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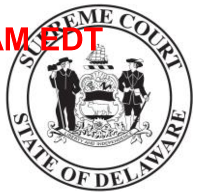

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE VOLCANO CORPORATION STOCKHOLDER LITIGATION	
MELVIN LAX, MELISSA GORDON and MOHAMMED MUNAWAR,	C.A. No. 372, 2016
Plaintiffs Below-Appellants,	Court Below: Court of Chancery of the State of Delaware C.A. No. 10485-VCMR
v.	
GOLDMAN, SACHS & CO., KIERAN T. GALLAHUE, LESLEY H. HOWE, R. SCOTT HUENNEKENS, SIDDHARTHA KADIA, ALEXIS V. LUKIANOV, RONALD A. MATRICARIA, LESLIE V. NORWALK, DANIEL J. WOLTERMAN and VOLCANO CORPORATION,	
Defendants Below-Appellees.	

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NATURE OF THE PROCEEDINGS

This is an appeal from the Court of Chancery's order dismissing Plaintiffs' class action complaint for breach of fiduciary duty and aiding and abetting in connection with the acquisition of Volcano Corporation ("Volcano" or the "Company") by Koninklijke Philips N.V. and its affiliates (collectively, "Philips") – a transaction that Volcano's stockholders overwhelmingly approved by tendering approximately 95% of the Company's outstanding shares (the "Merger"). This case concerns the legal effect of that concededly fully informed, uncoerced, and disinterested approval of the Merger by Volcano's stockholders.

Plaintiffs have never alleged that the Merger was coerced in any manner, and their Opening Brief confirms that they have abandoned their half-hearted disclosure claims (which were belatedly asserted in the Court below). Thus, in seeking to reverse the Court of Chancery's holding, Plaintiffs effectively ask this Court to ignore *stare decisis* and overturn its own recent opinion in *Singh v. Attenborough*, 137 A.3d 151 (Del. 2016). There, this Court held that the fully-informed and uncoerced approval of a merger by the holders of a disinterested majority of the company's stock barred all claims but waste, and that, under those circumstances, the Court of Chancery's consideration of a breach of care claim was therefore "erroneous." With this appeal, Plaintiffs now urge this Court to adopt the

exact portion of the Court of Chancery's *Zale* decision that this Court flatly rejected in *Singh*.

Plaintiffs also seek to overturn the holding from the Court below (and indirectly the same holding from the Court of Chancery's recent decision in *Larkin v. Shah*, 2016 WL 4485447 (Del. Ch. Aug. 25, 2016)) that a fully informed, uncoerced, disinterested tender offer to effect a merger pursuant to 8 *Del. C.* § 251(h) has the same cleansing effect as a stockholder vote under 8 *Del. C.* § 251(c). In her well-reasoned and thorough opinion in the Court below, the Vice Chancellor provided a strong analytical basis for this equivalence, reasoning that: (1) Sections 251(c) and (h) both require a board of directors recommending a transaction to its stockholders to meet the same statutory obligations (under Sections 251(a) and (b)) and fiduciary duties; (2) tender offers under Section 251(h) must necessarily be made on terms specifically designed to limit any coercive effect on a company's stockholders; and (3) the policy animating the business judgment rule applies equally regardless of whether a merger is effectuated by tender offer or vote.

Finally, Plaintiffs invite this Court to reverse the lower Court's dismissal of their aiding and abetting claim. But Plaintiffs have not (and cannot) plead a predicate breach of fiduciary duty claim against the Volcano directors,

much less allege the knowing participation required to state an aiding and abetting claim against Goldman, Sachs & Co. ("Goldman").

This Court should affirm the Court of Chancery's opinion in its entirety.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly held that the fully-informed, uncoerced, and disinterested approval of the Merger by the holders of a majority of Volcano's outstanding shares rendered the business judgment rule irrebuttable, thereby barring all claims but waste.

2. Denied. The Court of Chancery properly held that stockholder approval of a tender offer pursuant to 8 *Del. C.* § 251(h) has the same cleansing effect as a stockholder vote in favor of a merger pursuant to 8 *Del C.* § 251(c).

3. Denied. The Court of Chancery correctly dismissed Plaintiffs' aiding and abetting claim against Goldman.

STATEMENT OF FACTS

Plaintiffs do not assert that the Court of Chancery made any inappropriate factual determinations and do not expressly rely on any fact in the Argument of their Opening Brief. Instead, Plaintiffs base this appeal solely on legal grounds. *See* OB at 1 (summarizing three supposedly "radical" rulings by the Court of Chancery that Plaintiffs seek to overturn).

As set forth below, and in the briefs submitted in the Court below, there are two transactions at issue in this appeal: (1) a routine and fully-disclosed derivative transaction that Volcano entered into in 2012 in connection with the issuance of convertible notes; and (2) the challenged Merger with an unrelated third party in 2014. Each was unobjectionable and fully disclosed to Volcano's stockholders before the Merger was approved.

A. The 2012 Transaction.

Volcano is a medical device company formed in 2000 that develops precision-guided therapy tools, including intravascular ultrasound products, to enhance the diagnosis and treatment of coronary and peripheral vascular disease. Because Volcano required considerable funds to develop its products, Volcano needed a substantial cash infusion in 2012 and chose to raise funds by issuing convertible notes, with Goldman and J.P. Morgan Securities LLC acting as joint underwriters. *In re Volcano Corp. S'holder Litig.*, 2016 WL 3626521, at *2 (Del.

Ch. June 30, 2016); B226; B268.[1] The Company agreed to sell $400 million of 1.75% Convertible Senior Notes (the "Convertible Notes") and, at the option of the joint underwriters, up to an additional $60 million of Convertible Notes. B32; B226; B268. The underwriters exercised that option on December 5, 2012, issuing the full $460 million of Convertible Notes on December 10, 2012. *Volcano*, 2016 WL 3626521, at *2; B97; B226.

To reduce the potentially dilutive effect of the Convertible Notes, Volcano also entered into routine derivative transactions (the "Call Spread Transactions") with Goldman and J.P. Morgan Chase Bank, National Association, London Branch ("J.P. Morgan"). *Volcano*, 2016 WL 3626521, at *2; B32; B228; B268. As described in greater detail in the Answering Brief of Appellee Goldman, Sachs & Co. ("Goldman's Answering Brief"), the Call Spread Transactions reduced the potentially dilutive effect of the Convertible Notes, but also expressly provided that Goldman and J.P. Morgan could be entitled to net payments from Volcano in the event of certain change-of-control transactions. Goldman's Answering Brief at 5-10. All pertinent information was disclosed to Volcano's counsel, Board of Directors, and stockholders when the Call Spread Transactions

[1] Citations to B___ are references to Appellees' Appendix filed contemporaneously with this brief.

were effected, including the parameters for determining payments due in the event of a change-in-control transaction. *See* Complaint ¶ 14; B276-80 (explaining "Merger Events," "Tender Offers," and "Additional Termination Events"); B253-56 (explaining "Merger Events" and "Additional Termination Events"); B226 (explaining that "Fundamental Change" may require Volcano to repurchase Convertible Notes); B242-43; B246-47 (defining "Fundamental Change"); *see also* B32-33; B289-90.

