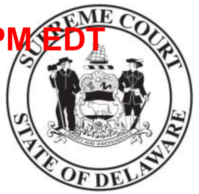
EFiled: Jun 18 2019 12:24PM EDT
Filing ID 63373920
Case Number 168,2019



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ARON ENGLISH and RICHARD PEPPE, Individually and on Behalf of All Similarly Situated Individuals, Appellants, Plaintiffs-Below, v. CHARLES K. NARANG, PAUL A. DILLAHAY, JAMES P. ALLEN, PAUL V. LOMBARDI, CINDY E. MORAN, AUSTIN J. YERKS, DANIEL R. YOUNG, CLOUD INTERMEDIATE HOLDINGS, LLC, CLOUND MERGER SUB, INC., and H.I.G. CAPITAL, LLC, Appellees, Defendants-Below.	No. 168, 2019 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 2018-0221-AGB

APPELLANTS' [CORRECTED] OPENING BRIEF

COOCH AND TAYLOR, P.A.
Blake A. Bennett (#5133)
The Brandywine Building
1000 West Street, 10th Floor
Wilmington, DE 19801
(302) 984-3800

Counsel for Appellants/ Plaintiffs-Below

Dated: June 18, 2019

TABLE OF CONTENTS

TABLE OF CITATIONS iii

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 4

I. Background of NCI 4

II. Narang Controlled NCI 4

III. Narang Decides to Retire but Lacked Liquidity. 5

IV. Narang Implements His Plan To Sell NCI To Satisfy His Liquidity Needs. 7

V. NCI's Strategic Growth Plan and Positive Future Outlook 8

VI. NCI Favors H.I.G. as the Acquiror. 10

VII. The Board Was Indifferent as to Whether the Acquisition Was Fair to NCI's Public Shareholders. 12

VIII. NCI Issues a False and Misleading 14D-9. 15

ARGUMENT 18

I. The Court of Chancery Erred in Declining to Apply Entire Fairness 18

A. Question Presented 18

B. Scope of Review 18

C. Merits of Argument 18

II. The Court Erred in Holding that NCI Stockholders Approved the Acquisition on a Fully Informed Basis and That Dismissal Was, Therefore, Appropriate Under *Corwin* 36

A. Question Presented 36

B. Scope of Review 36

C. Merits of Argument..36

CONCLUSION 45

TABLE OF CITATIONS

Cases

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 21

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 20, 21

Brinkerhoff v. Enbridge Energy Co.,
159 A.3d 242 (Del. 2017) 18, 36

Calma v. Templeton,
114 A.3d 563 (Del. Ch. 2015) 37

Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC,
27 A.3d 531 (Del. 2011) 23

Cinerama, Inc. v. Technicolor, Inc.,
663 A.2d 1156 (Del. 1995) 25

CompoSecure, LLC v. CardUX, LLC,
2018 Del. Ch. LEXIS 41 (Del. Ch. Feb. 1, 2018) 38

Crescent/Mach I Partners, L.P. v. Turner,
846 A.2d 963 (Del. Ch. 2000) 22, 23

Emerald Partners v. Berlin,
787 A.2d 85 (Del. 2001) 25, 26

Feldman v. Cutaia,
951 A.2d 727 (Del. 2008) 19

Gilbert v. El Paso Co.,
490 A.2d 1050 (Del. 1984) 26

Guth v. Loft, Inc.,
5 A.2d 503 (Del. Ch. 1939) 25

In re Answers Corp. S'holders Litig.,
2012 Del. Ch. LEXIS 76 (Del. Ch. Apr. 11, 2012) 28, 34

In re Barnes & Noble S'holders Deriv. Litig.,
C.A. No. 4813-CS (Del. Ch. Oct. 21, 2010) 29

In re Crimson Expl. Inc. Stockholder Litig.,
2014 Del. Ch. LEXIS 213 (Del. Ch. Oct. 24, 2014) 26, 27

In re Emerging Communs., Inc. S'holders Litig.,
2004 Del. Ch. LEXIS 70 (Del. Ch. May 3, 2004) 40

In re GM (Hughes) S'holder Litig.,
897 A.2d 162 (Del. 2006) 18

In re Hansen Medical, Inc. Stockholders Litigation,
2018 Del. Ch. LEXIS 197 (Del. Ch. June 18, 2018) 23, 24

In re Inv'rs Bancorp, Inc. Stockholder Litig.,
177 A.3d 1208 (Del. 2017) 37

In re KKR Fin. Holdings LLC Shareholder Litigation,
101 A.3d 980 (Del. Ch. 2014)....................................38

In re LNR Property Corp. S'holders Litig.,
896 A.2d 169 (Del. Ch. 2005).................................... 27, 31

In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig.,
2017 Del. Ch. LEXIS 151 (Del. Ch. Aug. 18, 2017)....................................27

In re Novell, Inc. S'holder Litig.,
2013 Del. Ch. LEXIS 1 (Del. Ch. Jan. 3, 2013) 31

In re PNB Holding Co. S'holders Litig.,
2006 Del. Ch. LEXIS 158 (Del. Ch. Aug. 18, 2006)....................................41

In re Primedia Inc. Derivative Litig.,
910 A.2d 248 (Del. Ch. 2006).................................... 23, 27

In re Pure Res. S'holders Litig.,
808 A.2d 421 (Del. Ch. 2002)....................................39

In re Saba Software, Inc.,
2017 Del. Ch. LEXIS 52 (Del. Ch. Mar. 31, 2017) 40

In re Solera Holdings, Inc. Stockholder Litig.,
2017 Del. Ch. LEXIS 1 (Del. Ch. Jan. 5, 2017) 38

In re Straight Path Communs. Inc.,
2018 Del. Ch. LEXIS 202 (Del. Ch. June 25, 2018) 28

In re Synthes, Inc. S'holder Litig.,
50 A.3d 1022 (Del. Ch. 2012).................................... 25, 32, 33

In re Toys "R" Us, Inc. S'holder Litig.,
877 A.2d 975 (Del. Ch. 2005)....................................41

In re Volcano Corp. S'holder Litig.,
143 A.3d 727 (Del. Ch. 2016)....................................39

IRA Tr. FBO Bobbie Ahmed v. Crane,
2017 Del. Ch. LEXIS 869 (Del. Ch. Dec. 11, 2017) 28

Jedwab v. MGM Grand Hotels, Inc.,
509 A.2d 584 (Del. Ch. 1986)..3

Kahn v. M&F Worldwide Corp.,
88 A.3d 635 (Del. 2014) 24

Loudon v. Archer-Daniels-Midland Co.,
700 A.2d 135 (Del. 1997) 39

McMullin v. Beran,
765 A.2d 910 (Del. 2000) 28, 34

Morrison v. Berry,
191 A.3d 268 (Del. 2018) 39

N.J. Carpenters Pension Fund v. infoGROUP, Inc.,
2011 Del. Ch. LEXIS 147 (Del. Ch. Oct. 6, 2011).......................... 28, 31, 32, 34

RBC Capital Mkts., LLC v. Jervis,
129 A.3d 816 (Del. 2015) 40

Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.,
506 A.2d 173 (Del. 1985) 36

Rich ex rel. Fuqi Int'l, Inc. v. Yu Kwai Chong,
66 A.3d 963 (Del. Ch. 2013)...19

Rosenblatt v. Getty Oil Co.,
493 A.2d 929 (Del. 1985) 39

Sciabacucchi v. Liberty Broadband Corp.,
2017 Del. Ch. LEXIS 93 (Del. Ch. May 31, 2017) 37

Solomon v. Armstrong,
747 A.2d 1098 (Del. Ch. 1999)...38

Tel. & Data Sys., Inc. v. Eastex Cellular L.P.,
1993 Del. Ch. LEXIS 182 (Del. Ch. Aug. 27, 1993)...31

Thorpe v. Cerbco, Inc.,
1993 Del. Ch. LEXIS 257 (Del. Ch. Oct. 29, 1993)..25

Weinstein Enters., Inc. v. Orloff,
870 A.2d 499 (Del. 2005) 26

Zirn v. VLI Corp.,
621 A.2d 773 (Del. 1993) 39

Other Authorities

Bajaj, Mukesh and Denis, David J. and Ferris, Stephen P. and Sarin, Atulya, *Firm Value and Marketability Discounts* (February 26, 2001) 30

Donald J. Kochan, *While Effusive, "Conclusory" Is Still Quite Elusive: The Story of a Word,* Iqbal*, and a Perplexing Lexical Inquiry of Supreme Importance*, 73 U. Pitt. L. Rev. 215 (2011) 20

Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U. L. Rev. 553, 580 (2010) 20

NATURE OF PROCEEDINGS

This appeal, which arises out of the 2017 acquisition (the "Acquisition") of NCI, Inc. ("NCI") by H.I.G. Capital, LLC and its affiliates (collectively, "H.I.G."), challenges the Chancellor's decision not to apply entire fairness and resulting application of *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015). Specifically, the Chancellor held that entire fairness did not apply because the controller was not conflicted, and the Chancellor rejected Appellants' argument that there were any material misrepresentations and omissions. Appellants dispute the Chancery Court's ruling on both grounds.

