



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRYAN REILLY, individually on  
behalf of himself and all others similarly  
situated,

Plaintiff-Below/  
Appellant,

v.

KEITH L. HORN, ZACHARY  
TARICA, THOMAS STAGGS, PETER  
SCHLESSEL, MARTIN LUTHER  
KING III, TERESA MILES WALSH,  
SHEILA A. STAMPS, IDAN SHANI,  
SALIL MEHTA, KEVIN MAYER,  
JEREMY TARICA, FOREST ROAD  
ACQUISITION SPONSOR LLC and  
FOREST ROAD COMPANY LLC,

Defendants-Below/  
Appellees.

No. 426,2025

Court Below:  
Court of Chancery of the  
State of Delaware,  
C.A. No. 2024-0654-LWW

**PUBLIC VERSION**  
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## **NATURE OF PROCEEDINGS**

Plaintiff-Below/Appellant Brian Reilly (“Plaintiff”) brought this putative class action on June 14, 2024, asserting breach of fiduciary duty and unjust enrichment claims related to a de-SPAC transaction whereby Forest Road Acquisition Corp. (“Forest Road”) merged with The Beachbody Company, LLC (“Beachbody”), an established health and wellness company. The Amended Complaint (“AC”) alleged that Defendants-Below/Appellees (“Defendants”) breached their fiduciary duties by issuing a false and misleading Proxy on May 28, 2021, impairing the stockholders’ decision whether to redeem their shares.

Specifically, the AC alleged the Proxy failed to disclose the net cash per share Forest Road would contribute to the merger; failed to disclose certain details regarding an insider sale of legacy Beachbody shares in December 2020 (the “December Sale”); failed to disclose the impact on Beachbody’s projections if its digital subscriptions returned to pre-COVID trends; failed to disclose certain risks related to Beachbody’s multi-level marketing (“MLM”) structure; and failed to include a set of “base case” projections that Forest Road prepared prior to conducting due diligence on Beachbody. (A1030-A1031.)

The Court of Chancery dismissed the action in its entirety, finding Plaintiff’s claims barred by laches. The Court of Chancery determined that Plaintiff’s claims accrued when the Proxy was issued because that was the date of the allegedly

“wrongful act,” causing stockholders an “immediate informational injury.” (Op. at 11-12.) Because Plaintiff did not file his claims until more than three years later, outside of the analogous statute of limitations, the Court of Chancery determined Plaintiff unreasonably delayed bringing his claims and prejudice to the Defendants could be presumed. (*Id.* at 15 & nn. 79, 80.)

The Court of Chancery also held that Plaintiff had not established equitable tolling. On that score, the Court of Chancery observed that “[b]y highlighting at least three omissions observable on the face of the proxy, the complaint pleads its own untimeliness, demonstrating that the plaintiff was on inquiry notice long before June 14, 2021.” (*Id.* at 18.)

On appeal, Plaintiff argues his claims did not accrue until the merger closed on June 24, 2021, because he could not have brought suit for *damages* until that date. (OB at 23-24.) Under well settled Delaware law, however, an “injury” for accrual purposes does not require damages or loss. *See ISN Software Corp. v. Richards, Layton & Finger, P.A.*, 226 A.3d 727, 732-33 (Del. 2020). Stockholders have a ripe claim and can bring suit to correct a flawed proxy before a vote. (*See* Op. at 14; *see also Stein v. Blankfein*, 2019 WL 2323790, at \*10 (Del. Ch. May 31, 2019) (“[T]he preferred time to address [claims based on allegedly deficient disclosures] is before a stockholder vote in order to afford remedial relief appropriate for genuine informational deficiencies.”).

With respect to equitable tolling, Plaintiff points to information he allegedly learned for the first time from the response to his Section 220 demand, while ignoring the AC's allegations that the Proxy omitted material information that was apparent from its face. The Court of Chancery correctly rejected Plaintiff's similar tactic in the proceedings before it, where Plaintiff tried to disavow the AC's repeated allegations regarding the December Sale to avoid a finding that Plaintiff was on inquiry notice when the Proxy was issued. Inquiry notice, however, does not require that plaintiff was aware of all aspects of the alleged wrongful conduct. *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at \*7 (Del. Ch. July 17, 1998).

Plaintiff also contends the Court of Chancery erred in finding that Defendants had established all elements of their laches defense, including prejudice. However, the Court of Chancery correctly determined that prejudice may be presumed where, as here, Plaintiff's claims were brought outside the analogous statute of limitations and Plaintiff has not shown any rare or unusual circumstances that would warrant equitably extending the time to file.

Respectfully, the Court of Chancery's dismissal of Plaintiff's claims as being barred by laches should be affirmed.

## SUMMARY OF ARGUMENT

1. DENIED. The Court of Chancery correctly determined that Plaintiff’s claims accrued when the Proxy was issued on May 28, 2021. Under Delaware law, a breach of fiduciary duty claim “accrues at the moment of the wrongful act—not when the harmful effects of the act are felt—even if the plaintiff is unaware of the wrong.” *In re Coca-Cola Enters., Inc.*, 2007 WL 3122370, at \*5 (Del. Ch. Oct. 17, 2007), *aff’d sub nom., Int’l Bhd. Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Del. 2008); *see also Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004). The AC alleges Defendants breached their fiduciary duties by disseminating a materially false and misleading Proxy that deprived stockholders of information needed to decide whether to exercise their redemption rights. (A1029-A1031; *see also* A1027, A1031, A1115, A1117-A1119.) The Court of Chancery correctly held that Plaintiff’s claims accrued at the moment of that allegedly wrongful act, when stockholders suffered an immediate informational injury. (Op. at 11-12.)

2. DENIED. The Court of Chancery correctly determined that equitable tolling did not apply because the AC itself reveals that Plaintiff was on “inquiry notice” of alleged deficiencies in the Proxy as of the date it was issued. *See Gallagher Indus. LLC v. Addy*, 2020 WL 2789702, at \*13 (Del. Ch. May 29, 2020) (“Where tolling occurs, it lasts until a plaintiff is put on inquiry notice of facts that

ought to make it *suspect* wrongdoing. A plaintiff need not be aware of all the aspects of the alleged wrongful conduct.”).

The AC alleged the Proxy was deficient for failing to disclose multiple details related to the “December Sale”, including: (1) the basis for the enterprise valuation of \$1.5 billion for the sale (A1091); (2) “the identities of the Legacy Beachbody ‘current management’ that participated in the December Sale, or the amount and value of the shares they sold” (A1091); and (3) the “personal and unique reasons” supporting their decision to sell (A1092). The fact that information was not included in the Proxy was evident from the face of the document.

The AC also alleged the Proxy was deficient for failing to disclose the net cash per share Forest Road would contribute to the Merger, as evident from the face of the Proxy. (A1087-A1090.) Plaintiff argues the materiality of the net-cash-per-share was not apparent, but he does not point to any information he learned *after* the Proxy was issued that put him on notice the net cash per share figure was omitted. (*See* Op. Br. at 31-37.) Instead, Plaintiff’s net-cash-per-share allegations are based entirely on information pulled from the Proxy itself. (*See* A1087-A1090.)

