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Case Number 106,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN ANDERSON and SUSAN FITZGERALD,	:	No. 106, 2021
Plaintiffs Below/Appellants,	:	On appeal from the Court of Chancery
v.	:	C.A. No. 2018-0602-SG
STEVEN LEER, JENNIFER SCANLON, JOSE ARMARIO, WILLIAM H. HERNANDEZ, RICHARD P. LAVIN, BRIAN A. KENNEY, GRETCHEN R. HAGGERTY, MATTHEW CARTER, JR., and THOMAS A. BURKE,	:	
Defendants Below/Appellees.	:	

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

CASES

STATUTES & RULES

NATURE OF PROCEEDINGS

This appeal arises from an order of the Court of Chancery dismissing a suit against the former directors of USG Corporation ("USG" or "Company") for purported breaches of fiduciary duty. The underlying case is a post-closing challenge to an arms-length, third party merger in which Gebr. Knauf KG ("Knauf") acquired USG for $44.00 per share in cash.

Plaintiffs filed this action in August 2018, after the Board approved the merger, and before the stockholder vote. Plaintiffs moved for a preliminary injunction, claiming that Knauf and Berkshire Hathaway (then USG's largest stockholder) had entered a secret agreement that triggered Section 203 of the Delaware General Corporation Law, with the result that the merger would require approval by 66 2/3% of voting stock not owned by Knauf and Berkshire. On September 25, 2018, the Court denied Plaintiffs' motion.

On September 26, 2018, the stockholders voted to approve the transaction. The vote effectively mooted Plaintiffs' claim under Section 203, as the 88.07% margin in favor of the transaction exceeded the margin that would have been required had Plaintiffs prevailed on their initial claims.

The transaction closed on April 24, 2019. After a fourteen-month intermission (during which the case was administratively closed due to inactivity), Plaintiffs filed an amended complaint ("Complaint") on November 26, 2019.

Though the merger consideration represented a 31% premium over the unaffected market price and fell within the price range contemplated by every single valuation methodology conducted—Plaintiffs alleged that the Board had *actually* sold USG for less than its "true" intrinsic value, which Plaintiffs asserted was precisely $50.00, based on a statement made by USG in the course of negotiations with Knauf.

The Court of Chancery dismissed the Complaint, holding that Plaintiffs failed to allege a reasonably-conceivable inference that the Board acted in bad faith in approving the sale. In the same opinion, the Court concluded that the overwhelming shareholder vote did not cleanse the transaction under *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), because the Proxy did not reference the Board's supposed view of intrinsic value. Nevertheless, the Court acknowledged that this "omission" could not have been in bad faith because the Board disclosed its negotiating range, that the range was informed by its view of the Company's intrinsic value, and openly admitted that it had decided not to disclose a view of intrinsic value. Opinion at 77-78. The Court's rulings dismissing the Complaint and denying leave to amend should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery applied enhanced scrutiny, explicitly stating that "the Acquisition constituted a change of control triggering *Revlon*" and characterized the relevant inquiry as "whether the Defendants' choices were reasonable under the circumstances as a good faith attempt to secure the highest value reasonably attainable." Opinion at 80-81.

The Court rightly held that Plaintiffs failed to plead a non-exculpated claim, 8 *Del. C.* § 102(b)(7). There was nothing remarkable about the Board's decision to accept an offer that represented a 31% premium. That offer was fair in light of the valuation analyses conducted by USG's financial advisors, was not topped by any other bids following a market check, and was supported by 80% of shares, even excluding those held by Knauf and Berkshire. Plaintiffs' contention that the Board sold USG at a price lower than what they believed its intrinsic value to be due to "extraneous considerations and influences," Br. at 3, fails. The main influence they posit—that the Board lost a withhold campaign centered on whether to accept an offer to sell at $42.00 per share—was not at odds with the shareholders' interest in obtaining maximum value. Instead, the Board's decision was premised on a rational, publicly-disclosed view that, because no other offers had emerged, failure to agree to a sale posed a material risk of a hostile takeover that would result in lower consideration for shareholders.

Plaintiffs' alternative argument that the Board failed to disclose its supposed determination that USG was actually worth *precisely* $50.00 per share is equally meritless. Plaintiffs do not argue, nor could they, that the decision not to quantify intrinsic value in the Proxy was made in bad faith.

This Court should affirm dismissal on the basis of *Corwin*, too. No matter the number of times the concept of the Company's inherently-unknowable intrinsic value was alluded to in the Proxy, the absence of disclosure of any subjective intuition the Board may have had about it (and Defendants do not concede they had one) was immaterial, including in light of the Proxy's other disclosures.

2. Denied. Plaintiffs pretend to have pursued a duty-of-care claim against Jennifer Scanlon, USG's CEO, supposedly ignored by the Court of Chancery. The Complaint did not plead any claim against Scanlon in her capacity as an officer, and Plaintiffs never presented any such theory before the Court granted Defendant's motion to dismiss. Instead, they advanced an officer-liability theory for the first time in a motion for "re"argument. The Court of Chancery did not err in declining Plaintiffs' baseless pursuit.

3. Denied. Plaintiffs' claim that the Court of Chancery should have granted leave to amend to plead an officer-liability theory against Scanlon is meritless. Plaintiffs had the chance to amend (for the second time) before filing their

answering brief. Rather than amend, they opposed the motion to dismiss, and they lost. Rule 15(aaa) controls, and the only proper result is affirmance.

STATEMENT OF FACTS

A. USG Corporation And Its Stockholders

USG was a publicly-traded manufacturer and distributor of building materials, including drywall and joint compound. (A39.) The Company's market is cyclical, and USG's stock price moved accordingly—falling to approximately $5 per share after the 2008 financial crisis. (B2.) From 2013 to 2017, the price fluctuated between $16 and $38, with an average price of $28 per share. (B3.)

USG's largest stockholder during the relevant period was Berkshire Hathaway, which then owned 31.1% of outstanding common stock. (A47.) By 2017, Berkshire was ready to exit its investment, with Warren Buffet publicly describing the investment as "not one of my great ideas." (A58-A59.) Another significant shareholder, Knauf, a German company that manufactures building materials (A52), held 10.6% of USG's outstanding common stock. (A45.) Plaintiffs alleged that—unbeknownst to the USG Board—Knauf and Berkshire Hathaway began discussing a possible sale of USG to Knauf in October 2017. (A69-A71; A76.) According to the Complaint, "Knauf walked away from this . . . meeting with the clear understanding that Berkshire would sell to Knauf at $40 per share." (A70.)

B. Knauf Opens Negotiations With USG

In November 2017, when USG's stock was trading at approximately $37 per share, Knauf offered to purchase USG at $40.10 per share. (A72.) Just three months earlier, USG's stock traded as low as $26 per share. (B4.) On December 13, 2017

(A73-A75 (citing A642)),[1] the Board considered the possibility of a hostile takeover by Knauf (A73-A74), and Berkshire's "previously stated desire for an eventual exit from its USG investment." (A74 (internal quotation marks omitted).) The Board concluded that the initial offer of $40.10 per share was "insufficient." (A75 (quoting A642).) On December 20, 2017, the Board rejected Knauf's offer. (A77 (citing A643).)

