EFiled: Aug 31 2022 11:57AM EDT
Filing ID 68004244
Case Number 224,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEAMSTER MEMBERS RETIREMENT PLAN, individually and on behalf of all others similarly situated,

Appellant, Plaintiff-Below,

v.

RANDALL S. DEARTH, ROBERT M. FORTWANGLER, STEVAN R. SCHOTT, JAMES A. COCCAGNO, CHAD WHALEN, J. RICH ALEXANDER, WILLIAM J. LYONS, LOUIS S. MASSIMO, WILLIAM R. NEWLIN, JOHN J. PARO, JULIE S. ROBERTS, TIMOTHY G. RUPERT, and DONALD C. TEMPLIN,

Appellees, Defendants-Below.

No. 224, 2022

CASE BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE

C.A. No. 2020-0807-MTZ

REDACTED PUBLIC VERSION
DATED: August 31, 2022

APPELLANT'S OPENING BRIEF

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DATED: August 16, 2022

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

CASES

Page

SECONDARY AUTHORITIES

NATURE OF PROCEEDINGS

This appeal challenges the Court of Chancery's dismissal of a complaint under *Corwin v. KKR Financial Holdings, LLC*.[1] The dismissal contradicts the rule that non-disclosure of "material information undermining the integrity or financial fairness of the transaction" precludes stockholder ratification.[2] The non-disclosures central to this appeal go directly to the integrity of the challenged transaction, as well as its financial fairness.

This case is about a management team at Calgon Carbon Corporation ("Calgon" or the "Company") that repeatedly spurned an interested buyer until that buyer, Kuraray Co., Ltd. ("Kuraray"), enticed management with the promise of lucrative personal benefits. From that point forward, management pressed ahead with a single bidder process, issued a false and misleading proxy statement ("Proxy") to obtain stockholder approval, and collectively reaped over $20 million in single-trigger golden parachute payments and retention bonuses.

Notwithstanding these conflicts of interest, the Court of Chancery erroneously dismissed this case on *Corwin* grounds. In doing so, the Court of Chancery

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[1] 125 A.3d 304 (Del. 2015).

[2] *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 898 (Del. Ch. 1999), *quoted in Morrison v. Berry*, 191 A.3d 268, 275 n.18 (Del. 2018), and *Corwin*, 125 A.3d at 312 n.27.

unwittingly created a rule that company data is ***automatically*** rendered immaterial as a matter of law whenever there is an intervening event – even where that intervening event does not alter the significance of the data. Such a rule is contrary to Delaware law, and dismissal should be reversed.

Delaware's materiality test has been in place for decades. From its 1985 decision in *Rosenblatt v. Getty Oil*,[3] through its decision last month in *In re GGP, Inc.*,[4] this Court has unwaveringly held that "[i]nformation is considered material 'if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote.'"[5] "'[T]he question is not whether the information would have changed the stockholder's decision to accept the merger consideration, but whether "the fact in question would have been relevant to him."'"[6]

That is the inquiry the Court of Chancery was required – but failed – to make in deciding whether Plaintiff here has alleged material nondisclosures. The materiality test does not ask, much less hinge entirely, as the Court of Chancery would have it, on whether intervening events have (or have not) occurred. The test on a motion to

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[3] *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929 (Del. 1985).

[4] *In re GGP, Inc. S'holder Litig.*, 2022 WL 2815820 (Del. July 19, 2022). Unless otherwise indicated, all emphasis is added and all citations and footnotes are omitted.

[5] *Id.* at *17.

[6] *Id.*

dismiss is simply whether, regardless of any intervening events, it is reasonably conceivable that the information at issue would have been considered important by stockholders. Again, that question was never posed by the Court of Chancery in this case.

To put the undisclosed information in context, immediately prior to the merger at issue here – which was agreed to in September 2017 – Calgon was preparing to participate in the Ballast Water Initiative ("BWI") program, an $18 to $28 billion program requiring 64,000 ships to be retrofitted by 2024.[7] Company management believed that Calgon was "well positioned to benefit from" participation in the BWI program and "expect[ed] to be a significant supplier" for that program.[8]

This belief was bolstered by Boston Consulting Group ("BCG"), an advisor hired by the Company in late 2016 to conduct a months-long, in-depth analysis of Calgon and its prospects.[9] BCG projected that Calgon was positioned to generate over $1.1 billion in annual revenues by 2021, in part due to its participation in the BWI program.[10]

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[7] A197-98, 216-17, 220 ¶¶35, 39, 81, 88.

[8] A219-20 ¶87.

[9] A195-97, 202-03 ¶¶32-35, 50.

[10] A196-97 ¶¶33, 35.