Likewise, with respect to the projections included in the Proxy, the AC conceded that the Proxy disclosed that the projections were based on an assumption that subscriptions would continue to increase as they had as a result of COVID. (A1094-A1095 (“The Proxy revealed that the primary basis for the projected rise in

subscriptions was due to the recent increase in subscriptions due to COVID.”.) To the extent Plaintiff wanted to know what Beachbody’s projections would look like if the company assumed the opposite—*i.e.*, assumed that consumers would return to the gym and subscriptions would return to pre-COVID levels—he needed nothing more than the Proxy itself to make that inquiry.

3. DENIED. The Court of Chancery correctly held that Defendants met their burden to establish laches. It was clear from the face of the AC that Plaintiff had knowledge of the basis for his claims more than three years before his case was filed. “A filing after the expiration of the analogous limitations period is presumptively an unreasonable delay for purposes of laches ... and prejudice to defendants is thus presumed.” *Winklevoss Capital Fund, LLC v. Shaw*, 2019 WL 994534, at \*5 (Del. Ch. Mar. 1, 2019) (citation omitted; alteration in original). *See also Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, at \*6 (Del. Ch. Jan. 27, 2010) (“Although not strictly determinative, legal statutes of limitations serve as a benchmark for this court in applying the doctrine of laches, and create the outermost limit of when a claim may timely proceed.... Indeed, a plaintiff in the Court of Chancery may be barred by laches before the analogous statute of limitations has run if the plaintiff should have acted with greater alacrity and, by his delay, has inequitably exposed the defendant to possible prejudice.”).

## **STATEMENT OF FACTS**

Forest Road was a special-purpose-acquisition company (“SPAC”) incorporated in Delaware on September 24, 2020, for the purpose of pursuing a business combination with a target business in the technology, media, and telecommunications (“TMT”) space. (A0145.) Forest Road’s sponsor, defendant Forest Road Acquisition Sponsor LLC (“Sponsor”), was responsible for supporting Forest Road while it sought a merger partner.

### **A. Forest Road Invites Highly Experienced Directors, Officers, And Advisors To Assist Its Search Process**

Forest Road’s Board consisted of seven directors, each of whom had extensive investment and operational experience in TMT and consumer-facing industries. (See A0216-A0220.) The Board included:

- Keith Horn (Forest Road’s CEO and Secretary)
- Thomas Staggs (Chairperson of the Strategic Advisory Committee)<sup>1</sup>
- Zachary Tarica (Chairperson and Chief Investment Officer)
- Peter Schlessel (independent director). Schlessel also was a director of Village Roadshow Entertainment Group, a co-producer of major Hollywood motion pictures, a director of Redbox, a video rental company, and had previously served as CEO of FilmDistrict, an independent movie distribution company and in senior roles at Sony Pictures Entertainment. (A0218.)

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<sup>1</sup> Staggs was previously a senior executive at the Walt Disney Company where he served as CFO, Chairman of Disney Parks and Resorts Worldwide, COO, and as an advisor to Bob Iger. (A0218.)

- Martin Luther King III (independent director). King is a celebrated human rights advocate who, among other things, heads the “Realize the Dream” social movement that has partnered with major corporations, sports leagues and school systems across the U.S., and co-founded Bounce TV, a television broadcast network. (A0218-A0219.)
- Teresa Miles Walsh (independent director). Walsh founded and is CEO of Access Media Advisory, a boutique corporate advisory firm focused on media sector clients. She previously held various senior investment banking positions. (A0219.)
- Sheila A. Stamps (independent director). Stamps is a director and serves on the audit committee and executive compensation committee of Pitney Bowes, a technology company, is a director and Chairperson of the audit committee of Atlas Worldwide Holdings, an airfreight company, and a director of CIT Group, a financial services company. She previously served as the Commissioner of the New York State Insurance Fund and, prior to that, held senior roles at various investment companies. (A0219.)

Forest Road also had a highly skilled management team. In addition to Horn and Z. Tarica, the management team included Chief Financial Officer Salil Mehta and Chief Operating Officer Idan Shani. (A1040-A1042.) Forest Road also formed a Strategic Advisory Committee, consisting of Staggs, Kevin Mayer, and others, to assist management in its search for suitable acquisition targets. (A0219-A0220.)

Jeremy Tarica, who was the Head of the Investment Team and Head of SPACs and Opportunistic Investment for Forest Road and the Sponsor, respectively, also assisted the search and negotiation of a potential business combination. (A1036-A1037.) He was not a Forest Road director, officer, or member of the Strategic Advisory Committee and did not hold any fiduciary positions at Forest Road.

**B. Forest Road Offers Units For Sale To The Public**

After its formation, Forest Road issued a Prospectus and undertook an IPO to raise proceeds to fund a potential merger. (*See generally* B00710-B00783.)

Each unit offered in the IPO included one share of Forest Road Class A common stock and one-third of one warrant. (B00722.) Each warrant would be exercisable in exchange for one share of Class A common stock at an exercise price of \$11.50. (*Id.*)

Each share of Class A common stock came with a redemption right that would allow stockholders to redeem at a per-share price anticipated to be \$10 instead of participating in the merger. (B00732.)

The Prospectus disclosed that the Sponsor purchased 7,187,500 shares of Forest Road Class B common stock (“Founder Shares”) for \$25,000, which reflected the Sponsor’s compensation for promoting the SPAC, and that the Sponsor had committed to purchase up to 5,335,333 warrants at a price of \$1.50 per warrant. (B00727, B00729.) Following a stock dividend, the Sponsor held approximately 7,500,000 Founder Shares after the IPO. (A0145-A0146.)

The IPO occurred on November 30, 2020. Forest Road sold 30,000,000 units at \$10 per unit and raised \$300 million. Concurrently with the completion of the IPO, the Sponsor purchased an aggregate of 5,333,333 private placement warrants, for \$8 million. (A0146.)

**C. Forest Road Identifies Beachbody As A Promising Target And Conducts Due Diligence**

At the time of the IPO, gyms across the country had either been shuttered by government orders or abandoned by members as a result of the global pandemic, and many people began using at-home fitness platforms. (See A0084.)

Against this backdrop, Forest Road commenced an active search for prospective businesses to acquire. Forest Road initiated contact with, or was contacted by, approximately 50 potential target companies. (A0146.) Ultimately, Forest Road actively engaged in discussions with four companies—Beachbody, a media company, a marketing company, and a music company—and signed non-disclosure agreements, met with management for formal presentations, and conducted due diligence for three of them. (A0146-A0149.)

