IN THE SUPREME COURT OF THE STATE OF DELAWARE

MANTI HOLDINGS, LLC, MALONE MITCHELL, WINN INTERESTS, LTD., EQUINOX I. A TX, GREG PIPKIN, CRAIG JOHNSTONE, TRI-C AUTHENTIX, LTD., TRI-C AUTHENTIX PREFERRED, LTD., DAVID MOXAM, JON LAL PEARCE, and JIM RITTENBURG,

Plaintiffs-Below/Appellants,

v.

THE CARLYLE GROUP INC., CARLYLE U.S. GROWTH FUND III, L.P., CARLYLE U.S. GROWTH FUND III AUTHENTIX HOLDINGS, L.P., CARLYLE INVESTMENT MANAGEMENT L.L.C., TCG VENTURES III, L.P., BERNARD C. BAILEY, STEPHEN W. BAILEY and MICHAEL G. GOZYCKI,

Defendants-Below/Appellees.

No. 112,2025

Court Below:
Court of Chancery

C.A. No. 2020-0657-SG

APPELLANTS' OPENING BRIEF

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Dated: April 29, 2025

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NATURE OF PROCEEDING

This case involves the time-pressured sale of a private equity portfolio company for less than fair value. The controller, private equity firm Carlyle, wanted to liquidate the significant holdings of a fund before the end of its ten-year term. Authentix was the last remaining. The problem seen by everyone was that it was a poor time to sell Authentix due to the uncertainty surrounding key customer contracts up for renewal. Yet Carlyle pushed the sale forward, Authentix's CEO explaining to the Federal Reserve that Carlyle's "motivation to sell" Authentix was that "Carlyle has a bylaw that requires sale of investments after 10 years."[1]

The Court of Chancery acknowledged Carlyle felt pressured and "wanted" to sell Authentix by September 2017 to meet its ten-year timeline. This was supported by several undisputed facts, including:

- One Carlyle partner wrote for a textbook that timely liquidating an older fund can justify sacrificing the value of a single portfolio company such as Authentix.
- The Carlyle partner in charge of the fund holding Authentix confessed in emails that it was "hard" and "awkward" to sell Authentix due to then-existing customer contract uncertainty but he wanted the sale because Authentix was in "an older fund that we are hoping to liquidate soon."
- Authentix's sale process advisor, Baird, wrote that "We advised Carlyle not to launch at this time given the uncertainty around the contract extension and early stages of diversification, but they asked us to execute a scoping process given their hold period ends in mid-2017."

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[1] A1017.

- Every defendant, sale advisor, and buyer agreed the turnout for the auction Baird conducted was depressed by the contract uncertainty. Of the 127 potential buyers approached by Baird, only 4 submitted even initial indications of interest, which one director called a "low yield" and the eventual buyer (Blue Water) called a "failed auction" by a "forced seller."

- Three weeks before Authentix's sale to Blue Water, *the uncertainty was removed and the key contracts were secured*. But without testing the market, Carlyle hurried to close the sale just before the end of its fund term. It did not inform other potential buyers of the key contract wins. It did not inform Baird about the key contract wins. It did not try to negotiate a higher price from Blue Water. This decision not to test the market after winning the key contracts was against the expectation of every sale advisor, of Blue Water, and of the prospective buyers who specifically asked to be told when the contracts were renewed. To explain the odd behavior, Baird observed that Carlyle was "hell bent" on closing by September.

These and other undisputed facts show that Carlyle's desire for liquidity influenced the sale process, giving it a non-ratable benefit that should have triggered entire fairness review. *See Maffei v. Palkon*, __A.3d__, 2025 WL 384054, at *19 (Del. Feb. 4, 2025).

Instead of applying entire fairness, however, the Court of Chancery accepted Carlyle's argument that to do so would be an "attack on the [PE] industry model"[2] because Carlyle's time pressure arose only from "the business model itself." Op. 2 ("there was no 'pressure' for a quick exit *beyond that inherent in the business model itself"* (emphasis added)). It concluded that time pressure arising from the PE business model, regardless of its effect, cannot trigger entire fairness review because

[2] A3909; *see also* A3897 (characterizing Plaintiffs' claim as a "generalized critique of the private equity industry").

a firm must be under an "imperative" or "exigent need" to sell for entire fairness to apply. It did not analyze whether Carlyle's desire for liquidity exerted a *material effect* on the sales process, which is the proper standard.[3] So rather than grapple with many of the undisputed facts showing that Carlyle's time pressure influenced the sale, it summarily dispensed with them as mere evidence that Carlyle "wanted" to sell but not that it had an exigent "need" to sell. *See* Op. 2, 43, 44, 46, 62, 64.

The court also relied on its flawed premise that *Carlyle* was the majority common stockholder in Authentix and so was necessarily motivated to maximize Authentix's value. Op. 35, 43, 62, 65-66. This muddled the distinction between the motivations of the *fund* which owned the common stock and the motivations of the *firm* (Carlyle) who managed the fund for the benefit of outside investors and itself received only a fractional share of fund profits. It did not account for the Carlyle partner's admission that Carlyle would indeed sacrifice the value of a single portfolio company to achieve timely fund liquidation. Nor did it account for how the fund's preferred stock position made it easier for Carlyle to exit at less than fair value.

Besides its "exigent need to sell" standard and its presumption that Carlyle *must have been* seeking to maximize the sales price, the court erroneously handled (or did not handle) key undisputed facts. For example, it failed to address the fact that Carlyle did not market Authentix or alert Baird after it won the key contracts.

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[3] *Maffei,* 2025 WL 384053 at *19.

This lawsuit is not an attack on the PE industry's business model. It seeks redress because Carlyle allowed its conflicts to corrupt the Authentix sales process. As other PE professionals often do, the Carlyle directors could have insulated the process from those conflicts by recusing themselves, or obtaining a fairness opinion before the sale, or employing any number of the conflict-of-interest reduction procedures Delaware law recognizes.[4] Requiring Carlyle to either take advantage of processes to sterilize conflicts of interest, or face entire fairness review, does not threaten the PE industry or its business model. By contrast, adopting the "exigent need to sell" standard and "motivated to maximize sales" presumption will insulate even the most horribly botched sales process from judicial review. Carlyle's mismanagement of the Authentix sales process should be reviewed under entire fairness. The Court of Chancery's decision to apply the business judgment rule and enter judgment against Plaintiffs' claims should be reversed.

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[4] A2290:23-A2291:20.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by holding that entire fairness review is triggered only when a controller's desire for liquidity involves an "imperative" or "an exigent need (such as a margin call or default in a larger investment)." Op. 36, 41-42.

2. The Court of Chancery committed clear factual error when it relied, repeatedly, on its mistaken belief that controller "Carlyle" stood to reap 50% of any higher sales price of Authentix and was thus "inherently" motivated to maximize that price.

3. The Court of Chancery made further errors in its handling (or not handling) of undisputed facts, including Baird's advice that Carlyle not launch a sales process given the contract uncertainty, Carlyle's failure to market Authentix after the contract uncertainty was removed, and Carlyle's repeated admissions internally and externally that it was under time pressure.

STATEMENT OF FACTS

A. Carlyle's Future Success Depended on Winding Down its Funds within 10 Years.

Carlyle's success as a private equity firm depends on timely winding down its PE funds at the end of their 10-year terms.

Carlyle raises money from investors who become limited partners in a fund. Carlyle manages the fund for the benefit of its limited partner investors. Op. 12. Carlyle directs what companies the fund will buy, participates in the management of those companies, and decides when the fund will sell a company, a so-called "exit." *Id.* at 12-13. When an exit occurs, Carlyle distributes the proceeds and hopefully gains on the investment to the limited partners investors. *Id.* Although there is not a legal mandate to exit all companies and return capital to investors by the end of a 10-year term, it is a strong norm in the private equity industry that investors will have substantially received back their capital and any gains within ten years.

