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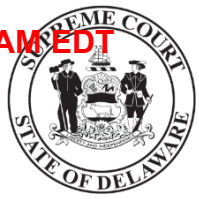


**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| KEVIN ANDERSON and SUSAN FITZGERALD,<br><br>Plaintiffs Below/Appellants,<br><br>v.<br><br>STEVEN LEER, JENNIFER SCANLON, JOSE ARMARIO, WILLIAM H. HERNANDEZ, RICHARD P. LAVIN, BRIAN A. KENNEY, GRETCHEN R. HAGGERTY, MATHEW CARTER, JR., and THOMAS A. BURKE,<br><br>Defendants Below/Appellees. | No. 106, 2021<br><br>On appeal from the Court of Chancery, C.A. No. 2018-0602-SG<br><br>**PUBLIC VERSION FILED 8/4/21** |

# APPELLANTS' REPLY BRIEF

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### A. The Trial Court Correctly Determined That the Board Reached a Determination of USG's Intrinsic Value

The Trial Court correctly concluded that Plaintiffs adequately alleged that Defendants reached a view that USG's "precise intrinsic value" was $50.00/share and considered disclosing that value, but chose not to, rendering the vote uninformed. Opinion, 51-58. Defendants now ask this Court to disregard the Trial Court's findings by disputing whether the Board ever reached such a determination. In other words, Defendants ask this Court – on appeal – to disregard well-pleaded allegations and construe disputed facts in their favor.

But well-pleaded factual allegations must be accepted as true and reasonable inferences drawn in Plaintiffs' favor. And the Trial Court's conclusion is supported by well-pled allegations. *Id.* For example, the Complaint alleged that Defendants:

(1) Conducted a strategic review *after* Knauf approached USG and determined to proceed with their standalone plan because there was no "strategic value" in Knauf's proposal;

(2) Did not believe that it was the right time to sell and determined USG's standalone plan and its $50.00/share value were "thoroughly vetted" and "realistic and achievable";

(3) Determined that Knauf's proposals were "insufficient," "wholly inadequate," and did not "warrant further discussion";

(4) Rejected these proposals based on their determination of "intrinsic value" and "measuring" that value and USG's standalone plan against Knauf's proposals;

(5) Recognized that Knauf would never pay intrinsic value;

(6) Repeatedly considered disclosing their view of intrinsic value to shareholders, ***but decided not to***; and

(7) Recorded in their own minutes that "*the Board believes that the intrinsic value of [USG] is $50 a share*."

A064, A067, A073-A074, A075, A082-A084, A088-A089, A090-A091, A095-A098, A111-A127, A142-44, A641; *see also* A213-A216 (outlining allegations). Plainly, as the Trial Court correctly found, the Board came to a determination about intrinsic value. Opinion, 51-58 ("references USG's intrinsic value fifteen times"). Defendants cannot prevail on an appeal from a motion to dismiss by raising a *factual dispute* with the well-pled allegations.

Defendants also argue that, even *if* the Board reached a determination, it was not $50.00/share and that figure was nothing more than "negotiations" or "an asking price, deliberately set high." Answering Brief ("AB"), 32. This contention is likewise contrary to the facts. First, the $50.00 figure is what the Board's ***own meeting minutes*** identified as their view of intrinsic value. A125-A126. Those minutes contain no caveat that this figure was a negotiation tactic. At this stage, the minutes must be taken at face value, and any factual dispute must be construed in Plaintiffs' favor – not Defendants'.

Second, using the $50.00 figure as a negotiation tactic at the juncture at which it was mentioned makes no sense. On April 30, 2018, the Board authorized Scanlon to begin negotiations between $48.00-$51.00/share, based on a "detailed discussion" of intrinsic value, and USG thereafter communicated a $50.00/share counterproposal. A119-A121, A123. Then, on May 23, 2018, ***after*** Knauf rejected the $50.00/share counterproposal and ***at the same time*** that Scanlon countered at $47.00/share, she "**re**iterated" – *i.e.*, she had said before – "that the Board believes that the intrinsic value of [USG] is $50 a share." A125-A126. Plainly, the $50.00/share figure identified in the Board's minutes as its view of intrinsic value could not have been "an asking price, deliberately set high" because Knauf had already rejected $50.00/share and Scanlon was countering at $47.00/share.