Charles Narang ("Narang") founded NCI and controlled the company for its entire existence, owning more than 80% of its voting power even after NCI went public. Narang steered business to family members and hired relatives to work for hefty salaries. The Board acquiesced to whatever Narang wanted and did, because his controlling stake permitted him to wipe the slate clean whenever he so desired.

But in 2015, when he was 73 years-old and wanted to retire, Narang had a problem. Having hoarded NCI stock for years, he tried unloading some of his stock on the open market but could not do so without a market-based financial penalty. NCI was a small cap company and in public filings acknowledged that its stock price would suffer if Narang sold any shares or was perceived as wanting to sell any shares. If Narang wanted to avoid a steep discount on selling his shares, he had to

orchestrate the sale of NCI regardless of whether it would benefit NCI's minority stockholders. He then relinquished the CEO position but remained Chairman of the Board, and he oversaw the sale of NCI to H.I.G. pursuant to a tainted, uninformed, and biased process. On July 3, 2017, NCI and H.I.G. announced the Acquisition, which valued NCI at $20 per share, or a total of approximately $283 million.

After the Acquisition closed, Appellants filed suit, alleging breaches of fiduciary and asserting that entire fairness applied. Defendants moved to dismiss. Following briefing and oral argument, the Chancery Court granted the motion, holding that (i) entire fairness does not apply and (ii) dismissal under *Corwin* was appropriate because the 14D-9 did not misrepresent or omit any material information. Appellants timely appealed.

SUMMARY OF ARGUMENT

1. Entire fairness applies whenever a corporation's controller engages in a conflicted transaction. *See Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 594-95 (Del. Ch. 1986). There is no dispute that Narang controlled NCI. Moreover, he had a need for liquidity and diversification, as borne out by his own actions. At this stage, these factual allegations must be accepted as true, and Appellants are entitled to all reasonable inferences. Thus, Narang was conflicted, and entire fairness applies.

2. Under *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015), the business judgment rule "applies only to fully informed, uncoerced stockholder votes[.]" The 14D-9 misrepresented and omitted material information regarding NCI's financial projections. Specifically, NCI's public statements just prior to the announcement of the Acquisition suggested an upward trajectory that significantly exceeded what was disclosed in the 14D-9, and statements made shortly after the Acquisition closed demonstrate that the financial projections disclosed in the 14D-9 drastically understated NCI's true potential. Based on the pleading-stage inference Appellants are entitled to, the various statements surrounding NCI's prospects render the 14D-9 materially misleading and incomplete with respect to the company's financial projections.

STATEMENT OF FACTS

I. Background of NCI

NCI's predecessor and wholly owned subsidiary, NCI Information Systems, Inc., was founded by defendant Narang in 1989 as a Virginia corporation. In 2005, to take the Company public, Narang incorporated NCI as a Delaware corporation and successfully completed its initial public offering (the "IPO"). (A013 ¶ 4; A024 ¶¶ 40-42.) Narang served as the Chairman of the Board and served as NCI's CEO from NCI's inception through October 1, 2015. (A019-20 ¶ 23.)

NCI was "a leading provider of enterprise solutions and services to U.S. defense, intelligence, health and civilian government agencies." (A025 ¶ 44.) Through government contracts, NCI recorded multi-million-dollar net income every single year since its IPO except in 2012, when it recorded a one-time goodwill impairment charge. (A028 ¶ 50.) NCI also had a multifaceted general growth strategy that had been in place for a while. (A027 ¶ 49.)

II. Narang Controlled NCI

Defendant Narang dominated NCI's affairs from the beginning through his voting and managerial power. (A019-20 ¶ 23; A028 ¶ 51.) Not only was Narang NCI's CEO until his retirement in 2015 and Chairman of the Board throughout NCI's entire independent existence, but Narang also had 83.5% of NCI's total voting

power, which granted him absolute power over the Board and the actions of the Company.[1] (A028-29 ¶¶ 52-54.)

Narang's absolute control over NCI is not disputed. (A029-30 ¶ 55.) In its SEC filings, NCI itself acknowledged that Narang, simply based on his beneficial ownership of NCI stock had "the ability—without the consent of [NCI's] public stockholders—to elect all members of [NCI's] board of directors and to control [NCI's] management and affairs." (*Id.* at ¶ 55.)

Narang also wielded day-to-day managerial control over NCI (A030 ¶ 57), and he wielded his control to benefit himself and his family (A030-32 ¶¶ 58-62). For example, since it went public, Narang caused NCI to pay nearly $9 million to Renegade Technologies, Inc., which is owned by Narang's son and which Narang himself owned before divesting it as part of the plan to take NCI public. (A030-31 ¶¶ 59-61.) Narang also abused his control to hire his relatives at NCI and paid them up to $120,000 yearly. (A031-32 ¶¶ 62-63.) The Board did nothing to curb Narang's use of NCI for personal gain. (A031 ¶ 61.)

III. Narang Decides to Retire but Lacked Liquidity

By 2015, Narang was 73 years-old and had run NCI for almost 3 decades. (A014 ¶ 7.) Narang wanted to retire, but he had a big problem: nearly all Narang's

---

[1] When the Acquisition was announced, Narang owned approximately 34% of NCI's total number of shares of stock: 117,659 shares, or 1.3%, of NCI's Class A stock and 4.5 million shares, or 100%, of NCI's Class B stock.

wealth was tied up in an illiquid block of NCI stock. (A024 ¶ 40, A032 ¶ 64.) Narang had no other business interests or assets to fund his retirement, and his lucrative executive compensation as CEO would terminate upon retirement. (A032 ¶ 64; A035 ¶ 77.) Narang, having nearly all of his wealth tied up as his equity interest in NCI, needed to secure and diversify his assets given the wealth management, tax, and estate planning concerns. (A033-34 ¶¶ 66-71.) Indeed, prudent, reasonable, and widely accepted norms dictated that Narang would not keep his entire net worth locked up in the relatively illiquid securities of a volatile small-cap company. (*Id.*)

In mid-2015, Narang announced his plan to retire but still to retain his position of Chairman of the Board. (A035 ¶ 77.) Around the same time, Narang also began to try unloading his position in NCI by selling shares on the open market. (A034 ¶¶ 72-74.) Notably, prior to 2015, Narang had not sold any NCI shares since April of 2009. (*Id.*) But there was a problem with this plan: NCI was a small-cap company with a thin trading volume, which entailed a grave risk of wide fluctuations in stock price, as NCI expressly acknowledged in its public filings. (A032 ¶ 65; A033 ¶ 68; A034 ¶ 73.) If Narang were to sell his equity interest in the open, illiquid market, he would have sold at a deep discount. (A034 ¶ 72.) Indeed, this is exactly what happened on a small scale in 2015 when he retired as NCI's CEO: when the market learned that Narang was selling his NCI shares based on Narang's filing of a Form 4 with the SEC, the market responded negatively. (A035 ¶ 75.) Narang soon realized

that gradually winding down his stake in NCI in the open market would mean selling at a deep discount. (*Id.* at ¶¶ 75-76.)

With no other viable options to achieve his retirement plan, Narang leveraged his control and power over NCI and the Board to sell the Company. (*Id.* at ¶ 76.)

