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Case Number 305,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, STEAMFITTERS LOCAL 449 PENSION FUND, and STEAMFITTERS LOCAL 449 RETIREMENT SECURITY FUND,

Plaintiffs-Below, Appellants,

v.

INOVALON HOLDINGS, INC., KEITH R. DUNLEAVY, MERITAS GROUP, INC., MERITAS HOLDINGS, LLC, DUNLEAVY FOUNDATION, ANDRÉ HOFFMANN, CAPE CAPITAL SCSp, SICAR - INOVALON SUB-FUND, ISAAC S. KOHANE, MARK A. PULIDO, DENISE K. FLETCHER, WILLIAM D. GREEN, WILLIAM J. TEUBER, and LEE D. ROBERTS,

Defendants-Below, Appellees.

No. 305, 2023

Court Below:
Court of Chancery of the State of Delaware
C.A. No. 2022-0698-KSJM

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

NATURE OF PROCEEDINGS

In February 2021, the board of directors ("Board") of Inovalon Holdings, Inc. ("Inovalon" or the "Company") commenced a process to explore a potential strategic transaction. Inovalon's CEO and controlling stockholder, Dr. Keith Dunleavy, made clear that he would only support a transaction in which all stockholders received the same consideration. The Board's advisors conducted an extensive, multi-phased market check that included outreach to 30 potential counterparties, none of whom are alleged to have any prior affiliation with Dunleavy.

At the end of the process, the highest and only remaining offer was from Nordic Capital ("Nordic"), a private equity firm. Nordic's initial proposal was not conditioned upon any equity rollover by incumbent management, and made clear that any hypothetical, future rollover request would be conditioned upon the approval of both an independent special committee and a vote of the unaffiliated stockholders, as required under *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"). As negotiations progressed, Nordic began to doubt its ability to finance the full purchase price, and it became increasingly likely that Nordic might ask Dunleavy to roll over some amount of his equity into the post-closing entity. The Board, therefore, decided to form a special committee of independent directors

(the "Committee") comprising three highly sophisticated individuals whose independence and disinterestedness were not challenged before the Court of Chancery. The Committee was given full authority to consider, negotiate, accept, or reject Nordic's proposal, and to retain its own advisors.

After the Committee was formed, Nordic made a proposal that included a rollover of some of Dunleavy's equity. True to its word, Nordic conditioned that proposal on the approval of both an independent special committee and a vote of Inovalon's unaffiliated stockholders. The Committee hired its own advisors, negotiated with Nordic at arm's-length for over a month, and conducted multiple rounds of market outreach before agreeing to sell the company at a 25% premium over Inovalon's unaffected trading price (the "Transaction"). All of this was described in the 12-page "Background of the Merger" section in the Company's Proxy Statement filed on October 15, 2021 (the "Proxy"). The Transaction was approved by the holders of 99% of Inovalon's unaffiliated shares.

Plaintiffs filed suit alleging breach of fiduciary duties. After motion to dismiss briefing and argument, the Court of Chancery dismissed the Complaint on the ground that Plaintiffs failed to sufficiently allege that the *MFW* elements were not satisfied, and that business judgment review therefore applied.

On appeal, as below, Plaintiffs do not challenge the independence or disinterestedness of the Committee members. Nor do they claim on appeal that the Committee failed to comply with its duty of care. Instead, Plaintiffs challenge the Court of Chancery's decision as to only two *MFW* elements. Specifically, Plaintiffs claim that: (1) the Board did not timely form a special committee, and (2) the unaffiliated stockholder vote was not fully informed. For the same reasons the Court of Chancery rejected them, Plaintiffs' arguments fail.