B. The 2014 Transaction.

The holders of a vast majority of Volcano stock approved the Merger for a clear premium to Volcano's stock price: the holders of almost 95% of Volcano's stock approved the transaction at $18.00 per share. *Volcano*, 2016 WL 3626521, at *7; B297. Philips' offered price represented a significant, 64.2% premium to Volcano's three-month average trading price ending on December 15, 2014, the day the Merger was announced. B24. The Merger price was particularly attractive in light of Volcano's volatile stock price, Volcano's market check, and the aggressive negotiations by Volcano's Transaction Committee with Philips. B24-26.

In fact, the Transaction Committee rejected Philips' bids four times, shut down the data room for due diligence twice, and directed counsel to demand

that Philips return or destroy all confidential information obtained through due diligence. *Volcano*, 2016 WL 3626521, at *4-6; B20-23. Plaintiffs ignore these facts and ask this Court to overrule its own precedent and second-guess Volcano's fully-informed stockholders based on their brief's one-sided factual recitation. *See* OB at 14-18. It would be contrary to established Delaware law to override the informed decision of a majority of Volcano's disinterested stockholders based on Plaintiffs' selective version of Volcano's Recommendation Statement, and this Court should reject Plaintiffs' appeal.

1. Volcano Begins Exploring a Strategic Transaction with Philips Prior to a Market Downturn.

Volcano regularly evaluated strategic opportunities to strengthen its competitive position, which included engaging in discussions concerning potential strategic transactions. B18; B72; B283-85. In January 2014, as part of Volcano's routine business development outreach, Volcano's CEO and director, R. Scott Huennekens, met with two companies ("Company A" and "Company B") to discuss their respective interests in exploring a strategic transaction with Volcano. B18; B283. While discussions with Company A and Company B progressed, Volcano retained Goldman to help perform a market check. B18; B283.

The Board considered thirteen potential buyers for Volcano. B283. The Board narrowed the scope of the market check by excluding: (1) counterparties that would face significant regulatory approval issues; and (2) financial buyers, because Volcano's negative cash flow would likely not support a leveraged acquisition. Volcano contacted three additional parties. *Volcano*, 2016 WL 3626521, at *3; B18; B283. Ultimately, the five companies contacted declined to hold further discussions regarding a transaction, and the Board ended its market check process in or around April 2014. B18; B283.

The response to Volcano's market check was tepid, but Volcano was still a likely acquisition target because Volcano's business required collaboration with several larger companies in the medical device field to access target markets and develop uses for its technology. B72. Philips was one such company: Philips and Volcano had worked together since 2007 to ensure that their products would be compatible. B18. In addition, Philips resold Volcano products along with its own products in certain markets. *Id.* Through this relationship, Philips was already knowledgeable about Volcano's business. Thus, in June 2014, Philips contacted Volcano regarding a potential strategic transaction, and Philips and Volcano initiated merger discussions and entered into a confidentiality agreement. B18-19.

On July 25, 2014, when Volcano's common stock closed at a price of $16.18 per share, Philips provided its first non-binding indication of interest to acquire Volcano for $24.00 per share. The indication of interest was contingent on eight weeks of exclusivity, during which Philips would perform due diligence.[2] B19. The Board, Volcano senior management, Goldman, and Volcano's legal counsel met to discuss Philips' initial $24.00 per share indication of interest, and the Board authorized the creation of a Transaction Committee, comprised of Defendants Gallahue, Howe, Lukianov, and Matricaria. B19; B283-84. Although the Board decided to allow Philips to proceed with due diligence, Volcano's Board rejected Philips' request for exclusivity unless it offered a higher price. B20.

Philips agreed to proceed with due diligence without exclusivity. Accordingly, the Transaction Committee directed Goldman to re-contact Company A and Company D, as these potential bidders did not have significant regulatory approval risks. B20; B284. Company A and Company D responded by indicating

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[2] Less than a week later, and before Goldman's retention as Volcano's financial advisor in connection with a potential transaction with Philips, on July 29, 2014, Goldman made a presentation to Volcano's senior management regarding the Call Spread Transactions and invited discussions between Goldman and Volcano's counsel on the potential impact of a change in control transaction on the Call Spread Transactions. B19; B294. Counsel for Volcano and Goldman participated in such discussions in August and September 2014. B19.

that they were not interested in engaging in further discussions with Volcano. *Id.* Volcano never received any other expressions of interest from any other parties throughout the sale process. B20.

2. Volcano's Stock Price Falls, but Volcano Rejects Philips' First Bid.

On August 7, 2014, Volcano issued its earnings press release for the second quarter and notified Philips that it would be lowering guidance for the remainder of 2014. *Id.* The next day, the price of Volcano's common stock declined to $12.56 per share, representing a drop of approximately 22.4% from July 25, 2014, when Philips submitted its first indication of interest. B19-20.

Cognizant of the risks of a prolonged due diligence process, Volcano informed Philips that if Volcano and Philips did not reach an agreement with respect to a transaction by September 12, 2014, Volcano would cease any merger discussion with Philips and would instead focus on running Volcano as a standalone company. B20. On that date, a Philips representative communicated to Huennekens that Philips had not yet completed is due diligence, but that if Philips was required to make a firm offer, the firm offer would be in the range of $17 to $18 per share. B21.

The Transaction Committee discussed the offer and decided to shut down the transaction process. *Id.* On behalf of the Transaction Committee,

Matricaria informed Philips that the proposed price range was insufficient, cut off Philips' access to the data room, and halted Volcano's advisors' work on the transaction. *Id.*

3. Volcano Rejects Philips' Unsolicited Second and Third Bids.

On September 15, 2014, a representative of Philips sought out Huennekens at a conference and informed him that Philips was still interested in a transaction with Volcano. *Id.* Huennekens reiterated the Board's position that Philips' proposed price was inadequate. *Id.* Philips nevertheless requested to meet with Matricaria and Huennekens and to reopen the data room to allow Philips to continue with its due diligence. *Id.*

Based on additional meetings and due diligence, Philips submitted a second, non-binding indication of interest to acquire Volcano for $17.25 per share on October 20, 2014, and requested a response by October 22, 2014. *Id.* Despite a September 29, 2014 letter from a large stockholder calling for replacement of Volcano's CEO and agitating for the sale of the Company, Volcano responded by stating that it would not enter into any transaction at a price of less than $18.00 per share. B21-22.

Philips balked and withdrew its second offer on October 23, 2014. B22. Volcano closed access to its data room yet again, and notified Philips

through its financial advisors that Volcano's Board had decided to cease discussions and to focus on running Volcano as a standalone company. *Id.* Plaintiffs omit entirely this important sequence of negotiations initiated by Philips, which led to Volcano's second rejection of a Philips' bid. *See* OB at 11.

On October 28, 2014, Philips sent Volcano a third, unsolicited indication of interest at $16.00 per share. B22. The Transaction Committee met to discuss Philips' third offer, and Goldman, at Matricaria's direction, once more stated to Lazard (Philips' financial advisor) that Volcano would not consider any offer below $18.00 per share. *Id.* Plaintiffs criticize this counteroffer on the basis that Volcano previously "rejected offers at or above $18.00 per share," but ignore that Volcano's stock price was continuously falling at that time due to the revised earnings guidance announced on August 7, 2014. OB at 11; B20; B22; B24. In fact, at the time of Philips's $16.00 indication of interest, Volcano's common stock was trading at approximately $10.00 per share.