IV. Narang Implements His Plan To Sell NCI To Satisfy His Liquidity Needs

The sale of the Company was driven by Narang, not the Board. (*Id.* at ¶ 76.) To hide this fact, Defendants put forth pretextual justifications in the 14D-9 purporting that the Board began pursuing a sale "in light of significant consolidation in the government services industry." (A036 ¶ 82.) But, this assertion if refuted by the reality that NCI had already cemented its role as a leader in its industry, and the real reason for engaging the financial advisors was to satisfy Narang's desire for liquidity. (A025-26 ¶¶ 44-46; A035 ¶¶ 76, 78; A036 ¶ 80.)

Although he stepped down from his role as the CEO in October 2015, Narang retained his control and position as the Chairman to successfully implement his exit plan. (A032 ¶ 63.) Narang placed his longtime ally and subordinate, Brian J. Clark ("Clark") in the CEO post to effectuate Narang's plan to sell the Company. (A035-36 ¶¶ 78-79.) That plan was triggered right away in October 2015 when the Narang-controlled Board began the process of retaining financial advisors to assist the sale of the Company. (A036 ¶ 80.) On January 16, 2016, the Board retained Wells Fargo and Stifel (*Id.* at ¶ 81.)

Wells Fargo and Stifel reached out to various potential buyers soon after they were retained. (A037 ¶ 83.) Only one serious potential buyer, a private equity firm referred to as "Party A" in the 14D-9, engaged in the process in the first half of 2016. (*Id.*) However, Party A withdrew from the bidding process after discovering regulatory concerns associated with another company its investment portfolio. (*Id.*) Soon after, NCI announced that Clark was resigning purportedly "to pursue other opportunities," but this rings hollow. (*Id.* at ¶ 84.)

Paul Dillahay ("Dillahay") was appointed as Clark's replacement to effectuate the sale of the Company. (*Id.* at ¶¶ 84-85.) Soon after Dillahay's appointment as the CEO, NCI's management received interest from H.I.G. to buy NCI. (*Id.* at ¶ 86.)

Unfortunately for Narang, his plan to sell NCI quickly came to a temporary halt when NCI announced on January 23, 2017 that it was investigating an embezzlement of Company's funds by its former controller. (A038 ¶ 88.) The embezzlement issue was soon contained and addressed, and H.I.G. reinitiated contact with NCI to buy the Company on February 22, 2017. (*Id.* at ¶¶ 88-89.)

Discussions resumed on March 8, 2017 when NCI received H.I.G.'s initial proposal to acquire NCI for $18.00 per share. (A039 ¶ 91.)

V. NCI's Strategic Growth Plan and Positive Future Outlook

Around the time NCI's discussions were taking place with H.I.G., NCI was developing a strategic growth plan. (A041 ¶ 99.) The strategic growth plan was

announced on April 5, 2017 during an investor conference call. (*Id.* at ¶ 99.) The strategic growth plan focused on improving NCI's personnel, margins, and profitable opportunities. (A041-42 ¶ 100.) As to the profitable opportunities, Dillahay emphasized that NCI would target "fewer and more complex opportunities" such that NCI would pursue 70 opportunities valued at approximately $1.7 billion in 2017 as compared to 90 opportunities valued at approximately $1 billion in 2016. (*Id.* at ¶¶ 100-01.)

NCI's strategic growth plan was well matched with the positive market outlook in the defense industry. (A061-63 ¶¶ 169-73.) As Dillahay stated in the April 5th conference call, "[t]he Trump administration campaigned on further increasing defense spending," and "[t]he Trump administration's focus on expanding the size of the military and modernization" were to create explosive market conditions for NCI to capitalize on. (A062 ¶ 170.) As to the timing for reaping the benefits of the strategic growth plan, Dillahay noted that the plan may take a few years to realize its investment. (A063 ¶ 172.)

Following the announcement of NCI's strategic growth plan, Dillahay continued to express positive outlook of the Company. (A063-64 ¶¶ 175-178.) On an earnings call on May 9, 2017, Dillahay expressed confidence in NCI's growth prospects and emphasized the progress that had already been made within a short amount of time. (A064 ¶¶ 176-77.)

The public reacted positively to NCI's strategic growth plan, and NCI's stock price immediately began to climb through the announcement of the Acquisition. (A042 ¶ 102.) Despite the positive outlook, Defendants continued their plan to sell the Company. (A043 ¶ 103.)

VI. NCI Favors H.I.G. as the Acquiror

Within a couple of months after the sales discussions were reinitiated on March 8, 2017 when H.I.G. proposed to acquire NCI for $18.00 per share, several other potential acquirers indicated their interest in entering into a strategic transaction with NCI perhaps partially due to the positive outlook outlined in NCI's strategic growth plan. (A039-40 ¶¶ 92-93; A040-41 ¶¶ 95-98; A043-45 ¶¶ 104-114.) Several parties, identified in the 14D-9 as Party A, Party C, Party D, and Party E, indicated interest in acquiring NCI ranging from $18 to $20 per share. (A039-40 ¶¶ 92-93; A040-41 ¶¶ 95-98; A043-45 ¶¶ 104-114.)

Knowing that H.I.G. and its affiliates have a history of retaining existing management after acquisitions, NCI's management was particularly interested in selling NCI to H.I.G. to continue receiving their lucrative compensation post-Acquisition. (A038 ¶ 87.)

During March and April of 2017, other potential bidders were either put on pressure to move swiftly with an all-cash offer or otherwise were shut out from the bidding process. (A043-45 ¶¶ 107-14.) When the potential bidders came back with

concerns, NCI dismissed those bidders without providing information that would lessen the potential bidders' concerns. (A044-45 ¶¶ 111-14.) For example, Party A and C voiced their concerns regarding the recompete risk, but NCI did not invite the parties to discuss with any of NCI's customers to get more comfortable with NCI's recompete positioning. (A045 ¶¶ 112-13.)

On the other hand, when H.I.G. expressed similar concerns, NCI dealt with its preferred bidder in a very different manner. (A045-47 ¶¶ 115-20.) Not only did NCI grant H.I.G. permission to speak directly with some of NCI's customers without any representative from NCI participating on the calls, but NCI also granted exclusivity to H.I.G. with multiple extensions without any additional consideration. (*Id.* at ¶¶ 115-20.)

While NCI was exclusive negotiating with H.I.G., both during the formal exclusivity period and after, NCI's stock continued to rise. (A047 ¶ 120.) On June 26, 2017, H.I.G. indicated that it was ready to move forward with acquiring NCI at $20.00 per share despite the fact that NCI's shares were trading at $21.15 on the same day. (*Id.* at ¶ 121.) Already set on selling NCI to H.I.G., the Board spent the next few days cementing the deal. (*Id.* at ¶ 122.)

Despite having no mention of any post-close employment related discussions prior to H.I.G.'s June 26, 2017 offer in the 14D-9, the 14D-9 notes—for the first time—that Wells Fargo contacted H.I.G. on June 26, 2017 to inform H.I.G. that NCI

was proposing transaction and retention bonuses for certain key employees in the aggregate amount of approximately $1.75 million. (A038 ¶ 89; A039 ¶ 91; A040 ¶ 94; A047-48 ¶ 123; A048 ¶ 125.)

VII. The Board Was Indifferent as to Whether the Acquisition Was Fair to NCI's Public Shareholders

While the discussions were progressing with potential acquirers, the Board did not consult the financial advisors or undertake any financial analyses to determine whether the offer amount would be fair to the public shareholders. (A039-40 ¶¶ 92-93; A040-41 ¶¶ 96-98; A043 ¶ 106.) For example, on March 10, 2017, Dillahay contacted H.I.G. to inform H.I.G. that there was another bidder and that H.I.G. increase its bid to $20.00 per share, without consulting the financial advisors or performing any financial analyses. (A039-40 ¶ 93.)

Similarly, on March 29, 2017, the Board rejected a mixed cash-and stock offer from Party C without consulting the financial advisors or conducting any financial analysis to adhere to Narang's desire to liquidate his holdings. (A040-41 ¶¶ 97-98.) Further, during the meeting held on April 20, 2017 with Stifel and Wells Fargo to discuss the existing bids from H.I.G, Party A, and Party C, the Board still did not care to determine whether the bids would be fair to the public shareholders at that meeting with the financial advisors. (A043 ¶ 106.)