First, the record shows that the Committee was formed before Nordic proposed an equity rollover. Until that point, the controller's interests were fully aligned with those of the unaffiliated stockholders. Both this Court and the Court of Chancery have consistently held that *MFW*'s requirements apply only when a conflict arises—in this case, only once the buyer made a proposal that involved separate consideration for the controller. Plaintiffs ask this Court to expand the *ab initio* requirement to require the formation of a special committee as soon as it becomes *possible* that a buyer might make such a request—an unworkable standard that would impose significant and unnecessary burdens upon companies, directors, and advisors. This Court should reject the invitation. As the Court of Chancery explained, the "purpose of the *ab initio* requirement is to implement the procedural protections of *MFW* in time to disable conflicts and simulate arm's-

length negotiations,"[1] and "[b]efore a conflict arises, the *MFW* protections *are unnecessary*."[2]

Second, Plaintiffs fail to raise a valid disclosure claim that would undermine the overwhelming vote of the unaffiliated stockholders. Plaintiffs first criticize the Proxy's disclosures regarding the post-closing equity incentive plan offered to management participants ("Management Incentive Plan" or "MIP"). While the Company did disclose that the post-close entity would implement an equity incentive plan, it did not disclose the MIP's specific terms because there were no set terms: the plan was "not legally binding" and "subject to material change" at the time of the stockholders' vote.[3] Plaintiffs have not shown that the Court of Chancery erred in ruling that such speculative information was immaterial.

Plaintiffs' criticisms of the Proxy's disclosures regarding the relationships of the Committee's financial advisors, Evercore Group LLC ("Evercore") and JP Morgan Securities LLC ("JPM"), and their respective roles in the Transaction process, fare no better. Plaintiffs fault the Company for not disclosing unrelated work the advisors' *affiliates* performed for Consortium members, or the work the

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[1] Tr., 26-27. Terms not defined herein have the same meaning as in Appellants' Opening Brief ("AOB").

[2] *Id.* at 27 (emphasis added).

[3] *Id*. at 42-43.

advisors performed for Consortium members' *affiliates*, but such tangential information is immaterial under well-settled law. Likewise, the fact that JPM led bidder outreach—while Evercore assisted with and reviewed that work—was accurately described in the Proxy. And to the extent Plaintiffs fault the Committee for allowing JPM to stay in that lead role, that is not a disclosure claim (and was properly rejected as a due care claim by the Chancellor).

The Chancellor issued a detailed and thorough transcript ruling, which took an hour to deliver and addressed each element of *MFW* and each disclosure claim set forth in the Complaint. Plaintiffs offer no valid reason to disturb that ruling on appeal. And as below, Plaintiffs fail to address the most fundamental question of all: *why* would a committee of highly sophisticated and experienced directors—whose independence and disinterestedness Plaintiffs do not challenge—have approved and recommended a transaction that favors Dunleavy's interests over those of the unaffiliated stockholders, including the directors themselves? Plaintiffs do not offer a theory to explain this basic point, let alone well-pleaded allegations.

This Court should affirm the Court of Chancery's decision.

SUMMARY OF ARGUMENT

1. **Denied.** The Court of Chancery correctly held that the parties committed *ab initio* that any transaction would be contingent on approval by both a special committee and an unaffiliated stockholder vote. *MFW* conditions are only required at "the moment [a] conflict arises."[4] Plaintiffs ask for an unsupported expansion of *MFW*, requiring the Court to view this Transaction through the lens of cases where the transaction was conflicted from the outset. Here, "conflicts did not arise until Nordic formally requested that Dunleavy roll over a portion of his equity as part of its written offer"—which Plaintiffs do not dispute occurred "after the [Committee] was formed."[5] Nordic's early bids expressly stated they were *not* contingent on a rollover. Under a proper reading of *MFW*, "Plaintiffs' allegations … fail to demonstrate that the parties adopted the *MFW* conditions too late."[6]

2. **Denied.** The Court of Chancery correctly held that Plaintiffs did not sufficiently plead "that the [P]roxy failed to disclose material facts."[7] Plaintiffs continue to challenge three of the Proxy's disclosures regarding (1) the MIP, (2) Evercore's and JPM's purported conflicts, and (3) Evercore's role in market

[4] Tr., 24.