In spite of Volcano's falling stock price, on October 29, 2014, Volcano formally rejected Philips' third unsolicited indication of interest.[3] B22.

4. Philips Offers $18.00 Per Share and the Merger Is Approved.

The Board's and the Transaction Committee's concerted refusal to budge on price succeeded. On November 17, 2014, Philips' CEO, Frans van Houten, called Matricaria to reiterate Philips' interest in acquiring Volcano for $16.00 per share. *Id*. Matricaria responded that he expected Volcano's stock price to increase in the near future, from $11.59 per share to $13 or $14 per share, and, consistent with Volcano's negotiating position over the last few months, stated that the Board would not consider a price less than $18 per share. *Id.*

Four days later, van Houten called Matricaria and informed him that Philips was willing to increase the price to $18 per share, subject to negotiation of a merger agreement and completion of its due diligence. *Id.* Matricaria responded that he would report the offer to the Board, and between November 23 and

[3] Plaintiffs claim that, beginning on September 29, 2014, following receipt of a stockholder letter agitating for a sale, the Board "worked swiftly to complete a deal." OB at 11. Their recitation of facts, however, fails to mention several offers from Philips that Volcano's Transaction Committee rejected (including this third rejection), as well as any mention of Volcano's declining stock price.

December 16, 2014, legal representatives of Volcano and Philips exchanged draft merger agreements and completed due diligence.[4] B22-23.

As often occurs, Philips sought to retain Huennekens for a short period post-merger to assist with the transition. The negotiations regarding compensation for Huennekens' services did not take place until the end of the merger discussions between Philips and Volcano.[5] B23; B284. On December 11, 2014, Philips, for the first time, sent a draft consulting agreement to be signed by Huennekens prior to signing the merger agreement. B23; B284-85. Huennekens, with the assistance of his own counsel, negotiated the agreement with Philips from December 11 to December 15, 2014, which ultimately provided that Huennekens would receive up to $500,000 for his consulting services. B23; B285. Plaintiffs'

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[4] As described in greater detail in Goldman's Answering Brief, Goldman made a detailed written and oral presentation to the Transaction Committee regarding its interest in the Call Spread Transactions during this period. B258-65. The presentation described the details of the Call Spread Transactions, including a summary of the effect of the Call Spread Transactions under different structures and illustrating the estimated net gain to Goldman in an all-cash deal at various offer prices. B261; B263. After the presentation, the Transaction Committee (without Goldman present) consulted with its counsel and senior management and agreed that Goldman did not have a conflict of interest in serving as Volcano's financial advisor as a result of the Call Spread Transaction. B23.

[5] Plaintiffs claim that Philips sought to retain Huennekens "[a]s early as November 2014." Nothing cited supports this allegation. *See* OB at 13 (citing CAC ¶¶ 96-97).

insinuation that Huennekens was distracted by these negotiations, which took place after an agreement had already been reached, is not factually supported and is not credible. *See* OB at 13-14.

5. Volcano and Philips Effect a Merger Pursuant to Section 251(h) of the Delaware General Corporation Law.

On December 15, 2014, Philips informed Volcano that its board of directors approved a cash-out merger with the Company at a price of $18 per share. B23. After discussions regarding the merger agreement, Goldman's fairness opinion and Huennekens' consulting agreement, Volcano's indisputably independent Board unanimously voted to enter into the Merger Agreement, which provided that the Merger would be consummated as a two-step transaction under Section 251(h) of the Delaware General Corporation Law (the "DGCL"). B18; B23-24.[6]

The Merger was announced on December 17, 2014, and on December 30, 2014, Philips, through Merger Sub, commenced the tender offer to purchase all of Volcano's outstanding common stock for $18 per share in cash. *Volcano*, 2016 WL 3626521, at *6-7; B23-24, 297.

[6] As described *infra* at 35-37, the Merger was consummated pursuant to Section 251(h) to expedite payment of consideration to Volcano's stockholders.

On February 17, 2015, the tender offer consummating the Merger closed. *Volcano*, 2016 WL 3626521, at *7; B297. Volcano's stockholders approved the transaction in a landslide: 89.1% of the outstanding shares of Volcano were tendered, and additional notices of guaranteed delivery were delivered with respect to approximately 5.7% of the outstanding shares. *Volcano*, 2016 WL 3626521, at *7; B297. The Merger was thereby effectuated pursuant to Section 251(h), with approval from holders of approximately 95% of Volcano's outstanding shares. *Volcano*, 2016 WL 3626521, at *7; B297.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY HELD THAT THE BUSINESS JUDGMENT RULE IRREBUTTABLY APPLIES TO THE MERGER AND BARS PLAINTIFFS' CLAIMS.

A. Question Presented

Whether the Court of Chancery properly held that the fully informed, uncoerced, disinterested approval of the Merger by the holders of a majority of Volcano's outstanding shares renders the business judgment rule irrebuttable, thereby barring all claims but waste.

B. Standard of Review

The Supreme Court will review the Court of Chancery's decision to grant Defendants' motion to dismiss *de novo*. *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

C. Merits of Argument

Plaintiffs do not challenge the Court of Chancery's holding that Volcano's stockholders were fully informed, uncoerced and disinterested when they approved the Merger. Rather, they contend that the fully informed, uncoerced, disinterested approval of the Merger by the holders of a majority of Volcano's outstanding shares does not eliminate all claims except for waste – *i.e.*, it does not render the business judgment rule irrebuttable. OB at 17. Plaintiffs are

wrong. Their argument contradicts this Court's recent decision in *Singh*, which, despite Plaintiffs' claim to the contrary, does not conflict with prior precedent.

1. Plaintiffs Effectively Ask This Court to Overrule Its Prior Decision in *Singh v. Attenborough*.

In express reliance on this Court's opinion in *Singh v. Attenborough*, 137 A.3d at 152-53, the Court of Chancery correctly held that the legal effect of the fully informed, uncoerced, disinterested stockholder approval of the Merger is to invoke the business judgment standard of review and to bar all claims but waste. Specifically, the Vice Chancellor stated:

> In [*Singh*] . . . the Supreme Court held that upon a fully informed vote by a majority of a company's disinterested, uncoerced stockholders, the business judgment rule irrebuttably applies to a court's review of the approved transaction . . . . Thus, such an approved transaction only can be challenged on the basis that it constituted waste.

Volcano, 2016 WL 3626521, at *11. In reaching this conclusion, the Vice Chancellor quoted this Court's unambiguous direction in *Singh*:

> [T]he reargument opinion's decision [in *Zale II*] to consider post-closing whether the plaintiffs stated a claim for the breach of the duty of care after invoking the business judgment rule was erroneous. Absent a stockholder vote and absent an exculpatory charter provision, the damages liability standard for an independent director or other disinterested fiduciary for breach of the duty of care is gross negligence, even if the transaction was a change-of-control transaction.