With the $20 per share cash offer from H.I.G. in place, the Board finally decided to take a look at the financial analyses of NCI on June 27, 2017, just two

days before when Wells Fargo and Stifel presented their financial analyses and fairness opinions to the Board rationalizing H.I.G.'s offer to acquire NCI for $20.00 per share in cash. (A048 ¶ 124; A049 ¶ 127.)

The fact that H.I.G.'s June 26th offer was lower than NCI's stock price did not matter to Wells Fargo and Stifel in rendering their fairness opinions because the financial advisors were financially incentivized to justify any price. (A049 ¶ 128.) Wells Fargo stood to receive $500,000 simply for issuing a fairness opinion, but it was to earn an additional $2.25 million if the Acquisition was completed. (A052-53 ¶ 143.) Similarly, Stifel was entitled to $375,000 based on its issuance of a fairness opinion, and it were to receive approximately $1.7 million more upon completion of the Acquisition. (*Id.* at ¶ 143.)

Blinded by their respective financial incentives, Wells Fargo and Stifel created fairness opinions that overstated NCI's risks and downplayed the results of NCI's strategic turnaround plan—ultimately misleading NCI's public stockholders to tender their shares at an inadequate price. (A054-55 ¶¶ 148-49; A059 ¶ 161; A061 ¶ 167; A063 ¶ 175.) For example, during the first quarter of 2017, the financial advisors emphasized NCI's risk in bidding and winning government contracts. (A054-55 ¶ 148.) However, this inflated risk factor was directly contradicted by NCI's management's public statements in the same period, which stated that NCI's turnaround plan was being successfully implemented and that NCI was "trending in

the right direction" to "hav[ing] more volume and qualification" in 2018 and 2019. (*Id.* at ¶ 148.)

Wells Fargo and Stifel also overstated the risk of losing valuable contracts through the recompete process in their financial analyses. (A055 ¶ 149.) This overstated risk was also directly contradicted by NCI's management. (*Id.* at ¶ 149.) For example, during the Q4 2016 earnings call, Dillahay stated that "NCI's win rates and recompetes have been 90-plus percent, exceeding the industry average of around 65%." (*Id.* at ¶ 149.)

Determined to justify H.I.G.'s offer by any means, the financial advisors turned to performing analyses that conflicted with NCI's public statements about the trajectory of NCI's business. (A055-56 ¶ 150.) Both Wells Fargo and Stifel used the perpetuity growth rate in their discounted cash flow ("DCF") analysis of NCI, which assumes stable and steady growth. (*Id.* at ¶ 150.) Employing the perpetuity growth rate completely ignored NCI's strategic growth plan, which was not expected to begin generating returns after the projections period. (*Id.* at ¶ 150.) Even Stifel's DCF analyses using the terminal multiple method—still plagued with overstated risks and downplayed growth potential—yielded a valuation range of $20.26 to $21.65 per share. (A056 ¶ 151.)

Equipped with the paid-for fairness opinions from Wells Fargo and Stifel, the Board voted to enter into the Merger Agreement with H.I.G. in the same meeting on

June 29, 2017. (A048-49 ¶¶ 126-27.) To conclusively push the sale through to provide liquidity to Narang, the Board agreed to unreasonably prohibitive deal protection measures in the Merger Agreement. (A056 ¶ 153.)

In addition to high termination fee and no solicitation provision, the Board and NCI's management agreed to tender their shares to H.I.G., which amounted to approximately 35% of the outstanding shares of NCI. (A056-58 ¶¶ 154-59.) This amount excluded additional 15.6% held by the Narang Family Trust that was implicitly agreed to be tendered to H.I.G. as well. (A057 ¶ 157.) The explicit and implicit tender agreements ensured that H.I.G. would be buying NCI for $20.00 per share and no one else. (*Id.* at ¶ 157.)

VIII. NCI Issues a False and Misleading 14D-9

On July 17, 2017, NCI filed the 14D-9 to solicit shares from NCI's public shareholders. (A058-59 ¶ 160.) Knowing that the sale process was marred by incurable conflicts of interest, the 14D-9 contained numerous materially misleading misrepresentations and omissions to induce NCI's public stockholders to tender their shares. (A058-68 ¶¶ 160-93.)

First, the 14D-9 materially misrepresented NCI's financial outlook disclosing financial projections that downplayed NCI's positive outlook and exaggerated certain risk factors. (A059-65 ¶¶ 161-82.) In recommending the Acquisition, the Board supposedly relied on their financial advisors' financial analyses and fairness

opinions they knew contradicted the realities at NCI. (A048-49 ¶¶ 126-27.) But, the Board's reliance was not warranted given that the financial analyses were based on inaccurate projections created by NCI's management solely for the purpose of forcing the Acquisition through. (A061 ¶¶ 165-67.) As discussed above, the unreasonably pessimistic view of the Company that was incorporated into the projections, and in turn the financial analyses, were in direct opposition to NCI's management's own public statements regarding the outlook of NCI. (A059-65 ¶¶ 161-82.)

NCI's post-Acquisition statements further demonstrate that Defendants deliberately suppressed the Company Projections with an unreasonably pessimistic view of NCI's future. (A064-65 ¶ 180.) In an article published on October 10, 2017, Dillahay planned on growing NCI's EBITDA from $30 million to $100 million in 2020, more than double the estimate of the financial projections NCI created for the sole purpose of justifying the Acquisition. (*Id.* at ¶ 180.)

Second, the 14D-9 made materially misleading omissions regarding various conflicts of interest. (A065-68 ¶¶ 183-93.) NCI's management, including Dillahay, knew that H.I.G. would retain NCI's existing management post-close to continue implementing the strategic growth plan. (A065-66 ¶¶ 183-90.) Supported by the negotiation of the retention bonuses pre-close as well as NCI's management's pessimistic projections to push the deal through, NCI's management put their

interest over those of NCI's public stockholders. (A038 ¶ 89; A039 ¶ 91; A040 ¶ 94; A047-48 ¶ 123; A048 ¶ 125; A065-66 ¶¶ 183-90.)

Driven by a conflicted controlling shareholder and supine members of the Board as well as NCI's conflicted management and the financial advisors, the public stockholders were induced to tender their shares at an unfair price through an unfair process.

ARGUMENT

I. The Court of Chancery Erred in Declining to Apply Entire Fairness

A. Question Presented

Did the Court of Chancery commit reversible error in disregarding and discrediting Plaintiffs' allegations concerning Narang's personal conflict and, therefore, determining that the Acquisition was not subject to entire fairness? (A012-71, A246-257.)

B. Scope of Review

An appeal from a decision granting a motion to dismiss is reviewed *de novo*. *Brinkerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 252 (Del. 2017).

C. Merits of Argument

1. The Standard for Adjudicating Motions to Dismiss Under Ct. Ch. R. 12(b)(6)

The standards governing motions to dismiss under Chancery Court Rule 12(b)(6) are well settled:

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are "well-pleaded" if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."

In re GM (Hughes) S'holder Litig., 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002) (footnotes omitted)).

Despite Delaware's "lenient pleading standard," *Rich ex rel. Fuqi Int'l, Inc. v. Yu Kwai Chong*, 66 A.3d 963, 981 (Del. Ch. 2013), "conclusory allegations need not be treated as true," *Feldman v. Cutaia*, 951 A.2d 727, 731 (Del. 2008). What constitutes a "conclusory" allegation, however, is inherently subjective.

Here, although the Chancellor did not expressly label any of Plaintiffs' allegations "conclusory," the Opinion implies that certain allegations were viewed as such, including the purely factual assertions that Narang's "NCI holdings accounted for nearly all of his net worth," Opinion at 18-19 (criticizing this as "an assertion that is lean on factual support"), that Narang "attempted to unload his shares on the open market," *id*. at 19 (asserting that this was "similarly devoid of factual support"), and that "Narang did, in fact, attempt to sell some of his shares on the open market beginning in late 2015," *id.* at 20 (describing this as a "non-specific assertion").