[5] *Id*. at 27.

[6] *Id.* at 26.

[7] *Id*. at 38.

outreach. But they do not identify any materially false or omitted facts that would have altered the total mix of information available to stockholders (*i.e.*, that would have been "material"). Plaintiffs offer no reason to disturb the Chancellor's holding that "[n]one of these form a reasonably conceivable basis to deem the stockholder vote uninformed."[8]

[8] *Id*. at 39.

STATEMENT OF FACTS

A. Inovalon Establishes Itself as a Leading Provider of Cloud-Based Healthcare Platforms

Dunleavy formed Inovalon in 1998 to provide cloud-based healthcare solutions to providers, payers, pharmacies, and the life sciences industry.[9] He has been Inovalon's CEO since its formation and helped take the Company public in 2015. He also served as Chairman of the Board and held the majority of the Company's voting power throughout the Transaction negotiations.[10]

Committee members William Teuber, Jr., William Green, and Mark Pulido joined the Inovalon Board in 2013, 2016, and 2018, respectively.[11] Mr. Teuber's long career in the technology and financial sectors has included serving as Vice Chairman and CFO of EMC Corporation and Lead Independent Director of Popular Inc.[12] Mr. Green served as CEO and Chairman of Accenture plc, before joining the boards of large-scale companies like Dell Technologies, Inc., S&P Global, Inc., and

[9] A246.

[10] A246-A247, A252.

[11] A358-A360.

[12] A359-A360.

GTY Technology Holdings, Inc.[13] Mr. Pulido also had extensive experience in the healthcare technology industry prior to joining the Inovalon Board.[14]

Following Inovalon's IPO, the Company was widely recognized as "the premier technology platform in health care."[15] In early 2021, despite a global pandemic, the Company reported a 15% year-over-year increase in revenue and entered into partnerships with Walmart, AstraZeneca, Humana, Cardinal Health, and the U.S. government.[16]

B. Inovalon Begins Exploring Strategic Alternatives

In September 2019, Inovalon's Board and management initiated a preliminary strategic review to strengthen the Company's market position and enhance stockholder value.[17] Several companies expressed early interest in Inovalon. For example, in late 2020 and early 2021, Dunleavy received unsolicited outreach from private equity firm [redacted] and [redacted] to discuss potential business combinations or strategic partnerships.[19]

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[13] A358.

[14] A359.

[15] AOB, 9.

[16] Tr., 7.

[17] A258.

[18] A51 ¶ 53.

[19] *Id.* ¶ 54.

At a Board meeting on February 11, 2021, Dunleavy provided an overview of the interest from [redacted] and [redacted].[20] On the same day, the Board authorized management to contact financial advisors who could advise the Board on "various strategic alternatives," including a sale of the Company.[21]

On May 3, 2021, the Board invited JPM to present a preliminary evaluation of the Company's financial position.[22] Following JPM's presentation, the Board authorized the engagement of JPM to advise Inovalon on potential strategic alternatives, including a capital raise, an increase in the company's credit, or other strategic partnerships.[23]

From May through July 2021, the Board directed JPM to engage in outreach to over 20 potential counterparties to gauge interest in a sale transaction or other strategic partnership with the Company.[24] As part of this outreach, JPM re-engaged with [redacted].[25]

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[20] A51 ¶ 55.

[21] A52 ¶ 55.

[22] A52-A53 ¶¶ 56-57.

[23] A259.

[24] A260.

[25] *Id.*

The Board instructed JPM to inform potential buyers that any proposals should be structured so that all of the Company's stockholders receive the same amount and type of consideration.[26] Based on initial outreach, the Company entered into 13 confidentiality agreements with interested parties (including [redacted].[27]

Although a representative of Nordic previously reached out by email to Dunleavy on April 20, 2021, Nordic did not appear interested in a transaction with Inovalon, and so JPM's initial outreach did not include Nordic.[28] Nordic reached out to Dunleavy again on May 26, 2021 to express interest in exploring an acquisition of Inovalon.[29] Plaintiffs do not allege that these initial conversations with Nordic included any discussion of transaction price or a potential rollover.