Third, while Defendants ask this Court to ignore the $50.00 figure, they fail to identify any other figure in the record that would refute Plaintiffs' allegations, which forecloses their attempts to cast doubt on the one figure identified in their *own* minutes.

At their irreducible core, Defendants' arguments regarding the $50.00 figure are factual disputes, which cannot be resolved in their favor on a motion to dismiss. *Clements v. Rogers*, 790 A.2d 1222, 1243 (Del. Ch. 2001) (assertion that "Presentation was a mere negotiating tool" was a factual dispute that could not "support…summary judgment"). At the motion to dismiss stage, the Trial Court was

correct to construe Plaintiffs' allegations as leading to the reasonably conceivable conclusion that the Board determined that USG's intrinsic value was $50.00/share.

### B. The Trial Court Correctly Determined That the Failure to Disclose The Intrinsic Value Determination Was a Material Omission

The Trial Court likewise correctly found that the failure to disclose this determination was a material omission. Opinion, 51-58. This undisclosed fact bore on the Buyout value, and "the fairness of the consideration offered in a merger…is material." *Gilmartin v. Adobe Res. Corp.,* 1992 Del. Ch. LEXIS 80, at *30-32 (Del. Ch. Apr. 6, 1992). The omission also rendered the Board's recommendation of the Buyout and its statement that the Buyout was "more favorable" than "a standalone basis" (A653) materially misleading, because the Proxy contained no tempering disclosure of the Board's $50.00/share view of intrinsic value or that the $50.00/share value was achievable and it was not a good time to sell. *Id.*

In response, Defendants argue that the Board's specific, dollar-value determination was just an immaterial "subjective, amorphous assessment of value." AB, 33. This position is contrary to decades of jurisprudence. *See Gilmartin,* 1992 Del. Ch. LEXIS 80, at *10-18, *27-31, n.12 (Where directors "believed that this was a bad time to sell," but proxy, like here, "convey[ed]…directors stand unified in their belief (and recommendation) that…merger is the best alternative," failure to disclose directors' misgivings rendered recommendation and message that merger was "a fair price" "materially misleading without *an additional simultaneous, tempering*

*disclosure* that two…directors believed that this was a bad time to sell."); *Appel v. Berkman*, 180 A.3d 1055, 1058-59, 1063 (Del. 2018) (Where proxy failed to disclose that one director was "disappointed with the price" and believed "it was not the right time to sell," this Court reversed dismissal, reaffirmed *Gilmartin*, and found that non-disclosure rendered board's recommendation "misleadingly incomplete."); *Chester Cty. Emples. Ret. Fund v. KCG Holdings, Inc.*, 2019 Del. Ch. LEXIS 233, at *30-32 (Del. Ch. June 21, 2019) (failure to disclose director's initial position that offer undervalued company rendered vote uninformed).

Like these three cases, Defendants here acknowledged that the Buyout was not in stockholders' best interests, that USG's standalone plan was "realistic and achievable" and would provide greater value, and that it was not the right time to sell. *Supra*. Nonetheless, the Proxy contained no simultaneous, tempering disclosure, rendering the vote uninformed.

Although these cases featured prominently in the briefing below, Defendants ignore them now, arguing instead that "stockholders had at their disposal a set of formal [banker] valuations." AB, 32. While those sources may have *informed* the Board's determination, they are not a substitute for the Board's actual opinion of value. *Appel*, 180 A.3d at 1059-62 (failure to disclose beliefs on value material because "stockholders…entitled to give weight to their ***fiduciaries' opinions***").

Defendants also attack the reliability of their *own* $50.00/share determination, dismissing it as just a "feel." AB, 32-34. But it was serious enough for Defendants to repeatedly reference it, to reject real proposals based on it, and to consider publicly disclosing it (without doing so). If that valuation determination was reliable enough for Defendants to so rely on it, it was material enough for Defendants to disclose it before asking shareholders to ignore *all of their previous warnings* and vote for the Buyout they resisted for a year. Opinion, 57n.266 (citing *Lynch v. Vickers Energy* Corp., 383 A.2d 278, 281 (Del. 1977) (if management believed that one estimate of value was more accurate than another, it was free to endorse that estimate and explain why, "but full disclosure…was a prerequisite")).