The term "conclusory" is a frequently employed label in Delaware jurisprudence—the term appeared nearly a thousand times in Appellants' search of Chancery Court cases on LexisNexis—yet Appellants are not aware of any Delaware case that clearly defines what is a conclusory versus a non-conclusory allegation. Legal commentators have also observed the dispositive yet elusive nature of the

label.[2] Commentators have even suggested that the elusiveness of "conclusory" is similar to unsettling subjectivity of Justice Potter Stewart's "I know it when I see it" approach to identifying pornography. *See* Kochan, 73 U. Pitt. L. Rev. at 219 (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring)). Appellants, thus, turn to the expositional language in two U.S. Supreme Court opinions.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which involved an alleged conspiracy in violation of the antitrust laws, the U.S. Supreme Court characterized a "bare assertion of conspiracy" with "conclusory allegation of agreement . . . ." *Id.* at 557.[3] The Court elaborated, explaining that, although the Second Circuit Court of Appeals "specifically found the prospect of unearthing direct evidence of conspiracy" precluded dismissal, the Supreme Court emphasized that "the complaint does not set forth a single fact in a context that suggests an

---

[2] *See* Donald J. Kochan, *While Effusive, "Conclusory" Is Still Quite Elusive: The Story of a Word,* Iqbal*, and a Perplexing Lexical Inquiry of Supreme Importance*, 73 U. Pitt. L. Rev. 215 (2011) (noting that "the word 'conclusory' has taken center stage in the procedural plays of civil litigation" but "its lack of clarity is troublesome and problematic with potentially dire consequences to plaintiffs"); Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U. L. Rev. 553, 580 (2010) (calling the conclusory allegation label "bankrupt[]").

[3] The standard for adjudicating a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is more stringent than exists under the Chancery Court rules, with the former requiring "plausibility" as contrasted to Delaware's requirement only of "conceivability." Nonetheless, Appellants have been unable to find as detailed a discussion of "conclusory" as exists in U.S. Supreme Court jurisprudence.

agreement." *Id.* at 561-62. After clarifying the law, the Court held insufficient the plaintiff's utterly conclusory allegation that the defendants "have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Id.* at 551, 564-67.

Two years later, in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which involved a constitutional challenge to a post-September 11 investigation conducted by the FBI and other entities within the U.S. Department of Justice, elaborated on *Twombly*'s discussion of "conclusory" allegations, explaining: "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678 (citing *Twombly*, 550 U.S. at 555). As the Court explained, the complaint alleged that the former U.S. Attorney General was the "principal architect" of the policy and that FBI Director Robert Mueller was "instrumental," but "[t]hese bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim . . . ." *Id.* at 680-81 (quoting *Twombly*, 550 U.S. at 555).

In Delaware jurisprudence, a particularly illustrative case is *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 975 (Del. Ch. 2000). One issue before the court was whether a defendant was subject to personal jurisdiction in Delaware, and the plaintiff therein asserted two theories. *Id.* at 974. As to the first, which rested on the transaction of business in the forum state, the Court of Chancery stated, "Plaintiffs allege that JLT Beverages clearly transacted business in Delaware within the parameters of Section 3104(c)(1)." *Id.* at 975. The Chancery Court characterized these allegations as "conclusory" and found that they were insufficient to establish sufficient ties to Delaware. *Id.* at 975.[4] As to the second, the "conspiracy theory" of jurisdiction, the Chancery Court explained that the plaintiffs "allege that the out-of-state transactions by non-resident defendants were inextricably linked to the merger and facilitated the 'side-deals' that constituted the breaches of fiduciary duty enriching Turner which were in turn sanctioned by Sweezey and Hunt. They were parties to a conspiracy that existed in the form of a plan to divert value from the plaintiffs to Turner and his affiliates through a squeeze-out merger." *Id.* at 976-77.

[4] *Crescent* also involved other "conclusory" allegations, including the "bald" assertion that one defendant "had a beneficial interest" in the transaction, *id*. at 980, as well as the plaintiffs' allegation that the defendants breached their fiduciary duty of loyalty by "imposing burdens and obstacles that deprived minority stockholders of a fair opportunity to determine how they should vote on the plan of merger," *id*. at 983.

The Chancellor deemed these allegations to be non-conclusory and held that they were sufficient to establish jurisdiction. *Id.* at 977.

The prevailing theme is that an allegation should be disregarded as conclusory if it is nothing more than a general or contextualized recitation of either the elements of a cause of action or the predicate for a key holding, such as the naked assertion that "Narang controlled NCI" or "Narang was conflicted with respect to the Acquisition." But at the pleading stage, while some factual support must be offered, the emphasis is on "reasonable conceivability," which asks whether there is a "possibility" of recovery. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 & n.13. (Del. 2011) ("Our governing 'conceivability' standard is more akin to 'possibility,' while the federal 'plausibility' standard falls somewhere beyond mere 'possibility' but short of 'probability.'"). A motion to dismiss should be denied if even just "one conceivable set of facts could possibly merit granting [the] plaintiff relief." *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006) (modification in original).

In re Hansen Medical, Inc. Stockholders Litigation, 2018 Del. Ch. LEXIS 197 (Del. Ch. June 18, 2018), is instructive on "reasonable conceivability." One issue in *Hansen* was whether a group of stockholders could be deemed a control group, and Vice Chancellor Montgomery Reeves held that, although various factors alleged by the plaintiffs "alone, or perhaps even less than all these factors together, would be

insufficient to allege a control group existed, all of these factors . . . make it reasonably conceivable that the Controller Defendants functioned as a control group during the merger." *Id.* at *19. Vice Chancellor Montgomery-Reeves further stated:

> Defendants offer reasonable explanations for some of the connections, parallel investments, and actions of the purported control group. One might even argue that they offer a more compelling version of events. It may well be that Defendants' version prevails at a later stage of litigation. At the motion to dismiss stage, however, the question is not whether Plaintiffs offer the only, or even the most, reasonably conceivable version of events. Rather, the question is whether Plaintiffs have stated a reasonably conceivable claim for which relief can be granted.

Id. at *22.

As argued herein, Appellants' Complaint contained numerous factual assertions which should be accepted as true and support the reasonable inferences necessary to defeat Defendants' Motion to Dismiss.

2. Overview of the Entire Fairness Standard

Entire fairness is Delaware's most onerous standard and applies when the board labors under actual conflicts of interest. *See Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014) ("[E]ntire fairness is the highest standard of review in corporate law. It is applied in the controller merger context as a substitute for the dual statutory protections of disinterested board and stockholder approval, because both protections are potentially undermined by the influence of the controller."). The reasons underlying the entire fairness doctrine are plain: "A primary focus of our

corporate jurisprudence has been ensuring that controlling stockholders do not use the corporate machinery to unfairly advantage themselves at the expense of the minority." *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1039 (Del. Ch. 2012) (citations omitted). *See also Getty Oil Co. v. Skelly Oil Co.*, 267 A.2d 883, 887 (Del. 1970) ("A basic ground for judicial interference with business judgment on the compliant of minority interests is an advantage obtained by the dominant group to the disadvantage of the corporation or its minority owners."); *Thorpe v. Cerbco, Inc.*, 1993 Del. Ch. LEXIS 257 (Del. Ch. Oct. 29, 1993) (recognizing principle that "a controlling shareholder may not utilize his control to deprive minority shareholders of the value of their stock."); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. Ch. 1939) ("Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.").

In practice, entire fairness is a burden-shifting standard—once it applies, the defendants must establish "to the court's satisfaction that the transaction was the product of both fair dealing and fair price." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) (internal quotation marks omitted). The fair dealing, or fair process, inquiry "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stock holders were obtained." *Emerald Partners v. Berlin*, 787 A.2d 85, 97 (Del. 2001). The fair price aspect "relates to the economic

and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." *Id*.

Germane here, entire fairness applies whenever a corporation's controller or control group engages in a conflicted transaction. *See In re Crimson Expl. Inc. Stockholder Litig.*, 2014 Del. Ch. LEXIS 213, at *39 (Del. Ch. Oct. 24, 2014). As alleged in the Complaint and discussed herein, Defendant Narang controlled NCI and was conflicted with respect to the Acquisition.

Neither Defendants nor the Chancery Court contest that Narang controlled NCI—he controlled a supermajority of NCI's votes and more than a third of NCI's total shares,[5] and he led the company for decades as Chairman and CEO.[6] The only issue is whether Narang was conflicted such that the Acquisition should be subjected to entire fairness review.

