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Case No. 8505-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GARDNER DENVER, INC.	:	**CONSOLIDATED**
SHAREHOLDERS LITIGATION	:	**C.A. No. 8505-VCN**

MEMORANDUM OPINION AND ORDER

Date Submitted: November 26, 2013
Date Decided: February 21, 2014

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NOBLE, Vice Chancellor

Before the Court is an apparently novel, procedural request. In short, the plaintiff has moved to strike, from the defendants' brief in support of a motion to dismiss, references to the expedited discovery record, which was developed in advance of a preliminary injunction hearing, that are beyond the selected quotations from, and characterizations of, that record in the amended complaint. Although the Court will address the present motion in isolation, it recognizes that there may be other, and perhaps more appropriate, ways to resolve this procedural issue in the future.[1]

A stockholder (the "Plaintiff") of Gardner Denver, Inc., ("Gardner Denver") filed this class action seeking to enjoin preliminarily a merger (the "Merger") between Gardner Denver and an affiliate of Kohlberg Kravis Roberts & Co. L.P. ("KKR"). After conducting expedited discovery, which involved the production of documents and the depositions of several witnesses, the Plaintiff withdrew his petition for a preliminary injunction in exchange for the waiver of certain

[1] Typically, this Court resolves the procedural questions raised here in its disposition of the underlying motion. *See, e.g.*, *In re Primedia, Inc. S'holders Litig.*, 2013 WL 6797114, at *8-11 (Del. Ch. Dec. 20, 2013) (addressing the plaintiffs' motion to strike certain references from the defendants' brief in support of their motion for judgment on the pleadings in the same opinion as the underlying motion for judgment on the pleadings); *In re Nine Sys. Corp. S'holders Litig.*, 2013 WL 4013306, at *12 (Del. Ch. July 31, 2013) (concluding that plaintiffs' motion to strike references to extraneous matters from the defendants' motion to dismiss brief was moot "[b]ecause the Court did not rely upon the exhibits which the [plaintiffs] sought to keep from the Court's consideration").

The Court's resolution of the present motion should not be misinterpreted or mischaracterized as a movement away from this practice. This motion has likely led to increased costs and delay in litigating this action. Were these issues to be raised under different circumstances, the Court might deem it appropriate to follow a course of action different from the one taken here.

contractual provisions governing the Merger and for additional disclosures to stockholders.[2]

Over a month after Gardner Denver stockholders approved the Merger,[3] the Plaintiff filed an amended complaint (the "Amended Complaint") alleging that the directors of Gardner Denver (the "Board," and, together with KKR, the "Defendants") breached their fiduciary duties with respect to the Merger and that KKR aided and abetted these breaches.[4] The Amended Complaint includes several quotations from, and numerous characterizations of, selected portions of deposition testimony obtained in expedited discovery. The Defendants moved to dismiss the Amended Complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim (the "Motion to Dismiss") and filed a joint opening brief (the "Opening Brief"). In their Opening Brief, the Defendants quote and characterize portions of deposition testimony and certain documents other than those explicitly or implicitly referenced in the Amended Complaint.[5]

In response, the Plaintiff moved to "strik[e] references to matters outside the pleadings from Defendants' Opening Brief" (the "Motion to Strike").[6]

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[2] Letter from Joel Friedlander, Esquire (July 3, 2013).
[3] The Court takes judicial notice of the stockholder approval. *See* Gardner Denver, Inc., Current Report (Form 8-K) (July 17, 2013); *see also* D.R.E. 201.
[4] Verified Am. Compl. ("Am. Compl.") ¶¶ 183-91.
[5] The Defendants cite to a seventeen-item Transmittal Affidavit ("Perkins Trans. Aff.") submitted in support of their Opening Brief for these references.
[6] Pl.'s Mot. to Strike or, in the Alternative, to Treat the Defs.' Mot. to Dismiss as One for Summ. J. ("Pl.'s Mot. to Strike") 1.

Specifically, the Plaintiff seeks to strike references to: (i) extraneous portions of five deposition transcripts; (ii) an email chain; (iii) printouts of two pages from Gardner Denver's website; (iv) two Gardner Denver filings with the Securities and Exchange Commission ("SEC"); and (v) the purported replacement of Gardner Denver senior management after the Merger.[7]

For the following reasons, the Motion to Strike is granted in part and denied in part.

I. ANALYSIS

A. *The "Universe of Facts" Upon a Rule 12(b)(6) Motion*

With the allegations of the complaint, the plaintiff "ordinarily defines the universe of facts"[8] from which the Court is to determine, upon a motion to dismiss under Rule 12(b)(6), whether there is a "reasonably conceivable" basis for recovery.[9] At this stage, the Court accepts the non-conclusory allegations of the complaint as true and draws all reasonable inferences in the plaintiff's favor.[10] "[C]onsidering facts not before the court . . . on a motion to dismiss is

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The Plaintiff initially sought alternative relief to treat the Defendants' motion to dismiss as one for summary judgment. By stipulation among the parties, the Plaintiff withdrew this request for alternative relief. Stip. and Order (Oct. 24, 2013).