Finally, Defendants contend that the disclosure of the Board's $48.00-$51.00/share negotiating range was sufficient to inform shareholders of the Board's *actual* view of value. AB, 34. But Defendants themselves differentiated between a "negotiating price" and "a view of intrinsic value" in their brief (AB, 20, 32), and the Trial Court likewise correctly concluded that there is a *meaningful difference* between disclosing "negotiating price" and "a view of intrinsic value." Opinion, 54-55. They simply are not the same.

In short, the Trial Court correctly found that Defendants' failure to disclose their determination of intrinsic value was a material omission.

### C. The Trial Court Erred in Determining that Defendants' Decision to Knowingly Sell USG for Less Than Its Intrinsic Value and

**Knowingly Mislead Shareholders About that Value Did Not Implicate the Duty of Loyalty/Bad Faith**

Where the Trial Court erred was in finding that these same facts – Defendants' determination of intrinsic value, their decision to sell below that value, and their decision to hide that value from shareholders – were not sufficient to implicate the duty of loyalty/bad faith. Defendants attempt to explain away those facts through a series of *potential* innocent explanations. That attempt must fail *on an appeal from a motion to dismiss*.

**1. "If a sale is not the right thing and you believe a sale is not the right thing, you're not supposed to sell."**

It is well-established that, in a *Revlon* sale, if a board determines that its standalone plan would yield greater value than the transaction proposed, its fiduciary duty of loyalty/good faith demand that it pursue that plan and eschew any non-stockholder motivated influence. OB, 18-20; *In re Columbia Pipeline Grp., Inc.*, 2021 Del. Ch. LEXIS 39, at *85, *88 (Del. Ch. Mar. 1, 2021) ("what typically drives a finding of breach 'is evidence of…a[ny] non-stockholder-motivated influence'"); *In re Pattern Energy Grp. Inc. Stockholders Litig.*, 2021 Del. Ch. LEXIS 90, at *121-22 (Del. Ch. May 6, 2021) (directors must "treat stockholder welfare as the *only end*" and "court[s] must take a nuanced and realistic look at the possibility that personal interests short of pure self-dealing have influenced the board"). This line of jurisprudence has converged into a straightforward maxim: "***If a sale is not the right***

***thing and you believe a sale is not the right thing, you're not supposed to sell.***"

*Riche v. Pappas,* Del. Ch., No. 2018-017, Laster, VC (Oct. 2, 2018), OB, Ex. E, 25-26.

### 2. Knowingly Withholding Material Information Likewise Constitutes Disloyalty/Bad Faith

It is similarly well-established that allegations that a fiduciary *knowingly* withheld material information are sufficient to plead bad faith. OB, 29-30; *Pattern Energy*, 2021 Del. Ch. LEXIS 90, at *156-58 ("fail[ure] to correct a Proxy [directors] knew to be false and misleading" was "actionable *as bad faith*"); *Columbia Pipeline*, 2021 Del. Ch. LEXIS 39, at *153 (where "disclosure violations also concerned [defendants] own actions, supporting an inference that *they knew the Proxy was false when issued*," complaint "supports a reasonable inference that [defendants] breached…duty of loyalty by failing to act in good faith"); *Morrison v. Berry*, 2019 Del. Ch. LEXIS 1412, at *48 (Del. Ch. Dec. 31, 2019) ("knowingly-crafted deceit *or* knowing indifference to duty…show bad faith").[1]

[1] Plaintiffs do not contend that merely "know[ing] that information was not disclosed," while not *also knowing it was material*, constitutes disloyalty/bad faith. AB, 26. Rather, as outlined below, Plaintiffs sufficiently alleged that Defendants knew that (1) the Proxy omitted their view of intrinsic value *and* (2) that view was material. Defendants also conflate motive with knowledge of materiality. AB, 26. But there is a difference between "conscious disregard for one's [disclosure] responsibilities" and "'subjective bad faith,' that is, fiduciary conduct motivated by an actual intent to do harm," and both establish bad faith. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 64, 66 (Del. 2006).