C. Knauf Increases Its Bid

Months later, in March 2018, Knauf made a second offer of $42 per share. (A81 (citing A643).) While USG's share price had briefly hit a high of $40.82 per share in January 2018 (A78), by March 2018 the stock had fallen below $35 per share—$2 less than where it had been trading at the time Knauf made its earlier offer. (B5.) Berkshire proposed to grant an option to Knauf to purchase Berkshire's shares of USG for $42 per share (A85), and informed Knauf that it would make an SEC filing disclosing its offer and the surrounding circumstances. (A85.) As a result, "before the Board could even meet to consider Knauf's Second Proposal," "Berkshire decided to take matters into its own hands by forcing Knauf's bid in to the public." (A84.)

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[1] Citations to "Proxy," both in this brief and in the Amended Complaint, refer to the Schedule 14A Definitive Proxy Statement filed by USG with the Securities and Exchange Commission ("SEC") on August 23, 2018. (A42.)

The Board met to discuss Knauf's improved offer (A82-A84), but determined that it was inadequate considering, among other things, USG's stock price and "intrinsic value." (A82.) The Board also discussed Berkshire's support for the sale, noting that it was "'positioned differently from all the other shareholders'" because of its large stake and that the Board "'could not substitute the judgment of one shareholder for what they believed to be in the interest of all shareholders.'" (A82-A83 (quoting A644).) The Board again acknowledged the risk of a hostile takeover attempt by Knauf. (A83-A84.)

On March 26, 2018, Berkshire publicly disclosed its offer of an option to sell to Knauf at $42 per share and that "beginning many years ago, executives of Knauf had contacted Berkshire to describe Knauf's potential and conditional interest in a transaction with USG." (A88.) The effect of the disclosure on USG's share price was immediate: the price jumped from below $35 to over $40 per share. (*See* B6.)

That same day, the Board formally rejected Knauf's second offer of $42 per share as "wholly inadequate" in light of the "intrinsic value of our long-term strategic plan." (A88.) The Board issued a press release stating that it believed its long-term strategy for USG—which it had recently set forth in detail at an Investor Day event—would "deliver significantly more value to our shareholders than Knauf's [$42] proposal." (A89.)

D. The Withhold Campaign

In April 2018, Knauf began a highly-public "withhold campaign" urging stockholders to withhold support for the Company's four director nominees to signal widespread dissatisfaction with the Board's rejection of the $42 per share offer. (A90-A95.) Berkshire "publicly communicated its intent to support" the withhold campaign. (A98.) Knauf highlighted Berkshire's support throughout the course of the campaign, treating Berkshire's offer of an option as a "clear indication that Berkshire Hathaway views our $42 offer price as fair and would be a willing seller" at that price. (A102; *see also* A103.)

The Board "issued a formal letter to shareholders" that labeled the withhold campaign "a misguided attempt to pressure the Board into accepting a proposal . . . that we believe is substantially below our intrinsic value." (A96.) The Board also made clear that it was "open to the evaluation of any proposal to acquire USG" but was "committed to creating value for *all* our stockholders." (A97.)

Given Knauf's 10.6% and Berkshire's 31.1% ownership, the success of the campaign depended on their ability to convince other stockholders to support their position. (A119-A120.) In this respect, the campaign to "send a clear message to the USG Board of Directors to engage immediately in a constructive dialogue with Knauf" (*see* B9) was a resounding success. Other market sophisticates announced that they would vote in support of the campaign and against the Company's director nominees. (A110 (Shapiro Capital); A120 (ISS and Glass Lewis).)

With the Company's large stockholders lining up to support a sale, the Board opened communications with other potential bidders; none were willing to make an offer. (A118-A120 (citing A645-A648).) The Board also decided to reopen negotiations with Knauf, advocating a range of $48-51 per share, and made Knauf a formal counteroffer of $50 per share before the stockholder vote on the withhold campaign. (A120, A123, A142 (citing A648).) Despite the Company's opposition and public statements about its view that Knauf's offers did not reflect "intrinsic value," 75% of shares voted at the May 9, 2018 meeting were voted to withhold. (A123.) This means that 57% of shares voted, other than Knauf and Berkshire's, voted in favor of Knauf's withhold campaign.

E. Knauf Again Increases Its Price

Following the vote, Knauf rejected the Board's counteroffer of $50 per share and indicated that Knauf would be willing to increase its offer to $43.50 per share. (A125 (citing A649).) Members of the Board tried hard to push Knauf higher—again citing the Company's "intrinsic" value. (A125 (citing A649).) In the course of negotiations, Scanlon told representatives of Knauf that the "'Board believes that the intrinsic value of the Corporation is $50 a share'" but that the Board "may be willing to support a sale as low as $47.00 per share." (*Id.*) Knauf refused to be swayed, saying "there was no room to move from $43.50 per share." (A126.)

The Board next met on May 24, 2018. (A126 (citing A650).) The Board considered the potential downside of rejecting the offer—including the "risks of Knauf walking away from negotiations and engaging in a hostile acquisition of the Company at $42.00 per share or lower or pursuing an alternative transaction with another U.S. wallboard competitor." (*id.* (quoting A650).) The Board also reviewed investment banker-generated projections for USG's future business and discussed potential upside and downside risks. (*Id.*)

Having weighed these considerations, the Board approved a transaction at or above $44 per share. (A127 (citing A650).) The Board would continue to push Knauf for a higher price, seeking to "ground" conversations with Knauf "in the Board's view of intrinsic value" (A126-A127), but also discussed "likely next steps by Knauf and other shareholders [*i.e.,* Berkshire] in the event that the parties are unable to reach terms." (*Id.*)

Despite the atmospherics, the Board *again* convinced Knauf to increase its offer, this time from $43.50 per share to $44 per share—a significant increase from the $42 per share offer that precipitated the withhold campaign (to say nothing of Knauf's original offer of $40.10 per share). (A128-A129 (citing A651).) The offer included a cash payment of $43.50 per share and an additional $0.50 special dividend that USG would pay following stockholder approval of the merger. (*Id.*) Knauf was unequivocal: this was its "best and final" offer. (*Id.*)

"[T]he Company began receiving interest from other potential buyers in April 2018," after Knauf's interest became public. (A118.) The Complaint highlights one potential buyer in particular—"Company A"—and concedes that, although "the Company interfaced with representatives of Company A," it declined to make an offer. (*Id.*) The Complaint acknowledged that "the Board also authorized outreach to Company A and four other potential bidders" following the withhold campaign, but these companies "were unable or unwilling to submit a competing bid." (A128.) With no competing bidders, the Board voted unanimously on June 10, 2018 to accept Knauf's offer of $44 per share. (A130 (citing A652).)

F. The Stockholder Vote

On August 23, 2018, the Board authorized the filing of the Proxy. (A134.) The Proxy included extensive disclosures concerning the background of the proposed merger and the Board's rationale for recommending approval. Among other things, the Proxy:

- Summarized the negotiating history, including the Board's rejection of Knauf's prior offers on the ground that those offers did not reflect USG's intrinsic value. (A641-A649.)
- Disclosed management's projections for future revenues, under which USG's operating profit as a standalone entity would increase from $435 million in 2018 to $1.076 billion in 2022. (A656-A658.)

