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Case Number 112,2025

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' REPLY BRIEF

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INTRODUCTION

Raising the specter that this case will be viewed as an "attack" on private equity, Carlyle argues Delaware should treat liquidity-based conflict claims differently than other non-ratable benefit claims and impose a presumption that controllers like Carlyle are always motivated to maximize the value of their portfolio companies even if evidence suggests otherwise. It is a request for favoritism, not fairness.

Carlyle's re-telling of the case history makes its decision to sell Authentix seem sensible at first, until one realizes it left out half the undisputed facts—those showing time pressure loomed over and affected the sales process. While it is not Plaintiffs' burden to prove time pressure was Carlyle's *only* reason to sell Authentix (only that it was a *material* reason), it is noteworthy that Carlyle's narrative about why it sold Authentix relies only on self-serving witness testimony rather than contemporaneous records. The only documented reason Carlyle gave for the sale at the time of the events was time pressure. The only contemporaneous discussions of Authentix's business condition were positive. Authentix's business circumstances were given as a reason *not* to sell.

The facts here are largely undisputed, from contemporaneous documents whose meaning is plain. The outcome turns not on judicial fact-finding (*i.e.*, who did what and when) but on how to characterize, rationalize, or draw conclusions from

the facts. This is an exercise in legal analysis. The Court of Chancery construed the evidence in express reliance on its belief that Plaintiffs had to prove Carlyle was under an "imperative" to sell. The court focused on the relative strength of Carlyle's "want" or "need" to sell rather than how its desire for liquidity *influenced* the sale process. This was error. The court was also mistaken about Carlyle having the greater financial interest as majority common stockholder—an incorrect premise that it repeatedly referred to in its analysis. Interpreting the evidence through these erroneous lenses led the court to make wrong conclusions.

Defendants argue for a near irrebuttable presumption that Carlyle was motivated to seek the highest price and thus was not motivated to sell early. The evidence shows this presumption is unsustainable. Per its partner De Benedetti, Carlyle does not seek the highest price for every portfolio company when liquidating a fund that is at the end of its life. The unrebutted evidence of Carlyle's specific behavior here is the same. Neither Carlyle nor the court acknowledge the several emails stating that Carlyle "has reasonable value expectations for an asset with this type of growth considering their fund life considerations[.]"[1]

The Court of Chancery disregarded much evidence in reliance on its erroneous legal standard and its general presumption that Carlyle always seeks the highest value no matter how long it takes. Where the evidence contradicts those

[1] A390; *see also* Appellants' Opening Br. ("OB") at 15 (citing several emails).

assumptions, the post-trial opinion does not account for it—as with Carlyle's failure to market Authentix after winning the key contracts—or it misinterprets it, as with Baird's clear advice not to launch a sale process due to the contract uncertainty. These are *logical* errors which this Court can and does reverse.

ARGUMENT

I. The Court of Chancery erred in failing to analyze whether Carlyle's desire for liquidity influenced the sales process.

To determine whether entire fairness applied, the court erred in focusing on whether Carlyle had a "want" versus a "need" for liquidity. Regardless of a "want" or a "need," a liquidity motive is disabling if it influences the sales process. OB31-34.

As an initial matter, this error was not "waived." *See* Appellees' Answering Br. ("AB") at 32. Plaintiffs have argued throughout this case that Carlyle's desire for liquidity influenced the sale of Authentix and was thus a breach of fiduciary duty.[2] To the extent Carlyle takes exception to Plaintiffs making an argument based on *Maffei v. Palkon*, 2025 WL 384054 (Del. Feb. 4, 2025), it is misplaced. *Maffei,* the first Delaware Supreme Court decision to explicitly apply a materiality standard to a controller's non-ratable benefit, was not decided until after the Court of Chancery entered judgment in this matter. But consistent with the *Maffei* standard, Plaintiffs argued below that "a conflict is established when defendants show by words and deeds that time pressure affected them."[3]

Selectively quoting from past opinions of the Court of Chancery, Carlyle proposes the correct test is "whether Carlyle had a *uniquely* urgent need for

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[2] AR264.
[3] *Id.*

liquidity[.]"[4] Under this standard, there would never be conflict if a controller *ordinarily* has urgent needs for liquidity or if a desire for liquidity influences a sales process but is not "urgent."