### 3. It Is Reasonably Conceivable that Defendants Knowingly Sold When a Sale Was Not the Right Thing and Knowingly Withheld Material Information Regarding Value

It is reasonably conceivable that Defendants violated both lines of jurisprudence by considering extraneous influences in determining to sell and in knowingly withholding their view on value. The Complaint adequately alleged that, even though Defendants ***had just determined their standalone plan was in shareholders' best interests and superior to Knauf's offers and knew the Buyout did not reflect their determination of intrinsic value*** – *i.e.*, that a "sale [wa]s not the right thing" (*Riche*, Transcript, 25-26) – once defeated, they disregarded their view of intrinsic value and knowingly acted adverse to stockholders' interests by selling for $6.00/share less. OB, 5-14. They also repeatedly considered disclosing their determination of value, but ***chose not to***, and instead deliberately misled shareholders about that value while recommending the Buyout and misrepresenting that it was "more favorable" than "a standalone basis." *Id.* Neither decision can be deemed – as a matter of law on a motion to dismiss – in good faith.

### 4. Defendants' Counterarguments Are All Competing Factual Explanations of What *Might* Have Happened, Inappropriate on a Motion to Dismiss

In response to these well-pled allegations, Defendants present their own counter-narrative of *purported* facts and justifications for their conduct, attempting to explain away the allegations through a series of *potential* explanations of what

*might* have happened, and ask this Court to disregard the allegations, draw inferences in their favor, and pretend to know what was in Defendants' minds (just as the Trial Court erroneously did). *E.g.,* AB, 30 ("obvious *explanation* of *why* the Board *would* have thought…"). This Court should decline that invitation.

In essence, Defendants argue that "there must have been some other reason why they chose to sell for less than their determination of intrinsic value and then chose to withhold that determination from shareholders." Perhaps, but this is not an appropriate inquiry at the pleadings stage. That Defendants offer other *potential, theoretically possible* explanations for their actions does not negate the well-pled allegations that their decision was driven by non-stockholder motivations, and Plaintiffs need not *dis*prove *every other potential, theoretically possible factual explanation* Defendants offer to survive a motion to dismiss.

Rather, a motion to dismiss will be granted "only if the 'plaintiff could not recover under ***any reasonably conceivable set of circumstances susceptible of proof.***'" *City of Ft. Myers Gen. Emples. Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020) (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 536 (Del. 2011)). Even if a plaintiff may be unable to ultimately prove his claims, "that is not the test." *Morgan Stanley*, 27 A.3d at 536. Nor is "the issue…whether the Court believes that the Plaintiffs' theory of the case is plausible, much less accurate." *In re Answers Corp. S'holders Litig.*, 2012 Del. Ch. LEXIS 76,

at *31 (Del. Ch. Apr. 11, 2012). Nor must a plaintiff offer an explanation for *why* defendants acted as they did. *Id.* at *27 n.48. Rather, "[i]f the facts are as the Plaintiffs allege them, [and] they could recover," a motion to dismiss must be denied. *Id.* at *31. Thus, as long as there are allegations that conflict with Defendants' self-serving, potential explanations and that point to a reasonably conceivable, non-stockholder motivated influence that drove Defendants' about-face, the Opinion must be reversed. And there are plenty of such allegations.

For example, and first, Defendants assert that they could not have been worried about a second proxy contest loss because they had already suffered the harm from the Withhold Campaign, posit that they were instead actually worried about the potential for a tender offer, and conclude that this was a reasonable explanation for their about-face. AB, 21-26. Perhaps that will prove true, but Defendants' competing explanation is again an inappropriate inquiry at this stage. Another competing, *reasonably conceivable* explanation for Defendants' about-face is that they did not want to lose a second election *where they would actually be removed*, and simply sought to end the ordeal by getting Knauf to "pay a small 'obstinance tax'…that allow[ed] the board to save face." A121-A122.