Investors' expectation of a timely return of capital is well known. Carlyle partner Marco De Benedetti acknowledged in a leading private equity textbook that a fund's 10-year life cycle provides the "expected cadence of realizations to LPs." Op. 48.[5] As a result, he says, the impending conclusion of a 10-year term is reason "to expedite the liquidation of the fund:"

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[5] A434.

> Another aspect to consider is where any given investment is relative to the *life of the fund*. In the event of funds that have generated a successful return for the Limited Partners, the General Partner might want to *expedite the liquidation of the fund* and focus on the successor fund.[6]

Per the same textbook, when investors evaluate a PE fund's overall performance, timeliness of exits is a matter of first importance: a "PE firm's ability to achieve *timely* and profitable exits reliably across multiple funds is a key measure of success applied by financial market players."[7] While profitability is of course important for achieving a fund's mandate, timeliness ensures the PE firm can "approach those institutional investors again for future fundraising." Op. 48.[8]

The reason typical investors care about timeliness is that they have a "complex set of cash flows to manage" due to commitments to various other funds with overlapping periods of investment and divestment.[9] It is common for institutional LPs to use distributions from "mature, divesting funds" to meet capital calls for later funds, a practice known as "recycling capital."[10] In unrebutted testimony, PE professional Jim Timmins explained that institutional investors usually do not keep much liquid capital sitting in savings accounts at low interest but instead actively manage their capital for higher yields—leading to lower cash margins—which

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[6] *Id.* (emphasis added).
[7] A425 (emphasis added).
[8] *Id.*; *see also* A2246:18-A2247:2 (Timmins).
[9] A418; A2235:3-23 (Timmins); A3430:4-19 (Coburn).
[10] A446-47; A2234:11-19; A2237:15-A2238:16.

creates “a very complex traffic management problem.”[11] Liquidity therefore becomes a top-of-mind issue for most institutional investors because they need to make sure that what is coming in is sufficient to fund what’s needed to go out.[12] They may not know what a single portfolio company is worth, but they do take notice when a fund is late to return capital because it cannot liquidate a large holding.[13]

While it is not uncommon at the end of a fund’s life to have a few unsold assets (“loose ends”),[14] what limited partners expect is to receive a substantial return of their capital, meaning exits of the “real needle moving deals.”[15] Hence Coburn was seen to inquire in emails, “how do we create liquidity for LPs in the older funds as they hit end-of-life?”[16]

For these reasons, De Benedetti explains, Carlyle will sometimes exit a portfolio company *before* maximizing its value: “***situations may arise where holding an investment to realize incremental upside is attractive on a stand-alone basis; however, from a portfolio management perspective, the General Partner may ultimately decide to pursue an exit***[.]”[17] This practice does not ordinarily cause

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[11] A2243:11-A2244:11.
[12] A296; A2239:16-22; A1097; A2262:8-16; A2244:24-A2245:2.
[13] A434; A2255:8-A2256:5.
[14] A3431:7-9 (Coburn).
[15] A2255:23-A2256:5 (Timmins); A1097 (investor inquiry about needle moving deals); A2239:23-A2240:16 (explaining concept).
[16] A329.
[17] A434 (emphasis added).

concern for investors because "[o]ne needs to remember that the Limited Partners are interested in the performance of the overall fund in addition to each individual investment."[18]

B. Preparations are made to sell CUSGFIII's largest and longest-held investment.

Carlyle (US) Growth Fund III ("CUSGFIII") purchased Authentix in 2008. Op. 11. It sold Authentix in September 2017, the final month of the fund's 10-year term. Op. 9, 14. At the time of sale, Authentix was the fund's largest and longest-held investment, by far the largest of the three lingering investments in the portfolio and the only "needle-moving" deal.[19] It was also an especially large and long-held investment compared to the fund overall (an "outlier"),[20] which put a drag on the fund's overall performance and added pressure to exit the investment timely.[21]

At the time of sale, the Authentix board was comprised of five directors. Carlyle had designated three: CEO Bernard Bailey ("Bernard"), Carlyle partner Steve Bailey ("Steve"), and Carlyle managing director Michael Gozycki. Op. 38. The other Authentix directors were Paul Vigano, designated by PE stockholder Whitney & Company whom Carlyle brought to the transaction in 2008, and Lee Barberito, designated by founding stockholder Manti. Op. 3, 10.

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18 A434.
19 A2525, A2547; A2240:17-A2241:2; A2258:2-14; A2281:10-24.
20 A2525; A2258:2-14.
21 A2526; A2257:4-14.

To prepare to market the company, in 2015, the board received presentations from five investment bankers whose preliminary valuations for Authentix ranged from $200 million to $275 million. Op. 19-20. Baird was the investment banker selected to run the process. *Id*. Baird's lead on the engagement was Trish Renner, working alongside David Steinkeler.[22] Baird was managed throughout the sale process by Carlyle and the Director Defendants.[23]

The Carlyle partner in charge of CUSGFIII was Brooke Coburn, the "boss" of the two Carlyle directors on the board.[24]

C. Brooke Coburn asserts influence to sell despite major contract uncertainty that would impair the sale process.

Authentix had expected the formal sale process to launch in the third quarter of 2016, which was to follow the anticipated renewal of Authentix's largest customer contract with Saudi Aramco. Op. 20.[25] But the renewal did not happen according to plan. In May 2016, rather than receive the expected two-year contract renewal, the company received the first of a series of temporary extensions that would draw out the contract award into the next year. *Id.* at 20-21.

When the news first broke that Aramco was only temporarily extending Authentix's contract, Coburn acknowledged to Steve that this was "a big deal" and

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[22] A1823:8-19.
[23] A2765:20-A2766:11.
[24] A1764:19-21; A3403:9-21; A3457:6-9.
[25] A323.

"unfortunate timing" but nevertheless instructed him that "our bias should be to sell this year."[26] In August, Coburn acknowledged to other colleagues they were in an "awkward position" trying to sell Authentix because the value of the uncertain Aramco contract "is potentially $50-100MM of sale proceeds" so "it's a fairly material issue for us." Yet, there was pressure to sell Authentix as "one of the last remaining assets in an older fund that we are hoping to liquidate soon."[27] This tension between the timely liquidation of a fund and the potential to hold an individual asset longer to maximize value is what De Benedetti described: "situations may arise where holding an investment to realize incremental upside is attractive on a stand-alone basis; however, from a portfolio management perspective, the General Partner may ultimately decide to pursue an exit . . . ."[28]

In preparation for a meeting with CUSGFIII investors on September 14, 2016, Coburn instructed Steve and Gozycki to "put an emphasis on our liquidity plan."[29] Following that meeting, Coburn told Steve he would get more involved in the Authentix sale because of its importance as the last needle-mover: "I don't want to micromanage—that's not the intention—but this is so important to the fund."[30]

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[26] A326.
[27] A331.
[28] A434.
[29] A333.
[30] A348.