Beachbody stood out among the potential targets. Founded in 1998, Beachbody had grown to over 2.7 million digital subscriptions and 0.4 million nutritional subscriptions by the time of the merger, built mature revenue streams that grossed over \$11 billion since its formation, and had been consistently profitable. (A0230; B00912.) In recent years, Beachbody had successfully transformed from a supplement and DVD business into a multi-product digital platform. (A0160.) Beachbody offered a holistic health and fitness solution under three brands: (i) Beachbody, offering fitness nutrition supplements and digital subscriptions for at-

home fitness; (ii) Openfit, a live, on-demand, fitness platform partnered with fitness celebrities and influencers, including Arnold Schwarzenegger and LeBron James; and (iii) Myx, which provides stationary bikes and equipment with integrated virtual workouts. (B00878, B00914-15.) At the time of the negotiations, Beachbody was in the process of acquiring Myx. (A0147.)

In December 2020, Forest Road held multiple meetings with Beachbody management and conducted preliminary due diligence on Beachbody's financials, marketing, and operations while maintaining discussions with other potential targets. (A0147, A0149.) During that time, Forest Road's advisors provided detailed presentations regarding their initial findings. (A0147-A0150; *see also* B00874-B00920, B00921-B00931.) On December 17, Forest Road and Beachbody entered into a final, non-binding LOI, which provided a \$2.9 billion pre-money equity value for the combined Beachbody-Myx business. (A0150-A0151.)

Forest Road's diligence continued after signing the LOI. Between December 21 and 24, Forest Road representatives and its advisors met 11 times with Beachbody and Myx and provided the Forest Road Board with interim diligence reports. (A0151.)

On January 6, 2021, the Board met to discuss diligence findings. (A0152; B00944-B00978.) Regarding COVID, the presentation observed favorable macroeconomic trends in the health and wellness market, as well as structural shifts

in consumer behavior, which were expected to continue benefiting Beachbody post-COVID. (B00954-B00955.)

The presentation also provided detailed findings on Beachbody’s multi-level marketing (“MLM”) structure, which involved compensating Beachbody’s fitness coaches for selling products to consumers or other coaches. (B00949.) As explained in the presentation, the Federal Trade Commission’s MLM guidance requires that the MLM advertisements realistically reflect participants’ earnings and that participants be incentivized to sell products to end-users instead of recruiting other participants. (*Id.*) The presentation stated that Beachbody’s MLM structure was compliant, and Beachbody had “largely minimized risks,” including by hiring a vendor to monitor coaches’ earnings claims on social media. (*Id.*) Additionally, 99% of coaches were focused on selling products to end-users rather than recruiting other coaches. (B00957.)

**D. Forest Road Scrutinizes the December Sale**

On January 8, 2021, Beachbody informed Forest Road that “on December 29, 2020, certain existing shareholders of Beachbody, including a limited number of the current management, sold \$72.5 million of their existing equity in Beachbody to Raine and certain new investors . . . at an implied enterprise value of approximately \$1.5 billion.” (A0152.)

Forest Road and its advisors accordingly examined the December Sale, including by speaking with Beachbody’s legal counsel, reviewing the underlying transaction documents, and speaking with various executives at Beachbody, including individual sellers. (*Id.*) Through these discussions, Forest Road confirmed each seller had “personal and unique reasons for selling in the December Sale, notwithstanding the discounted valuation (relative to the valuation under the potential transaction with Forest Road).” (*Id.*) Some personal reasons included “the fact that there was no certainty of close and even after close, sales of shares under Rule 144 would not be permitted for a significant period of time.” (A0153.) Additionally, following the sale, “many selling unitholders [still] retained a significant position in Beachbody options.” (*Id.*) For these reasons, as disclosed in the Proxy, “Forest Road did not change its view of valuation after reviewing the information regarding the December Sale,” including because Forest Road’s valuation “took into account other factors such as, anticipated synergies, operating efficiencies, tax, or other cost savings resulting from the [merger], which were not considered in the December Sale implied valuation.” (*Id.*)

**E. The Parties Negotiate The Definitive Transaction Agreements**

During the remainder of January and into early February, the parties negotiated transaction agreements while continuing due diligence. (A0153.) Forest Road and Beachbody also commenced the private placement process (“PIPE Investment”) and began meeting with potential investors. (*Id.*)

On February 3, 2021, Forest Road’s Board met to review the status of the transaction and discuss various financial and valuation analyses, including the impact, if any, of the December Sale on its valuation of Beachbody. (A0155.)

The accompanying presentation summarized a set of revised projections provided by Beachbody management to reflect a more conservative case, as well as certain accounting adjustments for public disclosure. (B00981.) Based on the revised projections, the enterprise value of Beachbody (including Myx) was [REDACTED] pursuant to a comparable-company analysis, and [REDACTED] pursuant to a discounted-cash-flow analysis. (B00985.)

On February 8, 2021 Forest Road’s Board met and received an update on the PIPE Investment and key terms of the merger agreement. (*See* B01009-B01010.) After discussion, the Board unanimously approved the merger agreement and related transaction documents. (B01011.) The Board considered, among other things, the valuation analyses presented at the February 3, 2021 meeting and found that \$2.9 billion was an attractive valuation relative to publicly listed companies and recent

precedent transactions in the private market. (A0156, A0160.) The Board also considered, among other things, Beachbody's growth over the prior 22 years and that COVID was having a material impact on consumer fitness patterns and increased demand for Beachbody's and Myx's offerings. (A0159-A0160.)

On February 9, 2021, the parties executed the transaction agreements. (B01017-B01024; A0156.) That same day, the PIPE investors executed subscription agreements for the purchase of an aggregate 22,500,000 shares of Forest Road common stock at \$10.00 per share. (A0156.) Forest Road announced the transaction on February 10, 2021—well in advance of the two-year deadline to complete a merger. (*Id.*)

**F. Beachbody Has Strong Financial Results In The First Quarter of 2021**

On May 19, 2021, Forest Road announced Beachbody's financial results for the first quarter of 2021. (B01025-B01036.) The combined revenue of Beachbody and Myx was \$243.3 million for Q1 2021, a 43% increase compared to the same period in 2020. (B01031.) The nutrition-related revenue increased 23% and the digital revenue increased 56%, relative to the same period in 2020. (*Id.*) Myx sold 11,300 bikes, compared to 1,100 bikes sold in the first quarter of 2020. (B01031-B01032.) Beachbody's total paid subscriptions reached a record high of 3.2 million. (*Id.*)

**G. Forest Road Disseminates The Proxy To Shareholders On May 28, 2021**

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On May 27, 2021, Forest Road filed the final Proxy for the proposed merger, and the Proxy was issued to shareholders the next day. (A0020-A0021.) Although the Proxy depicted Beachbody as a company with a unique approach in a growing market, it also disclosed substantial risks, including with respect to the uncertainty of the business post-COVID, the need to continue to attract subscribers in a highly competitive market, and the risks associated with Beachbody’s MLM program. (A0161.)

**COVID-related uncertainty:** The Proxy disclosed that Forest Road and Beachbody believed that a significant percentage of consumers did not plan to return to the gym post-pandemic, and that the trend towards adoption of at-home connected fitness, which had accelerated during the pandemic, would continue. (A0084, A0160, A0232, A0246 (“we anticipate that this structural change to the fitness industry will continue after COVID-19”).)