And this reasonably conceivable explanation finds ample support in the record. First, *Knauf was subject to a standstill* – a fact Defendants continue to ignore – and the Trial Court correctly concluded that "it is not reasonably conceivable that

the Board knew as a certainty that Knauf would launch a hostile tender offer." A122; Opinion, 60. Second, any hostile offer would have required an offer above $44.00/share to succeed because it would have lacked Defendants' blessing, a fact neither Defendants nor the Trial Court genuinely addressed. Third, even *if* Defendants truly believed a sub-$44.00/share hostile offer was imminent and agreed to the Buyout to avoid it – two inferences improperly drawn in Defendants' favor – *they still owed shareholders a duty to disclose their view that that price was not fair*. Their deliberate decision to withhold that fact constituted disloyalty/bad faith.

Moreover, we *know* that Defendants were worried about a second proxy loss ***because they specifically asked about it***. On June 6, 2018, when Defendants determined to agree to the Buyout, ***they asked "whether Knauf would be obligated to vote for [USG's] director nominees at the <u>next</u> annual meeting"*** as a result. A129. The fact that they asked means they were concerned. And the fact that they were concerned means it is *reasonably conceivable* that they agreed to the Buyout – *i.e.*, changed their position that a standalone plan was best – in response to that concern. And we know that Defendants were willing to change position in response to concerns about losing proxy contests *because they had already done so once before* – from refusing to negotiate with Knauf to agreeing to – in response to the Withhold Campaign.

*Neither Defendants nor the Trial Court have ever attempted to genuinely*

*address* the fact that Defendants asked if their agreeing to the Buyout would mean that Knauf would now have to vote for them at the *next* meeting. That silence is deafening – an admission that Defendants cannot square this inconvenient fact with their argument.

This inconvenient fact demands reversal because it leads to the reasonably conceivable conclusion that Defendants' decision was tainted by a non-stockholder motivated influence. And, "[b]y eliding the inquiry – whether [Plaintiff's] well-pleaded Complaint stated a claim that is ***provable under any reasonable conceivable set of circumstances*** – and instead deciding substantively" Plaintiffs' claims, the Trial Court inappropriately shifted the burden and held Plaintiffs to a higher standard than required. *Morgan Stanley*, 27 A.3d at 538.

Second, Defendants speculate that the Board "initially believed that the standalone approach was better, but changed their minds" after the Withhold Campaign. AB, 23. This again requires the Court to *assume* a disputed fact – whether Defendants *actually* changed their minds, or just changed position to avoid another loss – in Defendants' favor, which is inappropriate. This argument also *admits* that Defendants were willing to change their position when faced with a proxy loss – *the whole point of Plaintiffs' argument*. Finally, "even if (contrary to the record) [Defendants] had changed their minds and later came to believe that it was a good time to sell [USG], the Proxy Statement should nonetheless have disclosed their

prior belief and then explained why the[y] changed their minds." *Gilmartin*, 1992 Del. Ch. LEXIS 80, at *41 n.15; *accord Appel*, 180 A.3d at 1063-64 (rejecting same contention; decision to sell "could have been motivated by understandable considerations unrelated to him changing his mind"); *Chester Cty. Emples.*, 2019 Del. Ch. LEXIS 233, at *32 (where insiders change views concerning merger, "proxy should disclose their prior belief and explain why").

Third, Defendants contend that "Plaintiffs never identify any allegations that would support an inference…that the Board thought its view of intrinsic value was material but nevertheless declined to disclose it." AB, 27-28. But there are ample allegations of exactly that. The Board's minutes record that it *repeatedly* considered disclosing its view of value, but ***chose not to***. A111-12, A120-22. This fact, and Defendants' concern regarding whether "Knauf would [now] be obligated to vote for [them] at the next annual meeting" for approving the Buyout (A129), lead to the reasonable inference that their decision not to disclose their view of value was a knowing decision to withhold material information.