D. Carlyle directs Baird to proceed with broad auction despite advice to await key contract renewals.

Baird's Renner detected in May 2016 that Carlyle was biased to sell now despite the negative impact on valuation: "as we all know buyers struggle with uncertainty . . . my big question will be around Carlyle goals . . . Is it 2016 or are they prepared to hold longer if that maximizes valuation . . . its clear that we were pushing for a 16 transaction . . . [but] if we don't have Saudi and/or other big projects set there could be an impact on valuation."[31]

In October 2016, she reported internally that she advised Carlyle not to launch the sale process because of the contract "uncertainty" but Carlyle directed Baird to move forward because their "hold period" was ending:

> ***We advised Carlyle not to launch at this time given the uncertainty around the contract extension*** and early stages of diversification, ***but they asked us to execute a scoping process given their hold period ends in mid-2017***. . . . We agreed to launch a scoping process in advance of a broad auction in 2017, once there is more visibility on the contract extension, to see if we can bring a few parties to the table.[32]

A scoping process tests the market with a limited number of buyers in advance of the broad auction.[33] Baird described it as giving "a small group an early chance to

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[31] A328.

[32] A358.

[33] Op. 21 (defining "scoping" as "not broad"); A3803:20-A3804:11 (Atkins: "Scoping is going to a limited number of good prospects . . . and then getting

acquire the business ahead of a full process." [34] But in the Fall of 2016, Baird "ultimately contacted a total of 127 potential buyers, including 27 financial buyers." Op. 22. As Renner explained, this was not mere scoping, but the auction itself: the process "morphed" or "evolved" or was "paused and then we went broad."[35]

The contemporaneous record explains why. At about the time Renner wrote about its advice "not to launch" (October 2016), Authentix received news the Saudi contract award would be delayed again.[36] Bernard lamented to Renner that this was "a good deal more problematic in light of our timeline."[37] Bernard well understood the pressure to sell during CUSGFIII's term, as he explained to the U.S. Federal Reserve (an important Authentix customer[38]) that "Carlyle has a bylaw that requires sale of investments after 10 years."[39]

Because they could not meet this timeline if they waited still longer, Defendants pushed the sale forward. Later the same month (still October 2016), Bernard complained to Steve: "I am concerned that Baird does not have the sense of urgency that we may have regarding the process calendar. . . . I am trying to represent

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feedback from those prospects"); A1903:18-24 (Barberito: "make a few phone calls to see what kind of level of interest is out there"); A334 (Renner: "test the market").

[34] A349 (emphasis added).

[35] A1802:20-A1803:16.

[36] A356.

[37] A356.

[38] A3275:15-A3277:6

[39] A1030.

what I hope is the *Carlyle position* in that we want to go faster, not delay this process, despite the uncertainty around Saudi."[40] Steve responded, "I am with you on moving fast, yes. . . . I can call Trish [Renner] offline too."[41] They spoke with Renner the next day.[42] This is evidently when, in Renner's words, the process "morphed" and "went broad."[43]

Bernard admitted at trial that timing concerns remained a source of tension with Baird "throughout the process."[44] For example, a Baird associate reported to his colleagues that "Bernard absolutely exploded on me – screaming, swearing," because they were "behind schedule."[45]

E. To explain why Carlyle was selling at such an "odd time," Baird cites Carlyle's fund life and the opportunity to buy low.

Predictably, Baird faced questions from buyers as to why Carlyle would sell amid the uncertainty. Buyers observed it was an "odd time to do a deal given the Saudi renewal"[46] and wondered "why Carlyle wouldn't wait another 3-6 months."[47] In response, Baird explained the company was being sold because of Carlyle's fund life and this was their opportunity to get a good deal:

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[40] A370 (emphasis added).
[41] *Id.*
[42] A371; A373.
[43] A1802:20-A1804:16.
[44] A3363:17-21; *see also* A3362:7-22.
[45] A376, A378.
[46] A1232.
[47] A476.

- "Discussed process, he said why go now if you have the renewal . . . [I answered] Carlyle a seller."[48]

- "The shareholders are planning to launch a full sale process next year after receiving the contract extension, *but given their extended hold period* they are open to giving a small group an early chance to acquire the business this ahead of a full process."[49]

- "seller has reasonable value expectations / fair value for asset balancing their timing objectives."[50]

- "expect the client has reasonable value expectations for an asset with this type of growth considering their fund life considerations."[51]

- "seller has reasonable value expectations and fund life considerations."[52]

- "given shareholder dynamics/fund life considerations, cash up front is critical"[53]

One prospective buyer summarized the message as, "Carlyle need to exit – fund closure,"[54] noting, "Authentix is in Carlyle No2 fund of 14 companies, only 3 left, so time to bale [sic]."[55]

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48 A375.
49 A349 (emphasis added).
50 A374 (emphasis added).
51 A390 (emphasis added).
52 A1234 (emphasis added).
53 A513.
54 A466.
55 A451.

F. Auction participation is suppressed by contract renewal risk.

At the end of Baird's broad outreach, only four submitted initial indications of interest (Op. 23), which was a "rather low yield"[56] compared to the 127 potential buyers contacted and the expected IOI submission rate of 15%-20%.[57] The first reason Baird cited for the low turnout was "large contract renewal risk." Op. 23.[58]

Of the four IOIs, one was in the range predicted by the investment banks—TBG for $207m to $248m—but it had to exit the process for unrelated reasons. Op. 23. The other three (Innospec, Opsec, Intertek) included in their IOIs significant discounts or holdbacks for the contract uncertainty. *Id*. They would proceed to a second round of diligence before updating their indications of interest. *Id.* at 23-24.

The second round of diligence focused not only on Saudi Aramco, but Ghana, the company's second largest contract also up for renewal. Baird explained that these uncertainties were the consistent focal point for all buyers going through diligence.[59]

After completing that round of diligence, Opsec dropped out because "there is too much risk and risk with the contracts."[60] Innospec submitted an updated indication of interest of $177M which included a $100M contingency for the uncertain contracts. Op. 24. Intertek provided a $140 million indication of interest,

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[56] A2779:16-20 (Vigano).
[57] A2377:14-A2378:11 (Atkins).
[58] A395; A2779:17-A2780:4; A1771.
[59] A477; A489.
[60] A490.

with $55 million contingent on Authentix renewing the Aramco and Ghana Tax contracts on existing terms. *Id*.

G. Everyone acknowledges the negative material impact of the sale timing.

Everyone saw that the sale of Authentix was being materially impaired by the timing of the sale. Steve told Coburn in February 2017 that buyers were declining to bid on Authentix "all because of Saudi."[61] In another email, he described the sale process as "so discouraging" because buyers were focusing on Saudi and Ghana despite the fact that Authentix had "beat their 2016 numbers handily."[62]

Bernard wrote in May 2017 (4 months before the sale to Blue Water) that, although "the underlying health of our business is strong," the Saudi and Ghana contracts were the "major uncertainties."[63]

In June, Coburn reported to another Carlyle colleague that the challenge they faced in the sale of Authentix was "Aramco" and "Ghana" and that we "certainly should have focused on a different set of buyers with more comfort in Saudi and Africa."[64] Otherwise, he observed, the business was strong: "the leadership team is excellent, the core technology is highly differentiated and has great patent protection, and there is recently good long-term growth potential."[65]

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[61] A480.
[62] A485.
[63] A823.
[64] A861.
[65] *Id.*

Gozycki testified that buyers were deterred by the contract uncertainty,[66] consistent with the email he wrote during the sale process (March 2017) that "potential buyers have struggled with some of the large renewals with governments in emerging markets."[67]

Vigano testified that Authentix was "unsaleable" until the Aramco contract was renewed.[68]

Baird's Steinkeler testified that if the "Saudi contract was renewed, we would have had a very different sale process entirely."[69]

H. Coburn emphasizes speed despite these impairments.

But the pressure to liquidate CUSGFIII's last needle-mover was not abating. In February 2017, one Carlyle partner responsible for investor relationships prodded Coburn: "what happened to the sale process for the remaining assets in US Growth III? We see [investor] BNA next week. . . Would be nice if there was closure on this fund."[70]

Coburn turned and prodded Steve the same day:

> In the hottest seller's market of all time, in an environment where you don't even need a banker to sell [a] company….we are struggling. There is good overhang-

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[66] A3509:20-A3510:4.
[67] A1750:1-A1751:24; A517.
[68] A2800:4-A2801:6.
[69] A1771:16-18.
[70] A488; A3454:1-16 (Coburn).