C. Inovalon Receives Several Early Indications of Interest from Bidders, But the Process Stalls

In June 2021, Inovalon received three written, non-binding indications of interest for cash transactions: one from [redacted] at $36-$39 per share, one from [redacted] at $35 per share, and one from [redacted]

[26] *Id.*

[27] *Id*.

[28] A259-A260.

[29] AOB, 11.

[redacted] at $34 per share.[30] [redacted] submitted several updated non-binding indications of interest, initially increasing its valuation range to $38-$40 per share, but quickly dropping back down to a valuation of $38 per share.[31]

At a Board meeting on June 9, 2021, JPM provided an update on negotiations with potential acquirers, including the preliminary proposals from [redacted] and [redacted].[32] [redacted] had informed JPM that, following diligence, it was no longer interested in an acquisition of the Company.[33] During this meeting, Dunleavy reiterated his commitment to support a sale only if all stockholders received the same amount and type of consideration.[34] JPM also provided an update on potential standalone strategies Inovalon was exploring, including an equity offering and an increase in the Company's credit line.[35] At this meeting, the Board also resolved to engage Latham & Watkins LLP ("Latham") as the Company's legal counsel in connection with its exploration of potential strategic transactions.[36]

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[30] A260.

[31] A260-A261.

[32] A58 ¶ 70; A260.

[33] A260.

[34] A260.

[35] *Id.*

[36] A260-A261.

On June 17, 2021, the Board discussed JPM's ongoing outreach to several large technology companies, including [redacted] and [redacted].[37] Blackstone had indicated that it was unable to continue with the process due to potential regulatory hurdles to closing a transaction.[38] And, despite JPM pushing for an increased offer, [redacted] was unwilling to increase its offer price above $35 per share.[39] JPM continued discussions with [redacted] and [redacted] from mid-June through mid-July 2021, but both companies only expressed an interest in participating in a financing consortium with other bidders.[40]

By July 2021, [redacted] non-binding offer for $38 per share was the only offer outstanding.[41] Following discussions with the Company Board, JPM informed [redacted] that it would need to increase its offer price to continue with the process, but [redacted] declined to do so.[42]

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[37] A261.

[38] A543.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

D. JPM Expands Its Outreach and Nordic Makes an Offer

Given the limited market interest following initial outreach, the Board asked JPM to expand the scope of its efforts. In connection with that outreach, Dunleavy suggested contacting Nordic, who months earlier had expressed interest in a transaction.[43] Nordic and the Company executed a confidentiality agreement on June 24, 2021, and Nordic commenced due diligence.[44]

JPM's expanded outreach also resulted in a meeting between Dunleavy and the CEO of [redacted] on July 2, after which Roche expressed interest in financing or participating in a potential acquisition of Inovalon.[45] [redacted] dropped out a few weeks later.[46]

On July 5, Dunleavy met with Nordic to discuss a potential transaction.[47] At the meeting, the parties did not discuss price, structure, or the possibility of a rollover; however, Nordic expressed that "in transactions of a similar size and assuming an advanced stage of discussions, Nordic … would typically request that

[43] A54 ¶ 61, A58 ¶ 69.

[44] A261.

[45] A261, A263.

[46] A264.

[47] AOB, 12.

members of management participate in a rollover."[48] Dunleavy responded that he would "not consider any rollover at this point," and "would only be willing to discuss the matter further if Nordic['s] … rollover proposal was supported by the Company Board."[49]

On July 6, 2021, Dunleavy received an unsolicited email from private equity firm Permira Advisors LLC ("Permira") expressing interest in exploring an acquisition of the Company.[50] The Company executed a confidentiality agreement with Permira the next day.[51] Permira verbally indicated that it may be prepared to submit a preliminary, non-binding indication of interest in the low $40 per share range.[52]

On July 12, 2021, Nordic submitted its first preliminary, non-binding indication of interest to acquire the Company for $43 per share.[53] Nordic's offer indicated that it was "[redacted]" and "[redacted]

[48] *Id.*

[49] A261.