Carlyle's standard is contrary even to the cases Carlyle cites. One such case held a liquidity benefit is material and disabling if it "influenced" the performance of the controller's duties.[5] In another case, the Court of Chancery found that the plaintiffs had sufficiently pleaded a disabling liquidity conflict because—like here—the controller's own statements showed they were "subjectively affected" by liquidity motives. *In re Mindbody*, 2020 WL 5870084, at *16 (Del. Ch. Oct. 2, 2020). Quoting this Court's precedent, it rejected analyses resembling the court's below that would focus *in the abstract* on whether liquidity motivations are influential: "the test is subjective and '*not* whether a reasonable person in the same or similar circumstances could be affected by a financial interest of the same sort as present in the case, but whether *this* [fiduciary] was or would likely be affected.'"[6]

Carlyle also cites *Firefighters' Pension*, which likewise acknowledged "[t]he desire to wrap up an existing fund or to provide potential investors with attractive realizations while raising a new fund *can affect* a fund manager's approach to

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[4] AB29.

[5] *N.J. Carpenters Pension Fund v. Infogroup, Inc.*, 2011 WL 482588, at *9 (Del. Ch. Sept. 30, 2011).

[6] *In re Mindbody*, 2020 WL 5870084 at *16 n.120 (quoting *City of Fort Myers Gen. Employees' Pension Fund v. Haley*, 235 A.3d 702 722 (Del. 2020)).

achieving liquidity[.]" *Firefighters' Pension Sys. of Kan. City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 258 (Del. Ch. 2021) (emphasis added). But the pleaded facts did not support this inference because the plaintiffs had relied *solely* on the PE fund life cycle, in contrast to a successful plaintiff in another case where the sale process (like here) was launched "contrary to the advice of its investment banker" and the defendant (like here) "pushed the board to speed up the sales process." *Compare id.* at 257 (plaintiffs' sole reliance on PE life cycle) *with id.* at 259 (distinguishing allegations from *In re Answers Corp. S'holders Litig.*, 2012 WL 1253072 (Del. Ch. Apr. 11, 2012)).

If there was a tension in lower court descriptions of how to approach liquidity-driven conflicts, it was resolved by *Maffei.* A non-ratable liquidity benefit is a material disabling conflict if the controller was "influenced by [its] overriding personal interest." *Maffei*, 2025 WL 384054, at *18 (internal quotation marks omitted). Carlyle would limit *Maffei* to the narrow situation where controllers receive the benefit of reduced prospective liability. AB 3, 31. But *Maffei* applies materiality to *any* non-ratable benefit and specifically to liquidity benefits. In the section entitled, "Defining a Non-Ratable Benefit," the Court cited a liquidity-based conflict case. 2025 WL 384054, at *19 n.172 (citing *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022 (Del. Ch. 2012)). In the preceding section—"Triggers for Entire Fairness Review"—the Court twice cited another liquidity-based conflict case. *Id.* at

*18 nn.164 & 166 (citing *Larkin v. Shah*, 2016 WL 4485447 (Del. Ch. Aug. 25, 2016)). The Court's discussion of the materiality standard does not suggest disparate treatment of liquidity conflicts. *Id*. at *20.