At the same time, however, the Proxy repeatedly warned that COVID’s long-term impact on the market and customer behavior could not be predicted, and its effect on Beachbody could be material and adverse. (A0084, A0161, A0247, A0445.) For example, the Proxy disclosed that “COVID-19 [] had a significant impact on the fitness sector and ha[d] increased demand for home fitness solutions,”

which “led to an increase in [Beachbody’s] customers, *a trend which may be negatively impacted when commercial and office gyms reopen.*” (A0084 (emphasis added).)

**MLM-related risks:** The Proxy disclosed that Beachbody’s network marketing program was subject to federal and state regulations that were directed to prevent “‘pyramid’ or ‘chain sales’ schemes” and that it “could be found not to be in compliance with” such laws. (A0103.) In addition to the regulatory risk, the Proxy disclosed that Beachbody was “subject to the risk of private party challenges to the legality of [its] network marketing program” and “[such] programs of other companies have been successfully challenged in the past.” (A0103.)

**Historical performance:** The Proxy provided Beachbody’s unaudited financials for the three months ending March 31, 2021, as well as the audited historical financial statements of three preceding years ending December 31, 2020, 2019, and 2018. (A0065.) The information showed that Beachbody’s nutrition-related revenue decreased from 2018 to 2020, and while its digital revenue was growing each year, total revenue dipped in 2019. (A0066.)

**December Sale:** The Proxy also disclosed information concerning the December Sale, including (i) that the sale “implied enterprise value of approximately \$1.5 billion,” which was at “a significant discount to Beachbody’s estimated value”; (ii) that the sellers included current Beachbody management, each of whom “was

fully aware of the potential transaction with Forest Road and the valuation of Beachbody”; and (iii) a list of various reasons in support of the sellers’ decision to sell at the lower valuation. (A0152-A0153.)

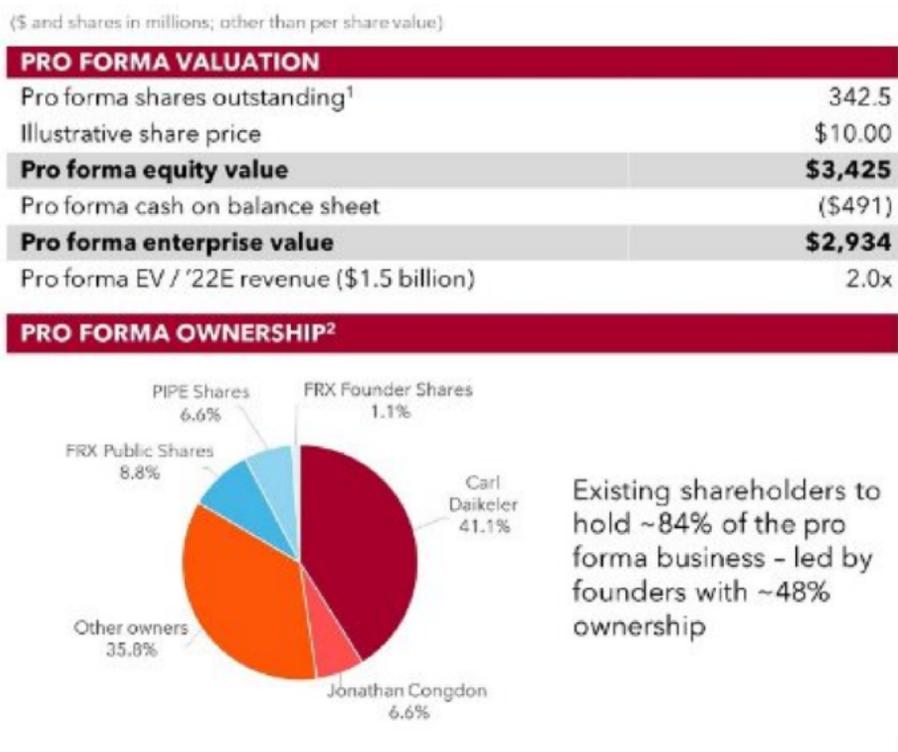
**H. Forest Road Discloses Its Cash Dilution**

On February 10, 2021, Forest Road publicly filed an investor presentation (“Investor Presentation”) (B01037-B01078) as a communication for the business combination, which was incorporated by reference into the Proxy. (A1071, A1080, A1088-A1090, A1094, A1097.) That presentation disclosed the net cash Forest Road would contribute to Beachbody. In a Sources-and-Uses chart, stockholders were informed that Forest Road had \$525 million of investment proceeds, assuming no redemptions, and would use \$38 million as secondary proceeds (*i.e.*, cash proceeds to Myx stockholders as part of the merger consideration), and \$63 million as fees and expenses, leaving \$424 million as “Cash to [Beachbody’s] balance sheet” (B01068):

[\$ in millions]			
<b>SOURCES</b>		<b>USES</b>	
FRX cash in trust	\$300	Cash to balance sheet	\$424
PIPE investment	\$225	Secondary proceeds	\$38
		Estimated fees and expenses	\$63
<b>Total</b>	<b>\$525</b>	<b>Total</b>	<b>\$525</b>

This chart showed that nearly 20% of the investment proceeds would be diluted by expenses and certain Myx stockholders' cash out.

The Investor Presentation provided on the same slide information regarding the total number of shares. The slide showed that Forest Road's public stockholders would hold "8.8%" out of "342.5 [million]" outstanding shares post-merger, while the Sponsor would hold "1.1%" and the PIPE investors would hold "6.6%":



(B01068.) The amount of pre-merger shares was thus 16.5% of 342.5 million—*i.e.*, around 56,500,000 shares.

Similar information was contained in the Proxy itself. In a "Sources and Uses" chart, the Proxy disclosed that the cash to be contributed to the Merger would be diluted by payments to Myx Shareholders, stockholder redemptions, and

transaction fees. (A0062, A0167-68.) The Proxy also disclosed the number of shares that would be outstanding as of the Closing, depending on the number of redemptions, as well as the number of public and private warrants. (A0198, A0210.)

### **I. New Beachbody's Performance Struggles After The Merger**

On June 24, 2021, Forest Road's stockholders approved the merger. Roughly 28% of Forest Road's public stockholders chose to exercise their redemption rights (A1081), redeeming about 8.38 million of the 30 million public shares.

New Beachbody did not perform as well as expected after the closing. On August 12, 2021, New Beachbody announced financial results for the second quarter of 2021. (B01079-B01091.) Total revenue for the first six months of 2021 modestly increased relative to the same period in 2020. (B0108.) With that modest growth, New Beachbody decided to adjust the revenue and EBITDA forecast for 2021 to "present a more conservative view," "[g]iven the many consumer and supply chain variables created by the pandemic," and to account for the initiatives to integrate Beachbody's digital content and increase media investment. (*Id.*)

As more people returned to public spaces, post-merger Beachbody's financial results deteriorated in the third quarter of 2021, with total revenue decreasing 17% and digital revenue decreasing 5% as compared to the same period in 2020. (B01097.) Although New Beachbody's subsequent quarterly financial results all exceeded or met the public guidance from the preceding quarter, overall growth did

not meet pre-merger projections. The AC acknowledges the decline in sales was due to gym reopenings after the close of the merger. (A1098.)