[50] *Id.*

[51] *Id.*

[52] A262.

[53] A546-A550.

[redacted]."[54]

Nordic's initial offer did not contemplate any equity rollover by management.[55] Nordic's offer stated that *if* a rollover were part of the final transaction, Nordic's bid "would be conditioned on [the approval of both] a special committee of independent directors" and "a majority of [the Company's unaffiliated] stockholders."[56]

On July 13, 2021, the Board met to discuss Nordic's and Permira's indications of interest.[57] JPM was continuing its outreach but had not received any additional indications of interest.[58] Although Nordic's proposal did not include an equity rollover by management, the Board determined to form a special committee "in the event that [Nordic's] proposed transaction terms that would include Dunleavy or any affiliate of the Company receiving different consideration than the Public Stockholders."[59] The Board also authorized JPM to propose a counteroffer to Nordic of $44 per share.[60]

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[54] A547.

[55] *Id.*; *see also* A1134.

[56] A547.

[57] A60 ¶ 77.

[58] A262.

[59] *Id.*

[60] *Id.*

On July 14, 2021, in response to JPM's counteroffer, Nordic submitted a revised proposal to acquire the Company for $44 per share in cash.[61] Nordic's revised offer again expressed confidence that Nordic would be able to finance 100% of the purchase price through a mixture of debt and equity.[62] The revised proposal also did not request an equity rollover and reiterated that, *if* a rollover was proposed, it would be conditioned on the approval of a special committee and the Company's minority stockholders.[63]

The same day, Permira—the only other party still in the process—informed JPM that it would no longer participate.[64]

E. The Board Forms the Committee Three Days Before Nordic Requests a Rollover

During its July 18, 2021 meeting, the Board discussed Nordic's latest offer.[65] Although Nordic still had not conditioned its offer on a management rollover or proposed any amount for a rollover, JPM conveyed Nordic's preference that Dunleavy roll over a portion of his equity in connection with a transaction.[66]

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[61] A552-A556.

[62] A553.

[63] *Id.*

[64] A62 ¶ 82.

[65] A630.

[66] A631.

Following discussion, the independent directors determined that a rollover request from Nordic was now "reasonably likely," and unanimously resolved to form a special committee of independent directors Teuber, Green, and Pulido.[67]

The Board resolved that the Company would not enter into, and the Board would not approve, any transaction unless the Committee determines "the Transaction is fair to and in the best interests of all the Corporation's stockholders (including such stockholders other than [Dunleavy])," and "the Transaction has been fully approved by a fully informed vote" of Inovalon's unaffiliated stockholders.[68]

On July 21, 2021, three days after the Committee was formed, Nordic requested for the first time that Dunleavy participate in a rollover as part of a transaction.[69] JPM informed Dunleavy of Nordic's request, and Dunleavy immediately informed the Committee that he would not participate in a rollover without the Committee's approval.[70]

The Committee determined that it was unlikely Nordic would proceed with a transaction without a rollover by Dunleavy, so it authorized him to commence preliminary negotiations with Nordic regarding a potential rollover—with the

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[67] A263.

[68] A565.

[69] A264.

[70] *Id.*

understanding that the Committee would have to review and approve the terms of any such rollover.[71]

F. The Board and Committee Evaluate and Select Advisors

On July 20, 2021, the Committee selected Latham and Morris, Nichols, Arsht & Tunnell LLP as legal counsel to the Committee given their experience, industry knowledge, and absence of conflicts of interest.[72] The Committee noted that Latham had been retained as counsel to the Company a month prior, but determined that Latham was independent of Company management given the short term of its engagement for the Company, and the fact that Latham was not the Company's historic counsel.[73]

The Committee also determined to retain a separate financial advisor from the Company.[74] On July 22, 2021, the Committee met with several potential financial advisors, including Evercore and [redacted] and ultimately hired Evercore based on its expertise, experience with recent transactions in the industry and take-private transactions generally, and its knowledge of Inovalon's business.[75]

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[71] *Id.*

[72] AOB, 15; *see also* A263.