> ***Therefore, employing this same standard after an informed, uncoerced vote of the disinterested stockholders would give no standard-of-review-shifting effect to the vote.*** When the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result. That is because the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful.

Id. (quoting *Singh*, 137 A.3d at 152 & n.3 (emphasis added)).

Similarly, in *Corwin v. KKR Fin. Holdings*, *LLC*, 125 A.3d 304, 308 (Del. 2015) ("*Corwin*"), this Court stated that "when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies[,]" affirming a Court of Chancery decision holding that the effect of such approval extinguishes all claims but waste. *See In re KKR Fin. Holdings S'holder Litig.*, 101 A.3d 980, 1003 (Del. Ch. 2014) (dismissing an action "because plaintiffs have not alleged a claim for waste or gift"). In so doing, this Court relied upon established Delaware

law concerning the effect of stockholder approval on judicial review of a challenged transaction.[7]

Notwithstanding these recent and unequivocal statements of Delaware law, Plaintiffs base their appeal on the same flawed reasoning from *Zale II* that this Court overruled in *Singh.* OB at 23 (stating the "reasoning in *Zale II* is consistent with the position advocated by Plaintiffs' here"). Plaintiffs even block quote the portion of *Zale II* providing that a claim for breach of a director's duty of care is evaluated under the gross negligence standard after "informed, uncoerced stockholder approval." OB at 23. But, as set forth above, that is precisely the portion of *Zale II* that this Court rejected as "erroneous." *See supra* at 19; *Singh*, 137 A.3d at 151-52.

To sidestep these dispositive rulings in *Singh* and *Corwin*, Plaintiffs claim this Court erred in those cases by relying upon *Harbor Finance Partners v. Huizenga*, 751 A.2d 879 (Del. Ch. 1999), and *Marciano v. Nakash*, 535 A.2d 400

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[7] *See Gottlieb v. Heyden Chem. Corp.*, 90 A.2d 660, 665 (Del. 1952) ("Ratification by stockholders . . . is frequently decisive of controversies in this field of law."); *In re Wheelabrator Technologies, Inc. S'holders Litig.*, 663 A.3d 1194, 1200 (Del. Ch. 1995) ("[T]he effect of the shareholder vote in this case is to invoke the business judgment standard, which limits review to issues of gift or waste with the burden of proof resting upon the plaintiffs."); *In re KKR*, 101 A.3d at 1001 n.98 (collecting cases).

(Del. 1987). OB at 19-20, 24, n.18 (contending that *Harbor Finance* and *Marciano* are derivative cases and claims for waste are "usually derivative"). Setting aside that the derivative nature of those cases was known to this Court when it relied on them, Plaintiffs do not explain why that fact should alter the effect of stockholder approval, much less contend that waste occurred here. Indeed, Plaintiffs do not, and cannot, show why stockholder approval should have a different effect on this Court's standard of review depending on whether a subsequent stockholder plaintiff brings an action directly or derivatively. The logic of affording stockholder approval the legal effect of limiting judicial "second-guessing" is the same whether a stockholder later seeks to bring a claim on behalf of herself or the corporation. *See Corwin*, 125 A.3d at 313-14 & n.28.

Plaintiffs also contend that the Court of Chancery decided *Harbor Finance* in error because it relied on "easily distinguishable" authority. OB at 20-21. But Plaintiffs misread those cases. For example, in *Solomon v. Armstrong*, 747 A.2d 1098, 1116 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000), the Court states only that a breach of duty of loyalty claim is not extinguished after proper minority stockholder approval ***if*** the claim concerns a controlling stockholder transaction. *Id.* at 1116-17. However, *Solomon* makes clear that, outside of this narrow context, other duty of loyalty claims do not survive, and the business

judgment rule presumption can only be rebutted with "facts showing . . . that the transaction was irrational or amounted to waste." *See id.* at 1115-16 ("[T]he Court reaffirmed the settled proposition that shareholder ratification by a majority of the disinterested shareholders acts as a safe harbor in situations where directors' potentially conflicting self-interests are at issue."). Similarly, in *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 616 (Del. Ch. 1999), the Court declared: "Because the shareholders were afforded the opportunity to decide for themselves on accurate disclosures and in a non-coercive atmosphere, the business judgment rule applies, and the plaintiffs must, to avoid dismissal, plead that the [transactions] were wasteful." Thus, *Harbor Finance* is wholly in accord with this Court's rulings in *Singh* and *Corwin*.

Citing *Zutrau v. Jansing*, 2014 WL 3772859, at *17 (Del. Ch. July 31, 2014), *aff'd*, 123 A.3d 938 (Del. 2015), Plaintiffs also imply that the Court of Chancery erred in *In re KKR*, 101 A.3d at 990 n.29. But *Zutrau* did not evaluate the effect of cleansing stockholder approval. Instead, in *KKR*, the Court of Chancery properly cited *Zutrau* for the proposition that generally failing to rebut the business judgment presumption bars any claim but waste. *Id.* As the Court of Chancery properly held below, proper stockholder approval renders the

presumption of the business judgment rule irrebuttable. *Volcano*, 2016 WL 3626521, at *9.

The settled decision of this Court in *Singh* "forms a precedent which is not afterwards to be departed from or lightly overruled or set aside . . . and [it] should be followed except for urgent reasons and upon clear manifestation of error." *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001) (internal quotation and citation omitted). The doctrine of *stare decisis* applies when there is a final opinion by the Court on a point of law and "operates to fix a specific legal result to facts in a pending case based on a judicial precedent directed to identical or similar facts in a previous case in the same court or one higher in the judicial hierarchy." *Id.* (citation omitted); *see also Kohls v. Kenetech Corp.*, 791 A.2d 763, 770 (Del. Ch. 2000) (explaining that under the principle of *stare decisis*, "[p]laintiffs must differentiate the facts and/or legal theories of their case from valid and binding precedents"). Under the final and settled Delaware law established in *Singh* (and *Corwin*), the undisputed fact of a fully informed, uncoerced, disinterested stockholder approval of a merger legally causes the business judgment standard of review to apply and bar all claims but waste. Plaintiffs utterly fail to differentiate the facts of this case from these binding precedents, and offer no urgent reason to set aside the sound judgments of this

Court. Further, neither Plaintiffs' reliance on overruled portions of *Zale II*, nor their lackluster differentiations of *Harbor Finance* and *Marciano*, support their claim that the Court of Chancery erred. Plaintiffs' request that this Court overrule *Singh* so recently after it was decided and their attempt to relitigate settled issues "is an affront to both" the Court of Chancery and this Court. *Kohls*, 791 A.2d at 772.

2. Plaintiffs Fail to Demonstrate that *Singh* Conflicts with Prior Precedent.

In a futile attempt to overturn *Singh* (which was decided just five months ago), Plaintiffs seek to manufacture a conflict between *Singh* and prior precedent that Plaintiffs contend *Singh* "did not overrule." OB at 24. Specifically, Plaintiffs argue that (1) *In re Wheelabrator Tech., Inc. S'holders Litig.*[8]; (2) *Stroud v. Grace*[9]; (3) *Williams v. Geier*[10]; and (4) *Santa Fe*[11] support their contention that fully informed, uncoerced, and disinterested stockholder approval of a merger "simply shifts the burden of proof to plaintiffs to then rebut the business judgment

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8 663 A.2d 1194 (Del. Ch. 1995). Plaintiffs erroneously refer to and cite *Wheelabrator* as a Delaware Supreme Court case. OB at 19 & n.15.