When the Court cited *In re Synthes*, it did not adopt the *dicta* described by the Court of Chancery as "extreme," "hyperbolic," and limited to its facts.[7] It merely approved the statement that disabling liquidity conflicts arise in "very narrow circumstances,"[8] which Plaintiffs agree with. Plaintiffs' private equity expert testified without rebuttal that PE firms ordinarily take different steps than Carlyle did here to prevent their liquidity needs from influencing their sale processes.[9] The question is not how narrow the circumstances may be to meet the test, [10] but whether *this case* presents an instance when the controller allowed its desire for liquidity to *influence* the sales process.[11]

By applying the wrong test, the Court of Chancery committed reversible error. Its factual analysis was swayed by this test. The court explained: "a simple predicate step must ***control my analysis***. Have Plaintiffs met their burden to show that Carlyle's inclination to support a sale was really an ***imperative*** . . . ?" Op. 36

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[7] *Firefighters' Pension*, 251 A.3d at 257; *In re Mindbody Inc*., 2020 WL 5870084, at *17.
[8] *Maffei*, 2025 WL 384054, at *19 n.172.
[9] A2290:23-A2291:20.
[10] AB3.
[11] The remaining cases cited by Carlyle were dismissed on the pleadings because they had no facts like this case.

(emphasis added). It brushed aside evidence that Carlyle's strong desire to sell influenced the sale process by reference to its belief that Plaintiffs' burden was to prove compulsion or "exigent need." OB33-34 (citing and quoting Op. 2, 41-44, 48, 56, 62, 64).

The Court of Chancery's erroneous legal standard stunted its analysis. Its misplaced inquiry into whether the evidence proved *compulsion* caused it to lose sight of the fact that the evidence proved *influence*.

II. The Court of Chancery had no basis to presume Carlyle's singular motive was to maximize value.

The court also presumed without evidence that Carlyle's sole and overriding interest in the sale of Authentix was maximizing value. A finding will be reversed when it relies on premises not supported by evidence. *See Unitrin, Inc. v. Am. Gen. Corp*., 651 A.2d 1361, 1380 (Del. 1995). In *Unitrin,* the Court of Chancery assessed the appropriateness of defensive measures taken by a target corporation in response to a takeover effort. *Id.* It presumed, without evidence, that certain outside directors who were also stockholders would not vote like other stockholders in a proxy context because they desired the "prestige and perquisites" of the director's office. *Id.* The Supreme Court rejected this assumption because it "appear[ed] to be subjective and without record support." *Id.*

Here, the Court of Chancery relied on the erroneous belief that "Carlyle" had the greater financial interest as 50% owner of common stock. OB 35 (citing Op. 35, 43, 62, 65-66). Even if it knew the difference between the firm and the fund (as Carlyle urges), the court reasoned repeatedly that *the decisionmakers responsible for the sale of Authentix* gained most financially from a higher price. *Id.* As a result, it demanded proof of an *overbearing compulsion* to sell: "I find that Carlyle was not under ***compelling pressure*** to sell Authentix prior to the end of CUSGF III's term, such that it's ***self-interest***, shared with the minority, to maximize value ***was overborne***." Op. 44-45 (emphasis added). "As I stated above, Carlyle simply

wanting to sell off Authentix prior to the end of the fund term is not sufficient to show that Carlyle was ***willing to sacrifice fair value for its own stock***[.]" Op. 62 (emphasis added). Because the court weighed the evidence based on this erroneous premise, it should be reversed.

Carlyle argues that even though it was not the owner of the stock, its *fund's* ownership was a motivation to maximize value. AB40. Yet, as De Benedetti explains, the limited partners in the fund are less focused on the returns of a single portfolio company than they are on timing 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."[12] Significantly, these fund investors enjoyed preferred returns that allowed them to recoup the value of their investment even as the common stockholders were wiped out.[13] This took away an important incentive to seek a higher price that other common stockholders had. It is error to presume, as the Court of Chancery did, that either Carlyle or its fund had the same incentive as plaintiffs to maximize the sales price.