- Disclosed the opinions of Goldman Sachs and J.P. Morgan—the Company's financial advisors—that the transaction was fair to stockholders, A658-A671, and the analyses on which these opinions were based, including:

    - Goldman's historical stock-trading analysis showing that the offer represented a 31.2% premium over the stock's closing price on the last undisturbed trading day. (A660.)

    - Goldman's discounted cash flow analysis yielding a "range of illustrative present values per share ranging from $41 to $53." (A662.)

    - J.P. Morgan's discounted cash flow analysis yielding "an implied per share equity value range for shares of common stock of $42.09 to $55.25." (A669.)

    - J.P. Morgan's analysis of public trading multiples for analogous companies yielding "per share equity value ranges" of $42.50 to $51.50 for 2019 and $32.25 to $43.00 for 2018. (A668.)

- Disclosed the "material information and factors considered by the Board" in formulating its recommendation, A652-A656, including:

    - Positive factors (among others): the Board's consideration of the opinions of Goldman and J.P. Morgan, A653-A654, the "certainty of value" under the offer as compared to "the risks and uncertainties inherent in the Company's business," A654, the absence of any competing offers despite the Board's efforts to solicit them, *id.*, the level of stockholder support for a sale even at $42 per share, A655, and the risk that "further delay in the negotiations could result in Knauf terminating or lowering its offer or commencing a hostile tender offer to acquire the Company at a lower price," (A653.)

    - Potentially negative factors (among others): the fact that the "Company will no longer exist as a publicly-traded company, and that stockholders will no longer participate (in terms of share price appreciation and dividends) in the future growth of the

> business, including opportunities identified by the Company's senior management." (A655.)

On September 26, 2018, the proposed merger was approved with 88.07% of shares voting in favor. (A134; *see also* B15.) Only 0.57% of outstanding shares affirmatively voted against the merger. (B15.)

PROCEDURAL HISTORY

Plaintiffs have already had two bites at this apple. Originally fashioned as a Section 203 action, Plaintiffs moved for a PI and lost. More than a year later, they decided the time was ripe to pursue a post-closing, disclosure-based claim. On August 31, 2020, the Court of Chancery granted Defendants' motion to dismiss the amended complaint. The Court concluded that, while the Board was not entitled to the protections offered by *Corwin* (because the Proxy referenced intrinsic value fifteen times without pinpointing it), Opinion at 51-58 & n.252, the Complaint nevertheless failed to plead a non-exculpated breach of fiduciary duty. *Id.* at 63-86. Plaintiffs moved for reargument on multiple grounds, asserting, in a footnote, that Scanlon was liable for breach of the duty of care in her capacity as an officer, because the Proxy (***not*** the Complaint) indicated that she signed it in her joint capacity as an officer and a director. A348 n.3. On December 1, 2020, the Court of Chancery denied Plaintiffs' motion, holding that Plaintiffs had never asserted any officer-liability theory and, even if they had, that argument was waived because Plaintiffs never raised it in briefing or argument. Reargument Opinion at 2-4. Plaintiffs moved for leave to amend to add new allegations that Scanlon had signed the Proxy in her capacity as an officer. On March 11, 2021, the Court denied Plaintiffs' motion, holding that Rule 15(aaa) barred amendment for the purpose of supplementing the Complaint with new facts in support of Plaintiffs' breach-of-fiduciary duty claim. Leave Opinion at 6-8.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY DISMISSED ALL CLAIMS.

A. Question Presented

Did the Court of Chancery err in concluding that the Complaint failed to state a non-exculpated claim where USG's charter provided for exculpation and Plaintiffs pled neither a breach of the duty of loyalty nor bad faith? Opinion at 63-86; A177-A187, A190-A198, A294-A306.

B. Scope of Review

This Court reviews "*de novo* the dismissal . . . of a complaint under Rule 12(b)(6)." *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

C. Merits of Argument

Plaintiffs argue that the Court of Chancery erred in dismissing their claim by (1) supposedly failing to apply enhanced scrutiny; (2) rejecting their theory that the Board sold USG at less than its intrinsic value; and (3) holding that there was no reasonably conceivable inference that the non-disclosure of the Board's assessment of intrinsic value was made in bad faith. None of these arguments have merit. Additionally, this Court should affirm based on *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), because the shareholder vote was fully informed.

1. The Court of Chancery Applied Enhanced Scrutiny.

Plaintiffs' accuse the Court of Chancery of failing to apply enhanced scrutiny, Br. at 17-18, but the Court explicitly stated that "the Acquisition constituted a change of control triggering *Revlon*" and characterized the relevant inquiry as "whether the Defendants' choices were reasonable under the circumstances as a good faith attempt to secure the highest value reasonably attainable." Opinion at 80-81.

Plaintiffs misread the Opinion in arguing that "the Court of Chancery suggested that 'the *Revlon* standard of review' was not relevant because it is 'applicable principally outside the damages context.'" Br. at 18 (quoting Opinion at 80). All the Court did was reject Plaintiffs' specious argument that, because *Revlon* applied, all they were required to plead is that "the Defendants' actions regarding the Acquisition were less than reasonable." Opinion at 80. As the Court correctly held, that is not enough: *Revlon* does not eliminate "the burden to plead a non-exculpated claim," *id.* at 81, as Plaintiffs erroneously maintained. An exculpatory provision applies "regardless of the underlying standard of review." *In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1175-76 (Del. 2015). The Court of Chancery's rejection of this argument was not error.[2]

[2] Plaintiffs protest that the Court of Chancery did not to view the allegations of the Complaint "through the lens of enhanced scrutiny." Br. at 18. But their own case says this only requires "focus[ing] . . . on whether the directors' decision was, on balance, within a range of reasonableness" in "evaluating alleged breaches of the duties of care and loyalty." *In re Pattern Energy Grp. Inc., S'holder Litig.*, 2021

2. The Complaint Never Pled That The Board Sold USG For Less Than Its Intrinsic Value.

Plaintiffs' contention that the Court of Chancery erred in rejecting their theory that Defendants breached the duty of loyalty by "***knowingly*** sell[ing] USG for less than its intrinsic value," Br. at 21, is misleading at best. Plaintiffs assert that "Defendants ***knew*** the [Merger] did not reflect intrinsic value," *id.*, but the most Plaintiffs have ever purported to plead (before now) is that the Board ***subjectively believed*** that USG was worth $50.00/share. (A41, A123-A125.) All of the objective information alleged in the Complaint and contained in the Proxy indicates that the deal price was within every formal valuation conducted, A660-A668.