> related reason we need to hold catapult, but *I have to think there's a way to monetize ATX and Vu this year*. [71]

Catapult and Vu were the only other portfolio companies in CUSGFIII besides Authentix.[72] Thus, his email was about fund liquidation concerns rather than an Authentix-specific reason to sell now.[73]

Steve replied: "I agree with getting out asap."[74]

I. A concerned Barberito introduces new prospective buyers.

On March 3, 2017, Authentix had a board meeting to review the updated IOIs from Innospec and Intertek which both included the major contingencies (i.e., holdbacks/earnouts) described above.[75] Immediately afterward, with Carlyle's express approval, Baird delivered the following message to Intertek: "given shareholder dynamics/fund life considerations, cash up front is critical."[76] Intertek held firm with an $85M cash offer.[77]

At this point, Barberito feared Authentix would be sold below market value because of Carlyle's fund life considerations. Op. 58 & n.312.[78] Barberito's contemporaneous notes from the March 3 meeting indicate he heard that "Carlyle

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[71] A485.
[72] A2260:1-20.
[73] A2269:14-18.
[74] A485.
[75] Op. 23; A503; A497-98.
[76] A513.
[77] A515.
[78] A1919:17-A1920:13.

must sell by 9/1/2017" and it "wants to accept offer @85-95 no holdback."[79] Therefore, "Barberito approached S. Bailey to present a superior bid to buy Authentix." Op. 24. Barberito's contemporaneous journal notes from that follow-up call indicate Steve was "adamant" about a "9/2017 sale" and that Steve did not want any "hold-back" (earnouts) because the money would not be seen by "September."[80]

After obtaining permission, Barberito contacted private equity funds whom Baird did not approach during its sale process. The first, White Deer, decided after diligence not to move forward. Op. 25. Barberito began voicing objections to the sale around this time.[81]

The second new entrant, Blue Water, became the eventual buyer.

J. Blue Water perceives Carlyle to be a "forced seller" who ran a "failed auction" due to "contract uncertainty."

Following "intensive" due diligence in April 2017, Blue Water declared itself ready and willing to close a purchase on Authentix within three weeks.[82] Its CEO Tom Sikorski announced to Blue Water's Investment Committee that this was an "opportunity to acquire business at a discount . . . following a failed auction process and a forced seller."[83] He added that "Carlyle are a forced seller as they have reached

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[79] A227; A1916:6-A1917:15 (Barberito); A1918:23-24; A1919:3-10 (Barberito).
[80] A229; A1925:15-A1926:8.
[81] A520; A524.
[82] A767 (BWE memo); A526; A3737:20-23.
[83] A788; A3736:12-17.

the end of the fund's investment life and are required to exit by September 2017. They are selling at a sub-optimal time, given there is contract uncertainty."[84] Four days later, Sikorsky assured Steve that he was "sensitive to your time pressure and objectives."[85]

Meanwhile, Baird explained the situation to Intertek in similar terms:

> What has become clear now, however is that Carlyle and JH Whitney are going to sell the business now (by 'now' I mean in the next few months) . . . focused on an all cash deal with the understanding that the next buyer gets the upside of Saudi . . .[86]

K. Blue Water secures exclusivity as the only buyer who could close by September.

After Blue Water entered the process, it and Intertek each offered $115M cash (without contingencies). The board voted to award exclusivity to Intertek in April 2017. Op. 26. A disappointed Blue Water executive wrote that the "Silver lining is we can probably pick it up for less than $115 million if [the Intertek transaction] does fall apart."[87]

The Intertek deal did fall apart. According to Barberito's contemporaneous journal notes, in early June, Steve called Barberito "panicked that deal won't close

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[84] *Id.*
[85] A807.
[86] A522; A1828:9-22.
[87] A3743:6-13; A817.

by September" because Intertek needed regulatory approval.[88] Steve disputes Barberito's account but it is undisputed that Steve's memo to the CUSGFIII investment committee, dated three days before the sale, said a reason to transact with Blue Water was that "a deal with Intertek (a UK public company) would take from 4-6 months between signing and close due to regulatory issues."[89]

Intertek had reintroduced an earnout concept and reduced its cash offer to $85M. Op. 26.[90] Steve invited Blue Water to re-submit a competing offer, which it did at a lowered price of $105M. *Id.* Even at this lower price, Baird foresaw "meaningful risk" that Blue Water would retrade still lower if it gained exclusivity.[91] When Renner warned him, Steve confirmed he understood "they will retrade price" but wanted to go with Blue Water because he "does not think Intertek gets there in the end."[92] Steve explained to his colleagues that Blue Water's waiver of regulatory (CFIUS) review "really is a huge plus to me of their bid if we can confirm it."[93] After Blue Water officially confirmed it was waiving regulatory review,[94] on June 12, a majority of the board voted to grant exclusivity to Blue Water.[95]

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[88] A278; A1961:1-A1962:12 (Barberito).
[89] A1146.
[90] A820.
[91] A825.
[92] A853.
[93] A854.
[94] A836.
[95] A968; A857.

Renner testified that, in general, if a buyer "think[s] here's a deadline and they are the only buyer, they will think, great, I'll just stall, and then I'll reduce my price, and they don't have a choice."[96] That is what Blue Water did.

Shortly after being awarded exclusivity, Blue Water hired KPMG at an unusually high cost, according to one internal email, "not [as] customary due diligence but our tool to re-trade Carlyle by as much as $20 to 30 million."[97] On June 15, Bernard reported to every board member except Barberito that he just had a dinner with Sikorsky who "clearly will be back with a re-trade of the deal[.]"[98] Vigano was alarmed: "One day into diligence and BWE is already talking about a retrade? I think we should have a discussion about shutting down discussions immediately and focusing on a Plan B. . . . A purchase price reduction is just over the top and shows their true intentions/approach."[99] Steve responded that they should wait and see what Blue Water did, to which Vigano answered: "I feel like we are helplessly watching a slow motion train crash. BWE is clearly intending a big retrade."[100]

In response, Gozycki privately wrote Steve that we "can always hit 'pause' at any point if we see a material decrease in purchase price ***or*** a material positive

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[96] A1875:22-313:4.
[97] A3745:12-21; A984.
[98] A979-80.
[99] *Id.*
[100] *Id.*

development with Saudi ***or*** GTS[Ghana]."[101] As Gozycki conceded at trial, every one of those material contingencies came to pass but the sale did not pause.[102]

L. Carlyle does not test the market after the uncertainties are resolved.

In late July, Blue Water materially decreased its purchase price.[103] On August 21, Bernard announced to the board (except Barberito) that they had won the Aramco contract and that the Ghana extension was imminent.[104] Bernard declared victory in an all-company email, boasting that "the importance of this contract cannot be overstated."[105] Reactions from board members and their attorneys reflected the importance of the achievement: "Wow,"[106] "BIG WIN,"[107] "Great great news."[108]

Blue Water understood the implications and was certain Carlyle would now renegotiate the price. Sikorsky instructed colleagues to "be careful as they could do easily retrade here."[109] One Blue Water employee remarked: "Kind of wish they'd received this Saudi win the day after signing."[110] Another warned: "You are going to have your hands full now getting this thing signed. Carlyle going to come at you

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101 A972 (emphasis added).
102 A1762:21-A1763:14; A3512:19-A3513:17; A3516:19-A3519:6; A972; A970 (describing Saudi price plan).
103 A1042.
104 A1111.
105 A1122.
106 A1115.
107 A1107.
108 A1114.
109 A1120.
110 A1117.

hard!!"[111] But Carlyle never came. Nothing was done to capitalize on the removal of the major uncertainties that had suppressed the auction.