On May 22, 2023, nearly two years after the merger closed, a coach associated with Beachbody filed a lawsuit, alleging that Beachbody had failed to comply with California's labor code. (B01104-B01241.) The lawsuit does not challenge Beachbody's MLM structure as illegal or violating any laws regulating MLMs.

**J. Plaintiff Files The Complaint Over Three Years After The Proxy**

On February 2, 2024, Plaintiff demanded New Beachbody produce Forest Road's books and records relating to the merger under 8 *Del. C.* § 220. In response, New Beachbody produced almost 1,000 pages of Forest Road records documenting its presentations, due diligence findings, Board minutes, and internal governance documents among other things.

On June 14, 2024, Plaintiff filed his complaint. (D.I. 1.) On December 17, 2024, after Defendants moved to dismiss, Plaintiff filed the AC. (D.I. 42.) The AC alleged that Forest Road's directors, officers, and alleged controllers breached their fiduciary duties by issuing a misleading Proxy in connection with the merger and impairing stockholders' redemption rights (Counts I-III). It also alleged Defendants

were unjustly enriched by the alleged breaches (Count V).<sup>2</sup> The AC alleged the Proxy omitted material information regarding the December Sale (A1091-A1093), failed to disclose the net cash-per-share Forest Road would contribute to the Merger (A1087-A1090), failed to disclose what Beachbody’s projections would look like if results returned to pre-COVID trends (A1093-A1098), failed to disclose certain “Base Case” projections Forest Road created prior to conducting due diligence (A1099-A1102), and failed to disclose litigation risks related to Beachbody’s MLC structure (A1102-A1107). The AC also alleged that the documents produced in response to the Section 220 demand only contained one set of board minutes, calling into question whether the other board meetings described in the Proxy occurred (even though the Board decks relied on in the AC correspond in date and content to the Board meetings described in the Proxy). (A1085-A1086.)

Defendants again moved to dismiss arguing, among other things, that Plaintiff’s claims were barred by laches because they were filed more than three years after the Proxy was issued. The Court of Chancery agreed, holding that Plaintiff’s claims accrued when he suffered an “informational injury” when the Proxy was issued and that Plaintiff was on “inquiry notice” as of the same date

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<sup>2</sup> The AC also asserted a claim against Mr. Mayer for aiding and abetting (Count IV), but Plaintiff agreed to dismiss that claim based on this Court’s decision in *In re Columbia Pipeline Group, Inc. Merger Litigation*, 342 A.3d 324 (Del. 2025).

because several of the alleged omissions were obvious from the face of the Proxy. Because the Court of Chancery dismissed Plaintiff's claims as untimely, it did not reach Defendants' other grounds for dismissal.

## ARGUMENT

### **I. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFF’S CLAIMS ACCRUED ON THE DATE THE PROXY WAS ISSUED**

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#### **A. Question Presented**

Whether the Court of Chancery correctly held that Plaintiff’s claims based on an allegedly materially deficient Proxy that deprived stockholders of information necessary to make an informed redemption decision accrued when the Proxy was issued?

#### **B. Scope Of Review**

This Court reviews *de novo* the Court of Chancery’s decision to dismiss a complaint on the ground of laches. *Gallagher v. Long*, 65 A.3d 616 (Del. 2013); *see also ISN Software*, 226 A.3d at 731 (affirming dismissal of claims as time-barred). “In reviewing the grant or denial of a motion to dismiss, ‘the Court’ view[s] the complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations.” *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). “[The Court does] not, however, simply accept conclusory allegations unsupported by specific facts, nor do we draw unreasonable inferences in the plaintiff’s favor.” *Id.* (affirming dismissal of complaint as time-barred).

### C. Merits Of Argument

Delaware “is an occurrence rule jurisdiction, meaning a cause of action accrues at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action.” *ISN Software*, 226 A.3d at 732-33. The issue on appeal, accordingly, is when the “wrongful act” at issue occurred.

Delaware courts routinely hold that the “wrongful act” for a breach of fiduciary duty claim occurs, and a claim accrues, at the time the duty is owed and breached. *See, e.g., Gallagher Indus.*, 2020 WL 2789702, at \*11 (breach of fiduciary duty claims based on inadequate disclosures accrued when disclosures were made); *In re Coca-Cola Enters.*, 2007 WL 3122370, at \*5, *aff’d sub nom. Int’l Bhd. Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Del. 2008) (breach of fiduciary duty claims accrued when defendants entered into contract that “provided the means by which the Defendants effectuated their breaches of fiduciary duty”); *Lebanon Cnty. Emps.’ Ret. Fund v. Collis*, 287 A.3d 1160, 1195 (Del. Ch. 2022) (breach of fiduciary duty claim accrued at time of alleged breach: “When a fiduciary makes a decision that plaintiff alleges is wrongful, the decision is the wrongful act.”); *In re Ebix Inc. Shareholder Litig.*, 2014 WL 3696655, at \*8 (Del. Ch. July 24, 2024) (claim that directors breached their fiduciary duties through bonus agreement accrued on date agreement was approved).

Accordingly, where a stockholder’s claims are based on allegedly inadequate disclosures, as here, they generally accrue when the disclosures are made. *See Gallagher Indus.*, 2020 WL 2789702, at \*11; *Stein*, 2019 WL 2323790, at \*11 (claims based on disclosure deficiencies accrued when proxy was issued). As the Court of Chancery found, the issuance of a materially misleading proxy is a wrongful act that causes an “immediate informational injury by tainting the stockholder decision-making process.” (Op. at 12.) This is consistent with the theory of the AC, which is that the issuance of the Proxy was a breach of duty that “impair[ed] stockholder redemption rights.” (A1034.)<sup>3</sup>

Plaintiff asserts that claims for damages arising from an unfair merger do not accrue until the merger closes. (OB at 22.) That proposition, however, is directly contrary to Delaware’s occurrence rule. Delaware courts have consciously “declined to adopt” a rule from other jurisdictions where a cause of action accrues either “when damages have been suffered or are ascertainable” or “at the time of loss.” *ISN Software*, 226 A.3d at 732-33. In Delaware, “injury is distinct from damages,” and the “statute of limitations can start to run before any ‘actual or substantial damages’ occur.” *Id.* at 735. Consistent with Delaware’s occurrence

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<sup>3</sup> For example, there is only one allegation of any wrongful act by Mr. King in the AC, stating that “As a director, in connection with the Board’s approval of the Merger, King approved the preparation and filing of the Proxy.” (A1039-A1040.)

rule, Court of Chancery correctly determined that Plaintiff suffered an *injury*, and his claims accrued, when the allegedly deficient Proxy was issued, even if he had not yet suffered *damages*.<sup>4</sup> Plaintiff could have sued immediately and sought remedial disclosures. *See Stein*, 2019 WL 2323790, at \*10.