Defendants counter that it is "near-inconceivable" that they would disclose their own failure to disclose material information. AB, 27-29. But that's not what happened. Rather, Defendants disclosed that they had reached a view of value, just not the figure. This purposefully-tailored, "partial and elliptical disclosure" perversely – and likely intentionally – ***allowed them to continue to hide the ball***

***from stockholders regarding intrinsic value while providing them a basis for the Corwin defense they ultimately made***. *Morrison v. Berry*, 191 A.3d 268, 272 (Del. 2018). 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 Buyout." Without knowing that Defendants' view was $50.00/share, shareholders could have believed that the withheld value was at/below the Buyout, especially given Defendants' representation that the Buyout was "more favorable" than "a standalone basis." A653.

At this stage, this "partial and elliptical disclosure" supports an inference of bad faith, because it is reasonably conceivable, especially in light of how much they considered it, that Defendants' knowingly intended to use the shareholder information asymmetry to their advantage by hiding damning material facts while saying just enough to have a plausible *Corwin* defense. Indeed, *their strategy would have worked* if Plaintiffs hadn't obtained confidential documents that revealed the hidden $50.00 determination of value.

* * *

At bottom, Defendants ask this Court to accept, at the pleadings stage, *their* version of events and to assume contested facts – *i.e.*, the reasons for Defendants' about-face and for their decision to withhold material information – in their favor. Defendants will have an opportunity *at trial* to argue that they were not worried

about a second proxy loss and honestly believed that their view that the Buyout undervalued USG by $6.00/share was not material. But these factual disputes cannot be resolved on a motion to dismiss in their favor today. Rather, if, as Plaintiffs have adequately alleged, Defendants did indeed change their position and agree to the Buyout that they believed undervalued USG for non-stockholder-motivated reasons, and/or did knowingly withhold their view of intrinsic value in order to mislead shareholders – i.e., "[i]f the facts are as the Plaintiffs allege them" – then "they could recover," and a motion to dismiss must be denied. *Answers*, 2012 Del. Ch. LEXIS 76, at *31. Accordingly, the Trial Court's acceptance of Defendants' self-serving, *potential* explanations for what *might* have happened is contrary to the motion to dismiss standard, and its Opinion should be reversed. *Id.*

## II. PLAINTIFFS SUFFICIENTLY PLED – AND DID NOT WAIVE – THEIR CARE CLAIM AGAINST SCANLON AS AN OFFICER

Defendants contend that Plaintiffs either failed to plead a care claim against Scanlon as an officer or, if it was sufficiently pled, waived it. AB, 35-42. Both arguments fail.[2]

### A. The Claim Was Sufficiently Pled

Defendants misconstrue Delaware's liberal notice pleading standards. They assert that Plaintiffs failed to plead "an officer-liability *theory* in the Complaint." AAB 4, 35-38, 41. But "a party *need not plead a particular theory or 'cause of action' in support of a claim*. Rather, it is enough that a party plead (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief sought." *Simmons v. DeRamus*, 2016 Del. Ch. LEXIS 28, at *12 n.22 (Del. Ch. Feb. 11, 2016); *accord Bamford v. Penfold, L.P.*, 2020 Del. Ch. LEXIS 79, at *74 (Del. Ch. Feb. 28, 2020) ("'So long as claimant alleges facts in his description of a series of events *from which [a claim] may reasonably be inferred* and makes a specific claim *for the relief* he hopes to obtain,

[2] Defendants assert this error "is reviewed for abuse of discretion" because Plaintiffs "first presented" it on reargument. AB, 35. That is not true. As outlined below, Plaintiffs sufficiently pled and briefed their care claim against Scanlon as an officer. The fact that *Defendants failed to properly move to dismiss the claim* – which caused the Trial Court to overlook it and forced Plaintiffs to seek reargument – does not trigger abuse of discretion review, as the claim should have been addressed in the Opinion.

he need not announce with any greater particularity the precise legal theory he is using.'") (quoting *Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979)).

Thus, the pertinent question is *not* whether the Complaint pled "a particular theory or 'cause of action,'" *Simmons*, 2016 Del. Ch. LEXIS 28, at *12 n.22, but rather, whether it sufficiently alleged facts from which a care claim against Scanlon as an officer may reasonably be inferred. It did.