3. Narang Was Conflicted with Respect to the Acquisition

"Entire fairness is not triggered solely because a company has a controlling stockholder. The controller also must engage in a conflicted transaction." *In re*

---

[5] "[I]t is well established in the corporate jurisprudence of Delaware that control exists when a stockholder owns, directly or indirectly, more than half of a corporation's voting power." *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 507 (Del. 2005) (citations omitted).

[6] A030-32 ¶¶ 57-62.

Crimson, 2014 Del. Ch. LEXIS 213, at *39. Delaware courts have identified various types of conflicted transactions, including: "(a) transactions where the controller stands on both sides; and (b) transactions where the controller competes with the common stockholders for consideration." *Id.* at *40. The latter variety includes both "disparate consideration" cases, *id.* at *41, as well as "unique benefit" cases, *id.* at *44. This is a "unique benefit" case. *See generally id.* ("In these cases, the controller receives some sort of special benefit not shared with the other stockholders."); *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig.*, 2017 Del. Ch. LEXIS 151, at *48 n.75 (Del. Ch. Aug. 18, 2017) (citation omitted) ("[E]ntire fairness applies to allegedly conflicted transactions where the controller is on only one side of the transaction precisely to assuage the risk that a controller who stands to earn different consideration or some unique benefit will flex his control to secure that self-interested deal to the detriment of minority stockholders.").

Courts have recognized a variety of unique benefits that may give rise to a conflict of interest.[7] Here, Appellants allege that Narang was conflicted due to his

---

[7] *See, e.g., In re LNR Property Corp. S'holders Litig.*, 896 A.2d 169, 171 (Del. Ch. 2005) (applying entire fairness where controller received same consideration as other stockholders but also received unique benefit related to opportunity to invest in related entity post-transaction); *In re Primedia, Inc. S'holder Litig.*, 67 A.3d 455, 476 (Del. Ch. 2013) (applying entire fairness where the controller received a unique benefit in the form of de facto elimination of the derivative claim against it because

need for liquidity and diversification stemming from his age, decision to retire, and extraordinary concentration of his wealth in a volatile, small-cap company. (A019-20 ¶ 23; A032-35 ¶¶ 63-76; A050 ¶¶ 134-37.) Other Delaware cases have also observed that a desire for liquidity and estate planning concerns can give rise to conflicts of interest. *E.g., N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, 2011 Del. Ch. LEXIS 147, at *27 (Del. Ch. Oct. 6, 2011) (citation omitted) ("Liquidity has been recognized as a benefit that may lead directors to breach their fiduciary duties."); *In re Answers Corp. S'holders Litig.*, 2012 Del. Ch. LEXIS 76, at *26 (Del. Ch. Apr. 11, 2012); *McMullin v. Beran*, 765 A.2d 910, 922-23 (Del. 2000) ("One can reasonably infer from the factual allegations in McMullin's Amended Complaint that the Chemical Board compromised its deliberative process by seeking to accommodate ARCO's immediate need for cash" and finding that the plaintiff's loyalty allegations challenged the independence of the "ARCO conflicted" board members whose loyalty to ARCO may have led them to sacrifice potential shareholder value in order to obtain immediate cash for ARCO); *In re Barnes &*

---

the acquiring company would not pursue that claim); *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 Del. Ch. LEXIS 869, at *25 (Del. Ch. Dec. 11, 2017) (applying entire fairness where all stockholders received same pro rata consideration but transaction was perpetuated to help controller retain control); *In re Straight Path Communs. Inc.*, 2018 Del. Ch. LEXIS 202, at *40-41 (Del. Ch. June 25, 2018) (applying entire fairness where controller received "unique, non-ratable benefits" related to forgiveness of potential claims against another entity in which controller had a financial interest).

Noble S'holders Deriv. Litig., C.A. No. 4813-CS, at *7-8, 15 (Del. Ch. Oct. 21, 2010) (TRANSCRIPT) ("[I]t probably, for [the controlling stockholder], makes entirely good estate planning and other sense to begin to reduce the concentration of his wealth and particular assets . . . . He's able to liquidate a large part of his net wealth and put it in safer cash assets . . . . So there's an assumption that maybe he did it for his own benefit to keep it to himself when it's his own benefit.").

Appellants offered far more than just conclusory assertions regarding Narang's need for and interest in liquidity. Specifically, Appellants alleged that Narang, NCI's founder and longtime President and CEO, decided to retire in mid-2015, when he was 73 years-old. (A014 ¶ 7; A032 ¶ 63; A035 ¶ 77.) Because his NCI holdings accounted for nearly all of his net worth, Narang needed to liquidate his position as part of his estate planning and wealth management strategy. (A032-34 ¶¶ 64-72.) Indeed, Narang had already attempted to unload his shares on the open market, but he was unsuccessful due to concerns which NCI had openly acknowledged in its public filings. (A034-35 ¶¶ 72-75.)[8] Narang knew, therefore, that the only way to secure liquidity without incurring a massive blockage discount

[8] The Chancery Court stated in response to this assertion, "Plaintiffs plead no specifics in the Complaint—such as the dates and amounts of Narang's stock sales—to back up this contention. There is no legitimate excuse for failing to plead this information . . . ." (Opinion at 19.) But this is a notice pleading regime, and there is no need for any "excuse," "legitimate" or otherwise.

would be to pursue an all-cash sale of NCI, regardless of whether a sale of the Company was in the best interests of NCI's minority stockholders. (A014 ¶¶ 7, 8, A035 ¶ 76.)[9] And because Narang controlled NCI, owning a supermajority of its voting power, Narang had every means necessary to effectuate his desire to sell the Company. (A013 ¶¶ 5-6, A015 ¶¶ 9-10, A035 ¶¶ 76, 78, A050 ¶¶ 135-136, A051 ¶ 139, A057 ¶ 157.)

Moreover, although the Chancellor did not focus on the alleged process flaws (A035 ¶ 77 – A049 ¶ 129) in reaching his decision, the numerous shortcomings that led to the Acquisition support Appellants' position that Narang desperately sought the Acquisition. For instance, the Narang-led Board countered H.I.G.'s earlier offers without ever consulting with either of two financial advisors regarding price (A039 ¶ 93, A040 ¶ 96, A043 ¶ 106), H.I.G. was given preferential and extraordinary access to NCI's customers (A045 ¶ 115, A046 ¶ 119), the Board granted H.I.G. formal and then de facto exclusivity despite never being briefed on the adequacy of H.I.G.'s offers (A046 ¶¶ 116-18), and the Board members and management unilaterally decided to enrich themselves by awarding bonuses simply for adhering to their

[9] Identifying a specific illiquidity, or marketability, discount that Narang would face requires more rigorous analysis than is required at this stage. Nonetheless, discounts can range as high as 45% depending on the methodology used. *See* Bajaj, Mukesh and Denis, David J. and Ferris, Stephen P. and Sarin, Atulya, *Firm Value and Marketability Discounts* (February 26, 2001), available at: http://dx.doi.org/10.2139/ssrn.262198.

fiduciary duties (A048 ¶ 126). *Cf. Tel. & Data Sys., Inc. v. Eastex Cellular L.P.*, 1993 Del. Ch. LEXIS 182, at *39 (Del. Ch. Aug. 27, 1993) ("Intent may be inferred from the parties' actions at the time of the negotiations and from their conduct both before and after the controversy arose."); *In re Novell, Inc. S'holder Litig.*, 2013 Del. Ch. LEXIS 1, at *32 (Del. Ch. Jan. 3, 2013) (inferring bad faith from the severity of the conduct)

These non-conclusory factual assertions concerning Narang's age, financial situation, situation, control, and actions, as well as the nature of NCI's stock, and the inferences that plaintiffs are entitled to at the pleading stage, establish that it is reasonably conceivable that Narang suffered a conflict and that entire fairness applies. *Cf. In re LNR Property Corp. S'holders Litig.*, 896 A.2d 169, 171, 178 (Del. Ch. 2005) (applying entire fairness and denying motion to dismiss ever where complaint was "strikingly bare-boned in character" but explaining that "the bare bones of the complaint . . . could support a reasonable inference that [the controller] was sufficiently conflicted at the time he negotiated the sale that he would rationally agree to a lower sale price in order to secure a greater profit from [another opportunity]"). The Chancery Court decided otherwise, which Appellants argue was in error.