The court's presumption was also contrary to evidence of what Carlyle said and did during the sales process.[14] The Court of Chancery and Carlyle disregard this evidence because, in general, "investors act to maximize the value of their own

[12] A434.
[13] A1425 (60:18-24), A1454-55 (176:15-179:22) (Anderson); A1032; A1034.
[14] OB6-30.

investments." AB39; Op. 42-43. But any general theory of investor behavior must reckon with Carlyle partner De Benedetti's words about how PE firms *actually* behave when a fund is at the end of its life: the firms do not seek to maximize the value of every portfolio company.[15] The court's logic was faulty and inconsistent when it accepted Carlyle's argument that De Benedetti's article is not specific to this case—while relying on a general theory of value-maximizing behavior not specific to this case, and refusing to accept the evidence specific to this case that Carlyle heeded De Benedetti's teaching.[16]

As this Court has explained, the inquiry should focus not on abstract theories of behavior but *this* controller's behavior.[17]

[15] A434.
[16] AB38-39, 41; Op. 43, 49.
[17] *See supra* note 6.

III. The Court of Chancery made multiple reversible errors in logic.

Carlyle argues that, even if the court below used the wrong legal test and presumptions, its findings of fact are controlling. AB31-32. As explained above, this cannot be true because those findings of fact were expressly influenced by mistaken presumptions. Moreover, this Court performs its own review of a lower court's *logic.* This includes a *de novo* review of whether a sales process was influenced by time pressure and a similar review of logical errors underlying findings of fact.

A. The Court reviews *de novo* whether Carlyle's unique benefit was material.

Whether Carlyle's desire for liquidity influenced the sales process is a question for this Court to decide. "[M]ixed questions of law and fact, *including determinations of materiality*, are also reviewed *de novo*." *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (1999) (emphasis added); *see also Arnold v. Soc'y for Savs. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994) ("this Court may review *de novo* mixed questions of law and fact, such as determinations of materiality"). As part of the exercise, the Court may "review the entire record" and make its "own findings of fact." *In re Mindbody, Inc. Stockholder Litigation*, 332 A.3d 349, 386 (Del. 2024).

In *Mindbody*, the Court reversed the Court of Chancery's holding that an acquiror aided and abetted a CEO's breach of his fiduciary duty of disclosure in proxy materials and made its own determination that the standard had not been met.

Id. at 406. Analyzing the facts, the Court "assess[ed] the weight and materiality of the various omissions that formed" the disclosure breach. *Id.* at 396. It found certain predicate factual findings ("that Vista 'participated in the drafting of the Proxy Materials'") were "not supported by the record evidence." *Id.* at 401. It also found that other evidence cited by the trial court did not support its conclusions. *Id.* ("The record evidence cited by the trial court . . . does not adequately support a finding that Vista knew that its own conduct wrongfully contributed to Stollmeyer's disclosure violations.").

In *Arnold*, the Court reviewed *de novo* whether a bid to purchase a company's subsidiary was a material event requiring disclosure in a proxy statement. *Arnold*, 650 A.2d at 1273, 1276. It reversed the Court of Chancery's conclusion after performing its own review of "all the circumstances" and proceeding to "parse" the proxy statement disclosures "in light of the essential facts regarding the . . . bid." *Id.* at 1277-79. Though the Court agreed with the Vice Chancellor that, "as an abstraction, Delaware law does not require disclosure of inherently unreliable" information, it held disclosure was required "under the circumstances of this case." *Id.* at 1280-81.

B. Findings of fact based on logical errors will also be reversed.

This Court will likewise perform its own review of the *logic* underlying the Court of Chancery's findings of fact. *See In re Mindbody,* 332 A.3d at 386 (facts

must be "the product of an orderly and logical deductive process"). There are several examples of reversible logical errors that the Court of Chancery made here.

First, findings contrary to documents omitted from the Court of Chancery's analysis will be reversed. *See Salamone v. Gorman*, 106 A.3d 354, 382-83 (Del. 2014). In *Salamone,* the Court of Chancery found that an individual was not intended to be a key member of a voting agreement because his name did not "appear in the relevant documents until late in the process." *Id.* at 382. However, the individual had appeared in several documents not discussed by the lower court, including "email[s]," "the earliest version of the Voting Agreement," and a "draft of the Co-Sale Agreement." *Id.* at 382-83. Accordingly, this Court reversed and held that the Court of Chancery's analysis was "not supported by the record." *Id.* at 383.