9 606 A.2d 75 (Del. 1992).

10 671 A.2d 1368 (Del. 1996).

11 669 A.2d 59 (Del. 1995).

rule" and that "more than just claims of waste may survive stockholder ratification." OB at 17, 27. Plaintiffs' argument, however, relies on selective quotations taken out of context. When read in their entirety, these opinions only demonstrate that certain duty of loyalty claims subject to entire fairness review permit a plaintiff to avoid claim extinguishment following stockholder approval. They do not support Plaintiffs' overbroad proposition that a plaintiff always has the ability to rebut the business judgment rule, even after stockholder approval. *See* OB at 17-18, 24-27.

For example, in *Wheelabrator*, the Court of Chancery expressly endorsed application of the irrebuttable business judgment rule in the following statement:

> [T]he effect of the shareholder vote in this case is to invoke the business judgment standard, which limits review to issues of gift or waste with the burden of proof resting upon the plaintiffs.

Wheelabrator, 663 A.2d at 1200. *Wheelabrator* noted only that claims based on breaches of the duty of loyalty are not "extinguished" because Delaware courts maintain ***some*** "reviewing function in cases where the challenged transaction is approved by an informed stockholder vote." *Id.* at 1204. Specifically, in certain duty of loyalty cases implicating the entire fairness standard, the burden of proof is

shifted to the plaintiff. *Id.* at 1205.[12] However, where, as here, the applicable standard of review is business judgment, the plaintiff bears the burden of proving waste, or that stockholder approval was otherwise ineffective. *Id.* at 1200-03, 1205. Read in its entirety, *Wheelabrator* is aligned with recent Delaware authority reiterating that valid stockholder approval "insulates the transaction from all attacks other than on the grounds of waste." *In re KKR*, 101 A.3d at 1001 & n.97 (citing *Wheelabrator*, 663 A.2d at 1200).

Stroud[13] and *Williams* are equally consistent with *Singh* and *Corwin*. *Stroud* expressly states that the usual effect of fully informed, uncoerced, and disinterested stockholder approval is dismissal:

> In sum, after finding that the shareholder vote was fully informed, and in the absence of any fraud, waste, manipulative or other inequitable conduct, that should have ended the matter on basic principles of ratification.

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12 Plaintiffs have never alleged – and do not argue in their Opening Brief – that entire fairness applies to their claims.

13 *Stroud* is generally inapposite to the present action because it was adjudicated under the entire fairness standard. Plaintiffs quote *Stroud*'s statement approving the Court of Chancery's analysis under the business judgment rule without explanation, but this statement refers to the rejection of the heightened *Unocal* standard. OB at 25 (quoting *Stroud*, 606 A.2d at 83).

Stroud, 606 A.2d at 92 (citations omitted). The Court in *Williams* adopted this statement when evaluating the effect of stockholder approval under the business judgment rule standard of review. *See Williams*, 671 A.2d at 1384 (quoting the same text from *Stroud*).

Although Plaintiffs list quotations from *Stroud* and *Williams* suggesting that a stockholder plaintiff may challenge corporate acts on the basis of fraud, waste, or other inequitable conduct, such statements do not hold that a stockholder plaintiff may bring actions for breach of fiduciary duty arising from a merger after valid stockholder approval, as Plaintiffs claim. *See* OB at 25-26 (listing quotations from *Stroud* and *Williams* without explanation). The quotations—which concern challenges to directors' decision to adopt certain charter and bylaw amendments, not claims for breach of fiduciary duty arising from a merger—are fully consistent with *Singh* and *Corwin*. *Stroud* and *Williams* merely confirm that "acts which are [u]ltra vires, fraudulent or gifts or waste of corporate assets" are not "susceptible to cure by stockholder approval." *Michelson v. Duncan*, 407 A.2d 211, 219 (Del. 1979). The Merger was untainted by any such conduct, and none of the cases Plaintiffs cite regarding the effect of stockholder ratification contradict *Singh*, *Corwin*, and the Court of Chancery's ruling below

that, following fully informed, uncoerced and disinterested stockholder approval, the irrebuttable business judgment rule applies and bars any claims but waste.[14]

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[14] The single quotation that Plaintiffs rely on to support their assertion that *In re Santa Fe Pacific Corp. S'holder Litig.* is at odds with *Corwin* and *Singh* is the statement that "[p]ermitting the vote of a majority of stockholders on a merger to remove from judicial scrutiny unilateral Board action in a contest for corporate control would frustrate the purposes underlying *Revlon* and *Unocal*." *Santa Fe*, 669 A.2d at 68. That is because "unilateral Board action in a contest for corporate control" can be coercive. *See id.* at 67-68 (noting that the concerns underlying the *Unocal* standard of review arise from defensive actions that may disenfranchise stockholders); *id.* at 68 ("Board action ***which coerces stockholders*** to accede to a transaction to which they otherwise would not agree is problematic.") (emphasis added). *Singh* and *Corwin* do not apply if the stockholder approval is coerced, and Plaintiffs do not argue that Volcano's stockholders were coerced. *See Corwin*, 125 A.3d at 308-09.

II. THE COURT OF CHANCERY PROPERLY HELD THAT TENDERING STOCK UNDER SECTION 251(h) HAS THE SAME CLEANSING EFFECT AS A VOTE UNDER *CORWIN*.

A. Question Presented

Whether the Court of Chancery properly held that stockholder acceptance of a tender offer under Section 251(h) has the same cleansing effect under *Corwin* as a stockholder vote under Section 251(c).

B. Standard of Review

The Court's review of this legal question is *de novo*. *See supra* at I.B.

C. Merits of Argument

Plaintiffs frame the question before this Court as whether the Court of Chancery erred in finding that the "holding in *Corwin* . . . should be applied to tender offers." OB at 28. This framing of the question not only misstates the lower court's holding, but also evinces a fundamental misunderstanding of *Corwin* itself. The issue addressed by the Court of Chancery below was whether a transaction consummated *pursuant to Section 251(h)* – not just any tender offer – amounts to "approval" by a "fully informed" and "uncoerced" majority of the disinterested stockholders for purposes of *Corwin*. The Court of Chancery answered that question affirmatively. *Volcano*, 2016 WL 3626521, at *11 ("Stockholder acceptance of a tender offer pursuant to a Section 251(h) merger has

the same cleansing effect as a stockholder vote in favor of a transaction"). Thus, the issue before this Court is whether the Court of Chancery properly answered that narrow question. It did.