In assessing the sufficiency of Appellants' allegations, the Chancery Court focused on just two cases—*N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, 2011

Del. Ch. LEXIS 147 (Del. Ch. Oct. 6, 2011), and *In re Synthes Shareholder Litigation*, 50 A.3d 1022 (Del. Ch. 2012)—whittling itself into a binary situation and allowing no middle ground that would nonetheless survive a motion to dismiss. (Opinion at 18 ("In my opinion, the alleged facts here are similar to those pled in *Synthes* and bear no resemblance to those pled in *infoGROUP*.").

In *infoGROUP*, which involved a liquidity-seeking controller pushing for a sale of the company he ran, the chief perpetrator was the company's founder and longtime leader who wielded substantial control over the company's affairs and sought liquidity. 2011 Del. Ch. LEXIS 147, at *3. Moreover, in denying the defendants' motion to dismiss, the court highlighted the size-based "illiquidity" of the founder's position, *id.* at *32, crediting the plaintiff's allegations that he would face a "significant liquidity discount" if he sold his shares on the open market, *id.* at *10, 30 ("Thus, for [the controller], the sale of *info*GROUP was the best option to fulfill his need for liquidity, regardless of whether the timing, price, or process employed were in the best interests of NCI's other shareholders."). Finally, with respect to the uniqueness of the liquidity benefit, the court stated: "Thus, while the other shareholders did receive cash, liquidity was not a benefit to them, as it was to [the controller] . . . ." *Id.* at *34.

In *Synthes*, like here, the plaintiff alleged that the company's founder sought liquidity for the purposes of estate planning and caused the board of directors to

pursue a merger for inadequate consideration. 50 A.3d at 1031. But that's where the similarities end. In *Synthes*, several years passed from when the founder stepped down as CEO to when the company began exploring strategic alternatives, belying any need for liquidity. *Id.* at 1025-26, 1036. Moreover, the decision to explore a sale of the company was made by the Board, not the controller, undercutting any notion that the founder's interest drove the sale. *Id.* at 1026. Unlike here, the board in *Synthes* also appointed an independent director to serve as lead director and oversee the process. *Id.* Further, whereas nearly all Narang's net worth comprised NCI stock, there was no such allegation in *Synthes*. There was also no mention that the controller in *Synthes* had attempted to sell of stock unsuccessfully. Nor did the controller in *Synthes* exhibit the control which Narang asserted over NCI—whereas Narang held 83.5% of NCI's voting power, the founder in *Synthes* held only a 37% stake. Accordingly, *Synthes* has little applicability here except to underscore the contrast between the two different situations.[10]

[10] A review of the complaint filed in *Synthes* further highlights the differences between *Synthes* and this case. Specifically, the *Synthes* plaintiff offered only a few statements in support of its so-called liquidity theory, including that the controller wanted to retire (*Synthes* Compl. ¶¶ 57, 59), that the stock component of the merger consideration had a "different impact on his estate than cash" (*id.* at ¶ 59), and the largely conclusory assertion that the controller's "motivation to craft an ideal exit strategy for himself personally – and not the motivation to secure the best possible value for the Synthes shareholders – drove Chairman Wyss to dominate the merger process and steer the Proposed Transaction toward Board approval" (*id.*) Such a sparsely alleged theory of conflict should not be the measuring stick for whether

The argument that Narang received the same consideration as all other stockholders, and thus could not have shortchanged NCI stockholders for the purpose of obtaining liquidity, also ignores the premise underlying *infoGROUP* and other "unique benefit" cases. Appellants do not argue that Narang or any of Defendants preferred a lower deal price to a higher one. Rather, Appellants assert that Narang was willing to accept less than what NCI was worth in order to avoid a far more costly blockage discount. Although this situation is not an everyday occurrence, it is what *infoGROUP*, *Answers*, and *McMullin* expressly contemplated.

With respect to the Chancery Court's observation that it took "nearly two years" to sell the Company, this oversimplifies Plaintiffs' allegations. When Narang stepped down as CEO, he remained NCI's Chairman and continued to lead the Board. (A013-14 ¶ 5; A015 ¶ 9; A019-20 ¶ 23; A030 ¶ 57; A050 ¶ 136.) Moreover, the Narang-led Board retained two financial advisors within months of his initial transition. (A015 ¶ 10; A036 ¶¶ 80-81.) How long the negotiations ultimately took should not be dispositive, especially at the pleading stage, once Narang has already set in motion the plan to sell NCI. Moreover, inferring from the fact that it took two years to sell NCI is inconsistent at this stage.

Appellants adequately pled that Narang was conflicted.

Based on the foregoing, the Court should find that Narang was conflicted and, therefore, that entire fairness applies.

II. The Court Erred in Holding that NCI Stockholders Approved the Acquisition on a Fully Informed Basis and That Dismissal Was, Therefore, Appropriate Under *Corwin*

A. Question Presented

Did the Court of Chancery commit reversible error in determining that NCI's Schedule 14D-9 contained no material misrepresentations and disclosed all material facts? (Opinion at 2, 23-34.)

B. Scope of Review

An appeal from a decision granting a motion to dismiss is reviewed *de novo*. *Brinkerhoff*, 159 A.3d at 252.

C. Merits of Argument

If the Court declines to hold that the Acquisition is subject to entire fairness, Appellants still allege, and the Court can still hold, that NCI's Board members breached their fiduciary duties pursuant to enhanced scrutiny under *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985). Defendants argued below, and the Chancery Court held, that the Board would face no liability for any such misconduct because NCI's stockholders made a fully informed decision to tender their shares, requiring dismissal under *Corwin*. (A099-A105; Opinion at 34.)

Appellants originally alleged that the 14D-9 misrepresented or omitted material information concerning (i) NCI's financial projections (A059 ¶ 161 - A065 ¶ 182), (ii) pre-close discussions of post-close employment arrangements for NCI's

executives (A065 ¶ 183 – A066 ¶ 190), and (iii) potential conflicts of interest affecting NCI's two financial advisors arising out of work they had previously done for H.I.G. or its affiliates (A067 ¶ 191). In each instance, the Chancery Court held that the 14D-9 did not misrepresent or omit any material information. (Opinion at 23-34.) On appeal, Appellants assert that the Chancery Court erred with respect to the first disclosure issue (financial projections).

1. Ratification Under *Corwin* Is Appropriate Only Where Defendants Carry Their Burden of Establishing That Stockholders Were Fully Informed

Under *Corwin*, the business judgment rule applies to extinguish liability only where "a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders[.]" *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 309 (Del. 2015). "The Court cannot assume from an uninformed vote that stockholders determined that the transaction was beneficial, in light of the actual facts; thus, an uniformed vote has no ratification effect." *Sciabacucchi v. Liberty Broadband Corp.*, 2017 Del. Ch. LEXIS 93, at *47 (Del. Ch. May 31, 2017).

Ratification under *Corwin* is an affirmative defense. *E.g.*, *In re Inv'rs Bancorp, Inc. Stockholder Litig.*, 177 A.3d 1208, 1211 & 1217 (Del. 2017) (referring to "the affirmative defense of stockholder ratification"); *Calma v. Templeton*, 114 A.3d 563, 586 (Del. Ch. 2015) (discussing "the affirmative defense of ratification");

CompoSecure, LLC v. CardUX, LLC, 2018 Del. Ch. LEXIS 41, at *54 (Del. Ch. Feb. 1, 2018) (same). It does not address underlying claims of directorial or managerial misconduct. Instead, ratification excuses bad acts based on the premise that the stockholders whose interests fiduciaries were supposed to safeguard have nonetheless approved the transaction that resulted from any alleged misconduct. *Cf. Solomon v. Armstrong*, 747 A.2d 1098, 1128 (Del. Ch. 1999) (referring to ratification-based "claim extinguishment").

In *Harbor Finance Partners v. Huizenga*, Chief Justice Strine, writing then as Vice Chancellor, explained that "Delaware law does not make it easy for a board of directors to obtain 'ratification effect' from a stockholder vote. The burden to prove that the vote was fair, uncoerced, and fully informed falls squarely on the board." *Id.*, 751 A.2d 879, 899 (Del. Ch. 1999) (adding that "it is difficult for a board to prove ratification at the pleading stage"). This "same allocation of the burden of proof" was endorsed in *In re KKR Fin. Holdings LLC Shareholder Litigation*, 101 A.3d 980, 999 (Del. Ch. 2014), and remained undisturbed on appeal in *Corwin*.