[7] Pl.'s Mot. to Strike Exs. A-G.

[8] *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

[9] *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011); *see also* Ct. Ch. R. 8(a) (requiring a complaint to include only "a short and plain statement of the claim showing that the pleader is entitled to relief").

[10] *See Cent. Mortg. Co.*, 27 A.3d at 536.

inappropriate."[11] Thus, the universe of facts is typically limited to the allegations of the complaint and any documents attached to it.[12] One harm from the Court's examination of extraneous documents is "the lack of notice [to the plaintiff] that the material may be considered."[13]

But, the Delaware Supreme Court has recognized three exceptions to this rule by which the Court may consider certain documents extraneous to a complaint "for carefully limited purposes": (i) "when the document is integral to a plaintiff's claim and incorporated into the complaint";[14] (ii) "when the document is not being relied upon to prove the truth of its contents";[15] and (iii) when the document, or a portion thereof, is an adjudicative fact subject to judicial notice.[16] The public policy behind these exceptions is plain: allegations largely predicated upon documents not presented to the Court in the pleadings should not escape the

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[11] *Gantler v. Stephens*, 965 A.2d 695, 712 (Del. 2009).

[12] *See Alliance Data Sys. Corp. v. Blackstone Capital P'rs V L.P.*, 963 A.2d 746, 752 (Del. Ch. 2009), *aff'd*, 976 A.2d 170 (Del. 2009) (TABLE); *see also* Ct. Ch. R. 10(c).

[13] *In re Morton's Rest. Gp., Inc. S'holders Litig.*, 74 A.3d 656, 658 n.3 (Del. Ch. 2013) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)); *see also State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 523 (Del. Ch. 2005) ("The [Rule 12(b)(6)] motion . . . is not one that presupposes that the plaintiff has had access to all the information it will eventually need to prove its claim.").

[14] *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995) (following persuasive decisions of federal courts in this area of civil procedure)).

[15] *Id.*

[16] *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170-71 (Del. 2006) (citing *Santa Fe*, 669 A.2d at 70 n.9) (affirming this Court's authority, when reviewing a complaint under Rule 12(b)(6), to take judicial notice of facts "not subject to reasonable dispute" under Rule of Evidence 201); *Fawcett v. State*, 697 A.2d 385, 388 (Del. 1997) ("If there is any possibility of dispute the fact cannot be judicially noticed.").

Court's review under Rule 12(b)(6) by the plaintiff's merely alleging "selected and misleading portions" of those documents.[17]

Whether a document is integral to a claim and incorporated into a complaint is largely a facts-and-circumstances inquiry.[18] This Court has recently determined that documents as varied in form as employment agreements,[19] a limited partnership agreement,[20] a merger proxy statement,[21] an SEC filing,[22] an investment bank's email to a potential acquirer,[23] an email chain[24] and an internal

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[17] *Santa Fe*, 669 A.2d at 70 ("Without the ability to consider the document at issue, 'complaints that quoted only selected and misleading portions of such documents could not be dismissed under Rule 12(b)(6) even though they would be doomed to failure.'" (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991))).

[18] The relevant case law appears to use the terms "integral to the claim" and "incorporated into the complaint" almost interchangeably. For convenience, the Court adopts the former here.

[19] *See TVI Corp. v. Gallagher*, 2013 WL 5809271, at *2 n.3 (Del. Ch. Oct. 28, 2013) (concluding that the employment agreements attached to the defendants' brief were integral to the complaint asserting a claim for breach of fiduciary duty and waste related to the employment agreements).

[20] *See Gerber v. EPE Hldgs., LLC*, 2013 WL 209658, at *1, n.12 (Del. Ch. Jan. 18, 2013), *aff'd in part, rev'd in part*, 67 A.3d 400 (Del. 2013) (finding a limited partnership agreement attached to the defendants' brief to be integral because it was "given a defined term and referred to explicitly and implicitly throughout the Complaint," including in at least four paragraphs).

[21] *See Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013) (determining that a proxy statement was integral to a claim for breach of contractual duties related to a merger because the plaintiff "quote[d] from and cite[d] [it] almost exclusively in making his allegations regarding the Merger negotiation process and [a defendant's] motivations for the transaction").

[22] *See In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *4 n.18 (Del. Ch. Sept. 27, 2013) (noting an SEC filing was incorporated into the plaintiffs' claims because it was quoted in at least one paragraph of the complaint).

[23] *See In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *9 n.79 (Del. Ch. Jan. 31, 2013) (deeming an email incorporated where the plaintiffs "rel[ied] on and selectively quote[d] from [it]" in two paragraphs in the complaint").