Moreover, as the Court of Chancery observed, if Plaintiff's theory were adopted, it would "create an untenable result where stockholders could not sue to correct a flawed proxy before a vote" because they would not yet have a ripe claim. (Op. at 14.) Plaintiff's theory also would create perverse incentives for stockholders faced with inadequate disclosures to take a "wait and see" approach to see how a transaction turns out and then sue for damages. *Stein* is instructive. In *Stein*, the Court held the plaintiff's breach of fiduciary duty claims based on allegedly deficient

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<sup>4</sup> The cases cited in Plaintiff's Opening Brief pre-date *ISN Software* and are inapposite. Contrary to the statement in the Opening Brief, in *Tuckman v. Aerospace Corp.*, 1975 WL 1959 (Del. Ch. Oct. 21, 1975), the court did not hold that the claims accrued *on* the date of the merger. (OB at 22.) After noting the date of the challenged proxy, the date of the merger vote, and the date of the merger, the court held conspiracy and negligence claims against an accounting firm accrued "*not later than* ... the date of the merger." *Tuckman*, 1975 WL 1959, at \*1 (emphasis added). Because the claims were filed more than three years after that latest date, they were time-barred unless equitable tolling applied. *Id.* *In re Trados Inc. Shareholder Litigation*, 2009 WL 2225958 (Del. Ch. July 29, 2009) did not concern an allegedly deficient Proxy, and the defendants did not argue the plaintiffs' claims accrued prior to closing. *Id.* at \*5. In *Dofflemyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372 (D. Del. 1983), the District of Delaware held the plaintiffs' claims arising out of a merger did not accrue until the merger closed because the plaintiffs did not suffer damages until that date. *Id.* at 379. But *Dofflemyer* predates *ISN Software* by 37 years and is inconsistent with Delaware's occurrence rule.

disclosures to be untimely, noting that “the preferred time to address such claims is before a stockholder vote in order to afford remedial relief appropriate for genuine informational deficiencies.” *Id.* at \*10. Continuing, the Court stated: “Laches is apt in disclosure cases where plaintiff eschews pre-vote relief then, significantly after the fact, seeks rescission.” *Id.* The Court then determined that to the extent the stock incentive plan at issue omitted material information, “such deficiency would be obvious from the face of the Proxy Statement.” *Id.* at \*11. That is precisely the case here. Plaintiff should not be better off for laches purposes because he chose to wait and seek money damages. *See Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at \*18 (Del. Ch. Jun. 29, 2005) (noting it “clearly is not, and should not be, the law” that a plaintiff can wait and see if wrongful acts result in investment losses before bringing suit).<sup>5</sup>

Plaintiff’s reliance on *In re Dean Witter Partnership Litigation*, 1998 WL 442456 (Del. Ch. July 17, 1998), *aff’d*, 725 A.2d 441 (Del. 1999), is misplaced. (OB at 24.) While the Court there found the plaintiffs’ claims accrued when they invested in the partnerships (well beyond the statute of limitations), the plaintiffs alleged the

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<sup>5</sup> In *In re Straight Path Communications Inc. Consolidated Shareholder Litigation*, 2017 WL 5565264 (Del. Ch. Nov. 20, 2017) (cited in OB at 72), stockholders in a to-be-acquired corporation brought a lawsuit pre-merger related to assets transferred to a controller as a condition of his support for the merger. *Id.* at \*1. In determining the direct claims were unripe, the court noted that the plaintiffs did not seek to enjoin the merger. *Id.* Nor did the plaintiffs challenge the disclosures regarding the merger.

misrepresentations and omissions were made “at the time of purchase.” 1998 WL 442456, at \*3. In other words, the allegedly faulty disclosures and the investment were made on the same date. Moreover, the *Dean Witter* Court also found the plaintiffs were on inquiry notice of the alleged breaches as of the date of the partnership’s SEC filings that disclosed the alleged wrongdoing. Thus, *Dean Witter* supports the notion that Plaintiff was on inquiry notice when the Proxy (a public SEC filing) supplied the information underlying his claims. *Id.* at \*8 (“a plaintiff is on inquiry notice when the information underlying plaintiff’s claim is readily available”); *see also In re Primedia, Inc. Shareholders Litig.*, 2013 WL 6797114, at \*13 (Del. Ch. Dec. 20, 2013) (holding claims time barred and noting stockholders “must exercise reasonable diligence when monitoring corporate filings for potential claims ... [T]hey are not entitled to ignore red flags.”)

Plaintiff also notes that in *ISN Software*, the Court found a legal malpractice claim accrued when the incorrect legal advice was relied upon, not when it was given. (OB at 25 (citing *ISN Software*, 226 A.3d at 735).) Here, however, stockholders could immediately rely on the Proxy and decide whether to redeem their shares (which did not require any action if the stockholder decided not to redeem) and to “early vote” for or against the merger. Because stockholders can immediately rely on a proxy and change their position, Delaware courts hold that

disclosure-based claims accrue when the proxy is issued, giving stockholders the ability to seek immediate redress. *Stein*, 2019 WL 2323790, at \*10.<sup>6</sup>

The Court of Chancery also correctly held that Plaintiff's unjust enrichment claims, which were premised on the same allegations as his breach of fiduciary duty claim, were barred by laches. The Proxy fully disclosed that the Sponsor would achieve a significant return on its investment if the merger closed, and Plaintiff alleges Defendants were able to obtain that result by discouraging redemptions through the alleged misrepresentations and omissions in the May 2021 Proxy. (*See* A1027-A1028, A1034, A1081; *see also* OB at 28.) Because Plaintiff's unjust enrichment claims rise and fall with his fiduciary duty claims, it was proper to dismiss them on the same basis. *See Monroe Cnty. Emps.' Ret. Sys. v. Carlson*, 2010 WL 2376890, at \*2 (Del. Ch. June 7, 2010) (dismissing unjust enrichment claims that depended on the success of breach of fiduciary duty claims); *Urdan v. WR Capital P'rs, LLC*, 2019 WL 3891720, at \*20 (Del. Ch. Aug. 19, 2019), *aff'd*, 244 A.3d 668 (Del. 2020) (same). *See also infra*, pp. 39-40 (noting that legal statutes

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<sup>6</sup> Plaintiff contends that his claims go beyond "informational injuries." (OB at 26.) But he does not identify any alleged breaches of fiduciary duty that occurred after the Proxy was issued. Nor does Plaintiff seek relief for anything other than the alleged deprivation of information needed to decide whether to exercise his redemption right. (A1115.) *See also In re Hennessy Capital Acquisition Corp. IV Stockholder Litig.*, 318 A.3d 306, 319 (Del. Ch. 2024) (noting that direct claim premised solely on "fiduciaries' misaligned interests" would be "non-viable").

of limitations create the outermost limit of when a claim may timely proceed in equity).