Second, a factual finding will be reversed when it misinterprets documents. In *Salamone*, the Court of Chancery erred when it "misinterpreted two aspects regarding [a] 2011 email." *Id.* at 380. Over multiple pages, the Supreme Court explained why, under its "more reasonable interpretation" of underlying documents, the court was wrong. *Id.* at 380-382.

Third, internally inconsistent factual findings will be reversed. In *Unitrin,* the Court rejected one finding because it was "inconsistent with [the court's] earlier determination." 651 A.2d at 1383.

The same types of logical errors are present here.

C. The reasoning of the post-trial opinion made important omissions.

The court's logic was flawed, first, because it omitted key undisputed facts from its analysis.

i. The court denied what Baird said repeatedly in *writing*: Carlyle would sacrifice value.

Baird told buyers repeatedly that Carlyle would sacrifice value to meet its timing objectives.[18] The emails are unambiguous. Yet the court describes the notion as "untenable" without acknowledging the emails.[19] These unacknowledged emails go to the heart of the case. They are contrary to the Court of Chancery's theory that Carlyle would not allow timing objectives to compromise value. Carlyle does not defend this error.

ii. Carlyle's time pressure admissions were only accounted for with the court's flawed legal standard.

The court did not grapple with the documents where Carlyle admits and everyone acknowledges its time pressure. OB10-16, 18, 20, 43-46. Carlyle points to footnotes where the court disregards this evidence based on its exigent "need" standard. AB48 (citing Op. 56 n.306 ("These communications demonstrate that Carlyle preferred to sell Authentix . . . but not that Carlyle *needed* to sell." (emphasis added))). This underscores how its erroneous legal standard influenced its analysis.

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[18] OB43 & n.173 (citing A374; A375; A390; A513; A1234).
[19] OB44 (citing Op. 59-60).

Carlyle argues that the court did address Blue Water's understanding that Carlyle was a "forced seller" marketing Authentix at a suboptimal time. AB48-50. But all the court said was that the documents are "not sufficient to demonstrate that Carlyle indeed was operating under 'time pressure' such that it would sacrifice value[.]" Op. 62. The court does not say *why.* Its conclusion is based on its flawed premises.

iii. Other evidence regarding the effect of Carlyle's time pressure was not accounted for.

The court also did not address undisputed facts regarding the effects of Carlyle's time pressure on the sale process, including:

- The contract uncertainty dominated buyer due diligence.[20]
- The defendants, board members, and sale advisors admitted the sale process failed due to that uncertainty.[21]
- In June 2017, Steve Bailey caused the Board to switch negotiations from Intertek to Blue Water, despite Baird's warning that Blue Water would retrade price (which it did), because Blue Water waived CFIUS review (meaning it could close sooner than Intertek).[22]
- Every contemporaneous valuation of Authentix was much higher than the final sale price.[23]
- The Carlyle-controlled board did not pause for the sale to obtain a fairness opinion.[24]

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[20] OB16-17.
[21] OB17-18.
[22] OB22-23, 26.
[23] OB26-29.
[24] A1642:20-A1643:6.

Ironically, Carlyle tries to shore up the post-trial opinion with more facts the court did not account for. Carlyle argues it had no need to sell Authentix because it could theoretically have obtained liquidity by selling its remaining fund assets to another PE firm (*i.e.*, a secondary sale). AB43. Carlyle fails to mention that Coburn in fact *tried* to accomplish a secondary sale in late 2016 to satisfy investor liquidity pressures, "[s]ince we have struggled to monetize these assets individually,"[25] and "[o]ur goal is to monetize the remaining CVPII and/or CGPIII stub assets *by year-end.*"[26] The secondary sale effort failed because bids came in at deeply discounted valuations, partly due to the Authentix contract uncertainty.[27] From then on, selling Authentix became the only viable way to meet investors' liquidity expectations. The court did not discuss these facts except to list the exhibits in a footnote.[28]

iv. Carlyle's failure to market Authentix after winning the key contracts is not addressed.