[24] *See Latesco, L.P. v. Wayport, Inc.*, 2009 WL 2246793, at *1 n.1 (Del. Ch. July 24, 2009) (identifying an email chain, a portion of which was quoted in the complaint, as integral to a claim for fraudulent misrepresentation and concluding that "the court must view the quote in context to properly examine whether the plaintiffs allege a valid claim").

corporate letter[25] all can, depending on the relevant allegations of the complaint, be deemed integral to the claims and therefore be considered by the Court on a Rule 12(b)(6) motion.

The Court's context-specific analysis to determine whether a document is integral cautions against an effort to synthesize this precedent into a bright-line rule. Nonetheless, a general tendency is that the Court may conclude a document is integral to the claim if it is the "source for the . . . facts as pled in the complaint."[26] That a document is integral can have a material effect on the disposition of a Rule 12(b)(6) motion, as it is possible for an integral document to "effectively negate the claim as a matter of law."[27]

In addition, this Court commonly considers extraneous documents, not for the truth of their contents, but to test the sufficiency of allegations for disclosure-based claims. For example, a stockholder may, in asserting that the directors

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[25] *See e4e, Inc. v. Sircar*, 2003 WL 22455847, at *3 (Del. Ch. Oct. 9, 2003) (finding a letter from executives to the board integral not only because it "was referred to extensively and was given the status of a defined term by the drafters of the Complaint," but also because "much of the wrongful conduct alleged to have been engaged in . . . was taken directly from [it]").

[26] *Orman v. Cullman*, 794 A.2d 5, 16 (Del. Ch. 2002) (finding a proxy statement integral to a substantive claim and incorporated into the complaint for this reason); *accord Freedman v. Adams*, 2012 WL 1345638, at *5 (Del. Ch. Mar. 30, 2012), *aff'd*, 58 A.3d 414 (Del. 2013) ("When a plaintiff expressly refers to and heavily relies upon documents in her complaint, these documents are considered to be incorporated by reference into the complaint.").

[27] *Malpiede*, 780 A.2d at 1083; *see also Sirius XM*, 2013 WL 5411268, at *5 (concluding a claim was time-barred under laches because the contract provisions at issue were previously disclosed to stockholders in an SEC filing found integral to the complaint); *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003) ("Under Rule 12(b)(6), a complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations.").

improperly failed to disclose a material fact in advance of a stockholder vote, selectively quote or characterize the relevant proxy statement. In such cases, this Court may consider the proxy statement as a whole, rather than merely the portions alleged in the complaint, to determine what information was disclosed.[28] Unless the proxy statement is "put forth by [a] plaintiff[] as an admission of the truth of the facts referred to therein," this Court would not assume the truthfulness of the transaction-process disclosures in reviewing, upon a Rule 12(b)(6) motion, whether the plaintiff sufficiently alleged a substantive claim.[29]

B. *The Availability of the Motion to Strike*

Court of Chancery Rule 12(b) provides that if "matters outside the pleading are presented to and not excluded by the Court, the motion [under Rule 12(b)(6)] shall be treated as one for summary judgment and disposed of as provided in Rule 56."[30] If purportedly extraneous matter is presented, Rule 12(b) implies that the Court may, *sua sponte*, exclude it and hear the motion to dismiss, consider it and convert the motion into one for summary judgment, or conclude it is not

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[28] *See Gen. Motors*, 897 A.2d at 169 ("When a complaint partially quotes or characterizes what a disclosure document says, a defendant is entitled to show the trial court the actual language or the complete context in which it was used. Similarly, where a complaint alleges the omission of some material fact, a defendant is entitled to show that the disclosure was made in the document."); *see also Orman*, 794 A.2d at 16.

[29] *Santa Fe*, 669 A.2d at 70.

This is not to say that the Court may not draw from the proxy statement in immaterial ways that are not dispositive of its analysis.

[30] In that situation, the non-moving party should be provided "an opportunity for some discovery." *Santa Fe*, 669 A.2d at 69 (citing Ct. Ch. R. 56(e)).

extraneous but rather integral to the claims and then proceed with the motion to dismiss.[31] Indeed, this Court frequently does determine these issues *sua sponte* in its disposition of the underlying motion.[32]

Nothing in the rule, however, expressly prohibits a plaintiff from moving to ask the Court to define the relevant universe of facts and documents integral to the complaint. The Plaintiff contends that Rule 12(b) "contemplates" a procedural request like his Motion to Strike as a way to avoid the "dilemma" of his "either amend[ing] his Complaint to place in context the new material or run[ning] the risk that the Court accepts the new material as a basis to dismiss the Complaint."[33] Because the Defendants effectively conceded the availability of this procedural request by not arguing that it was improper,[34] the Court will resolve the questions

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[31] *Compare Malpiede*, 780 A.2d at 1090 ("Under Rule 56 in this context, there may be an opportunity for either side to submit affidavits or engage in discovery to explore the 'matter outside the pleadings [that had been] . . . presented to *and not excluded by the Court*.'") (emphasis added), *with id.* at 1091 ("Simply because a matter outside the pleading has been presented under Rule 12(b)(6) and thereby must be 'treated as one for summary judgment' with 'all parties . . . given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56,' it does not follow that the 'floodgates of discovery' have to be opened.").

