Defendants failed to directly address—let alone refute—Plaintiffs' argument that the Upside Case required disclosure because it was part of the 'circumstances surrounding the preparation' of the Baseline Case.").

at 28-29 (citing *KCG*'s and *Goldstein*'s discussion regarding the reliability of "projections relied upon by the board"); *see also id.* at 31 (discussing "projections" but omitting the *PLX* court's ruling based on "the circumstances surrounding the[] preparation" of the projections). Those cases require disclosure of *any* material information casting doubt on the reliability of last-minute projections created to support a lower offer price—they do not carve out information concerning other simultaneously created projections. *See, e.g.*, *KCG*, 2019 WL 2564093, at *14. Plaintiffs' argument is not a "novel theory"[7] but a straightforward application of Delaware law.

Defendants' conclusory claim that stockholders could assess the reliability of the Baseline Case because Zendesk selectively disclosed certain other information—including earlier projections and that the Baseline Case "was developed amidst the Board's settlement negotiations with JANA"[8]—ignores Plaintiffs' arguments. Defendants fail to challenge—and thus concede—that the simultaneously created Upside Case (i) constituted part of the circumstances surrounding the Baseline Case's creation and (ii) "'cast[s] doubt on the[] reliability' of the Baseline Case,

[7] Ans. Br. at 28.

[8] Ans. Br. at 29. As discussed above, that claim also ignores that Zendesk failed to disclose that the Baseline Case was created *after* the Board agreed to a settlement with JANA (A143-44, ¶201), further undermining the Baseline Case's reliability.

which '[was] significantly more pessimistic concerning [Zendesk's] standalone value than [the Upside Case].'" Op. Br. at 40-41 (quoting *KCG*, 2019 WL 2564093, at *14). Stockholders were entitled to all material information to enable them to assess the Baseline Case, on which the directors relied in approving the Transaction. The simultaneously created, more-optimistic Upside Case—which assumed the *same* revenue cuts as the Baseline Case but factored in expected cost savings—was critical to that assessment. Defendants were not free to omit that material information on the basis that "they, the defendants, had determined"[9] that "[s]tockholders had sufficient information regarding Zendesk's projections to draw their own conclusions." Ans. Br. at 31.

Defendants attempt to distinguish *Tornetta* and *Appel* based on irrelevant factual differences regarding the nature of the disclosures in those cases,[10] but both restate Delaware's fundamental prohibition against Boards selectively withholding material information. *See Tornetta*, 310 A.3d at 523 (rejecting argument that disclosure of material information "was unnecessary because it would wrongly oblige [defendants] to characterize their conduct in such a way as to admit wrongdoing," and explaining the proxy could have also included qualifying

[9] *Tornetta*, 310 A.3d at 523; *see also Appel v. Berkman*, 180 A.3d 1055, 1064 (Del. 2018).

[10] Ans. Br. at 29-30 n.4.

disclosures regarding the information "thereby allowing stockholders to make their own assessment."); *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."). And *Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994) did not carve out "valuation material" from this standard as Defendants posit (Ans. Br. at 29-30 n.4)—the Court there merely found that a single per-share value in an advisor presentation that was contingent on numerous uncertain asset values "was too unreliable to be material." *Arnold*, 650 A.2d at 1282.

Defendants cite cases regarding "overly optimistic upside cases"[11] to support their strawman argument that Plaintiffs contend "that every set of projections must be disclosed regardless of its reliability." Ans. Br. at 30. But "reliability" is not a consideration when the undisclosed projections constitute part of the material

[11] Defendants cite (i) *In re Micromet, Inc. Shareholders Litigation*, 2012 WL 681785 (Del. Ch. Feb. 29, 2012), involving undisclosed "very, very optimistic" projections "intended by management solely as an internal tool" (*id.* at *13), (ii) *In re Orchid Cellmark Inc. Shareholder Litigation*, 2011 WL 1938253 (Del. Ch. May 12, 2011), involving undisclosed "management projections" created with a base and downside case, where the proxy disclosed the base case and cautioned "even those projections should not be deemed reliable or material to their decision" (*id.* at *11), and (iii) *In re Formica Corp. Shareholders Litigation*, 1989 WL 25812 (Del. Ch. Mar. 22, 1989), involving "overly optimistic" "junior management [] projections," which were not "sufficiently reasonable as to be worthy of reliance for business planning purposes" (*id.* at *9). None of those cases involve last-minute projections—like the Upside Case—created to support a new, and drastically lower, transaction price. Rather, the relevant projections in those cases are akin to Zendesk's "Dare to Dream Plan" (A65, ¶67), which Plaintiffs do not argue required disclosure.