Baird was not made aware of these contract wins until this lawsuit, contrary to the expectation it had at the time that it would be informed because the contracts were so important to the transaction.[112] Carlyle had cut Baird out weeks before.[113] Two weeks before the sale, Renner wrote that she discussed with Bernard "it is odd that we are not involved and [Bernard] said that is Carlyle/Bailey approach and Bailey is ***hell bent on getting this done by 9/6***."[114] A couple months prior, she had similarly written: "Carlyle seems to simply want out . . . our client is a seller."[115]

Both Renner and Steinkeler testified that, if they had known about the contract wins, they would have notified other prospective buyers.[116] Defendants' own sale process expert admitted she would assume the company informed other prospective buyers "to push for a higher price" because "remember, they have perfect information; the buyer doesn't."[117]

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111 A1109.
112 A1784:15-A1786:22; A1857:22-A1858:10; A2808:15-17.
113 A1808:1-A1815:18 (Renner); A1035; A1036; A1063; A1038; A1065; A1066; A1069-70; A1068; A1100; A1104; A1124; A1126; A1127; A1131; A1194; A1199.
114 A1126 (emphasis added).
115 A858.
116 A1783:2-17; A1785:5-17; A1853:6-18 (Steinkeler); A3695:10-A3696:9 (Renner).
117 A3695:10-A3696:9 (Renner).

In fact, several buyers had specifically asked the company to inform them if the Saudi and Ghana contracts were secured because it would affect their offers, with some expressing very recent or renewed interest, and others giving Bernard a clear indication the door could be reopened if the contract risk resolved.[118]

The risk was resolved. The Aramco and Ghana contract wins were reported to a subset of the board on August 21[119] and to the full Authentix board on September 7.[120] Without informing anyone else except Blue Water, the company signed and closed on September 13, 2017 – the same day CUSGFIII's investor committee was having their last meeting of the fund's 10-year term[121]—an "extraordinary coincidence" as Timmins described in unrebutted testimony.[122]

M. Facing no market competition, Blue Water purchases Authentix for well below *every* contemporaneous valuation.

The final purchase price was $87.5 million (which includes a $9.8M receivable paid after closing). Op. 30. This was significantly below every contemporaneous valuation.

In an August 2017 internal memo after completing all its diligence, Blue Water touted that it was getting Authentix at a steep discount: "Our bid . . . represents

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[118] *See, e.g.*, A1294, A1309, A1336; A977; A1854:6-24 (Steinkeler); A1099; A1101; A1125.

[119] A1111.

[120] A1133.

[121] A1197.

[122] A2279:17-A2280:7.

a multiple of 7.5x 2017e (and 2018) EBITDA in an industry currently trading at ten-year average of 12-13x."[123] It described Authentix as "an exciting platform for further growth over the next five years" that by 2022 will be "able to double revenue and earnings to $122m revenue and $23m EBITDA."[124]

A few weeks later, Authentix's fundamentals improved still further but the sales price did not. Authentix not only won the key contracts (as noted above) but its EBITDA and cash flow went up.[125] As a result, Blue Water was able to purchase Authentix at an implied multiple of 5.6x 2017E EBITDA,[126] *far below every one of the 22 sale comparables that Blue Water used* to evaluate the transaction (its lowest comparable was 8.1x and its median and average were 13.2x and 13.8x, respectively).[127]

One week before the sale, Authentix management reported to its board that "[c]ashflow remain solid" and the business was anticipating $73M in revenue for the year.[128] To put that number in perspective, when Carlyle and Whitney purchased their interest in Authentix in 2008 at a $115M valuation,[129] revenue was $32M.[130]

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123 A1073.
124 A1073, A1077 (emphasis added).
125 A1150.
126 *Compare* A1138 (management report $15.5M 2017E EBITDA) *with* A1149 (purchase price).
127 A2632; A2471:23-A2472:17.
128 A1133, A1136.
129 A124.
130 A118.

When the company explored a partial sale in 2014 and the company was valued at $150M,[131] revenue was only $53M.[132] When the investment banks gave their $200-275M valuations in October 2017, revenue was $78M.[133] The following chart shows the $87.5M sales price compared to these historical valuations.

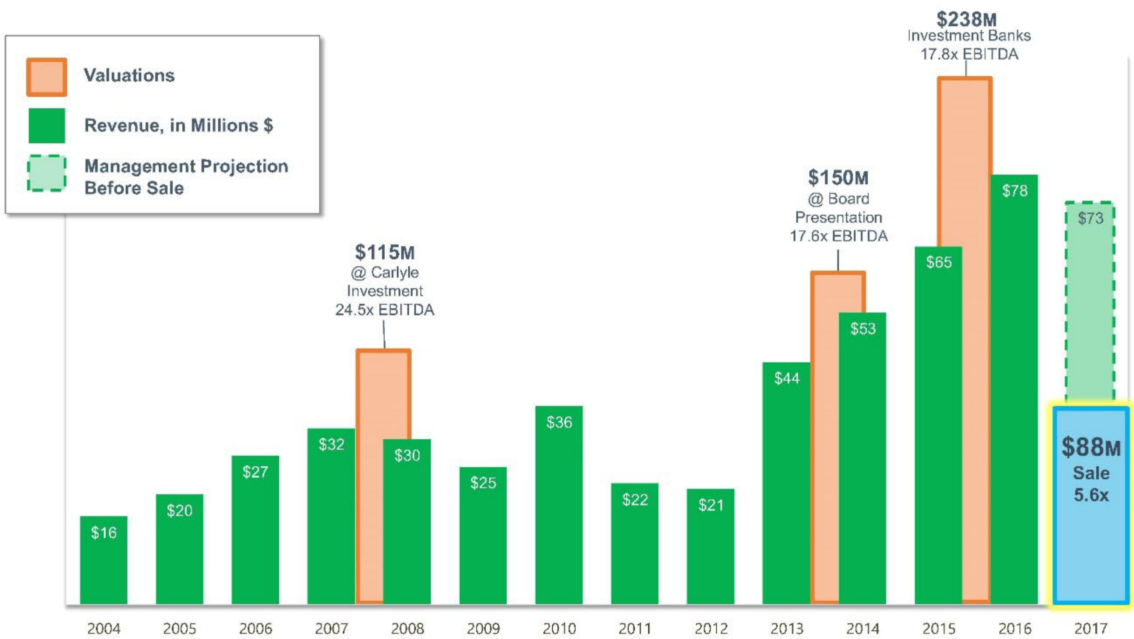

Fig. 1.[134]

Carlyle and Whitney themselves had very recently believed Authentix was worth more. During peak customer contract uncertainty, at the end of December

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131 A156.
132 A769.
133 *Id*.
134 A118; A1138; A1527.