[32] *See supra* notes 19-25; *see also Robotti & Co., LLC v. Liddell*, 2010 WL 157474, at *5-6 (Del. Ch. Jan. 14, 2010) (declining to convert the motion to dismiss, even though extraneous matters were presented, because the Court's disposition of the motion to dismiss did not rely upon the non-integral, extraneous matters); *Kessler v. Copeland*, 2005 WL 396358, at *3-4 (Del. Ch. Feb. 10, 2005) (converting a motion to dismiss into a motion for summary judgment where the "factual references" to extraneous matters were "inextricably entwined with [the] motion to dismiss.").

[33] Pl.'s Mot. to Strike 3.

[34] This is not to say, however, that the Defendants failed to argue that the requested relief is "extreme" and may require the Court "to strike, draw a line through, make [the Defendants] take out . . . things that [they] put in [their] opposition to the motion to [dismiss]." Oral Arg. Pl.'s Mot. to Strike ("Oral Arg.") 34-35.

raised in the Motion to Strike now before considering the Motion to Dismiss in due course.

C. *The Focus of the Motion to Strike*

The Plaintiff argues that the Defendants, in their Opening Brief, improperly reference certain extraneous documents related to "seven factual issues"[35] implicated by the allegations of the Amended Complaint. Much of the parties' submissions to the Court reflects and adopts this framework. Yet, because Delaware case law addresses whether a particular document, rather than a particular subject matter, is integral to the asserted claims, a more appropriate way

[35] The factual issues framed by the Plaintiff are:

- Did [Barry] Pennypacker discuss "confidential information" with KKR in September 2012?
- Did KKR disclose that [Barry] Pennypacker had been advising KKR about a potential acquisition of Gardner Denver prior to October 2012?
- Did KKR have prohibited transaction-related discussions with [Barry] Pennypacker during October through December 2012?
- Did [Barry] Pennypacker possess unique knowledge about Gardner Denver that was not known by former employees advising other bidders?
- Did KKR obtain permission to consult with [Barry] Pennypacker by threatening to drop out of the sale process absent Gardner Denver's consent?
- Was the Gardner Denver board fully informed during the sales process?
- Was CEO and director Michael Larsen motivated by his career prospects?

Pl.'s Mot. to Strike 2, Exs. A-G.

to determine the propriety of the Defendants' references in the Opening Brief is to examine each document in turn.

1. The Deposition Transcripts

For the Court to consider the additional references to the deposition transcripts in the Opening Brief, as the Defendants contend it may do,[36] instead of just the selected portions of deposition testimony referenced in the Amended Complaint, as the Plaintiff maintains it must only do,[37] the Court must conclude that each transcript was integral to the alleged claims.[38] The five depositions referenced in the Opening Brief[39] are those of: (a) Barry Pennypacker ("Pennypacker"), the former Chief Executive Officer ("CEO") of Gardner Denver;[40] (b) Dianne Schumacher ("Schumacher"), the Chair of the Board;[41] (c) Michael Larsen ("Larsen"), the CEO, Chief Financial Officer, and a director of Gardner Denver;[42] (d) Matt McClure ("McClure") of Goldman Sachs, the financial

[36] Defs.' Opp'n Br. to Pl.'s Mot. to Strike ("Defs.' Opp'n Br.") 8-19.
[37] Pl.'s Reply in Further Supp. of his Mot. to Strike ("Pl.'s Reply") 1-6; Pl.'s Mot. to Strike 8-14.
[38] The Court recognizes that the Plaintiff, as the drafter of the Amended Complaint, may not have treated all five deposition transcripts equally. Accordingly, neither must the Court uniformly conclude that all five transcripts at issue here are integral. That is, the Court's inquiry is whether each deposition, individually, is integral.
[39] *See, e.g.*, Opening Br. 8-9, 11-13, 16, 18, 38, 45, 48-49.
[40] Perkins Trans. Aff. Ex. F.
[41] *Id.* Ex. G.
[42] *Id.* Ex. H.

advisor to Gardner Denver for the Merger;[43] and (e) Pete Stavros ("Stavros") of KKR.[44]

The parties have not identified a binding precedent in Delaware or a persuasive decision from another jurisdiction in which deposition transcripts, produced in expedited discovery in advance of a preliminary injunction hearing and then partially quoted and characterized in an amended complaint, were deemed integral to the claims and thus properly before the court on a motion to dismiss.[45] Instead, the parties argue over the effects of *In re Morton's Restaurant Group, Inc. Shareholders Litigation*, a decision of this Court dismissing a stockholder complaint, amended with references to the expedited discovery record, for failure to state a claim.[46] After noting how the plaintiffs made "substantial references" to four deposition transcripts in "construct[ing] their Complaint," as evidenced by "citing them 28 times" as well as including "selective quotations," the *Morton's Restaurant* court concluded that "the depositions have been incorporated by reference."[47] But, the court's express acknowledgement that its disposition of the