circumstances surrounding last-minute and "more pessimistic" "Revised Projections" created to justify a lower offer and after the CEO—like Svane here—develops unique motivations to approve a lower transaction price. Op. Br. at 40 (quoting *KCG*, 2019 WL 2564093, at *8, *14). Requiring disclosure of projections in those unique circumstances would not, as Defendants claim, "hamper[] a board's discretion to motivate and incentivize management when compensation targets are tied to an upside case,"[12] and nothing in the record indicates that Zendesk's compensation targets were tied to the Upside Case. Rather, disclosure allows stockholders to assess the Board's abrupt about-face from remaining a standalone company back to selling "as soon as . . . an activist [] threaten[ed] a proxy contest" and how it "end[ed] up at a price below where they took the stance on standalone." *In re PLX Tech. Inc. S'holders Litig.*, C.A. No. 9880-VCL, Tr. at 47 (Del. Ch. Sept. 3, 2015) (TRANSCRIPT).[13]

Second, the Proxy's failure to disclose the Upside Case was a material omission because the Upside Case was reliable. *See Goldstein*, 2022 WL 1671006,

[12] Ans. Br. at 30.

[13] Defendants also curiously cite *Tornetta*, but the Chancellor there held that the failure to disclose information based on Tesla's projections—that three milestones in Elon Musk's compensation plan were "probable of achievement" within a year—was "likely material." 310 A.3d at 525 n.775. And the Chancellor expressed no concern that the disclosure of that information would somehow "hamper[] [the] board's discretion to motivate and incentivize management." Ans. Br. at 30.

at *26 ("[R]eliable management projections of the company's future prospects are of obvious materiality to the electorate" (internal quotations omitted)). The Upside Case (i) 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), and (ii) was more optimistic than the Baseline Case solely because the Upside Case included improved operating margins based on plans to reduce expenses that were already underway. Op. Br. at 42-43 (citing A117-19, ¶¶156-58).

Defendants' claim that they were entitled to omit the Upside Case because disclosure could "mislead stockholders into holding out for a nonexistent alternative" because "Zendesk's post-signing results significantly underperformed even the [Baseline] Case"[14] is wrong both factually and legally. Zendesk's "post-signing results" encompassed just two months (one of which was "preliminary"),[15] an insufficient data set from which to determine Zendesk's future prospects or the reliability of Zendesk's *10-year* projections. *See* A117-19, ¶¶156-58. Further, Defendants cherry-pick "assumptions" regarding bookings (not revenue or profitability) from a post-signing investor presentation that were seemingly extracted from Zendesk's 2022 revenue projections,[16] and which misrepresent

[14] Ans. Br. at 25.

[15] *See* A501-502.

[16] Ans. Br. at 25 (citing A501).

Zendesk's overall performance. Indeed, Zendesk's Q2 2022 results—announced on July 28—showed "'continued strong operational performance with revenue growing nearly 30% and margins continuing to improve.'" Op. Br. at 30 (quoting A1147).

Defendants' argument that disclosing the Upside Case risks "mislead[ing] stockholders into holding out for a nonexistent alternative"[17] also defies fundamental principles underlying Delaware disclosure law. Had Defendants disclosed all material information regarding the Upside Case (including Zendesk's margin improvement 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, and thus the Transaction price's adequacy. *See supra* pp. 11-13.

Unable to defend the Baseline Case's unreasonable assumption that management would continue under the same cost structure despite a massive, long-term revenue reduction caused by "significant changes in economic conditions,"[18] Defendants claim the Baseline Case "projected reduced expenses in line with any reductions to revenue" because it "assumed the same historical profitability" as the May 2022 Case. Ans. Br. at 26. That is incorrect. Only the "'scaling of

[17] Ans. Br. at 25.

[18] A115-16, ¶151.

profitability'" remained the same. *Id.* (quoting A1330). As the Complaint details, the Baseline Case assumed drastic cuts to critical profitability indicators—operating income and cash flow. *See* A117-19, ¶¶156-58. Thus, the Baseline Case unreasonably assumed that management would not actively seek to improve Zendesk's margins to address its purportedly dire outlook.

And Defendants cannot dispute that the Baseline Case did not incorporate Zendesk's planned "expense reductions" to "accelerate margin improvement,"[19] which any competent management team would initiate in the face of a sudden $13 billion loss in projected revenue over ten years. Thus, at minimum, it is readily inferable that the Upside Case was equally reliable as the Baseline Case and should have been disclosed.

As they did below,[20] Defendants base their argument that the Upside Case is speculative and unreliable on cherry-picked, self-serving statements made by conflicted management after slashing Zendesk's existing projections to justify the Consortium's underpriced offer. *See* Ans. Br. at 25 (citing A120-22, ¶¶163-64). And Defendants' one-off attacks on specific evidence ignore the undeniable inference arising from Plaintiffs' allegations. *Goldstein*, 2022 WL 1671006, at *39

[19] Ans. Br. at 11 (quoting A863).