Like the court, Carlyle does not address that Authentix was not marketed to *anyone* after winning the uncertain contracts. AB46-47. Carlyle argues the post-trial opinion accounts for why Carlyle failed to renegotiate with Blue Water without accounting for Blue Water's expectation that Carlyle *would* renegotiate.[29] More

[25] A333.
[26] B653-54 (emphasis added); A3445 (1742:19-24) (Coburn).
[27] A387-88.
[28] Op. 56 n.306 (citing B653-54, A387-88).
[29] OB24-25 & nn.103-117.

importantly, it does not address why Carlyle failed to market *to anyone else.* No other prospective buyer had Blue Water's information though many had asked for it.[30] Neither the court nor Carlyle answer several important questions. For instance, why not call back "the 27 PE funds" Baird contacted in the sale process who *all*, per Steve Bailey, *expressly* declined to bid on Authentix "because of [the] Saudi" uncertainty?[31] Or why not contact Innospec, who had valued the now-secured contracts at $100M, or any of the other advanced-stage prospective buyers (who participated notwithstanding the uncertainty). *See* Op. 24. Or why not at least consult the sale advisors who, uniformly, attest they would have re-marketed Authentix under these circumstances?[32]

Carlyle highlights the court's conclusion that suspending and delaying the sale process for a year would have had uncertain results. AB47, Op. 50-51. This again avoids the issue. Even if Authentix *continued* the sale process at that juncture, Carlyle could and should have approached the other prospective buyers with the good news of the contract renewals. The Carlyle-controlled Board did not explore these alternatives because there was no time. Director Vigano testified:

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[30] OB26 n.118 (citing A1294; A1309; A1336; A977; A1854:6-24 (Steinkeler); A1099; A1101; and A1125).
[31] A480.
[32] OB25 nn.117-18.

> Q: Were there any discussions that you remember about how these [contract] wins that were reported on September 7th ought to affect the sale process or strategy?
>
> A: I don't recall that.
>
> Q: Do you remember anybody seeking Baird's opinion about that?
>
> A: I don't recall.[33]
>
> . . .
>
> Q: And it's true, isn't it, that the whole sale process that they described here was done while those contracts remained uncertain; right?
>
> A: Correct.
>
> Q: And there was not a sale process run after those contracts had been secured; right.
>
> A: Correct.[34]

These facts featured prominently at trial and in pre- and post-trial briefing but the Court of Chancery did not address them.

The court's analysis of Coburn's email dated August 4, 2016 about the effect of removing contract uncertainty also reflects confusion on the issue. In a footnote in the court's discussion of why it did not find persuasive Carlyle's extensive internal discussions about its desire to sell Authentix before September 2017, the court quotes Coburn and adds emphasis through bolding part of the quote:

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[33] A2808 (1105:8-17).
[34] A2811-13 (1108:17-1110:16).

> We are in the late stages of preparing to launch a sale of Authentix, but their annual contract with Aramco recently came up for renewal and, given the changes at Aramco, is now caught in a cycle of month-to-month extensions. This puts us in a fairly awkward position, as the contract is material. **We could potentially defer the exit a year or two, but its very possible Aramco will be in the same position next year**. Additionally, this is one of the last remaining assets in an older fund that we are **hoping** to liquidate soon.[35]

The court's decision to highlight the uncertainty about the renewal of the Aramco contract *thirteen months* before the sale when the uncertainty about the Aramco contract was removed three weeks before the sale does not reflect a "logical deductive process."[36] Moreover, the only reason Coburn gives for selling Authentix was his desire to liquidate the fund. *Id.* This was true both before the contracts were secured and it remained true after the contracts were secured a year later. The desire to liquidate is the only plausible reason Carlyle did not test the market. *Id.* No other reason has been suggested.

D. The Court of Chancery made logical errors in its interpretation of undisputed facts.

In addition to omissions, the Court of Chancery erred in its interpretation of the undisputed record.