Calgon treated the BCG report as decidedly material, relying on it heavily throughout the merger process. For example, management and the Board expressly discussed and agreed that Kuraray should be given the BCG report, in an effort to get Kuraray to raise its offer price.[11] That effort succeeded.[12] Management also expressly used the BCG report as part of the Company's valuation process in connection with the merger.[13] Yet neither the BCG report, nor its findings, nor even its existence, were disclosed to stockholders.[14]

Meanwhile, in March 2017 – just months prior to Kuraray's initial merger offer – Calgon management prepared ordinary-course, run-the-business BWI projections for the Board that showed [redacted]

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[11] A202-06 ¶¶48, 52-53, 55.

[12] A176 ¶1 n.2.

[13] A206 ¶58.

[14] A196, 202-03, 208-09, 222 ¶¶33-34, 50, 62, 92-93. BCG also [redacted] A202-03 ¶50. This information was not disclosed to stockholders in connection with their vote on what, despite BCG's advice, was run as a single-bidder process. *Id.*

[15] A198-99 ¶39.

[redacted][16]

The retrofitting process was initially set to run from 2017 to 2024, but in July 2017, the exact same program was modified to run from 2019 to 2024.[17] As a result, "the program [went] from a seven-year implementation (2017-2024) to a five-year program (2019-2024)," making even more drastic what analysts had already described as an anticipated "'hockey stick' of revenues and earnings," for participating companies like Calgon.[18] Company management believed that the delayed implementation of the program would ***not*** impact the overall revenues to be generated by Calgon's participation in the program; it "'simply delayed the earnings growth projected by BCG by 2 years.'"[19]

On July 17, 2017, management presented the Board with a set of financial projections to be used in valuing the Company in connection with the merger.[20] Those

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[16] A198-99, 207, 219 ¶¶39-40, 60, 86.

[17] A206 ¶56.

[18] A220 ¶88.

[19] A206 ¶58.

[20] A209-10 ¶64.

projections only covered the period from 2017-2021.[21] There were two major implications of choosing this time period: [redacted][22] Put another way, [redacted], management created a set of projections that included all of the projected downside of the Company's participation in the BWI program, and little if any of the projected upside.[23]

Either of those elements – and certainly both of them combined –operate to lower the valuation conclusions contained in the fairness opinion given to stockholders. Yet stockholders were neither told about, nor provided with, management's March 2017 BWI projections, or any other information regarding the

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[21] A218-19 ¶85.

[22] A198, 207, 218-21 ¶¶39, 60, 85-88, 90.

[23] *Id.*

costs and revenues to be realized by Calgon in connection with the BWI program.[24] Nor were stockholders informed that the projections in the Proxy contained all the downside and none of the upside of the BWI program.[25]

Subsequent to management's July 17 presentation of financial projections to the Board, the Company's investment banker discovered an error in those projections related to CECA, a Calgon subsidiary.[26] Specifically, on July 27, 2017, the investment banker emailed management and inquired: "'[W]ill you be providing an updated segmented model that has the CECA EBITDA updated to $18.8M ***and the other segments revised downwards so that we get to the same total EBITDA as previously shown***?'"[27] Management quickly sent the investment banker "a 'revised model,' with an 'offset to CECA improvement' that management buried 'in Corporate.'"[28]

By lowering unspecified "Corporate" projections to offset up to $18.8 million in higher 2017 CECA EBITDA numbers, Plaintiff submits, management was able to

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[24] A178-79, 199, 219, 221 ¶¶5, 40, 86, 90.

[25] A219 ¶86.

[26] A209 ¶63.

[27] *Id.*

[28] *Id.*

avoid both having to go back to the Board with a now-higher set of projections, and having to give those higher projections to stockholders. Stockholders were not informed of the investment banker's request for "revisions" to the CECA model, or of management's revising "other segments … downwards" to offset those CECA EBITDA numbers.[29]

Confronted with Plaintiff's allegations, the Court of Chancery was charged, at the motion to dismiss stage, with determining whether it was reasonably conceivable that stockholders would have considered it important to know the foregoing information. For example, is it reasonably conceivable that stockholders would have considered it relevant that Company management expected Calgon, by the 2024 retrofit deadline, to generate [redacted] in revenues from the BWI? Of course they would, Plaintiff respectfully submits. And Plaintiff adequately pled that those projections existed, and that the delay in the start of the program did not change the total revenues ultimately to be generated by the Company by the 2024 deadline. Plaintiff also adequately alleged that [redacted] in BWI revenue would have been considered relevant information by stockholders, who were presented with projections in the Proxy that contained all of the cash-flow negative BWI program start-up costs, but none of the revenue upside.