Turning to that more specific question, Plaintiffs argue that the Merger should not receive *Corwin*-style cleansing because a voluntary decision to tender stock is distinct from a decision to cast a vote. This argument fails for at least four reasons: (1) *Corwin* applies with equal force to tender offers pursuant to Section 251(h); (2) the history and text of Section 251(h) demonstrate the General Assembly's intention to equate tenders under Section 251(h) with stockholder votes on a merger; (3) Plaintiffs fail to identify any difference between a transaction completed under Section 251(h) and one completed through a stockholder vote sufficient to justify disparate treatment; and (4) there is ample Delaware case law – including case law cited by this Court in *Corwin* – recognizing the equivalence of a tender offer to a stockholder vote.

1. *Corwin* Supports the Extinguishment of All Claims Except for Waste Following Stockholder Approval via Tender Offers Effected Pursuant to Section 251(h).

Delaware has a long tradition of deferring to the decisions of disinterested stockholders when their decisions are free and fully informed. It was this "long-standing policy" that formed the basis of this Court's decision in *Corwin*

to affirm the application of the business judgment standard of review following the stockholders' fully-informed approval of the transaction:

> When the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them. The reason for that is tied to the core rationale of the business judgment rule, ***which is that judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers*** with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed, disinterested stockholders). In circumstances, therefore, ***where the stockholders have had the voluntary choice to accept or reject a transaction, the business judgment rule standard of review is the presumptively correct one*** and best facilitates wealth creation through the corporate form.

Corwin, 125 A.3d at 313-14 (emphasis added; footnote omitted); *see id.* at 306, 311 n.24.

Given these considerations, this Court in *Corwin* focused on whether the disinterested approval by the stockholders was fully informed and uncoerced, not the specific method of stockholder approval. *Id*. at 310 n.19; *see also id*. at 311 n.24. In fact, there are several instances in the opinion where this Court uses the words "vote" and "approve" interchangeably. *See, e.g.*, *id.* at 306, 310.

Accordingly, in no uncertain terms, this Court concluded in *Corwin* that the relevant inquiry is whether the "stockholders have had the ***voluntary choice to accept or reject*** [the] transaction[.]" *Id*. at 314 (emphasis added). This same reasoning applies with equal force to the instant appeal.

a. Stockholders faced with a tender offer under Section 251(h) have a free choice to accept or reject the transaction.

A stockholder presented with a tender offer under Section 251(h) has a voluntary choice whether to accept or reject the transaction. Indeed, there is nothing more coercive about the first step of a tender offer under Section 251(h) than a stockholder vote in a one-step merger under Section 251(c). The General Assembly put multiple safeguards in place to ensure that first-step tender offers are not coercive to stockholders:

- The tender offer must be for *all* of the target company's outstanding stock (8 *Del. C.* § 251(h)(2));
- The consideration paid in the second step must be of "the same amount and kind" as that paid in the first step (*id*. § 251(h)(5));
- The second step must "be effected as soon as practicable following the consummation" of the first step (*id*. § 251(h)(1)(b)); and
- Appraisal rights are available in section 251(h) mergers (*id*. § 262(b)(3)).

Given these statutory protections, Plaintiffs do not (and cannot) argue that Volcano's stockholders were somehow coerced into tendering their shares in favor of the Merger. Thus, the Court of Chancery properly concluded that "Section 251(h) appears to eliminate the policy bases on which a first-step tender offer in a two-step merger may be distinguished from a statutorily required stockholder vote[.]" *Volcano*, 2016 WL 3626521, at *12.

b. Stockholders faced with a tender offer under Section 251(h) are fully informed of all material information.

A stockholder considering a Section 251(h) tender offer also has access to all material information regarding the transaction. It is undisputed that directors' disclosure obligations are the same whether they are making disclosures in connection with a Section 251(h) merger or a Section 251(c) merger. *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994). Thus, directors have a fiduciary duty to provide tendering stockholders with a full and fair disclosure of all material information in connection with a tender offer. *Id*. In addition, federal securities laws require the filing of a Schedule TO and a Schedule 14D-9, which disclose, among other things, the following information to stockholders:

- A summary of the material terms of the tender offer;

- Past contacts, transactions, and negotiations between the bidder and the target company;
- Any agreements, arrangements, or conflicts of interest between the bidder, the target company, or any their officers or directors;
- The recommendation, if any, of the target company's board of directors and the reasons for such recommendation;
- The purpose of the tender offer and any plans to change the target's company management, business, or corporate structure; and
- Financial information regarding the bidder.

Securities and Exchange Act of 1934, 17 C.F.R. § 240.14d-1 (2016) (Scope of Disclosure Requirements); *id.* § 240.14d-100 (Schedule TO); *id.* § 240.14d-101 (Schedule 14D-9). As a result, stockholders are generally armed with all necessary information when deciding whether to tender their shares in favor of a transaction. Plaintiffs' argument to the contrary is not persuasive. Plaintiffs claim that tender offers put stockholders' interests at risk because they "require only a 'limited amount of disclosure.'" OB at 30. This is simply not true. First, as explained above, both federal securities and state fiduciary duty laws require the full and fair disclosure of all material information. Second, Plaintiffs' argument is based on a misreading of *Matador Capital*. The Court of Chancery in *Matador Capital* did not – as Plaintiffs imply – state that a Schedule 14D-9 requires a "limited amount of disclosure." Rather, the court explained that at oral argument *counsel had suggested* that the duty of disclosure should be construed narrowly because a

Schedule 14D-9 requires limited disclosure. *Matador Capital Mgmt. Corp. v. BRC Holdings, Inc.*, 729 A.2d 280, 294 (Del. 1998). Unsurprisingly, the court rejected this argument. *Id*. at 295. In any event, Plaintiffs do not challenge the fact that Volcano's stockholders were fully informed when nearly 95% of them tendered their shares. *See supra* at 7. As explained above, Plaintiffs do not allege any specific deficiencies in the disclosures provided to Volcano stockholders.

2. The History and Text of Section 251(h) Demonstrate the General Assembly's Desire to Equate a Tender and a Vote.

Section 251(h) is intended to place consideration in stockholders' hands as quickly as possible once a merger becomes a *fait accompli*. Prior to the adoption of Section 251(h), the back-end merger of a two-step transaction could be accomplished via a long- or short-form merger, with the long-form merger taking significantly longer and at a much greater expense. *See Olson v. ev3, Inc.*, 2011 WL 704409, at *1 (Del. Ch. Feb. 21, 2011). In either case, however, the back-end merger is a *fait accompli*; the only question being how quickly the merger consideration would end up in the non-tendering stockholders' pockets.

In 1999, the SEC recognized the benefits to target stockholders of a short-form merger and adopted rules allowing for a subsequent offering period so that stockholders who previously opposed a merger by not tendering could tender

their stock once it became clear the minimum condition in the tender offer was satisfied. *See* Regulation of Takeovers and Security Holder Communications, Securities Act Release No. 33-7760, Exchange Act Release 34-42055, Investment Company Act Release No. 24107, 70 SEC Docket 2229 (Oct. 22, 1999) (observing that a purpose of permitting subsequent offering periods is to "assist bidders in reaching the statutory state law minimum necessary to engage in a short-form, back-end merger with the target"). But because the SEC's solution did not guarantee reaching the short-form threshold, the market began to use "top-up" options to further assist transaction partners in reaching that goal. The Court of Chancery approved the use of the top-up option because it "speeds deal closure" once a minimum tender condition is satisfied and it is a "win-win" for buyers and target stockholders alike. *Olson*, 2011 WL 704409, at *1-2.