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[43] *Id.* Ex. I.
[44] *Id.* Ex. E.
[45] There is likely more than one reasonable explanation for this lack of precedent. One of them may be that the issue had not yet been presented for unavoidable resolution in a way like the Motion to Strike. *See, e.g.*, *Primedia, Inc.*, 2013 WL 6797114, at *8-11; *Nine Sys. Corp.*, 2013 WL 4013306, at *12.
[46] *See Morton's Rest.*, 74 A.3d at 676-77.
[47] *See id.* at 658 n.3.

motion to dismiss did "not turn on this point"[48] largely limited its preceding analysis as dictum.[49] Nonetheless, the reasoning animating *Morton's Restaurant* is persuasive.

It would be difficult for the Plaintiff to argue he was harmed for want of notice of the Court's consideration of additional sections of the deposition transcripts when deciding the Motion to Dismiss if the Plaintiff's actions not only created the transcripts, but made them integral to the claims of the Amended Complaint.[50] The Plaintiff took the depositions, undoubtedly reviewed the transcripts, and deemed it appropriate to amend his complaint with quotations from, and substantial characterizations of, them. That the Plaintiff took the depositions at issue means that, although they are testimonial in nature, the transcripts do not suffer from the limitation on cross-examination that has motivated this Court's excluding of certain documents from its review at this procedural stage.[51] Moreover, it is not clear why, or how, deposition transcripts

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[48] *Id.*

[49] *See Brown v. United Water Del., Inc.*, 3 A.3d 272, 276-77 (Del. 2010) (characterizing a lower court's analysis as dictum because "it would have no effect on the outcome of this case"); *see also In re MFW S'holders Litig.*, 67 A.3d 496, 521 (Del. Ch. 2013) (reflecting on the treatment of dictum by Delaware courts).

[50] *See Morton's Rest.*, 74 A.3d at 658 n. 3 (citing *Chambers*, 282 F.3d at 153).

[51] *See In re New Valley Corp. Deriv. Litig.*, 2001 WL 50212, at *5-6 (Del. Ch. Jan. 11, 2001) (excluding from the court's review, upon a motion to dismiss, board and special committee minutes, an appraisal, and a fairness opinion obtained from the settlement of a preceding books and records action, even though the plaintiff "openly acknowledge[d] that some of the allegations in the complaint are a direct result of information gleaned from [these] documents," because they "do not directly portray a complete picture of the reasons behind the actions and decisions of each New Valley director").

should be treated differently than any other type of document that could be found integral to a claim. Therefore, consistent with analogous precedent, as well as the *Morton's Restaurant* analysis, the Court concludes that a deposition transcript may be deemed integral to the Plaintiff's claims if it was a substantial source for the allegations in the Amended Complaint.[52]

A thorough and careful review of the Amended Complaint reveals that all five deposition transcripts are substantial sources for the Plaintiff's allegations underlying his substantive claims. Accordingly, the transcripts of the depositions of Pennypacker, Schumacher, Larsen, McClure, and Stavros are all integral to the Amended Complaint.[53]

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[52] *Accord Morton's Rest.*, 74 A.3d at 658 n.3; *Orman*, 794 A.2d at 16.

The "substantial" qualification here is an attempt to note a distinction between a passing reference to a deposition transcript and significant reliance on it within the complaint. Reasonable minds may differ on how best to articulate when a deposition transcript becomes integral.

[53] The quantitative metrics about the depositions collectively support the Court's conclusion. By the Defendants' calculations, the Plaintiff "quotes or explicitly paraphrases deposition testimony in 32 paragraphs of the Amended Complaint." Defs.' Opp'n 8 (citing Compl. ¶¶ 26, 27, 28, 29, 30, 38, 45, 47, 48, 50, 51, 52, 53, 54, 55, 80, 82, 83, 87, 101, 118, 122, 124, 125, 126, 127, 133, 134, 154, 155, 156, 157). Of just this small sample, it is clear that each deposition was a substantial source of the allegations: Pennypacker's deposition is implicated in nineteen paragraphs, including five block quotations; Schumacher's in five paragraphs, including a block quotation; Larsen's in three paragraphs; McClure's in four paragraphs, including two block quotations; and Stavros's in three paragraphs, including a page-long, block quotation. In addition, according to the Defendants, another ten paragraphs "contain allegations that no longer explicitly reference deposition testimony but which are identical to factual assertions made in Plaintiff's preliminary injunction motion that Plaintiff supported with citations to depositions." *Id.* (citing Compl. ¶¶ 19, 20, 22, 23, 24, 25, 56, 57, 78, 130).