Stripped of hyperbole and the misleading characterization that Defendants "knew" USG's "true" intrinsic value was precisely $50.00/share, Plaintiffs' argument boils down to an assertion that the Board breached the duty of loyalty because they "agreed to a sale at a price below what they [**subjectively**] determined was fair." Br. at 24; *see also* Br. at 23 ("'[A] sale at a price above what Knauf had offered' is not the same thing as 'a price that reflects intrinsic value.'"). That the Board even had an undisclosed subjective view is not substantiated by the Complaint. That a price was adopted in negotiations with Knauf ("the Board

WL 1812674, at *48 (Del. Ch. May 6, 2021). The Court evaluated the Complaint in this manner and held that its allegations of unreasonableness were "a far cry from the 'extreme set of facts' necessary to support a reasonable inference that USG's Board acted in bad faith." Opinion at 85; *see also id.* at 82-84; *infra* 23-26.

believes that the intrinsic value of the Corporation is $50 a share" (A125-A126)), does not support an inference that the Board had a unanimous personal view that the Company is worth precisely that amount. *In re OPENLANE, Inc. S'holders Litig.*, 2011 WL 4599662, at *15 (Del. Ch. Sept. 30, 2011) ("[A] counteroffer is not necessarily a reliable indicator of a Board's view of the Company's value . . . ."). But even if the conjecture that the Board had such an opinion were credited, it would not matter. Directors do not have a duty to sell a company at or above the price they "feel" the company is worth or to secure "a price that reflects intrinsic value," whatever that means. Br. at 23-24. Rather, they have a duty "to [get] the best price for the stockholders at a sale of the company." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009) (alteration in original) (quoting *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986)); *Malpiede*, 780 A.2d at 1083 ("*Revlon* emphasizes that the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise.").

As Plaintiffs' cited authority concedes, to state a non-exculpated claim in the *Revlon* context, a complaint must contain allegations supporting a reasonably conceivable inference that the Defendants failed to seek the best available price because they "were interested in the transaction, lacked independence, or acted in bad faith." *Pattern Energy*, 2021 WL 1812674, at *49 (citation omitted). Merely pleading unreasonable or otherwise flawed action is not enough. *Id.*; *see also In re Essendant, Inc. S'holder Litig.*, 2019 WL 7290944, at *13 (Del. Ch. Dec. 30, 2019) ("In the context of a sale of corporate control, bad faith is qualitatively different from 'an inadequate or flawed effort' to obtain the highest value reasonably available for a corporation." (quoting *Lyondell*, 970 A.2d at 243)). *See also* Opinion at 79-86. In straining to meet this burden, Plaintiffs suggest that the Defendants acted in bad faith by "allow[ing] interests other than obtaining the best value reasonably available for [the Company's] stockholders to influence [director] decisions during the sale process, given that they made decisions falling outside of the range of reasonableness." *Chen v. Howard-Anderson*, 87 A.3d 648, 677-78 (Del. Ch. 2014); Br. at 22.

But the Complaint does not adequately allege any such interest. Plaintiffs merely ***conclude*** (1) that the Board must have been motivated by considerations external to shareholder welfare, because it changed its position in response to the withhold campaign, the failure of any alternative bidder to emerge, and the threat of a hostile takeover by Knauf, Br. at 20-21, and (2) that the Board's decision-making was driven by fear of a second proxy defeat, Br. at 30-35.

The first hypothesis is a nonstarter. The risk that a hostile takeover attempt might result in dissenting shareholders receiving ***less*** than an existing offer promises is not a consideration at odds with "obtaining the best value reasonably available for [the company's] stockholders." *Chen*, 87 A.3d at 677. Indeed, ***ignoring*** such a risk and stubbornly insisting on a standalone course in the face of a credible threat based on nothing more than an idiosyncratic view of intrinsic value might even constitute a dereliction of duty. *See* Opinion at 66-67.

Here, the threat of hostile action was more than credible given that 75% of shares voted (including 57% of shares *other than* Knauf and Berkshire's) voted in favor of the withhold campaign, (A123) effectively registering support for a sale at Knauf's then-best offer of $42.00/share—$2 less than the price the Board was ultimately able to extract. Considering this threat was "a nod to reality, not a disabling extraneous influence." Opinion at 67. And even if the Board initially preferred to continue to operate as a standalone enterprise, Br. at 20, and could not know with certainty whether there would be a successful hostile takeover or impact on shareholder returns, *id.* at 35, the law does not support Plaintiffs' argument that that the Board's decision to accept a sale within the range of every formal valuation in the face of this threat constituted "(1) an extreme set of facts to establish that disinterested directors were intentionally disregarding their duties or (2) that the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *In re MeadWestvaco S'holders Litig.*, 168 A.3d 675, 684 (Del. Ch. 2017) (citation omitted). "Enhanced scrutiny 'is not a license for law-trained courts to second-guess reasonable, but debatable, tactical choices that directors have made in good faith.'" *In re PLX Tech. Inc. S'holders Litig.* 2018 WL 5018535, at *40 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (TABLE).[3]

Nor does the Complaint support an inference that the Board "knew" a sale was "not best for shareholders," Br. at 19. At most, the Complaint alleges the Board ***initially believed*** that a standalone approach was better, but changed their minds when the withhold campaign demonstrated that a majority of shareholders would almost certainly support a hostile sale even at Knauf's $42.00/share offer. (A118-A119, A126-A127 (citing A650).) That is a far cry from *Riche v. Pappas*, C.A. No. 2018-0177-JTL (Del. Ch. Oct. 2, 2018) (TRANSCRIPT), where defendants shifted from a standalone position to sale posture not because of stockholder support for a sale, but because a director with a "modus operandi of forcing quick sales" and a "differential interest in . . . short-term liquidity" prevailed upon the other directors change course. *Id.* at 22-27.

The second hypothesis "divined by Plaintiffs' counsel" (Br. at 32), amounts to a self-contradictory theory that Defendants, "for the purpose of protecting their

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[3] Plaintiffs also assert that "any tender offer would have required an offer above $44.00/share to succeed because it would have lacked Defendants' blessing," Br. at 36, but they nowhere give any explanation of why that is the case, so this assertion cannot be credited, particularly given that the shareholders had already endorsed a lower offer. Beyond that, this assertion was never made in the Complaint, is not supported by any factual allegations in the Complaint, and was never made in prior briefing.

reputations as fiduciaries, breached their fiduciary duties, risking the far greater blackening of their fiduciary reputations." *Morrison v. Berry*, 2019 WL 7369431, at *14 (Del. Ch. Dec. 31, 2019). *See* Br. at 31-34. As the Court of Chancery recognized, "the Board had already lost exactly the type of public fight that the Plaintiffs contend made the Board interested." Opinion at 70.