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[29] *Id.*

But again, the Court of Chancery never even posed the question of whether it was reasonably conceivable that this was information that stockholders would consider important to know. The Court of Chancery just mechanically concluded that management's BWI revenue projections "were outdated because of the IMO's delay"[30] and were therefore immaterial as a matter of law. This was manifest error. Not every intervening event automatically operates to render preexisting management projections "outdated" and therefore immaterial as a matter of law. That is certainly true here, where, as alleged, management expected the Company to generate [redacted] [redacted] by 2024 ***regardless*** of the project start date.

The Court of Chancery further erred by mechanically concluding that, because five-year projections are "routine," existing management projections covering years extending beyond that five-year period are, as a matter of law, something stockholders would consider irrelevant, and are therefore immaterial. There is no such blanket rule. Plaintiff respectfully submits that it is reasonably conceivable that Calgon's BWI revenue projections beyond 2021 would be considered relevant by its stockholders, especially given that the 2024 retrofit deadline remained in place.

The Court of Chancery likewise erred by mechanically concluding that, because whole-company projections beyond the five-year period had not been created, the

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[30] Opinion at 35.

existing BWI projections that ***did*** extend beyond that five-year period were immaterial as a matter of law. Again, there is no such blanket rule – Plaintiff respectfully submits that it is reasonably conceivable that Calgon's BWI revenue projections would be considered relevant by its stockholders, even absent whole-company projections extending to 2024.

Similar errors infect the Court of Chancery's ruling that the BCG report was immaterial as a matter of law. While the Court of Chancery declared that "[a]ny more optimistic projections in the BCG Report were outdated and no longer the Board's best estimates of the Company's future," it simultaneously ignored Plaintiff's well-pled allegations demonstrating that ***Company management and the Board*** treated the BCG report as highly material, and used it, both internally and in their dealings with Kuraray, throughout the merger process. If management and the Board considered the BCG report so important, on what basis could the Court of Chancery then conclude, as a matter of law, that it was not reasonably conceivable that stockholders would do likewise? That was error.

Finally the Court of Chancery appears to have misapprehended the issue relating to the CECA EBITDA allegations. After the Proxy projections were created – but before they were used to provide a fairness opinion to the Board, or disclosed to stockholders – the Company's investment banker discovered that certain EBITDA

numbers for a subsidiary were falsely understated and determined that that error was large enough to involve management. Rather than just correcting the error and issuing new projections with overall larger EBITDA numbers, management and the investment banker contrived to lower other numbers so that the overall total would stay the same. Plaintiff asserts that this behavior calls into question the reliability of the projections being used to justify the fairness of the merger. Therefore, it is reasonably conceivable that this information would have been considered relevant to stockholders.

In sum, "[o]ne sufficiently alleged disclosure deficiency will defeat a motion to dismiss under *Corwin*."[31] Plaintiff here sufficiently alleged multiple disclosure deficiencies. Accordingly, judgment should be reversed.

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[31] *In re Mindbody, Inc.*, 2020 WL 5870084, at *26 (Del. Ch. Oct. 2, 2020).

SUMMARY OF ARGUMENT

1. The Court of Chancery was required to examine Plaintiff's disclosure claims under the reasonably conceivable standard, and from the perspective of what a reasonable stockholder would consider to be relevant. The Court of Chancery failed to do so and erroneously dismissed this action on *Corwin* grounds. It is reasonably conceivable that recently created, ordinary-course, run-the-business management projections regarding the BWI program, which showed [redacted] in revenues by the 2024 retrofit deadline, would be considered important by a reasonable stockholder. It is reasonably conceivable that stockholders would consider it important to know that the fairness opinion projections included the start-up costs but not the revenues and cash flows to be generated by the Company in connection with the BWI program. The same is true of the valuations and other analyses contained in the BCG report, which were so important to management and the Board that they used them throughout the merger process; it is reasonably conceivable that stockholders, like management and the Board, would consider that information to be relevant. The delayed start of the BWI program did not change the 2024 retrofit deadline, and did not change the overall revenues and cash flows the Company expected to generate from the program by that deadline. Therefore, it is reasonably conceivable that the delay did not render the management projections or the BCG report immaterial as a

matter of law from a reasonable stockholder perspective. It is also reasonably conceivable that management's concealment of manipulated financial models, and of information regarding potential buyers (which contradicted disclosures in the Proxy), also would be considered relevant to a stockholders trying to "protect themselves when left to vote on an existential question in the life of a corporation ...."[32] Because Plaintiff sufficiently alleged disclosure deficiencies, judgment in favor of Defendants should be reversed.

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[32] *Morrison*, 191 A.3d at 274.