The Blackline Version of the Verified Amended Complaint reveals that almost all of the substantive allegations in the Amended Complaint were, in fact, amended. Many of the amended allegations were derived from the Plaintiff's brief in support of its preliminary injunction petition, which itself was based, in no small part, on much of the deposition testimony

The Court thus may examine the integral deposition testimony referenced by the Defendants in their Opening Brief when considering the pending Motion to Dismiss. Yet, this conclusion should not be interpreted as an open invitation for the Defendants here or similarly situated parties in the future to contend that, because a deposition transcript is integral to a claim, the Court must accept every statement made during that deposition as true. That position is incompatible with settled Delaware law.

The standard of review for the Motion to Dismiss under current Delaware law is straightforward. The Court must accept the allegations in the Amended Complaint, including those based on deposition testimony, as true.[54] All reasonable inferences from these allegations based on deposition testimony must be viewed in the Plaintiff's favor.[55] Reasonable inferences favoring the Plaintiff cannot be disregarded in favor of contrary inferences favoring the Defendants.[56]

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at issue here. *Compare* Am. Compl., Substantive Allegations A-M, *with* Pl.'s Corrected Opening Br. in Supp. of his Mot. for Prelim. Inj., Statement of Facts A-P.

These calculations, although not necessarily dispositive, corroborate the Court's conclusion that the depositions were a substantial source for the allegations of the Amended Complaint.

[54] *See Cent. Mortg. Co.*, 27 A.3d at 536.

[55] *See id.*

[56] *See Gantler*, 965 A.2d at 709 ("On a motion to dismiss, the Court of Chancery [is] not free to disregard [a] reasonable inference, or to discount it by weighing it against other, perhaps contrary, inferences that might also be drawn.").

And, most importantly, the Court may not resolve conflicting testimony or conflicting inferences drawn from testimony.[57]

The integral deposition transcripts are testimonial in nature. They will undoubtedly include statements that conflict, perhaps irreconcilably, with the allegations of the Amended Complaint. Thus, in light of the procedural standard when testing the sufficiency of the Amended Complaint under Rule 12(b)(6), the parties should expect that the Court will disregard the additional deposition transcript references quoted and characterized by the Defendants in the Opening Brief absent endorsement of their truthfulness by the Plaintiff, which the Plaintiff has not done.[58] It is conceivable that there may be situations in which it would be appropriate for the Court to rely upon integral deposition testimony beyond that quoted or characterized in a complaint in its disposition of a Rule 12(b)(6) motion.[59] But, the present action does not appear to qualify as one of those situations.

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[57] *See Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2002) ("Resolving conflicting testimony is the providence of a fact finder at a trial, not a judge on summary judgment."); *see also Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2010 WL 3168407, at *12 (Del. Ch. Aug. 11, 2010) ("Resolving the conflicting evidence and inferences [from witness testimony] requires a trial.").

[58] Pl.'s Reply 8; Pl.'s Mot. to Strike 14.

[59] *Cf. Malpiede*, 780 A.2d at 1083 ("[A] claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law.").

It is conceivable that it may be appropriate for the Court to examine a selective, misleading quotation in its proper context. Suppose, for example, that a particular deposition transcript is a substantial source for the allegations of a complaint and therefore integral. The complaint asserts a claim based primarily on the following quotation from the deposition: "Billy did . . . shoot

2. The Email Chain

The same analytical framework applies to the email chain referenced in the Opening Brief; the Court must conclude it is integral to the Amended Complaint to consider it upon the Motion to Dismiss. The Plaintiff alleges that an email from Ray Hipp ("Hipp"), a Gardner Denver director, to Larsen complaining about being "in the dark" (the "Hipp Email") is evidence of the Board not being informed about the company's sales process.[60] The Amended Complaint features a block quotation of almost the entire Hipp Email.[61] The Opening Brief cites a response email from Larsen, sent thirty-one minutes later, in which he offers to "sort through the media reports and fill [Hipp] in on the details"[62] (the "Larsen Email"). The Hipp Email and the Larsen Email are part of the same document produced in discovery (the "Email Chain Document").[63] In the Amended Complaint, the Plaintiff does not quote or characterize the Larsen Email or the Email Chain Document, other than the Hipp Email.

Johnny." It turns out that the actual deposition testimony was "Billy did not shoot Johnny." Under the framework contemplated here, a defendant should be allowed to present the full quotation to the Court. Absent other supporting allegations, the Court may conclude that the integral deposition transcript effectively negates the asserted claim, which would likely be dismissed for failure to state a claim. *See, e.g.*, Oral Arg. 7-9. Whether the drafter of the complaint may be subject to sanctions under Court of Chancery Rule 11 is an issue separate from whether there is a reasonably conceivable basis for the alleged claim.

[60] *See, e.g.*, Compl. ¶¶ 11, 147.