The Complaint alleged that:

(1) Scanlon served as CEO/President (A043);

(2) Scanlon engaged with Knauf and the Board – including when she conveyed the Board's view of intrinsic value – as a member of management (A063, A070-A071, A073-A074, A076-A082, A087, A091, A095-A096, A111-A112, A119-A121, A123-A124, A126-A127, A129-A130, A144-A145);

(3) Scanlon knew the Board determined that intrinsic value was $50.00/share (A120-21, A125-27, A142);

(4) The Proxy – which Scanlon obviously knew she signed as "President and Chief Executive Officer" – was materially deficient for failing to disclose the Board's value determination (A146-A147); and

(5) Because of Defendants' positions with USG "*as officers* and/or directors," they owed stockholders duties of both *care* and loyalty (A047-A049, A147-A148), which they breached by failing "to provide…all material information" (A147-A148).

Under the liberal notice pleading standard, these factual allegations were sufficient to allege a care claim against Scanlon as an officer regarding the disclosure deficiency.

Defendants also contend that dual officer/directors should be able to *use the fact intensive nature of the inquiry* regarding whether they acted as an officer or a director as a shield – one that would provide them with the §102(b)(7) liability protection the Legislature declined to extend to officers. AB, 39-40. However, the recent opinions finding this fact intensive inquiry cannot be resolved on a motion to dismiss (OB, 29-30) are easily squared with *Arnold v. Soc'y for Sav. Bancorp* because that case involved a finding that plaintiff's failure "to highlight any specific actions" the CEO/director "undertook as an officer (as distinct from actions as a director)" was fatal ***at the summary judgment stage*** – after the plaintiff had the opportunity (but failed) to elicit evidence establishing actions as an officer. 650 A.2d 1270, 1273, 1288 (Del. 1994).

*Arnold* thus indicates that the capacity inquiry is indeed a fact intensive inquiry, which may be resolved ***on summary judgment***, when the record is more developed, but which is premature on a motion to dismiss where, as here, it is "reasonably inferable from the Complaint or the Proxy that" Scanlon was involved in preparing the Proxy as an officer because she affixed her signature to the Proxy in her self-declared capacity as President/CEO. *Pattern Energy*, 2021 Del. Ch.

LEXIS 90, at *178; *In re Hansen Med., Inc. Stockholders Litig.*, 2018 Del. Ch. LEXIS 197, at *28 (Del. Ch. June 18, 2018).[3]

Discontent with this recent jurisprudence, Defendants advocate for a new rule that would "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*." AB, 39. Defendants' new rule would allow dual officer/directors to always evade care-based liability by simply asserting – factually – that they performed the challenged conduct as a director rather than an officer. Indeed, their proposed analysis is the *exact* fact-intensive inquiry that is inappropriate on a motion to dismiss, and it is inappropriate because of the innumerable duties dual officer/directors may perform that could give rise to liability and the fact that "'[t]he fiduciary duties of officers are the same as those of directors" and thus a dual officer/director "may be liable for material misstatements in the Proxy in his capacity as an officer in addition to his capacity as a director." *Hansen Medical*, 2018 Del. Ch. LEXIS 197, at *28-29.

### B. The Claim Was Not Waived

[3] Defendants contend, without citation, that "[a]ll USG directors signed the Proxy." AB, 10n.42. This is simply false. A600-A721. So too is Defendants' citation-less contention that this case was "administratively closed due to inactivity," AB, 1, and Plaintiffs will submit the clerk's acknowledgment that the closing was in error should the Court desire.

Nor did Plaintiffs waive their care claim. Because the care claim against Scanlon as an officer was well-pled, it was ***Scanlon's obligation*** to devote some argument to dismissing the claim in Defendants' Opening Brief in Support of Their Motion to Dismiss. But the word "care" appeared only once in Defendants' brief, in the section where they erroneously argued that all claims were "barred by the exculpatory provision" because it "bar[s] claims based on the duty of care." A190-191. Of course, an exculpatory provision has no such effect with respect to care claims against officers, an issue Defendants ignored. Indeed, the word "officer" also only appears once in Defendants' brief, ironically where Defendants described Scanlon solely as "the Company's Chief Executive Officer." A163. The bottom line is that it is Defendants – not Plaintiffs – who failed to adequately brief the issue – *i.e.*, to argue that the care claim against Scanlon, "the Company's Chief Executive Officer," should be dismissed. *Loudon v. Archer-Daniels-Midland Co.*, 1996 Del. Ch. LEXIS 12, at *7 (Del. Ch. Feb. 20, 1996) (moving party bears burden of demonstrating that complaint fails to state claim).