By enduring the brunt of the reputational damage that could be inflicted, the Board actually demonstrated its willingness to endure those costs in order to carry out fiduciary obligations. *See id.* (noting that "the Board declined this course of action, instead proceeding with negotiations on a more measured timeline, thereby accepting the reputational harm of an institutional campaign defeat in order to continue to pursue the corporate interest"). Plaintiffs' unsupported charge that Defendants acted on a fear that they would be removed in a second election, Br. at 31-32, is both speculative and contrary to Delaware law, which "routinely rejects the notion that a director's interest in maintaining his office, by itself, is a debilitating factor." *In re TriQuint Semiconductor, Inc. S'holders Litig.*, 2014 WL 2700964, at *3 (Del. Ch. June 13, 2014) (citation omitted). *See also Morrison*, 2019 WL 7369431, at *13 (rejecting claim of self-interest based on "activist pressure and the specter of a proxy contest"); *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 729 (Del. Ch. 1999) (likewise rejecting claim based on "stockholder dissatisfaction" and "the possibility of a proxy contest"), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000) (TABLE). *See also* Opinion at 67-73.[4]

Plaintiffs also complain that the Court of Chancery "paid . . . lip service in a footnote" to their suggestion that the marginal reputational cost of a second proxy defeat was not worth the gain in increased compensation that would result from a higher share price. Br. at 34-35. That was more than the argument deserved, as it does not indicate any "interest[] other than obtaining the best value reasonably available for [the company's] stockholders," *Chen*, 87 A.3d at 677, but instead only purports to limit the impact of the rule that "[w]hen directors or their affiliates own 'material' amounts of common stock, it aligns their interests with other stockholders by giving them a 'motivation to seek the highest price' and the 'personal incentive as stockholders to think about the tradeoff between selling now and the risks of not doing so.'" *Id.* at 670-71 (quoting *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 600 (Del. Ch. 2010)). As the Court noted, because the threat of further reputational harm was greatly attenuated after the withhold campaign, the Board "faced only the

[4] Plaintiffs make a formalistic distinction between being a holdover director and being removed from office, emphasizing that no Defendant was actually removed and that the Board discussed whether Knauf would be obligated to vote for director nominees at the next annual meeting. Br. at 12, 32. Plaintiffs' theory is made of straw, as both shareholder actions evidence a lack of support for the standalone path being advanced by directors.

upside of increased consideration for their USG stock." Opinion at 72 n.315. Plaintiffs' argument to the contrary fails.

3. The Court of Chancery Correctly Held That The Single Disclosure "Omission" Did Not Constitute A Breach Of The Duty Of Loyalty.

Plaintiffs argue that because the Court purportedly found "that Defendants ***knowingly*** withheld material information," it was obligated to hold that this "deliberate conduct" amounted to conscious disregard of fiduciary duty. Br. at 24-25. But the Court found that it was "not reasonably conceivable that the Proxy Statement represents the knowingly-crafted deceit or knowing indifference to duty that would show bad faith," Opinion at 77 (internal quotation marks omitted), and if Plaintiffs were right that they do not "need to allege the *reason* behind Defendants' purported material omission," but only "a knowing material omission," Br. at 28-29, every breach-of-fiduciary-duty claim not dismissed under *Corwin* would automatically survive dismissal under Rule 12(b)(6), because every failure to disclose material information is "knowing" in the sense that the persons responsible likely know that the information was not disclosed.

Plaintiffs' argument conflates (1) knowingly failing to take an action that was, unbeknownst to the Board, potentially required by fiduciary duty, and (2) doing so with conscious awareness that the act withheld was legally required. Only allegations of the latter kind—showing bad faith or disloyalty— suffice to state a non-exculpated claim. *See Kahn v. Stern*, 2017 WL 3701611, at *14 (Del. Ch. Aug. 28, 2017) ("to state a non-exculpated claim the Plaintiff cannot simply point to erroneous judgment in the failure to make a disclosure, implicating the duty of care, but rather must point to facts in the Complaint supporting an inference that the Board acted in bad faith in issuing the disclosure, implicating the duty of loyalty"), *aff'd*, 183 A.3d 715 (Del. 2018) (TABLE); *In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *8 (Del. Ch. Oct. 16, 2013) ("[A]ny disclosure claim that does not adequately allege a violation of the duty of good faith cannot survive the exculpation provision in [the] certificate of incorporation."); *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *14 (Del. Ch. Oct. 13, 2011) (same). *See also* Opinion at 74.

Even the cases Plaintiffs cite affirm that a showing of bad faith is a prerequisite to the success of a post-closing disclosure claim. *See In re Columbia Pipeline Grp., Inc. Merger Litig.*, 2021 WL 772562, at *57 (Del. Ch. Mar. 1, 2021) ("A plaintiff that seeks to recover damages for a breach of the duty of disclosure also must establish that the fiduciary acted with a culpable state of mind or engaged in non-exculpated gross negligence." (internal quotation marks omitted)), *appeal refused*, 249 A.3d 801 (Del. 2021) (TABLE); *Pattern Energy*, 2021 WL 1812674, at *61 (requiring showing of bad faith and knowledge that omissions rendered proxy false and misleading); *Morrison*, 2019 WL 7369431, at *18 (requiring "a pleading of facts" from which one "may reasonably infer breach of the duty of loyalty, and not simply adequate pleading of a material omission"); *In re Hansen Med., Inc. S'holders Litig.* 2018 WL 3025525, at *10 (Del. Ch. June 18, 2018) (finding reasonably conceivable disclosure violation based on allegations of bad faith nondisclosure).[5]

To establish a non-exculpated disclosure violation, Plaintiffs were required to allege facts that support a reasonably-conceivable inference that the Board withheld its supposed view of intrinsic value despite knowing that such an "omission" was a violation of their disclosure obligations. *See* Opinion at 74-75; *van der Fluit v. Yates*, 2017 WL 5953514, at *8 (Del. Ch. Nov. 30, 2017). But Plaintiffs never identify any allegations that would support an inference, let alone a reasonably-conceivable one, that the Board thought that its view of intrinsic value was material but nevertheless declined to disclose it. Br. at 24-30. And indeed, as the Court of Chancery explained, it was "not reasonably conceivable that the directors would have demonstrated a conscious indifference to their fiduciary duties by not disclosing their view of intrinsic value, while at the same time disclosing to USG's stockholders ***that the Board had chosen not to make that very disclosure***." Opinion at 78.

[5] The Second Circuit decision Plaintiffs cite, *Wilson v. Great American Industries, Inc.*, 855 F.2d 987 (2d Cir. 1988), addressed a claim under Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), for which negligence is the applicable standard of conduct, not bad faith. And even so, *Wilson* did not hold that a mere omission constitutes bad faith, but only a state of mind "in excess of negligence." *Id.* at 995.

Plaintiffs proffer no explanation of why the Board would advertise that they were declining to disclose information that they knew to be material. The Court rightly held that it "is near-inconceivable (and thus not reasonably conceivable) that an independent and disinterested Board acting disloyally would have professed its bad faith to USG's stockholders in the Proxy Statement." Opinion at 78.