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[35] Op. 57 n.307 (quoting from A331-A332 (court's emphasis)).
[36] *In re Mindbody*, 332 A.3d at 386.

i. It is undisputable that Baird advised against launching a sales process given the contract uncertainty but Carlyle made Baird go ahead because Carlyle's "hold period" was ending.

Renner wrote that Baird recommended not to launch a sales process until after the uncertain contracts were renewed, and that solely because Carlyle's hold period was ending, she agreed to a limited scoping exercise before launching a regular sales process *after* the contracts were renewed.[37] Then, under time pressure from Bernard and Steve, Baird was compelled to proceed with the regular auction in 2016 before the contracts were renewed.[38] There was no process after the contracts renewed, contrary to Baird's written advice.

Rather than counter these undisputed facts, Carlyle argues the matter should be left alone because the court "found—based on Renner's credible testimony—that Baird did not recommend halting the sales process and the exchanges did not evince a need for liquidity." AB49; 45. The specific testimony cited by the court is fully quoted in Appellants' brief. OB39. Renner said no such thing and Carlyle does not identify any other testimony. Carlyle merely repeats the court's misperception.[39]

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[37] OB38-39; A358.

[38] OB13-14, 39-40 & nn.152-54.

[39] Its argument that the court should be affirmed because it noted some of the other evidence of pressure on Baird is a *non sequitur*. *See* AB46 & n.156 (compiling evidence of *pressure*).

ii. Carlyle does not defend the court's misinterpretation of Coburn's "pressure" email.

Carlyle merely repeats word-for-word the court's misinterpretation of another key email. AB34. The Court of Chancery stated Coburn's July 12, 2017 email showed no "personal pressure to avoid clawback" and did "not discuss selling off . . . Authentix to avoid clawback specifically."[40] The full email says what the court denied it said. OB45. Rather than argue the email was correctly interpreted, Carlyle argues "[t]his court should not draw different inferences from Appellants' efforts to rehash the same arguments and evidence." AB34. This is not a dispute over "inferences." Plaintiffs merely ask that documents be read to say what they say.

Similarly, the court did not address the incontrovertible fact that Coburn acknowledged *fund liquidation pressures* in his July 12 email: "*to the extent we weren't feeling pressure previously*, we really need to execute on the pending exits."[41] Carlyle does not propose an alternative interpretation.

iii. Carlyle's argument about the length of the sales process is illogical.

The court erred in accepting Carlyle's logic that, because the sales process played out over a year, it was not affected by time pressure.[42] The protracted sales

[40] Op. 52 & n.289 (*partially* quoting A1032).
[41] A1032 (emphasis added); OB45.
[42] AB35-36.

process only highlights the extreme difficulty of selling Authentix amidst the major contract uncertainty and Carlyle's unwillingness to halt despite the market feedback.

Carlyle allowed the process to go on like that because it was determined to sell and wanted the highest price it could get *within its time constraints*. Its goal was to sell before the end of the fund's term, which it barely did (literally the day of the Fund's last investor meeting).[43] To accomplish that, Carlyle had to skip any effort to market Authentix after the uncertain contracts were secured. This was not a "long" sales process. When it mattered most, Carlyle ran *no sales process*.

iv. Carlyle's argument about the condition of Authentix's business is unsupported.

The court accepted Carlyle's rationalization for the sale: that it was motivated by a supposedly struggling Authentix business. The supporting evidence is Defendants' self-serving trial testimony, not contemporaneous writings. Even if the condition of Authentix had been a partial concern, it would not change the fact that liquidating the fund was having a material impact on the sales process.

There are no contemporaneous documents justifying the sale of Authentix based on its allegedly deteriorating condition. Instead, the contemporaneous communications consistently tout the underlying strength of the business apart from the uncertainties of the Saudi Aramco and Ghana contracts.

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[43] OB26.