[61] *Id.* ¶ 147.

[62] Opening Br. 39.

[63] Perkins Trans. Aff. Ex. P.

The Plaintiff argues it is improper for the Defendants, at the motion to dismiss stage, to "add[] their own evidence not relied upon in the Complaint and ask[] the Court to conclude that evidence outweighs the well-pled allegations in the Complaint."[64] Meanwhile, the Defendants contend that the Plaintiff's use of the Hipp Email makes the entire Email Chain Document integral to the Amended Complaint such that they may "place into context the selective quotation."[65]

It is clear from the significant quotation and characterization of it in the Amended Complaint, albeit in only one paragraph, that the Hipp Email is integral.[66] The issue, however, is whether the Email Chain Document—including both the Hipp Email and the Larsen Email—is integral. In *Latesco, L.P. v. Wayport, Inc.*, this Court found an email chain to be integral where a portion of it was quoted in a complaint alleging a fraudulent misrepresentation claim that "rest[ed] on the quoted email."[67] The claims for breach of fiduciary duty and aiding and abetting asserted in the Amended Complaint are distinguishable from the fraudulent misrepresentation claim in *Latesco*. In the Plaintiff's words, the reference to the Hipp Email in the Amended Complaint supports its allegations that the Board "was kept in the dark about the sale process."[68] The Plaintiff's claims

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[64] Pl.'s Mot. to Strike 11.
[65] Defs.' Opp'n 20-21.
[66] *See BJ's Wholesale Club*, 2013 WL 396202, at *9 n.79.
[67] *Latesco*, 2009 WL 2246793, at *1 n.1.
[68] Pl.'s Mot. to Strike 10.

cannot be said to "rest" on the existence or content of any email response from Larsen as the claim for fraudulent misrepresentation did on an email chain in *Latesco*. Accordingly, the Court concludes that the only integral document is the Hipp Email, not the Email Chain Document or the Larsen Email.[69]

3. The Gardner Denver Website Printouts and SEC Filings

The Amended Complaint alleges in part that Pennypacker shared "confidential information" with KKR, including information about Gardner Denver's history, markets, and "product strengths and weaknesses," in violation of the confidentiality obligations of his Waiver and Release Agreement with Gardner Denver.[70] In their Opening Brief, the Defendants argue that the supposedly confidential information that Pennypacker is said to have shared was actually publicly available.[71] They cite to public statements about these topics on two pages of Gardner Denver's website[72] and in two Gardner Denver SEC filings, a

[69] As the Plaintiff noted, it would be unobjectionable were the Defendants to "seek[] to introduce the entirety of Hipp's email." Pl.'s Reply 10.

The Court's conclusion would likely differ if the Plaintiff's claim rested on Larsen's never responding to the Board's requests for information about the sales process. Then again, were allegations made to that effect by a plaintiff with knowledge of the Larsen Email, there may be Rule 11 problems with that submission to the Court.

[70] *See, e.g.*, Compl. ¶¶ 48, 50-57.

[71] *See* Opening Br. 9, 31-32.

[72] Perkins Trans. Aff. Exs. N-O.

February 2012 Form 10-K[73] and a May 2012 Form 8-K containing an investor presentation,[74] in support of their position.

The Plaintiff now contends that the Defendants should not be permitted to submit these documents to the Court because they are not "integral to, or even referenced in, the Complaint."[75] However, the Plaintiff does not contest the authenticity of any of these documents. The Defendants, in opposition, argue that they are not asking the Court to accept the truth of the website printouts and the SEC filings, which they recognize would require a finding that the documents are integral to the Plaintiff's claims. Instead, they submit the four documents "only to demonstrate what those documents said," insisting that "[t]he four public documents contain the very information that Plaintiff claims is confidential."[76]

These four documents, although they would not qualify as integral, are nonetheless documents that the Court may consider when deciding the Motion to Dismiss for what they disclose publicly, so long as it does not accept what they disclose as true.[77] Because the Defendants do not seek to rely on the website printouts for the truth of what they disclose, the Court need not be concerned with

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[73] Perkins Trans. Aff. Ex. J (Gardner Denver, Inc., Annual Report (Form 10-K), at 5-9 (Feb. 27, 2012)).
[74] Perkins Trans. Aff. Ex. K (Gardner Denver, Inc., Current Report (Form 8-K), at Ex. 99.2 (May 2, 2012)).
[75] Pl.'s Mot. to Strike 7.
[76] Defs.' Opp'n 21-22.
[77] *See Vanderbilt Income*, 691 A.2d at 613 (citing *Santa Fe*, 669 A.2d at 70).

the potential limitations on its ability to take judicial notice of them.[78] Even though the website pages were not publicly filed with a governmental agency, it cannot be reasonably disputed that they were publicly available. To test whether the Amended Complaint states a reasonably conceivable claim related to Pennypacker's alleged disclosure of confidential information, the Court may look to these documents to determine what was public information and, conversely, what may have been confidential information. In this way, the Plaintiff's allegations about Pennypacker's disclosure of confidential information are largely analogous to allegations about material omissions from a proxy statement.[79]