Plaintiffs respond with the puzzling argument that the Court of Chancery's holding was "premised on an incorrect inference—namely, that the 'only reasonable inference is that the Board's approval of a \$48.00 to \$51.00 negotiating range represented its view of a *realistic* transaction price.'" Br. at 27 (quoting Opinion at 78). This argument is non-responsive. The Court's point was that Plaintiffs' assumption that the Board would openly declare that it had chosen not to make a disclosure that it knew it was obligated to make was not reasonably conceivable. Whether the Board really believed Knauf was likely to accept a price in USG's proposed negotiation range was neither here nor there. And Plaintiffs' assertion that the Board ***knew*** that \$47.00 was a "walk-away" price for Knauf, Br. at 27, assumes too much; even if Knauf explicitly told the Board that in the course of negotiations (which the Complaint never alleges), that would hardly imply that the Board was certain that Knauf would walk away at that price. And the "walk away" price statement was made on May 24, 2018—***after*** Knauf's successful withhold campaign—whereas the negotiation range was approved on April 30. (A120-A121, A123, A126-A127, A142.) The Board's ability to push for a higher price already had been compromised.[6]

Plaintiffs also assert that there is "a significant difference between telling stockholders (i) 'we decided not to disclose our view of intrinsic value' and (ii) 'our view is that intrinsic value is $6.00 above the Merger Consideration.'" Br. at 27. Even if the Complaint pled that the Board had a definitive belief as to intrinsic value (it did not), how exactly that difference is supposed to support an inference that the Board knew that its wholly-subjective view on intrinsic value was material is never articulated. There is an obvious explanation of why the Board would have thought (in *good* faith) that non-disclosure of this "fact" would have been a mistake: there was a real risk that assigning a number to the Company's "intrinsic value" would have misled shareholders into supposing that the Directors had undisclosed, material information that led them to suppose that the comparatively objective valuations of the investment bankers were inaccurate. Indeed, given that this Court has held that even formal valuations conducted by investment bankers are immaterial if unreliable, it hardly would have been obvious to the Board that a court might deem the omission of an entirely-subjective opinion on value—if such opinion even existed—material. *See Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270, 1280, 1282

[6] Appellants' Brief recognizes as much: "Both Knauf and the market recognized the import of Berkshire's support and that Defendants would have little choice but to capitulate." Br. at 10.

(Del. 1994) ("Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information"; holding "Goldman's share valuation was too unreliable to be material"); *Morrison v. Berry*, 191 A.3d 268, 283 n.65 (Del. 2018) (similar).

4. Alternatively, This Court Should Affirm Under *Corwin*.

This Court also should affirm based on *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015). *See Tiger v. Boast Apparel, Inc.*, 214 A.3d 933, 937 (Del. 2019) ("This Court may affirm on the basis of a different rationale than that which was articulated by the trial court[ ] if the issue was fairly presented to the trial court." (alteration in original) (citation omitted)); Opinion at 36-63; A175-A190, A279-A294. Under *Corwin*, a merger is reviewed under the business-judgment rule if approved by a "fully informed, uncoerced majority of the disinterested stockholders." 125 A.3d at 306. Holders of more than 88% of USG's outstanding stock voted in favor of the merger. (A146.) The Court of Chancery ruled that their vote was not fully informed because the Board failed to disclose its subjective assessment of USG's intrinsic value. Opinion at 49-58.

But intrinsic value, by its nature, cannot constitute a material fact, because it is fundamentally unknowable matter of opinion. "Whether called fundamental value, true value, intrinsic value, or fair value, the really-real value of something is always an unobservable concept. No valuation methodology provides direct access to it. Fundamental value is like a Platonic form, and the various valuation methodologies only cutouts casting shadows on the wall of the cave." *In re Appraisal of Stillwater Mining Co.*, 2019 WL 3943851, at *51 (Del. Ch. Aug. 21, 2019), *aff'd sub nom. Brigade Leveraged Capital Structures Fund Ltd. v. Stillwater Mining Co.*, 240 A.3d 3 (Del. 2020). Valuations constructed through formal methodologies are grounded in objective data and an analytical approach that at least purports to arrive at a meaningful assessment of the worth of a company. The same cannot be said for a valuation that is based on nothing more than a director's raw intuitions about what a company is "really" worth.

The Complaint does not allege, nor could it, that the Board had any assessment of USG's intrinsic value that went beyond such a raw "feel." All the Complaint alleged was that Scanlon told representatives of Knauf that the "'Board believes that the intrinsic value of the Corporation is $50 a share'" but that the Board "may be willing to support a sale as low as $47.00 per share." (A125.) That statement was made in the context of negotiations and reflected nothing more than "an asking price, deliberately set high." *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991); *see also OPENLANE*, 2011 WL 4599662, at *15.[7]

[7] The Court of Chancery agreed that "'intrinsic value'" and "'fair value'" are "nebulous, even illusory, concepts," but nonetheless concluded that "[t]he Amended Complaint avers that the Defendants had a belief as to the precise intrinsic value of

Disclosure of a subjective, amorphous assessment of value would not have contributed to the "total mix of information made available." *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *11 (Del. Ch. June 30, 2014). USG's stockholders had at their disposal a set of formal valuations that provided facts rather than feelings concerning the value of USG stock and the associated merits of the transaction. They knew the Board's negotiating range, and that the Board had rejected Knauf's $42.00 offer as "wholly inadequate given the Company's intrinsic value." (A77 (citing A643).) Adding the Board's intuition about what the price "should" have been to the mix would have been, at best, a distraction. *See Arnold*, 650 A.2d at 1282 (holding "Goldman's share valuation was too unreliable to be material").

The Court of Chancery reached the opposite conclusion by accepting "materiality through repetition," reasoning that "because the Proxy Statement disclosed that the Board held a view of intrinsic value and frequently referenced such a view during its disclosures about the sales process, USG's stockholders were entitled to know the Board's opinion of USG's intrinsic value." Opinion at 57. But

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USG, and that their disclosures in the Proxy Statement repeatedly imply that such a belief was formed." Opinion at 56. But Plaintiffs never actually pled anything beyond the fact that Scanlon asserted a figure in the context of negotiations—hardly an indicator of a firm and rigid opinion that a particular number represents ***the*** intrinsic value of the Company. Boards, after all, do not habitually adopt a single dollar figure as their opinion of value; any sophisticated director understands value as an indeterminate range. And the references to "intrinsic value" in the Proxy that the Court of Chancery identified, Opinion at 53-54 n.252, never imply that the Board ever identified any particular figure as ***the*** intrinsic value of the Company.

repetition cannot transmute a purely subjective "feel" about value (if such a feel even existed) into a material fact. Indeed, as the Court of Chancery recognized, "it was no secret to USG's stockholders that the Board preferred to sell USG for more than $44.00 per share" because the Board disclosed the $48.00 to $51.00 negotiation range and "that the approval of that negotiation range was informed by the Board's view of intrinsic value." Opinion at 77.

With those facts in hand, the addition of a statement by the Board that it subjectively believed that the negotiation range—or even a particular number within that range (*e.g.*, $50.00/share)—reflected USG's intrinsic value, would not have contributed anything to the total mix of information available to evaluate the merits of the transaction. Dismissal also should be affirmed on the basis of *Corwin*.

II. PLAINTIFFS' OFFICER LIABILITY THEORY IS TOO LITTLE, TOO LATE.

A. Question Presented

Did the Court of Chancery err in dismissing Ms. Scanlon as a defendant where the only breach alleged was in her capacity as a director of USG? Reargument Opinion at 1-4; A190-A198, A294-A306, A355-A365, A450-461.