Section 251(h) effectively finishes the work started by the SEC in 1999 and furthered by a market device approved by the Court of Chancery. It does so by removing the need for a stockholder vote under Section 251(c) *only if* the stock tendered into the offer "equals at least such percentage of the shares of stock of such constituent corporation, and of each class or series thereof, that, absent [Section 251(h)], would be required to adopt the agreement of merger by [the DGCL] and by the [target's] certificate of incorporation." In other words, Section

251(h) equates a tender with a vote by obviating the need for a vote only if the amount of shares tendered represents the amount of stock otherwise required to vote in favor of the merger agreement.

The Synopsis to the legislation adding Section 251(h) expressly states:

> Section 6 amends § 251(h) to permit a merger agreement to include a provision eliminating the requirement of a stockholder vote to approve certain mergers if a statutorily defined minimum number of shares is tendered in a tender or exchange offer consummated by an arms'-length third-party acquiror. **The subsection does not change** the fiduciary duties of directors in connection with such mergers or **the level of judicial scrutiny that will apply to the decision to enter into such a merger agreement**, each of which will be determined based on the common law of fiduciary duty, including the duty of loyalty.

Del. H.B. 127 syn., 147th Gen. Assem. (2013) (emphasis added). This language evidences the General Assembly's intent that Section 251(h) transactions be reviewed with the same level of scrutiny as Section 251(c) transactions. Following *Corwin*, that level of scrutiny requires application of the irrebuttable business judgment rule and dismissal of all claims but waste following fully informed, non-coerced stockholder approval.

3. There are no meaningful differences between a transaction completed under Section 251(h) and one completed through a stockholder vote.

Plaintiffs fail to identify any meaningful differences between a tender offer under Section 251(h) and a vote for a one-step merger that would justify overruling the Court of Chancery's Opinion. As explained above, state and federal laws ensure that stockholders facing a tender offer are not coerced and are fully informed of all material facts. Nevertheless, Plaintiffs argue that the effect of a tender offer should be different from that of a stockholder vote for three reasons: (a) the target board has a diminished role in a tender offer, (b) the 50% approval threshold for a Section 251(h) merger is too low to protect stockholders, and (c) tender offers give stockholders less time to make a decision.[15] OB at 29-31. None of these arguments withstands scrutiny.

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[15] Plaintiffs did not raise any of these arguments below and have waived them. Del. Sup. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review.").

Further, Plaintiffs appear to have abandoned their prior argument that *Espinoza v. Zuckerberg*, 124 A.3d 47 (Del. Ch. 2015) stands for the proposition that tender offers should not be given the same cleansing effect under *Corwin* as a statutorily required vote. Plaintiffs now argue that *Zuckerberg* teaches the "lesson" of the "importance of adhering to DGCL formality, precision, and the avoidance of ambiguity (albeit in the context of ratification)." OB at 34. It is entirely unclear how these principles support their argument. In any case, because "there is no dispute that the Board

(Continued . . .)

a. Target boards are required to take an active role in the tender offer process under Section 251(h).

Relying on *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397 (Del. Ch. 2010),[16] Plaintiffs argue that directors of the target company lack "any explicit role" when responding to a tender offer. OB at 29. This argument is without merit. As explained by the Vice Chancellor, when engaging in a transaction entered into pursuant to Section 251(h), the target board must comply with subsections (a), (b), and (h) of Section 251, which "mandate that a target corporation's board negotiate, agree to, and declare the advisability of the terms of both the first-step tender offer and the second-step merger[.]" *Volcano*, 2016 WL 3626521, at *12. In addition, the board must comply with its fiduciary duties of care and loyalty, as well as issue a Schedule 14D-9 setting forth, among other things, whether it is recommending that stockholders tender their shares and the reasons for its recommendation. 17 C.F.R. § 240.14d-101.

(. . . continued)

complied with the DGCL's prescribed procedures for consummating a merger under Section 251(h) . . . . *Zuckerberg* largely is inapposite." *Volcano*, 2016 WL 3626521, at *14.

[16] Plaintiffs' Opening Brief cites to a passage from *Zuckerberg* that quotes *CNX*.

Further, *CNX* was decided before the adoption of Section 251(h) and is inapposite because the *CNX* court was analyzing what standard of review should apply to a tender offer made by a controlling stockholder. *Id*. at 406-07. In conducting that analysis, the court rejected the argument that a different standard should apply depending on whether a controlling stockholder freeze-out was conducted through a merger or tender offer:

> I question the soundness of the twin cornerstones on which *Silconix* rests. The first cornerstone is the statutory distinction between mergers and tender offers and the lack of any explicit role in the General Corporation Law for a target board of directors responding to a tender offer. For reasons explained at length in *Pure Resources*, the ***statutory distinction fails to justify adequately the divergent fiduciary approaches***. Scholars have joined in criticizing the statutory distinction.

Id. at 407 (emphasis added; citations omitted). In other words, the court in *CNX* concluded there is no statutory basis for applying a different standard of review to a merger versus a tender offer. *CNX* therefore supports Defendants' position—not Plaintiffs'.

b. Stockholders are not prejudiced by Section 251(h)'s 50% approval threshold.

Plaintiffs also argue that the Court of Chancery erred because it did not "consider the inherent reduction in target board bargaining power resulting

from 251(h) lowering of the tender offer approval threshold from 90% to 50%." OB at 29-30. Section 251(h) effected no such "lowering," and Plaintiffs' comparison to a short form merger under Section 253 is inappropriate because that is not the type of merger at issue in *Corwin*. The proper comparison is between a merger under Section 251(c) and a merger under Section 251(h). This analysis reveals that there is no difference between the two: "[T]he same number of the target corporation's outstanding shares must approve a merger, regardless of whether it is consummated under Section 251(c) or Section 251(h)." *Volcano*, 2016 WL 3626521, at *12 n.52.[17] For this reason, Section 251(h)'s 50% threshold supports—rather than refutes—application of *Corwin* to extinguish all claims arising from the Merger other than waste.

c. Stockholders are not disadvantaged by the timing of a tender offer completed under Section 251(h).

Plaintiffs argue that stockholders are given less time in a tender offer, which "substantially lowers the chance that a competitor company will enter with a topping bid." OB at 30-31. As an initial matter, this argument fails because the

[17] *See also* 8 *Del. C.* § 251(h)(3) (first step must result in the acquirer holding "at least such percentage of the shares of stock of such constituent corporation . . . [that] would be required to adopt the agreement of merger by this chapter and by the certificate of incorporation of such constituent corporation").

underlying premise is false. Stockholders get 20 *business* days in a tender offer, whereas the proxy materials for a one-step merger need only be sent 20 *calendar* days before the stockholder vote. *Compare* 8 *Del. C.* § 251(c), *with* 17 C.F.R. § 240.13e-4.[18] Plaintiffs do not (and cannot) explain why 20 business days – *i.e.*, almost an entire month – is not enough time for a company to make a topping bid. *See, e.g.*, *Miramar Firefighters Pension Fund v. Abovenet, Inc.*, 2013 WL 4033905, at *8 (Del. Ch. July 31, 2013) (holding 30-day go-shop period was "unremarkable" and therefore not onerous or preclusive).