Accordingly, although plaintiffs "challenging the decision to approve a transaction must first identify a deficiency in the operative disclosure document," *In re Solera Holdings, Inc. Stockholder Litig.*, 2017 Del. Ch. LEXIS 1, at *20 (Del. Ch. Jan. 5, 2017), defendants must "establish that the alleged deficiency fails as a matter of law in order to secure the cleansing effect of the vote," *id.* at *21. *See also*

Morrison v. Berry, 191 A.3d 268, 282 n.60 (Del. 2018) ("We agree with the Chancellor's statement in *Solera* . . ."); *In re Volcano Corp. S'holder Litig*., 143 A.3d 727, 748 (Del. Ch. 2016), *aff'd* 156 A.3d 697 (Del. 2017) ("[A] defendant bears the burden of demonstrating that the stockholders were fully informed when relying on stockholder approval to cleanse a challenged transaction.").

Materiality is the key issue, and the "materiality standard is an objective one, measured from the point of view of the reasonable investor," not from "the subjective views of the directors." *See Zirn v. VLI Corp*., 621 A.2d 773, 779 (Del. 1993). A misrepresented or omitted fact is material when it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Rosenblatt v. Getty Oil Co*., 493 A.2d 929, 944 (Del. 1985) (citation omitted). "'[I]t need not be shown that an omission or distortion would have made an investor change his overall view of a proposed transaction.'" *Zirn*, 621 A.2d at 779 (citation omitted). Rather, a fact is material and must be disclosed "if there is a substantial likelihood that a reasonable stockholder would consider it important" in deciding whether to tender. *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997) (citations omitted). Further, "[w]hen a document ventures into certain subjects, it must do so in a manner that is materially complete and unbiased by the omission of material facts." *In re Pure Res. S'holders Litig.*, 808 A.2d 421, 448 (Del. Ch. 2002).

"Whether disclosures are adequate is a mixed question of law and fact, requiring an assessment of the inferences a reasonable shareholder would draw and significance of those inferences to the individual shareholder." *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 858-59 (Del. 2015). At the motion to dismiss stage, the materiality standard through the lens of the "reasonably conceivable" standard for stating a claim. *In re Saba Software, Inc.*, 2017 Del. Ch. LEXIS 52, at *3-4 (Del. Ch. Mar. 31, 2017) (holding that "the Board may not invoke the business judgment rule under the so-called *Corwin* doctrine because the Complaint pleads facts that allow a reasonable inference that the stockholder vote approving the transaction was neither fully informed nor uncoerced"). Accordingly, any doubts concerning whether a given misrepresentation or omission is material should be "resolv[ed] in favor of those the statute is designed to protect," *i.e.*, the shareholders. *Id.* at 448 (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 385 (1970)).

2. The 14D-9 Contained Material Misrepresentations or Omissions Regarding NCI's Financial Projections

Management's financial projections are among the most important information a shareholder can have when evaluating whether to tender. *See In re Emerging Communs., Inc. S'holders Litig.*, 2004 Del. Ch. LEXIS 70, at *134 (Del. Ch. May 3, 2004) (projections are "highly material" because knowledge of the projections "would have enabled the shareholders to understand [the company's] intrinsic worth and the extent of the market's undervaluation of their company"); *In*

re PNB Holding Co. S'holders Litig., 2006 Del. Ch. LEXIS 158, at *58 (Del. Ch. Aug. 18, 2006) ("[R]eliable management projections of the company's future prospects are of obvious materiality to the electorate."). Financial projections are especially important given the standard reliance on the discounted cash flow ("DCF") analysis, which uses projections as its key input. *See In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1013 (Del. Ch. 2005) ("[A] DCF model . . . is the model most consistent with what the Company's stockholders would receive in an appraisal.").

Here, Appellants NCI's projections assumed critical importance in the Board's recommendation that NCI stockholders tender their shares. (A059 ¶ 164 – A061 ¶ 165.) Moreover, NCI's projections were created not as part of any ongoing strategic planning process but, rather, solely for use in connection with the Acquisition. (A061 ¶¶ 165-66.) Critically, Appellants assert that "the Individual Defendants misled Plaintiff[s] and all other similarly situated NCI stockholders by peddling Company Projections that grossly understated NCI's long-term prospects and overstated the Company's purported risks." (A061 ¶ 167.)

Far from mere speculation, Appellants premised their allegations on the strength of NCI's customer relationships, NCI's strong positioning, the drastically improving market for NCI's products or services, NCI's confidence in its strategic plan, the timing of expected increases in revenue, NCI's longstanding success in

earning repeat business, progress reports given during the second quarter of 2016, and the growing size in the Company's pipeline." (*Id.* at A061 ¶ 168 – A064 ¶ 178.) Post-close statements buttress Appellants' allegations, with Dillahay boasting about tripling EBITDA to levels that were double that which was contained in the Company Projections conveyed to NCI stockholders. (A064 ¶ 180 – A065 ¶ 181.)

At least at the pleading stage, it is reasonably conceivable that, based on Appellants' allegations, the financial projections disclosed in the 14D-9 materially understated NCI's prospects for growth and, thus, its intrinsic value.

Notwithstanding Appellants' well-pled allegations, the Chancery Court held that Appellants failed to allege and misrepresentation or omission regarding NCI's financial projections. (Opinion at 24-28.) The Chancery Court stated that Appellants' argument was based on a comparison of the financial projections disclosed in the 14D-9 with (i) various public statements previously made by NCI and its management as well as (ii) an article summarizing an interview with Dillahay after the Acquisition closed. (Opinion at 24-25.) The Chancery Court treated the effect of these allegations separately did not consider their cumulative impact on the accuracy of the projections disclosed in the 14D-9.

Turning to the pre-signing representations, the Chancery Court stated they "do not reflect an inconsistency with the Company Projections ***sufficient*** to support a reasonable inference that they were materially false or misleading." (Opinion at 26

(emphasis added).) In support of this conclusion, the Chancery Court observed that the projections disclosed in the 14D-9—which forecast a compound annual growth in revenue of 6.9% and compound annual growth rates of 11.7% of EBIT and 8.9% of Adjusted EBITDA—were "generally positive . . . ." (*Id.*) The Chancery Court then recited some of the quantitative financial results that NCI had boasted, including a 20% growth in the qualified portion of NCI's pipeline. (*Id.*) Regarding the post-close article, Dillahay's comments portray a more successful NCI than was depicted in the 14D-9. The Chancellor even acknowledged that the comments portrayed "a rosier financial picture of NCI" than what the 14D-9 disclosed. (*Id.* at 28.) But the Chancellor concluded that these "rosier" figures should be discounted because of unknowns about "different funding source[s]" and "a different capital structure." The Chancellor also affirmatively assumed that "key aspects of the Company had changed from what they were before the [Acquisition] closed." (*Id.*)

Although a court is free to weigh evidence at summary judgment and trial, courts are not free to disregard or discount certain well-pled allegations and assume into the record new facts in adjudicating a motion to dismiss. Accordingly, where the totality of Appellants' allegations regarding NCI's financial projections gives

rise to the reasonable inference that the 14D-9 misrepresented or omitted material information about NCI's true prospects, the Court should deny ratification.[11]

[11] Defendants' argument about there being no reason to give buyers a negative view (A103), which the Court appeared to accept (Opinion at 25 n.64), ignores that buyers typically disregard management's projections and create their own model following due diligence. To wit, H.I.G. conducted extensive due diligence and was even given access to NCI's key customers.

CONCLUSION

The Court should reverse the Chancery Court's decision and sustain Appellants' Complaint.

COOCH AND TAYLOR, PA.

/s/ Blake A. Bennett
Blake A. Bennett (#5133)
The Brandywine Building
1000 West Street, 10th Floor
Wilmington, DE 19801
(302) 984-3800
Counsel for Appellants/Plaintiffs-Below

OF COUNSEL:

JOHNSON FISTEL, LLP
W. Scott Holleman
Garam Choe
99 Madison Avenue, 5th Floor
New York, NY 10016
(212) 602-1592