B. Scope of Review

Because Plaintiffs first presented their theory that Scanlon was liable for conduct in her capacity as an officer in their motion for reargument, the Court of Chancery's rejection of this theory is reviewed for abuse of discretion. *Chrin v. Ibrix Inc.*, 70 A.3d 205, 2012 WL 6737780 (Del. Dec. 31, 2012) (ORDER). A190-A198, A294-A306, A355-A362, A450-A461.

C. Merits of Argument

1. Plaintiffs Waived Any Officer-Liability Argument.

Plaintiffs go to great lengths to pretend that they pled an officer-liability theory against Scanlon that the Court of Chancery overlooked. Br. at 37, 42-46. Nothing could be further from the truth. Ultimately, Plaintiffs' argument is irrelevant because they waived any officer-liability theory in the course of the motion to dismiss proceedings. Even if it were the case that an allegation of officer-liability "was well-plead in the Complaint" (one was not, *infra* 38-42), the Court properly "consider[ed] it waived as it was not advanced in briefing." *Stern*, 2017

WL 3701611, at *8 n.108; *see also Nguyen v. Barrett*, 2016 WL 5404095, at *3 (Del. Ch. Sept. 28, 2016) (holding plaintiff waived claims present in complaint by failing to discuss them in their opposition to the motion to dismiss); *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, 2007 WL 2982247, at *11 (Del. Ch. Oct. 9, 2007) (same). *See* Reargument Opinion at 2-3. This is true for at least three reasons.

First, Plaintiffs waived any officer-liability theory by failing to raise one in the text of their Brief in Opposition below ("Answering Brief") to Defendants' Motion to Dismiss. *See* Reargument Opinion at 2-3. The Answering Brief contained a grand total of three uses of the word "care," all in Section III.E, in an argument that "§102(b)(7) eliminates personal liability for damages predicated solely upon a breach of the duty of care," so "the Board cannot rely on USG's exculpatory provision unless it establishes that the factual basis for [Plaintiffs'] claim solely implicates a violation of the duty of care." A268.

Plaintiffs' assertion that they "devoted an entire section of their opposition to Defendants' motion [to] arguing that Section 102(b)(7) did not provide shelter" (Br. at 45) is misleading. Rather than argue that Scanlon was liable for officer-capacity acts, they argued that USG's § 102(b)(7) provision did not preclude Plaintiffs' claims because they "allege[d] breaches of the duty of loyalty, and allege[d] an unfair Merger Consideration." A268. Plaintiffs only ***mentioned*** the duty of care to suggest that their claim for breach of fiduciary duty supposedly was not exculpated because it was predicated on an alleged breach of the duty of ***loyalty***.

Likewise, Plaintiffs' assertion that this section of their answering brief "conclud[ed]" that "'exculpation is not available to Scanlon'" is a misrepresentation. Br. at 45. That one-sentence "argument" was an unsupported, by-the-way footnote. *See* A269 n.14. "[F]ailure to raise a legal issue in the above-the-line text of a brief generally constitutes waiver of that issue." *In re Tesla Motors, Inc. S'holder Litig.*, 2018 WL 1560293, at *20 (Del. Ch. Mar. 28, 2018). *See also Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, 2011 WL 6820362, at *3 n.15 (Del. Ch. Dec. 22, 2011); *Blank Rome, LLP v. Vendel*, 2003 WL 21801179, at *7 (Del. Ch. Aug. 5, 2003).

***Second*,** even if Plaintiffs had bothered to elevate the content of n.14 of their Brief in Opposition, their "argument" was far too cursory. *See Kelly v. Fuqi Int'l, Inc.*, 2013 WL 1150257, at *7 & n.82 (Del. Ch. Jan. 2, 2013) (explaining that conclusory and unsupported arguments are waived); *Nguyen*, 2016 WL 5404095, at *3 (claims "waived" where plaintiff "fail[ed] to defend them with any argument or authority"). Plaintiffs offered a conclusion only (A269 n.14), which does not suffice to preserve an issue.

Third, Defendants *did* counter n.14 by pointing out that the Complaint challenges "a decision made by the Board," A295 n.11 (citing *Se. Pa. Transp. Auth.*

v. Abbvie Inc., 2015 WL 1753033, at *13 (Del. Ch. Apr. 15, 2015)). In response, Plaintiffs said not one word on officer liability during oral argument on the Motion to Dismiss. *See* A308-A343 (no mention of the word "officer"). *See Capano v. Capano*, 2014 WL 2964071, at *1 (Del. Ch. June 30, 2014) (plaintiff "abandoned several claims by ignoring them throughout briefing and oral argument"); *Lechliter v. Del. Dep't of Nat. Res.*, 2015 WL 7720277, at *3 (Del. Ch. Nov. 30, 2015), *reargument denied*, 2016 WL 878121 (Del. Ch. Mar. 8, 2016) (limiting "analysis to those claims that have been clarified in the briefing or at Oral Argument"; remaining allegations "considered waived").[8]

2. Plaintiffs Never Pled An Officer-Liability Theory.

In any event, Plaintiffs are wrong to suggest that they pled an officer-liability theory in the Complaint. Br. at 42-46. The Complaint did not plead facts supporting an inference that the act that is supposed to serve as the liability predicate—dissemination of a Proxy sans a numerical representation of USG's "intrinsic value"—was carried out by Scanlon in her capacity as CEO or through any actions separate and distinct from the Board's actions. *See* Reargument Opinion at 3-4.

[8] That "Defendants bear the burden of moving to dismiss" gets Plaintiffs nowhere. Br. at 45. When Plaintiffs fail to mention claims ostensibly present in a complaint in subsequent briefing or at oral argument, those claims are abandoned. *Stern*, 2017 WL 3701611, at *8 n.108.

When "a defendant is a director *and* officer, only those actions taken solely in the defendant's capacity as an officer are outside the purview of Section 102(b)(7)." *Arnold*, 650 A.2d at 1288 (rejecting attempt to circumvent exculpatory provision because plaintiff "failed to highlight any specific actions [taken] as an officer (as distinct from actions as a director) that fall within the two pertinent exceptions to Section 102(b)(7)"). Applied to the pleading stage, this rule should require a plaintiff to plead facts supporting an inference that an officer-director defendant breached the duty of care when performing responsibilities that fell exclusively within the purview of her duties as an officer. Otherwise, Section 102(b)(7)'s protections would be rendered a nullity with respect to any director who is also an officer, because plaintiffs would be able to plead around its protections by the simple expediency of noting that an officer-director signed a document using both of her titles, regardless of whether the action involved her powers as an officer at all.

Plaintiffs interpret *In re Baker Hughes Inc. Merger Litigation*, 2020 WL 6281427 (Del. Ch. Oct. 27, 2020), and *Pattern Energy* to deviate from this rule at the pleading stage and assert that, when a defendant who is both an officer and a director of a company signs a proxy that omitted material information as Chairman/CEO, that is enough at the pleading stage "to support a reasonably conceivable claim that [the defendant] breached his duty of care with respect to the preparation of the Proxy he signed as . . . CEO," even though such an act is facially performed in the defendant's joint capacity as an officer-director. Br. at 39 (quoting *Baker Hughes*, 2020 WL 6281427, at *16); *see also Pattern Energy*, 2021 WL 1812674, at *70 (relying on the fact that CEO "signed the Proxy"); *City of Warren Gen. Emps.' Ret. Sys. v. Roche*, 2020 WL 7023896, at *19 (Del. Ch. Nov. 30, 2020) (same). These decisions, at least so interpreted, cannot be squared with *Arnold.* Regardless, to invoke this theory, Plaintiffs—at a minimum—needed ***to plead*** that Scanlon had signed the Proxy in her capacity as CEO.