4. <u>The Purported Replacement of Gardner Denver Senior Management</u>

In the preliminary statement of their Opening Brief, the Defendants assert that, after the Merger, "most of the senior management team [of Gardner Denver] (including the CEO [Larsen] who was the only management director on the Board), has been replaced."[80] There is no supporting citation to an allegation of the Amended Complaint or any other source. The Plaintiff contends this statement

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[78] *See, e.g.*, *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320-21 (Del. 2004) (reversing this Court's conclusion that the plaintiff was on inquiry notice as a matter of law because of this Court's taking of judicial notice of statements in various governmental publications and newspaper articles that were not attached to the complaint, integral to the claims, or filed with a governmental agency); *see also Primedia, Inc.*, 2013 WL 6797114, at *11.

[79] Without presently deciding this issue, it may be the case that the confidential information alleged to have been shared by Pennypacker with KKR is the same as, or altogether different from, the information publicly disclosed on these webpages and in these SEC filings. That issue remains for the pending Motion to Dismiss.

[80] Opening Br. 1.

must be stricken because it is an improper attempt to contradict his allegations that an interest in future employment motivated Larsen's actions during the sale of Gardner Denver.[81] The Defendants, in response, claim that Stavros's deposition testimony "supports the substance of the passage." In addition, they argue the Court may take judicial notice of this purported fact because it was "reported in GDI's public filings and [is] not subject to reasonable dispute."[82] But, judicial notice, the Plaintiff insists, is inappropriate because the statement is unrelated to his substantive allegations.[83]

Assuming the Defendants have requested the Court to take judicial notice of this purported fact, the Court must only do so if it is "supplied with the necessary information."[84] The August 2013 SEC filing cited by the Defendants[85] states, with one listed exception, that "the incumbent officers of the Company [i.e., Gardner Denver] immediately prior to the Effective Time [of the Merger with KKR] continued as officers of the Company [after the Merger]."[86] The accompanying press release describes the exception, noting that Timothy Sullivan became Gardner Denver's President and CEO and that Larsen "has transitioned to the role

[81] Pl.'s Mot. to Strike 14-15, Ex. G (citing Compl. ¶¶ 23-30, 67, 87, 116, 167).
[82] Defs.' Opp'n 20.
[83] Pl.'s Reply 11.
[84] D.R.E. 201(d).
[85] Defs.' Opp'n 20.
[86] *See* Gardner Denver, Inc., Current Report (Form 8-K), at Item 5.02 (Aug. 5, 2013).

of Interim Vice President & Chief Financial Officer."[87] Because it discusses a change in responsibility for only Larsen, this SEC filing does not meet the "necessary information" standard required for judicial notice of the purported replacement of Gardner Denver senior management.[88]

Stavros's integral deposition testimony may support the substance of the Opening Brief statement, but only to the limited extent that his deposition was taken before the Merger. Because this statement in the Opening Brief refers to purported facts occurring after the Merger, separate from the allegations of the Amended Complaint, and not subject to judicial notice, it is beyond the Court's review when deciding the Motion to Dismiss.[89]

II. CONCLUSION

For the foregoing reasons, the Plaintiff's Motion to Strike is denied as to the five deposition transcripts of Pennypacker, Schumacher, Larsen, McClure, and Stavros; the two Gardner Denver website printouts; and the February 2012 and May 2012 Gardner Denver SEC filings. The Motion to Strike is granted as to the

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[87] *Id.* at Ex. 99.1.

[88] *See, e.g.*, *Montgomery Cellular Hldg. Co., Inc. v. Dobler*, 880 A.2d 206, 226 (Del. 2005) (finding it not an abuse of discretion for this Court to decline to take judicial notice of certain purported facts where a party "neither provided the necessary information nor requested that the Court take judicial notice"); *see also In re China Auto. Sys. Inc. Deriv. Litig.*, 2013 WL 4672059, at *7 n.80 (Del. Ch. Aug. 30, 2013) (declining to take judicial notice of purported auditor licensing requirements for similar reasons).

[89] *See Gantler*, 965 A.2d at 712.

Larsen Email and the statement about the purported replacement of Gardner Denver senior management after the Merger.[90]

IT IS SO ORDERED.

/s/ John W. Noble
Vice Chancellor

[90] Striking portions of a submission to the Court such as the Opening Brief is a severe remedy with practical limitations. The obvious question is: how should an order to strike be implemented? For present purposes, because of the limited relief granted by the Court here, it is unnecessary to require revision of the Opening Brief. Instead, the Court will, as Rule 12(b) contemplates it may, exclude the non-integral documents during its consideration of the Motion to Dismiss without converting the motion to one for summary judgment.