2016, Whitney still valued Authentix at **$161 million**[135] (having carried it at $200M as recently as June 30, 2016[136]). At that same time in late December 2016, Carlyle's Coburn expected it to be sold for between "1.25-1.5x" MOIC (implying an Enterprise Value of **$125-150M**).[137]

The sales price of $87.5M thus reflects a steep discount to fair market value because the market was never tested after the material uncertainties were resolved, and every contemporaneous valuation was well above the sales price. Moreover, unlike the 2008 board prior to the sale to Carlyle, the 2017 board of Authentix did not obtain a fairness opinion or independent appraisal.[138]

N. CUSGFIII recovers 90% of investment due to preferred stock.

"Based on the liquidation preferences, from the sale of Authentix where $87.5 million was eventually paid out, approximately $70 million was first distributed to preferred stockholders." Op. 46. As a 70% holder of preferred shares, CUSGFIII was able to recover nearly the full value of its Authentix investment (90%) whereas the other common stockholders received a fraction.[139]

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[135] A3042:17-A3044:10 (Vigano); A404.
[136] A353.
[137] A384. CUSGFIII realized an MOIC multiple of 0.88x on Authentix. A1373, A1381.
[138] A1642:20-A1643:6.
[139] A1405; A1373.

Notwithstanding the dismal return for Authentix, the fund CUSGFIII performed well overall.[140]

O. Litigation History.

The month after the sale, Plaintiffs filed a suit for appraisal that was dismissed because they had waived their appraisal rights. *See Manti Holdings, LLC v. Authentix Acquisition Company, Inc.*, 261 A.2d 1199 (Del. 2021).

This action was filed in the summer of 2020 and then stayed pending Defendants' motion to dismiss. That motion was denied in June 2022. The case was tried in January 2024, submitted in June 2024, and the post-trial opinion issued in January 2025.

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[140] A1373.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN ITS ANALYSIS OF WHETHER CARLYLE RECEIVED A NON-RATABLE BENEFIT REQUIRING ENTIRE FAIRNESS REVIEW.

A. QUESTION PRESENTED

Did the Court of Chancery err in its analysis of whether Carlyle received a non-ratable benefit? Op. 2, 64.

B. SCOPE OF REVIEW

This Court reviews questions of law *de novo*. *Dematteis v. RiseDelaware Inc.*, 315 A.3d 499, 508 (Del. 2024).

Factual findings are reviewed for clear error. *Salamone v. Gorman*, 106 A.3d 354, 380 (Del. 2014). The misinterpretation of an email is an example of clear error. *Id*. at 380-83.

Mixed questions of law and fact are reviewed *de novo*. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (1999). The interpretation and application of facts, including materiality determinations, are examples of mixed questions of law and fact. *Id.*; *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (2004).

C. MERITS OF ARGUMENT

1. The Court of Chancery used the wrong legal standard.

The Court of Chancery used the wrong legal standard to determine whether to apply entire fairness.

Entire fairness applies when a director or controller competes with the common stockholders for consideration, including for "non-ratable benefits." *See Maffei*, 2025 WL 384054, at *19 (cleaned up). "A non-ratable benefit exists when the controller receives a unique benefit by extracting something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders." *Id.* (cleaned up). A desire or "want" for liquidity is a type of non-ratable benefit that can result in a disabling conflict. *See New Jersey Carpenters Pension Fund v. Infogroup,* 2011 WL 482588, at *10 (Del. Ch. Oct. 6, 2011).

Recently, this Court clarified that the test for whether a unique benefit triggers entire fairness review both for controllers and for directors is *materiality*—not whether the unique benefit arises from a legal obligation. *Id.* at *20. A benefit is material if, under the circumstances, it was "improbable that the director could perform her duties without being influenced" by it. *Id.* at 18 (cleaned up).

The Court of Chancery here applied a different legal standard than materiality. Rather than assess whether Carlyle and the Director Defendants were *influenced* by Carlyle's time pressure and desire for liquidity, the Court of Chancery imposed a "burden to show that Carlyle's inclination to support a sale was in reality an *imperative*." Op. 36 (emphasis added). It reasoned that liquidity conflicts "*have to* involve a crisis, a fire sale where the controller, in order to satisfy an *exigent need* (such as a margin call or default in a larger investment) agreed to a sale of the corporation without any effort to make logical buyers aware." Op. 41-42 (emphasis added) (quoting *In re Synthes, Inc. S'holder Litig.,* 50 A.3d 1022, 1036 (Del. Ch. 2012)). The court's examples of "exigent need" were legal obligations. *Id*. ("margin call or default").

The Court of Chancery acknowledged that the time pressures Carlyle faced were real—finding that the fund's desire for liquidity was "inherent in the business model itself"—and that its investors have an interest "that a fund adhere to a timeline." Op. 2, 48. Nonetheless, the court found these very real pressures "not enough" to create a liquidity conflict because they don't rise to the level of actual compulsion. *Id.* The undisputed evidence of time pressure was deemed not relevant because it did not show Carlyle was under compulsion: "While the facts certainly demonstrate that Carlyle wanted to exit its investment in Authentix in 2017, the facts do not demonstrate that Carlyle *needed* to exit its investment." Op. 43 (original emphasis); *see also id.* 2 ("Carlyle wanted the sale to go forward in 2017 . . . it did not need Authentix to be sold in 2017"), 44 ("even though Carlyle *wanted* to sell off its assets prior to the term expiration, there was nothing in the Limited Partnership Agreement that *required* it"), 56 ("These communications demonstrate that Carlyle preferred . . . but not that Carlyle needed to sell Authentix"), 62 ("nothing in this email indicates Carlyle *needed* to sell Authentix; it indicates that Carlyle *wanted* to sell Authentix”); 64 (“these communications are consistent with the record that demonstrates Carlyle wanted to sell of Authentix and wanted to move quickly”).

The Court of Chancery’s reliance on *Synthes* to impose a compulsion standard was error. Op. 41. The “extreme language in *Synthes* should not be read as establishing a general rule.” *Firefighters’ Pension Sys. of Kan. City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 257 (Del. Ch. 2021). “The court’s hyperbolic language in *Synthes* is best read in the context in which it was issued, where then-Chancellor Strine was reacting to a particularly poorly drafted complaint ‘strikingly devoid of pled facts to support’ the alleged liquidity-driven conflict.” *In re Mindbody, Inc.,* 2020 WL 5870084, at *17 (Del. Ch. Oct. 2, 2020).

Because the Court of Chancery picked the wrong test to examine the evidence, it came up with the wrong result. Even if the evidence does not prove an “imperative,” it does prove Carlyle’s desire to exit Authentix before the end of the fund’s term had a material effect on the sale process. *See supra* Facts. Other courts have applied entire fairness on similar but fewer facts. *See In re Answers Corp. S’holders Litig.*, 2012 WL 1253072, at *1-3, *7 (Del. Ch. Apr. 11, 2012) (applying entire fairness where sale launched at a time contrary to investment banker’s advice and defendants applied pressure to speed up process).

2. The Court of Chancery erred in assuming that the Carlyle decisionmakers had the greater economic interest in maximizing the sales price.

In addition to applying an erroneous legal standard, the Court of Chancery rested its conclusion on a misapprehension of Carlyle's motivation. The court repeatedly stated that it believed it implausible that Carlyle would allow time pressure to impair the sale process because "Carlyle had the most to gain from a higher sale value from distributions for its common shares . . . for every dollar over $70 million, approximately $0.50 went to Carlyle." Op. 65-66; *see also* Op. 62 ("As the holder of the majority of Authentix stock, Carlyle's motivation was to maximize value."); *id.* at 43 ("As the largest stockholder, CUSGF III had 'an inherent economic incentive 'to negotiate a transaction that [would] result in the largest return for all shareholders'"); *id.* at 35 ("So overweening was Carlyle's [liquidity] need, apparently, that it left more than $100,000,000 of value behind, *of which more than 50% would have flowed to Carlyle*" (original emphasis)).