The Complaint did no such thing. True to form, that "allegation" first appeared in a footnote, this time in Plaintiffs' motion for reargument. *See* A348 n.3. Plaintiffs' word choice creates the impression that allegations regarding Scanlon's signature were part of the pleadings, submitting: "Scanlon signed the Proxy's introductory letter and disseminated it as an officer." Br. at 40. But that allegation was not in the Complaint, and the Complaint offered nothing else about what Scanlon supposedly did in her capacity as CEO in connection with any intrinsic value disclosure. This pleading deficit precludes any reliance on *Baker Hughes*.

What is under review on a motion to dismiss are the factual allegations of ***the Complaint***, not facts taken for a test drive in later briefing *In re infoUSA, Inc., S'holders Litig.*, 953 A.2d 963, 973 n.7 (Del. Ch. 2007) ("well-settled rule" that "on a motion to dismiss the Court will consider only facts alleged in the complaint, not subsequent briefing"); *Orman v. Cullman*, 794 A.2d 5, 28 n.59 (Del. Ch. 2002) (plaintiff may not "improperly attempt[] to expand the scope of his complaint in his brief opposing the motion to dismiss by adding . . . new allegation[s]").[9] "Whether [Plaintiffs] *could* allege some facts to support a claim is not important; what is paramount at the motion-to-dismiss stage is whether [Plaintiffs] *did* allege sufficient facts in the Complaint." *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 467 (6th Cir. 2014) (rejecting attempt to "supplement the complaint on appeal with SEC filings").

Here, the allegations that *were* contained in the Complaint did not "provide[] the defendant[s with] notice of the claim" that ***CEO*** Scanlon breached the duty of care. *Thermopylae Capital P'rs*, 2016 WL 368170, at *9. Plaintiffs assert that the Complaint identified Scanlon as both an officer and a director and alleged that Defendants "knowingly or recklessly" violated their "duties of care and candor," but that boilerplate hardly signals intent to charge Scanlon under a conceptually-distinct theory. Br. at 43-44. And in asserting that the Complaint's allegations were

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[9] Plaintiffs cannot circumvent this problem by arguing that the Proxy was incorporated into the Complaint by reference. Br. at 44. "Incorporation by reference" does not excuse pleading deficiencies. Any contrary rule would create perverse incentives for plaintiffs to assert incomplete factual allegations in a complaint and then supplement them later, which is inconsistent with the principle that the "factual allegations in the Complaint" must "provide[] the defendant [with] notice of the claim." *Thermopylae Capital P'rs, L.P. v. Simbol, Inc.*, 2016 WL 368170, at *9 (Del. Ch. Jan. 29, 2016) (citation omitted). Indeed, if Plaintiffs were right that incorporation by reference could save them, there would be no bar to them raising a brand-new disclosure violation based on facts in the Proxy. That cannot be. *See Omnicare*, 769 F.3d at 467 (Plaintiffs cannot "amend the Complaint, effectively, through the vehicle of judicial notice.").

"sufficient to put Defendants on notice that Plaintiffs were challenging Scanlon's conduct as an officer *and* director," Br. at 43, Plaintiffs effectively concede that they never attempted to identify any actions taken by Scanlon "solely" in her capacity as an officer, as *Arnold* mandates. 650 A.2d at 1288.[10]

[10] All USG directors signed the Proxy, which precludes the inference that the act of authorization was an exclusively officer act. And in *Baker Hughes*, "[a]fter defendants moved to dismiss," plaintiffs "abandoned their claims against the Baker Hughes directors," so it was no secret that the suit asserted officer claims. 2020 WL 6281427, at *1.

III. PLAINTIFFS WERE NOT ENTITLED TO AMEND.

A. Question Presented

Did the Court of Chancery err in denying leave to amend despite the Rules' prohibition on amendment in the circumstances presented? Leave Opinion at 2-9; A596-599.

B. Scope of Review

A denial of leave to amend is reviewed for abuse of discretion. *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 262 (Del. 1993).[11]

C. Merits of Argument

Plaintiffs contend that the Court of Chancery should have granted them leave to amend to add allegations in support of a duty-of-care theory. (Br. at 47-48.) But Plaintiffs' time to amend (for the second time) was before filing their answering brief. Rather than amend, Plaintiffs chose to oppose Defendants' motion to dismiss. They lost and were not entitled to amend to plead around the Court's ruling. *See* Ct.

[11] Plaintiffs argue that "[a] ruling on a motion for leave to amend where the governing rule is in dispute is subject to *de novo* review," Br. at 47, but only the question whether Rule 15(aaa) or 15(a) applied is, not the order itself. The appropriate standard to evaluate the Court's denial of Plaintiffs' post-dismissal motion for leave remains abuse of discretion.

Ch. R. 15(aaa); *see also, e.g.*, *In re EZCORP Inc. Consulting Agreement Deriv. Litig.*, 130 A.3d 934, 938 (Del. Ch. 2016).

Plaintiffs insist that Rule 15(aaa) did not apply insofar as "the Complaint could not be 'read' to have pled a care/candor claim against Scanlon as an officer," Br. at 47, relying on *TVI Corp. v. Gallagher*, 2013 WL 5809271 (Del. Ch. Oct. 28, 2013). But *TVI Corp.* actually ***dictates*** the application of Rule 15(aaa) because what Plaintiffs sought was an opportunity to supplement their breach-of-fiduciary-duty claim with a ***new theory*** supported by ***new factual allegations***, not a wholly distinct claim that was entirely beyond "the purview of the motion to dismiss," 2013 WL 5809271, at *21 (concluding that the addition of a "factual allegation regarding the misappropriation claim" would "affect my decision to dismiss that claim and, therefore, should be assessed under Rule 15(aaa)"). Here, Plaintiffs did assert a care violation, and Defendants moved to dismiss that claim based on § 102(b)(7). Plaintiffs failed to plead any factual allegations that would support an officer-liability theory under that claim, so the claim was barred by § 102(b)(7), just as Defendants argued. *TVI Corp.* provides no support for the notion that Plaintiffs were entitled to retrofit this claim with allegations that Scanlon signed the Proxy in her capacity as an officer.

Plaintiffs also suggest that under Rule 15(aaa), they were entitled to leave to amend, but they never come close to showing that justice so required. (Br. at 48.)

The problem with their Complaint was not that it did not "break out" its officer-liability theory, but that it failed to plead facts that would support an inference of officer-level misconduct. And Plaintiffs do not even attempt to excuse their repeated failure to brief the issue of officer liability before their motion for reargument.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Chancery's decision and orders dismissing the Complaint and denying Plaintiffs' motion for leave to amend.

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