Moreover, while Defendants ignored the care claim in their opening brief, Plaintiffs nevertheless flagged the claim in their opposition, writing: "§102(b)(7) does not exculpate officers in their capacity as officers, ***such that exculpation is not available to Scanlon***. *McPadden v. Sidhu*, 964 A.2d 1262, 1273 (Del. Ch. 2008)." A269. And, while Defendants contend this argument was "far too cursory" (AB, 37),

courts do not require parties to belabor straight-forward legal points with unnecessarily lengthy arguments. This argument required no more than a sentence and a case citation – particularly given that it was made in support of a claim that ***Defendants failed to say a word about in their opening brief***.

While Defendants assert that they "did counter" in their reply brief, their counter consisted of continuing to deny that Plaintiffs pled "any claims against Ms. Scanlon in her capacity as an officer." A295. In other words, Defendants attempted to justify their failure to address the care claim against Scanlon as an officer in their opening brief by insisting the claim wasn't pled. But it was, *supra*, and the Court should not condone Scanlon's attempt to evade liability by simply ignoring the claim.

Furthermore, at oral argument, Plaintiffs' counsel referred to Scanlon as "CEO" while discussing the omission of the $50.00 intrinsic value determination, and Defendants' counsel asserted that the crux of Plaintiffs' disclosure claim "is the language of negligence and a quintessential duty of care." A325, A333-34. Yet Defendants never addressed this "quintessential duty of care" claim in their briefing, and the Trial Court thus failed to consider it. This Court should not let Scanlon use her own briefing failure and the Trial Court's resulting oversight to evade liability.

* * *

Plaintiffs sufficiently pled, and did not waive, their care claim against Scanlon as an officer, and Defendants cannot disregard the liberal notice pleading standard to escape that claim.

## III. ALTERNATIVELY, THE TRIAL COURT ERRED IN DENYING LEAVE TO AMEND

When the Trial Court erroneously denied reargument because it did "not appear" that the Complaint could "be so read" to contain a care claim against Scanlon as an officer, OB, Ex. B, 3, Plaintiffs sought leave to add a separate count containing the claim. Contrary to Defendants' argument, Plaintiffs did not seek "to supplement their breach-of-fiduciary-duty claim with a new theory," AB, 44, but instead sought to delineate the claim the Trial Court erroneously concluded was missing in a separate count.

Defendants conflate two different "claims" at issue in *Tvi Corp. v. Gallagher*, 2013 Del. Ch. LEXIS 260 (Del. Ch. Oct. 28, 2013). There, the plaintiffs sought to add a new "count" – *i.e.* "to add a new direct claim for fraud…and various allegations relevant to that claim." *Id*. at *14, *61, *65. The Court found "that the proposed addition of a new direct claim for fraud and other secondary changes that would not have influenced [its] decision to grant certain portions of the Motion to Dismiss should be assessed under Rule 15(a)." *Id*. at *66. The same reasoning dictates that Plaintiffs' Motion for Leave to Amend, which only sought to more explicitly delineate the care claim against Scanlon as an officer, should have been assessed under Rule 15(a) and granted. *Id*.

Moreover, even if Rule 15(aaa) applied, the dismissal should have been without prejudice as to Scanlon, as dismissal with prejudice was unjust under all

circumstances. *See id*. at *72; *see also In re EZCORP Inc.*, 2016 Del. Ch. LEXIS 14, at *32-33 (Del. Ch. Jan. 25, 2016) (amending "unnecessary" where facts supported claim against two defendants *even though defendants were not even named in relevant count;* even if amendment was necessary, dismissal with prejudice under 15(aaa) would be unwarranted).

## CONCLUSION

The dismissal should be reversed as to all Defendants, or, at the least, Scanlon. Alternatively, the denial of leave to amend should be reversed.

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Respectfully submitted,

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