The court's premise is factually wrong. The court failed to distinguish between Carlyle—the *firm* making the decisions about Authentix—and CUSGFIII, the *fund* that owned stock in Authentix. Eighty percent of the profits of the *fund* went to the limited partners and not to Carlyle.[141] As De Benedetti explained, the

[141] A2231:1-7, A2290:6-15 (Timmins); A1455 (179:4-8); A50 (3.5(a)(v) (20% carried interest)).

investors were less focused on returns of a single investment than the return from the portfolio overall and when those returns would arrive.[142] *Carlyle's* share of any profits was only 20%.[143] So using the court's hypothetical and adding $100M to the purchase price (Op. 35), Carlyle's incremental gain would only be about $10M, not the $50M that the Court believed. Plaintiffs by comparison would have received an additional $22.5M.[144]

Most importantly to Carlyle, ten million dollars was peanuts compared to the earnings from a 2% management fee every year on hundreds of billions under management from satisfied investors.[145] The importance of protecting that revenue stream was explained well in an email by PE firm White Deer when it declined to purchase Authentix in part because it was not in an industry its investors were interested in:

> I really like the deal but if it means we may lose LP's I wouldn't do it. A 2% fee on a $50mm LP investment over five years is $10mm. A 20% carry on a doubling of the $35mm is $7mm. I'd rather not lose the $50mm on a risk adjusted basis.[146]

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142 *See supra* Facts §A.

143 A2231:1-7, A2290:6-15 (Timmins); A1455 (179:4-8); A50 (3.5(a)(v) (20% carried interest)).

144 A1405.

145 A2230:15; A2233:9-20; A2246:18-A2247:4; A2296:17-20; A71 (6.2(a)(ii) (2% management fee)).

146 A519.

These dynamics elucidate why De Benedetti would recommend sacrificing the value of a single portfolio company to meet investor timing expectations.[147]

Further, the trial court failed to appreciate how CUSGFIII's preferred stock affected Carlyle's incentives. Op. 65-66. Because the preference allowed its investors to get almost all their money back on the Authentix investment,[148] Carlyle was able to meet liquidity objectives even while the common stockholders received next to nothing.

Therefore, the Court of Chancery got Carlyle's incentives wrong. Carlyle, the firm who controlled the decisions, was *not* "the holder of the majority of Authentix stock." Op. 62. This is clear factual error.

It follows that the court was wrong to infer that "Carlyle's motivation was to maximize value," which rested on its clearly erroneous factual premise. Op. 62. Further, it ignored De Benedetti's admission that Carlyle was *not* motivated to maximize the value of every portfolio company. And it ignored how CUSGFIII's preferred stock allowed Carlyle to sacrifice value for the common stockholders while still achieving its liquidity objectives. These mixed questions of law and fact receive no deference.

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[147] *Id.*

[148] A1405 (Proceeds Summary); A1373 (Authentix MOIC of 0.88x).

3. The Court of Chancery erred in its application or omission of key undisputed facts.

The Court of Chancery also erred in its handling of key undisputed facts.

a. The court does not have an explanation for Carlyle's rejection of Baird's advice.

Renner's October 2016 email makes explicit that the sale process was influenced by Carlyle's time pressure: "We advised Carlyle not to launch at this time given the uncertainty around the contract extension . . . but they asked us to execute a scoping process given their hold period ends in mid-2017."[149] Baird's advice is clear: Don't launch now because of the uncertainty of contract renewals. Carlyle's response is also clear: go ahead with a scoping process because its hold period ends in mid-2017. (For a further explanation of what a "scoping" process is. *See supra* Facts §D.

The court correctly understood that Authentix was advised not to pursue its broad process in 2016: "Baird's recommendation in September 2016 was to proceed with a 'scoping' (***not broad***) process by approaching buyers in a customized manner to market Authentix *ahead* of a regular sale in 2017." Op. 21 (emphasis added). The court also understood that the "regular sale in 2017" means, more precisely, the "regular *way* sale in 2017,"[150] i.e., the broad sale process anticipated for 2017 after

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[149] A358.
[150] *See* Op. 21 n.118 (citing A339, which contains this quote).

the contract uncertainty was removed, as Renner explained: "We agreed to launch a scoping process in *advance of a broad auction in 2017*, *once there is more visibility on the contract extension*."[151]

Consistent with her email, Renner testified that she *advised* Carlyle only to do a mere "scoping" process in 2016 ahead of the broad auction to be run after increased contract visibility:

> Question: And does this [JX229 email] accurately describe what you had advised Carlyle?
>
> Answer: We advised them to do a scoping process, if you read further [in JX229], in advance of a broad auction in '17. . . .[152]

But what happened instead is that they ended up running the broad auction in 2016 anyway:

> Question: Well, is there a difference between the scoping process and the broad auction?
>
> Answer: I don't recall. I think it *morphed* into one. I think it became scoping *into broad*. . . .We need to review more details for me to understand whether scoping paused and *then we went broad*, or whether it just *evolved*.[153]

The reason the process "went broad" prior to the contract renewals was the additional pressure Carlyle put on Baird in October 2016. *See supra* Facts §F. As

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[151] A358 (emphasis added).
[152] A1797:17-21.
[153] A1802:20-24; A1803:1-16 (Renner) (emphasis added).

Renner explained, although she "advised Carlyle not to launch at this time. . . you can't control whether people follow your advice."[154]

The Court of Chancery acknowledged that Baird's 2016 outreach to 127 potential buyers was a "comprehensive marketing and sales process." Op. 49. But when asked to consider how this squared with Baird's advice not to do that, the court reversed course and held Baird merely did "scoping." *Compare* Op. 58 *with* Op. 49. Both things cannot be true and the court did not try to reconcile them. The only evidence the court cited is Renner's testimony, which is quoted above and states that what may have begun as mere scoping "morphed" into the broad auction.[155]

Renner's email shows the sale was influenced by Carlyle's time pressure ("given their hold period ends in mid-2017"). Baird wanted to wait for the contract renewals but Carlyle compelled Baird to run the broad auction in 2016. This resulted in the failed auction. *See supra* Facts §G, J.

b. The post-trial opinion does not consider that Carlyle failed to market Authentix after winning the key contract renewals.

The post-trial opinion does not address that Authentix secured the major contracts shortly before the sale to Blue Water and Carlyle made no use of it. *No*

[154] A1863:4-15.
[155] Citations in this brief are to where in the transcript Renner's testimony is most complete. The post-trial opinion cites where a part of it was re-played.

sale process was run after Authenix secured the contracts and Carlyle did not even tell Baird about this development.[156]

Baird expected Carlyle to tell it about the contract wins so they could market them.[157] Baird's bankers testified that had they known about the Saudi and Ghana contract wins, they would have approached other potential buyers to generate price competition.[158] Carlyle's own sales process expert, a former investment banker, also testified that recanvassing the market after the contracts were secured would be standard procedure.[159] During the sales process, several buyers had requested to be informed if the contract extensions were secured. They were not.[160]

The post-trial opinion suggests the contract wins were insignificant because Blue Water had already anticipated and factored in the financial effects of those contracts being secured. Op. 29. Yet Blue Water plainly understood the difference between *anticipated* contracts and *secured* contracts and how they affect market value. *See supra* Facts §L ("Kind of wish they'd received this Saudi win the day after signing."[161]). Blue Water understood it had no competition to buy Authentix

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[156] A2808:8-17; A2811:17-A2813:16 (Vigano); *see supra* note 112.
[157] *See supra* note 112.
[158] *See supra* note 116.
[159] *See supra* note 117.
[160] *See supra* notes 117-118.
[161] A1117.

during the period of uncertainty, but now that the uncertainty was resolved, there would be competition. *Id.*

As an initial matter, the other major contract secured before the sale (Ghana) was renewed on the same terms it always had—and this was a material positive event that Carlyle failed to capitalize on.[162] Defendants argue the new Saudi contract was immaterial because it was less profitable than the original contract. But there is no dispute that the new Saudi contract was renewed on the terms Authentix had been hoping for since June 2017,[163] and Defendants' post-renewal communications confirm it was a significant achievement.[164] Director Gozycki admitted the renewal was the best he had hoped for and what he believed could be a reason to "pause" the sale process.[165]

Despite these achievements, Carlyle did not want to take the time to test the market as its advisors and Blue Water expected it would. This seemingly irrational decision had one obvious explanation. Carlyle was truly "hell bent" on closing by September, as Renner reported.[166]

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[162] A972; A1762:21-14 & A3518:19-22 (Gozycki).
[163] A3505:6-8; A3511:4-11; A3512:19-A3513:1.
[164] A1114; A1115; A1122; A1107.
[165] A3512:19-A3513:17; A3516:19-A3519:6; A972; A970.
[166] A1126.

c. The post-trial opinion does not address key time pressure admissions.