STATEMENT OF FACTS

I. Calgon's Standalone Strength

Before the Acquisition, Calgon was a successful Delaware corporation with strong prospects, based in a suburb of Pittsburgh.[33] Calgon was a global leader in innovative solutions, high quality products and reliable services designed to protect human health and the environment from harmful contaminants in water and air.[34] As a leading manufacturer of activated carbon, with extensive capabilities in ultraviolet light disinfection, Calgon provided purification solutions for drinking water, wastewater, pollution abatement, as well as a variety of industrial and commercial manufacturing processes.[35]

A. BCG Projects Calgon Revenue Growth to As Much As $1.1 Billion By 2021

As Plaintiff learned through its inspection, in late 2016, Calgon retained BCG, a respected management consultant.[36] Following a nine-week review process, including "70 market expert interviews, secondary research, and company data," BCG determined that Calgon was "[redacted]

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[33] A195 ¶29.

[34] A194-95 ¶28.

[35] *Id.*

[36] A195-96 ¶32.

[redacted]"[37] BCG valued the global activated carbon market at [redacted] [redacted][38]

According to BCG, one of Calgon's most valuable opportunities related to the BWI program. Enacted in September 2016 by the International Maritime Organization ("IMO"), the BWI program required all ocean-bound ships to be retrofitted by 2024 to manage their ballast water so that aquatic organisms and pathogens are removed or rendered harmless before the ballast water is released into a new location, mirroring requirements already in place by the U.S. Coast Guard.[39] Approximately 64,000 existing ships would need to add ballast water treatment systems.[40]

Calgon estimated this as an $18 to $28 billion opportunity for the industry – one that Calgon was "well positioned to benefit from" and "expect[ed] to be a significant supplier" in.[41] "The ballast water equipment end market could effectively double

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[37] A195-96 ¶¶32-33.

[38] A196 ¶34.

[39] A197-99 ¶¶35, 39.

[40] A197, 219-20 ¶¶35, 87.

[41] A197, 206, 219-20 ¶¶35-37, 56-58, 87.

[Calgon's] earnings if it capture[d] only a small portion of this opportunity for several years."[42]

BCG, after its extensive two-plus month review, identified a number of strategic growth opportunities for the Company, and projected revenues for Calgon of up to $1.101 billion in 2021.[43] BCG also assessed the possibility of selling Calgon, but concluded that Calgon would likely receive the most attractive offers only when the identified steps to maximize the business were underway and showing results.[44] To that end, BCG presented Calgon with [redacted][46]

It is important to note that Calgon's management and Board continued to utilize BCG's report and analyses throughout 2017, including as a key part of the merger

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[42] A220 ¶88.

[43] A195-96 ¶¶32-33.

[44] A196 ¶34.

[45] A202-03 ¶50.

[46] A195-96, 202-03 ¶¶32, 50.

process. For example, in July 2017, management and the Board [redacted] [48] Yet neither the BCG report, nor its existence, were ever disclosed to stockholders, in the Proxy or otherwise.[49]

Notably, the Company failed to utilize one important component of the BCG report. Despite BCG's [redacted] management successfully pressed for the sale of Calgon in a single-bidder process – to management's favored buyer, Kuraray.[50]

B. Management Projects [redacted] in Revenues by 2024 from the BWI Program

On March 20, 2017 – just months before Kuraray's initial June 14 acquisition offer – management presented to the Board's Investment Committee a set of ordinary course financial projections it had prepared regarding the BWI program:[51]

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[47] A202-06 ¶¶48, 52-53, 55.

[48] A206 ¶58.

[49] A196, 202-03, 208-09, 222 ¶¶33-34, 50, 62, 92-93.

[50] A176, 179 ¶¶1, 6.

[51] A198-99 ¶39.

[redacted]

[redacted][53] Stockholders were told nothing about these projections.[54]

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[52] A198-99 ¶39.

[53] *Id.*

[54] A199 ¶40.

C. The BWI Start Date Is Pushed Back From 2017 to 2019, But the 2024 Deadline Remains in Effect

In July 2017, the IMO announced that it was delaying the effective (start) date of the Initiative from September 2017 to September 2019.[55] It did not, however, change the 2024 deadline for completion of retrofitting.[56] Analysts emphasized that the change only "pushes off" the potential market, and "all ships are required to meet compliance by 2024, which is the original full compliance date."[57] This meant that "the program ha[d] gone from a seven-year implementation (2017-2024) to a five-year program (2019-2024)," making even more significant what analysts had already described as an anticipated "'hockey stick' of revenues and earnings."[58] As Calgon management put it after the extension, rather than changing the Company's overall revenue prospects, the postponement "simply delayed the earnings growth ***projected by BCG*** by 2 years."[59]

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[55] A206 ¶56.

[56] *Id.*

[57] A220 ¶88.

[58] *Id.*

[59] A206-07 ¶¶58-59.