## **II. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFF WAS ON INQUIRY NOTICE AS OF THE DATE THE PROXY WAS ISSUED**

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### **A. Question Presented**

Did the Court of Chancery correctly determine that Plaintiff failed to plead facts supporting the application of equitable tolling because the AC showed he was on inquiry notice as of the date the Proxy was issued?

### **B. Scope Of Review**

This Court reviews *de novo* the Court of Chancery’s decision to dismiss a complaint on the ground of laches. *Gallagher*, 65 A.3d 616; *see also ISN Software Corp.*, 226 A.3d at 731 (affirming dismissal of claims as time-barred). “In reviewing the grant or denial of a motion to dismiss, ‘the Court’ view[s] the complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations.” *Clinton*, 977 A.2d at 895. “[The Court does] not, however, simply accept conclusory allegations unsupported by specific facts, nor do we draw unreasonable inferences in the plaintiff’s favor.” *Id.* (affirming dismissal of complaint as time-barred).

### C. Merits Of Argument

Plaintiff does not dispute that, even where equitable tolling applies, it lasts only until a plaintiff is put on “inquiry notice.” (OB at 30.) Instead, Plaintiff argues the Court of Chancery erred in finding that “at least three omissions” were “observable on the face of the proxy.” (*Id.* (citing Op. at 18).) But the Court of Chancery’s determination was entirely correct.

**The December Sale.** The most obvious example of alleged omissions that were observable on the face of the Proxy are those related to the December Sale. The AC alleges the Proxy “did not disclose material information in connection with the December Sale” (A1091) and then lists the following alleged omissions that were apparent from the face of the Proxy: (1) the basis for the \$1.5 billion enterprise valuation (*id.*); (2) the identities of the Legacy Beachbody management that participated in the December Sale, or the amount and value of the shares they sold (*id.*); and (3) the “personal and unique reasons” the sellers agreed to the December Sale (A1092).

The Opening Brief argues Plaintiff did not discover that the December Sale’s valuation was in line with Forest Road’s initial enterprise valuation until he was provided the Section 220 documents. (OB at 41-42.) But Plaintiff did not need the Section 220 documents to know that the \$1.5 billion enterprise valuation was “nearly 50% lower than the valuation of Legacy Beachbody in the LOI” because that was

disclosed in the Proxy. (A1075.) Moreover, that was not the only alleged material omission regarding the December Sale described in the AC. Plaintiff does not contend that had he diligently pursued inquiry into the other alleged omissions, he would not have uncovered this information.

**Net cash per share.** The AC also alleges the Proxy was deficient because it “does not disclose the net cash per share that Forest Road stockholders would invest in the Merger in any sort of straightforward way ....” (A1088.) This too was obvious from the face of the Proxy. Plaintiff argues the mere omission of this metric did not put him on “inquiry notice” because there is no “per se requirement” to disclose net cash per share; it only needs to be disclosed if there is a “material” difference between \$10 redemption price and net cash per share. (OB at 32.) But Plaintiff does not point to any information he obtained *after* the Proxy’s issuance that allegedly put him on notice the difference was material. The calculation of net cash per share in the AC comes entirely from inputs obtained from the Proxy.

Plaintiff also complains the calculation is “not ... straightforward.” But even assuming that is true (which it is not), that is precisely why Plaintiff should have inquired if he believed more information was needed to better inform his redemption decision. The Proxy disclosed that the cash to be contributed to the merger would be materially reduced by transaction fees, payments to Myx shareholders, and any redemptions. (A0034, A0048, A0126-A0127.) It also disclosed the Sponsor held

7,500,000 Founder Shares for which it paid only \$25,000—significantly less than \$10 per share. (A0145-A0146.) These simple facts, apparent from the face of the Proxy, sufficed to put Plaintiff on notice that Forest Road would not be contributing close to \$10 cash per share to the merger. To the extent Plaintiff required additional disclosure to understand the delta between \$10 and the net cash per share, he should have inquired.

**COVID-19 impact on projections.** The Court of Chancery also correctly determined that it was observable from the face of the Proxy that the Proxy “failed to discuss the potential effect on the Proxy Projections if Beachbody subscriptions returned to pre-COVID levels,” putting Plaintiff on inquiry notice. (Op. at 18.) The AC alleges: “The Proxy revealed that the primary basis for [the] projected rise in subscriptions was due to the recent increase in subscriptions due to COVID.” (A1094-A1095.) The AC also acknowledges the Proxy disclosed “we anticipate that this structural change to the fitness industry will continue after COVID-19.” (A1096.) To the extent Plaintiff questioned that assumption and wanted to know what the projections would look like if subscriptions returned to pre-COVID levels, he knew that information was not included and thus was on injury notice.

Plaintiff argues he did not know to question that assumption because certain “warnings” the Board allegedly received were omitted from the Proxy. (OB at 40-41.) But the Board decks cited by Plaintiff observed there was “*uncertainty* around

sustainability of current COVID boosts,” which is precisely what the Proxy disclosed. (*Compare* A0160-A0161, *with* A1064.) Plaintiff does not identify any *fact* Forest Road knew pre-merger regarding how COVID would impact Beachbody post-merger that was not disclosed. Plaintiff points to Beachbody’s revenues for the five years preceding the pandemic (Op. at 40), but the Proxy contained audited financial statements for the years ending December 31, 2020, 2019, and 2018, showing Beachbody’s pre-COVID revenue trends. (A0065.) Simply put, how consumers would react when gyms reopened post-COVID was not “known or knowable” to Forest Road as of May 28, 2021, when the Proxy was issued, and the documents produced in the Section 220 demand do not show otherwise. *See Hennessey Capital Acquisition Corp. IV Stockholder Litig.*, 318 A.3d 306, 324 (Del. Ch. 2024), *aff’d* 337 A.3d 1214 (Table) (Del. 2024) (dismissing claims for alleged impairment of redemption right).

Once Plaintiff was on notice of *any* potential disclosure deficiency—*i.e.*, once he had facts sufficient to “suspect wrongdoing”—he is deemed to have been on notice of “everything to which [a diligent] inquiry might have led.” *Gallagher Indus.*, 2020 WL 2789702, at \*13; *see also Pomeranz v. Museum Partners, L.P.*, 2005 WL 217039, at \*3 (Del. Ch. Jan. 24, 2005) (“Inquiry notice does not require full knowledge of the material facts; rather, plaintiffs are on inquiry notice when they have sufficient knowledge to raise their suspicions to the point where persons

of ordinary intelligence and prudence would commence an investigation that, if pursued would lead to the discovery of the injury.”). The AC reveals Plaintiff was on notice of multiple alleged disclosure deficiencies that are the subject of this litigation when the Proxy was issued. The Court of Chancery correctly held that equitable tolling did not apply.

### **III. THE COURT OF CHANCERY CORRECTLY HELD THAT DEFENDANTS ESTABLISHED THEIR LACHES DEFENSE**

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#### **A. Question Presented**

Did the Court of Chancery correctly determine that Defendants established their laches defense?