As of YE2016 when the contract uncertainty was at its peak, Whitney still carried Authentix at nearly double the final sale price ($161 million[44]) and Coburn was expecting $125-$150M from a sale.[45] As of May 2017 (four months before the sale), Bernard wrote his management team that "the good news in all of this is that the underlying health of our business is strong" notwithstanding the "major uncertainties" of the Saudi and Ghana contracts.[46] His view was that Authentix is "a $76M or so revenue business with a solid EBITDA and significant upside potential."[47] In an internal email one month later, Coburn endorsed the same view, acknowledging the sales process had gone poorly only because of the Saudi and Ghana contracts (so they were considering a sales process "reset"), and remarking that "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."[48] Management's last report to the board one week before the sale was positive and optimistic about the direction of the business.[49]

Potential buyers saw the same thing. Per Baird, the uncertain contracts were the only significant concern through their second round of diligence:

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[44] A3042-44 (1339:17-1341:10) (Vigano); A404.
[45] A386-89; AR1-6.
[46] A823-24.
[47] A823-24; A3310-12, -3321 (1607:8-14, 1608:16-1609:5, 1618:13-24), A3328 (1625:12-21) (Bailey).
[48] A8616.
[49] A1133.

> **Innospec**: "Like the business and see the fit, but due to pending renewals of Saudi and Ghana Fuel contracts, they estimate that close to 50% of revenues are at risk . . ."
>
> **Opsec**: "Like the business, but due to renewals around Saudi and Ghana Fuel and potential downward profitability impacts on the Ghana Tax Stamp Program they have stability questions . . ."
>
> **Intertek**: "Like the business and technology and would like to do more work to understand the contracts (including Ghana Tax which they see as a medium term sizeable risk")"[50]

The month before the sale, Blue Water (after all its diligence) touted Authentix as "an exciting platform for further growth," believing "the company is able to double revenue and earnings to $122m revenue and $23m EBITDA."[51] Contrary to Defendants' made-for-litigation argument that Authentix was losing ground, Blue Water saw "strong cash flows underpinned by long-term contracts with reputable customers" and that "the company has been good at retaining customers" (with a 95% retention rate).[52]

Defendants show a graph depicting Authentix's decline in EBITDA from 2017 to 2018 (post-sale) to support its argument the business was declining.[53] They fail to mention that revenues increased that year[54] and EBITDA only declined

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[50] A478-79.
[51] A1073 & -77.
[52] A763 & -775; A1073; AR11.
[53] AB22.
[54] B1165.

temporarily because Authentix won a lucrative new contract requiring upfront capital expenditures.[55] EBITDA rebounded shortly thereafter.[56] More importantly, as explained above, those examining the business *before the sale* saw a growth business.[57]

Defendants' argument that Blue Water subjectively believed $60-$70m was a "fair" price[58] is belied by both Blue Water's contemporaneous valuation of the business and the price it actually paid.[59] They misplace reliance on an email about *negotiations*[60] where Blue Water had been exploiting Carlyle's "time pressure and objectives"[61] to "re-trade Carlyle by as much as $20-$30m."[62]

Authentix's business outlook was never discussed as a reason to sell, only as the reason to hold.[63] Everyone who looked at the business in contemporaneous documents, including Defendants, saw the business as a valuable growth asset. The only reason the court would or could have accepted the rationalization that Authentix

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[55] B1170 & -73. ; A3321 (1618:16-19), A3331-32 (1628:21-1629:13) (Bailey); AR198.
[56] A1150; AR167 (210:8-211:2) (McKenna).
[57] Even Defendants' criticism of Authentix's ancient history (2008-12) overlooks the dozen new contracts developed during the period that led to future growth. A1983 (420:11-22), A2029 (466:14-19) (Barberito); A3330-43 (1627:16-1640:8) (Bailey).
[58] AB19.
[59] OB26-27 & nn.123-27.
[60] B813.
[61] A807.
[62] A984; *see also* OB23 & n.97.
[63] A328; A331; A358; A861.

sold for business reasons was its foregone conclusion—based on flawed premises and logic—that time pressure could not be the reason. And even if Authentix's business were a reason to sell, such considerations were still doubtlessly influenced by Carlyle's time pressure.

CONCLUSION

The Court should reverse and render a liability judgment in Plaintiffs' favor.

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