Perhaps due to its misplaced focus on whether Carlyle "needed" to sell, the post-trial opinion does not address several contemporaneous communications showing that time pressure influenced Carlyle and infected the sale process.

First, although the court took note of Carlyle's admission in a PE textbook that fund life considerations create an incentive to sell (Op. 48), it did not acknowledge the central insight by Carlyle's De Benedetti: "*situations may arise where holding an investment to realize incremental upside is attractive on a stand-alone basis; however, from a portfolio management perspective, the General Partner may ultimately decide to pursue an exit*[.]"[167] This statement cannot be reconciled with the court's presumption that Carlyle was motivated to maximize the sales price of Authentix.

The court stressed that "[w]hat is missing is any *direct* indication that *limited partners* [i.e. investors] were insisting on a quick sale." Op. 46; *see also* Op. 49. This ignores the numerous admissions from high level Carlyle personnel and those running the Authenitix sales process that they felt time pressure, including (1) Thomas Fousse, the Carlyle partner responsible for investor relations,[168] (ii) Coburn,

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[167] *Id.*
[168] A488; A3454:1-16 (Coburn).

Carlyle's head of fund,[169] (iii) Steve, who agreed with "getting out ASAP,"[170] and (iv) Bernard, who observed Carlyle's "bylaw" to sell within 10 years[171] and grew frustrated when Baird did not.[172]

The Court of Chancery dismissed as "untenable" that buyers heard Carlyle would sacrifice value for timing. Op. 59-60. But it did not address the several emails where buyers were told exactly that: "seller has reasonable value expectations . . . balancing their timing objectives" and "fund life" considerations.[173] *See supra* Facts §§E, J.

The court also does not address Sikorsky's (Blue Water's) understanding that Authentix was an "opportunity to acquire business at a discount . . . following a failed auction process and a forced seller . . . as they have reached the end of the fund's investment life and are required to exit by September 2017. They are selling at a sub-optimal time, given there is contract uncertainty."[174] A few days later, Sikorsky directly communicated with Steve about Carlyle's "time pressure."[175] These unaddressed facts undermine the court's presumption about Carlyle's motivation.

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169 A326; A331; A333; A348; A484.
170 A484.
171 A1030.
172 A356; A370; A376, A378.
173 A374; *see also* A375; A390; A513; A1234.
174 *Id.*
175 A807.

The court believed that Carlyle's internal emails "do not indicate 'personal pressure' to avoid a clawback" and "do not discuss selling off portfolio companies of CUSGFIII, including Authentix, to avoid clawback specifically." Op. 52. One Coburn email describes vividly this precise form of personal pressure shortly before the sale:

> "I just noticed that ***CGP III slipped into clawback*** this quarter. . . . ***to the extent we weren't feeling pressure previously*****, we** ***really need to execute on the pending exits***. If we can ***execute on ATX*** and VU this year at valuations close to expectations ***we should rule out claw back*** (because the pref accretion will drop significantly), but we are truly ***dancing on the razors edge***. Without additional exits, the pref continues to tick up at about $1.1MM per quarter . . . so ***the exit timing REALLY matters***. . . . As my high school coach used to say "***pressure makes diamonds***!"[176]

The court's failure to appreciate the words of Coburn indicates it was guided more by its theory of Carlyle's incentives than by Carlyle's actual words and conduct. Coburn's "pressure previously" is an apparent reference to the pressure to liquidate the fund. Now he applies additional specific pressure to sell Authentix to avoid clawback—i.e., the repayment of advance carry distributions taken by deal team members—the risk of which was increasing with the passage of time.[177] Selling

[176] A1032 (emphasis added).
[177] A2284:7-11 (Timmins); A1452-53 (168:11-170:1). Every month that Authentix remained unsold, the "profits" on which Carlyle's carry was based were diminished by the 7% preferred return owed to LPs and the 2% management fee paid by LPs on

Authentix for more money later may have been another way to avoid clawback, but there is no evidence the deal team members made the kind of value judgment envisaged by the court.[178] The real explanation is more human than theoretical. The threat of having to write personal checks to repay clawbacks, when added to the preexisting pressure to liquidate the fund, weighed more heavily on their minds than the prospect of future gains for the fund's investors.[179]

Finally, in contrast to the numerous emails saying explicitly that the sale was motivated by fund-level timing pressures, not one contemporaneous email says the sale was motivated by Authentix's allegedly deteriorating business conditions (only Defendants' self-serving trial testimony). The court did not address this reality.

d. The extension of the fund term to accommodate two smaller investments is a non-event.

The court downplayed the pressure of selling Authentix during the Fund's 10-year term by citing CUSGFIII's extension to accommodate two smaller investments after Authentix was sold. Op. 44, 47, 57. But the issue in this case is not whether Carlyle was pressured to exit *every last investment* before the end of the 10-year

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the amount of assets under management. A1425 (60:18-24); A1454-55 (176:15-179:22); A1034; A1032; A2288:4-5 (Timmins).

[178] Carlyle's internal carrying values for its investments were, in Coburn's words, so "excessively conservative" and "asinine" as to be useless for determining market value. A381; *see also* A2272:6-A2273:3.

[179] A2287:4-23; A2288:21-23; A2236:5-14; A2339:6-7; A530; A1029; A1027; A1034.

term; the pressure on Carlyle was to exit the last "needlemover."[180] Compared to Authentix, the two remaining assets were tiny and immaterial.[181] Tellingly, some investors in the fund were still unhappy about those smaller investments remaining unsold, based on their "very firm view that agreed upon terms should be adhered to and . . funds should liquidate in the agreed upon time."[182] Since Authentix was worth more than double their size combined,[183] it is reasonable to infer that more investors would have been unhappy if Authentix remained unsold after September 2017.

4. Under entire fairness review, the sale of Authentix was unfair.

There is sufficient evidence on the record for this Court to apply entire fairness review to the Authentix sale and enter judgment in the Plaintiffs favor and remand the case to the Court of Chancery to determine damages. *See supra* Facts. If the court chooses not to undergo this entire fairness analysis, in the alternative, it can remand this case to the Court of Chancery to conduct entire fairness review for the purpose of determining liability.

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[180] *See supra* note 15.
[181] A992 (carrying values for Authentix, Catapult, and Vubiquity); A1373 (final value for fund).
[182] A1200.
[183] A2281:12-19.

CONCLUSION

For the foregoing reasons, Plaintiffs-Below/Appellants respectfully request that this Court reverse the judgment of the Court of Chancery, hold that Defendants are liable under the entire fairness standard, and remand the action for further proceedings to determine Plaintiffs' damages.

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Dated: April 29, 2025