#### **B. Scope Of Review**

This Court reviews *de novo* the Court of Chancery's decision to dismiss a complaint on the ground of laches. *Gallagher*, 65 A.3d 616; *see also ISN Software Corp.*, 226 A.3d at 731 (affirming dismissal of claims as time-barred).

#### **C. Merits Of Argument**

The Court of Chancery correctly determined that Defendants established their laches defense.<sup>77</sup> As explained, the Amended Complaint and documents incorporated by reference showed that Plaintiff had knowledge of a basis for legal action when the Proxy was issued, yet did not file this lawsuit until more than three years after that date, well outside of the analogous statute of limitations. No “extraordinary circumstances” exist that warrant equitably extending Plaintiff's time to file beyond the analogous statute of limitations period. *See Reid v. Spazio*, 970

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<sup>77</sup> In order to establish laches, a defendant is required to demonstrate (1) plaintiff's knowledge of “a basis for a legal action”; (2) “unreasonable delay in bringing a lawsuit”; and (3) prejudice suffered by the defendant as a result the plaintiff's unreasonable delay.” *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 77 (Del. Ch. 2013) (internal citation omitted).

A.2d 176, 183 (2009) (absent “unusual conditions or extraordinary circumstances,” time to file will not be equitably extended beyond time fixed by analogous statute of limitations). Plaintiff’s delay in bringing his lawsuit was unreasonable.

The Court of Chancery also correctly determined that because Plaintiff brought his claims after the expiration of the analogous statute of limitations, prejudice to Defendants could be presumed. (See Op. at 16 n.79 (citing *Forman v. CentriflyHealth, Inc.*, 2019 WL 1810947, at \*10 (Del. Ch. Apr. 25, 2019).) Plaintiff contends this was in error because he is bringing equitable claims for equitable relief, but that does not change the prejudice analysis. (OB at 46-47.) As the Court explained in *In re Sirius XM Shareholder Litigation*, 2013 WL 5411268 (Del. Ch. Sept. 27, 2013), even in equity, “[a]fter the statute of limitations has run, defendants are entitled to repose and are exposed to prejudice as a matter of law by a suit by a late-filing plaintiff who had a fair opportunity to file within the limitations period.” *Id.* at \*4.

Indeed, the fact that Plaintiff seeks “rescission or rescissory damages” (OB at 47), suggests a shorter period than the analogous statute of limitations may have been warranted, even if Plaintiff had filed within the statute of limitations period. As Delaware courts have explained, “the statute of limitations provides the outermost limit for a plaintiff, filing in Chancery, to bring a claim, with laches typically acting to require even earlier filing.” *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap.*

*Holdings LLC*, 2012 WL 3201139, at \*15 (Del. Ch. Aug. 7, 2012) (emphasis added). Indeed, “a laches bar may arise earlier than the statutory cut-off when a plaintiff seeks equitable remedies such as a mandatory injunction or rescission.” *Id.* (emphasis added). “Relief of this kind will only be obtained if the plaintiff acts with dispatch and will normally be foreclosed to a plaintiff who sits on its hands until near the end of the analogous limitations period.” *Id.* (internal quotations omitted); *see also Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 174 (Del. 2002) (“It is a well-established principle of equity that a plaintiff waives the right to rescission by excessive delay in seeking it.”) (citation omitted); *Midland Grange No. 27 Patrons of Husbandry v. Walls*, 2008 WL 616239, at \*9 n.36 (Del. Ch. Feb. 28, 2008) (“[A] plaintiff seeking rescission must demonstrate that it acted promptly; prejudice to the defendant is not essential.”); *Stein*, 2019 WL 2323790, at \*10 (“Laches is apt in disclosure cases where the plaintiff eschews pre-vote relief, then, significantly after the fact, seeks rescission.”).<sup>8</sup>

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<sup>8</sup> The cases cited in Plaintiff’s Opening Brief do not suggest otherwise. In those cases, prejudice was not presumed because, unlike here, the defendant was seeking a shorter period for laches than the analogous statute of limitations. *See City Investing Co. Liquidating Trust v. Continental Cas. Co.*, 1992 WL 65411, at \*4 (Del. Ch. Mar. 30, 1992), *aff’d*, 624 A.2d 1191 (Del. 1993) (case filed within analogous statute of limitations period); *Whittington v. Dragon Group L.L.C.*, 2008 WL 4419075, at \*8 (Del. Ch. June 6, 2008) (revised Sept. 30, 2008) (same).

Other facts before the Court of Chancery supported the finding that Plaintiff's delay was unreasonable and Defendants were prejudiced thereby, warranting the application of laches. Plaintiff filed his complaint just 10 days shy of three years after the merger closed—the date he argued his claims accrued. What is more, according to Plaintiff, his complaint is indistinguishable from seventeen other complaints challenging de-SPAC mergers in the Court of Chancery, starting with *In re: MultiPlan Corp.*, 268 A.3d 784 (Del. Ch. 2022), decided on January 3, 2022. (See A1200-A1201.) Nothing prevented Plaintiff from investigating and asserting his claims earlier.

Plaintiff also contends the Court of Chancery erred by allegedly failing to consider whether the presumption of prejudice was rebutted. (OB at 48.) But to rebut the presumption, *Plaintiff* had the burden to establish the applicability of a tolling doctrine or unusual or extraordinary circumstances. *Forman*, 2019 WL 1810847, at \*9. Plaintiff did not attempt to show unusual or extraordinary circumstances before the Court of Chancery, and any such argument accordingly has been waived. Del. Supr. Ct. R. 8; *SARN SD3, LLC v. Czechoslovak Grp. A.S.*, 362 A.3d 1170, 1201 (Del. 2024).

Plaintiff cannot rebut the presumption of prejudice in any event. Plaintiff argues that Defendants were not prejudiced because he began his Section 220 investigation in February 2024, within the limitations period. This does not suffice

to show unusual or extraordinary circumstances. The three-year statutory period is designed to provide sufficient time for plaintiffs to investigate and bring their claims, while balancing the inherent prejudice to defendants of delay. For this reason, service of a books and records demand alone does not toll the limitations period for a subsequent lawsuit. *Firemen's Ret. Sys. of St. Louis ex rel. Marriott Int'l v. Sorenson*, 2021 WL 4593777, at \*10-11 (Del. Ch. Oct. 5, 2021) (finding limitations period was not tolled during Section 220 investigation).<sup>9</sup>

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<sup>9</sup> *Levey v. Brownstone Asset Mgmt.*, 76 A.3d 764 (2013) (cited in OB at 48, n.147) did not involve a routine Section 220 demand. Instead, the court found “unusual conditions and extraordinary circumstances” existed where the plaintiff had “timely and consistently asserted his claim in two, non-Delaware, fora within the analogous limitations period, and [] his delay in filing suit in Delaware was attributable ... to extraneous factors other than his own inaction.” *Id.* at 772-73.

## CONCLUSION

The Court of Chancery's ruling should be affirmed. If the ruling is not affirmed, the case should be remanded to the Court of Chancery to consider Defendants' other arguments for dismissal.

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