[20] *See* A206-07; A1368.

(acknowledging that the holistic pleading-stage inquiry investigates whether "[t]aken together, the well-pled allegations of the complaint support an inference").

Defendants concede: (i) in April 2022, Zendesk was conducting "'further reviews to optimize expenses for improvement of operating margins for the remainder of the year'";[21] (ii) in June, Zendesk had "'commenced planning for certain expense reductions . . . [to] put [it] on the path of the [U]pside [C]ase'";[22] and (iii) in August, "Zendesk engaged Bain" regarding its "cost-cutting plans." Ans. Br. at 27.[23] That and other evidence—including management's June 2022 presentations to both the Board and Consortium detailing plans to cut expenses and improve Zendesk's margins[24]—is more than sufficient to create a reasonable inference that the Upside Case's margin improvements were imminent and reliable. Crediting Defendants' counterfactual assertions "regarding the weight of the . . . projections" over those well-pled facts "would require drawing an impermissible

[21] Ans. Br. at 27 (quoting A86-87, ¶102).

[22] Ans. Br. at 27 (quoting A120, ¶162).

[23] Defendants' argument "that hiring [Bain] nearly two months after considering the projections does not suggest that management had actionable cost-cutting plans in June" (Ans. Br. at 27-28) ignores that (i) the Proxy was not filed until August (A40, ¶11), around the time Bain was retained, with many supplemental filings thereafter, and (ii) the Complaint's well-pled allegations that Zendesk hired Bain to "*execute* cost-cutting and margin-improvement measures" it had already developed (A1164 (emphasis added)).

[24] A108-09, ¶11; A117, ¶154.

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, e.g.*, *KCG*, 2019 WL 2564093, at *10 (finding materiality inquiry "fact-intensive" and ill-suited to pleading stage resolution).

Defendants seemingly "ask[] the [C]ourt to draw inferences in their favor" and "treat[] the motion to dismiss as if the [C]ourt could weigh evidence and make findings of fact,"[25] because Zendesk's curated Section 220 production "w[as] incorporated by reference into the Complaint," which Defendants claim "negate[s] any inference in Plaintiffs' favor" regarding the reliability of the Upside Case. Ans. Br. at 25, 27 n.3. That approach defies Delaware law:

> The incorporation-by-reference doctrine does not enable a court to weigh evidence on a motion to dismiss . . . [and] does not change the pleading standard that governs a motion to dismiss. If there are factual conflicts in the documents or the circumstances support competing interpretations, and if the plaintiff had made a well-pled factual allegation, then the allegation will be credited . . . . The plaintiff also remains entitled to all reasonable inferences. Consequently, if a document supports more than one possible inference, and if the inference that the plaintiff seeks is reasonable, then the plaintiff receives the inference.

Voigt, 2020 WL 614999, at *9 (internal quotations omitted) (citing, *e.g.*, *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169-70 (Del. 2006) and *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)). Defendants'

[25] *Voigt v. Metcalf*, 2020 WL 614999, at *9 (Del. Ch. Feb. 10, 2020).

authorities do not hold otherwise. *See Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (acknowledging that "plaintiff is entitled to all reasonable inferences that logically flow from . . . the complaint" and the court should credit counter facts only if they "effectively *negate the claim as a matter of law*" (emphasis added)); *Sciannella v. AstraZeneca UK Ltd.*, 2024 WL 3327765, at *32 (Del. Ch. July 8, 2024) (finding "stale" projections unreliable and holding: "Unlike in *KCG Holdings* and *Goldstein*, the allegations in the Complaint do not support a reasonable inference that Viela's management cut the financial forecasts to justify the Merger price").

Finally, Defendants seemingly ask the Court to ignore the Proxy's material omissions because JANA voted for the Transaction. Ans. Br. at 1. That fact is irrelevant to the Board's disclosure obligations, and nothing in the record demonstrates JANA even knew about the Upside Case. "[O]ne [disclosure] violation is sufficient to prevent application of *Corwin*." *Van der Fluit v. Yates*, 2017 WL 5953514, at *8 n.115 (Del. Ch. Nov. 30, 2017); *see also Tornetta*, 310 A.3d at 545 ("[T]he failure to disclose material information will eliminate any effect that a favorable stockholder vote otherwise might have for the validity of the transaction or for the applicable standard of review."). Further, drawing *any* conclusion from JANA's support requires improper defense-friendly inferences because (i) JANA's total position in Zendesk is unknown, and JANA's initial refusal

to sign an NDA[26] and eventual limited NDA[27] indicate it held hedged or short positions that influenced its vote; and (ii) it is at least equally inferable that JANA decided to exit its Zendesk position—and not incur additional expense or use of resources—because it lacked leverage to block a deal supported by management and the Board.

[26] A104, ¶132.

[27] A114, ¶148.

CONCLUSION

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

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