4. Delaware Courts Have Repeatedly Recognized the Equivalence of a Voluntary Decision to Tender Stock and a Decision to Cast a Vote.

Finally, application of *Corwin* to tender offers completed under Section 251(h) is consistent with a long line of Delaware decisions that equate stockholder approval with the tendering of shares. *See, e.g., Matador Capital*, 729

[18] *See also* 17 C.F.R. § 240.14a-3; NYSE Company Compliance Guidance (Jan. 12, 2016) ("The Exchange recommends that shareholders receive notice of a shareholders' meeting, along with proxy solicitation material, a minimum of 20 days before the meeting."); *Litwin v. OceanFreight, Inc.*, 865 F. Supp. 2d 385, 395 (S.D.N.Y. 2011) (denying motion to preliminarily enjoin merger based on 17-day notice period between mailing of proxy and shareholder vote on merger and noting that "[t]here is no specific SEC rule dictating a particular minimum of days that must pass between a proxy and a shareholder meeting.").

A.2d at 294 ("[T]he BRC stockholders are being asked to decide to approve the sale of their corporation as part of their decision whether or not to tender shares in the first-step tender offer."); *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 842 (Del. 1987) ("[A]n informed minority shareholder . . . who either votes in favor of a merger or accepts the benefits of the transaction [by accepting a tender offer] cannot thereafter attack the fairness of the merger price."); *In re Orchid Cellmark Inc. S'holder Litig.*, 2011 WL 1938253, at *13 (Del. Ch. May 12, 2011) ("Tendering, of course, is a substitute for shareholder vote").[19] Indeed, in *Corwin*, this Court cited to *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656 (Del. Ch. 2013) – a tender offer case – as "additional precedent under Delaware law" supporting its holding. 125 A.3d at 310 n.19.

Plaintiffs argue that *Corwin* does not apply to tender offers because if the Court intended to "unsettle a long-standing body of case law" it would have said it was doing so. OB at 35. But it is entirely unclear to what "long-standing

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[19] *See also* J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1459 n.57 (2014) ("If the first-step tender offer in a two-step transaction is conditioned on tenders of a majority of the outstanding shares, and if sufficient stockholders tender to satisfy the condition, then it should have the same effect as an affirmative stockholder vote."). Chancellor Bouchard cited Vice Chancellor Laster's article in *In re KKR*. *See In re KKR*, 101 A.3d at 1001-02.

body of case law" Plaintiffs refer. Plaintiffs cite to only one case to support this argument. And that case, *In re Emerging Communications, Inc. S'holders Litig.*, 2004 WL 1305745 (Del. Ch. May 3, 2004), is inapposite. First, *Emerging Communications* involved a two-step acquisition between ECM and Innovative where ECM's CEO had voting control of both parties to the transaction. *Id*. at *1. As a result, the Court of Chancery reviewed the transaction under the entire fairness standard of review. *Id*. at *9. But, as this Court made clear in *Corwin*, the cleansing effect only applies to "a merger that is ***not*** subject to the entire fairness standard of review." 125 A.3d at 306 (emphasis added). Second, the tender offer at issue in *Emerging Communications* was made before the adoption of Section 251(h) and did not include safeguards to protect non-tendering stockholders from the possibility of lower consideration in the back-end merger (or the lack of a back-end merger at all). As a result, the Court of Chancery determined that the tender offer could be coercive. *Emerging Communications*, 2004 WL 1305745, at *31-32. Here, the procedural safeguards in Section 251(h) prevent this exact type of coercion from occurring. Thus, Plaintiffs' reliance on *Emerging Communications* is misplaced.

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For all of the reasons set out above, the Court of Chancery properly held that tendering stock in a transaction consummated pursuant to Section 251(h) is equivalent to casting a vote for purposes of applying *Corwin*.

III. THE COURT OF CHANCERY PROPERLY DISMISSED PLAINTIFFS' AIDING AND ABETTING CLAIM AGAINST GOLDMAN.

A. Question Presented

Whether the Court of Chancery properly held that the Complaint failed to state a valid aiding and abetting claim against Goldman.

B. Standard of Review

The Court's review of this legal question is *de novo*. *See supra* at I.B.

C. Merits of Argument

In their Opening Brief, Plaintiffs contend that the Court of Chancery erred in dismissing their aiding and abetting claim against Goldman for two reasons: (1) the Vice Chancellor "improperly dismissed Plaintiffs' underlying breach of fiduciary duty claim because stockholders did not ratify the Transaction;" and (2) the Vice Chancellor "improperly impos[ed] on Plaintiffs a 'high burden' at the pleading stage to plead the 'knowing participation' element of an aiding and abetting claim." OB at 37. Both arguments fail.

1. Even Under Enhanced Scrutiny, Plaintiffs Fail to Plead an Underlying Breach of Fiduciary Duty.

Plaintiffs ask this Court to overturn the Court of Chancery's dismissal of their underlying fiduciary duty claim "because stockholders did not ratify the Transaction." OB at 37. But even assuming *Corwin* does not apply (it does) or

even assuming the business judgment rule in this case is rebuttable (it is not), Plaintiffs have not pleaded a breach of care or loyalty against the Board. Plaintiffs do not address this issue at all in their Opening Brief, and with good reason. As set forth above and in Defendants' briefing with the Court of Chancery, there are no well-pleaded facts to support a non-exculpated[20] claim against the directors. The Board did not act in bad faith by permitting the CEO to participate in the merger negotiations. App. to Appellants' OB at A118-122. Further, the Board was fully informed regarding the Call Spread Transactions. B19; B23; B44; B258-65.

2. Plaintiffs Fail to Plead Knowing Participation by Goldman.

As fully set forth in Goldman's Answering Brief, which the Volcano Defendants join, Plaintiffs' aiding and abetting claim fails. The Court of Chancery applied the proper standard for assessing Goldman's scienter. Goldman's Answering Brief at 23-27. Further, Plaintiffs fail to plead facts from which this Court could reasonably infer Goldman's knowing participation in any purported breach of fiduciary duty. *Id.* at 28-29. Put simply, the Board was aware of, and

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[20] Volcano's Certificate of Incorporation contains a provision exculpating directors from breaches of the duty of care pursuant to 8 *Del. C.* § 102(b)(7). B305. To the extent Plaintiffs' claims are not extinguished for the reasons addressed above, this Court properly may consider this provision as an alternative ground for affirming the Court of Chancery's opinion dismissing this case. *Arnold*, 650 A.2d at 1286.

Goldman repeatedly disclosed, Goldman's interest in the Call Spread Transactions. *Id.* at 29-31. Goldman's interests were fully aligned with the interests of Volcano's stockholders. *Id.* at 31-33. And Plaintiffs fail to allege that Goldman's analyses were flawed or that the bank in any way impeded the sales process. *Id.* at 34-36.

CONCLUSION

For the foregoing reasons, the Volcano Defendants respectfully request that the Court affirm the Court of Chancery's dismissal of the Complaint, with prejudice and without leave to amend.

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2016, the foregoing document was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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