[73] A263.

[74] Tr., 32.

[75] A264.

Evercore confirmed that it had no material relationships with the Company and submitted a memorandum on July 29, 2021 disclosing its relationships with potential counterparties, including Nordic, the Company, and the known members of the Consortium (which had not yet been finalized).[76]

Evercore's July 29 memorandum indicated that Evercore had received $9 million in advisory fees in the previous two years from Nordic[77] (information that was disclosed in the Proxy[78]). The memorandum also indicated that one of Evercore's affiliates was in discussions to advise Nordic on an unrelated transaction outside of the U.S.,[79] and that another affiliate of Evercore was providing financial advisory services to a Consortium member on an unrelated matter.[80] After the members of the Consortium were finalized, Evercore submitted an updated memorandum on August 18, 2021,[81] detailing the compensation Evercore received from members of the Consortium in the previous two years,[82] all of which was also

[76] A264-A265.

[77] A68 ¶ 94.

[78] A290.

[79] A68-69 ¶ 94; A108 ¶ 176.

[80] A69 ¶ 96; A108 ¶ 176.

[81] A1136-A1139.

[82] A1137.

disclosed in the Proxy.[83] Evercore did not consider these fees to be material to its overall revenue of approximately $5.7 billion during the same period.[84]

JPM also submitted a memorandum to the Board disclosing its relationships with the Company and Nordic on July 28, 2021, including that JPM had received $15-$16 million from Nordic in the previous two years[85] (a fact that was disclosed in the Proxy[86]). Like Evercore, JPM also presented the Board with an updated memorandum after the members of the Consortium were finalized, disclosing its work for both Consortium members and their affiliates in the previous two years.[87]

G. The Committee Oversees Negotiations with Nordic While Performing a Final Market Check

At a Committee meeting on July 25, 2021, JPM presented an "in-depth summary" of the buyer outreach it had conducted so far.[88] As JPM had been engaging with potential counterparties since May 2021—a full two months before the Committee retained Evercore—and served as the point of contact for all bidders up to this point, the Committee determined that it made practical sense for JPM to

[83] A290.

[84] A1137.

[85] A74-A75 ¶ 106.

[86] A283.

[87] A570-A573.

[88] A71 ¶ 99.

continue to play a role in the buyer outreach process. The Committee instructed Evercore to thoroughly review JPM's outreach.[89]

During late July and early August 2021, Dunleavy reported to the Committee that Nordic would likely not move forward with a transaction unless Dunleavy increased his rollover from $400 million to $700 million.[90] The Committee authorized Dunleavy to engage in substantive negotiations regarding the terms of a potential rollover, subject to the Committee's review and approval in all respects.[91]

On August 10, 2021, Nordic informed JPM that it was unable to obtain financing at the previously proposed price of $44 per share, and verbally revised its offer to $40.50 per share—which was still the highest offer Inovalon had received to date from any bidder.[92] Nordic also requested that Dunleavy increase his rollover to $1 billion to help provide additional financing for a transaction.[93]

At an August 11, 2021 meeting, the Committee determined that Nordic's revised proposal "would not be in the best interests of the Company and its stockholders," and "discussed rejecting it given Inovalon's strong standalone

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[89] A702.

[90] A78 ¶ 113.

[91] A265.

[92] AOB, 20.

[93] A266.

prospects."[94] The Committee also determined that it would not approve a rollover by Dunleavy of more than $700 million.[95] The Committee decided to discontinue all negotiations with Nordic until Nordic submitted a revised proposal with more favorable terms.[96]

Later that day, Nordic submitted an updated written proposal in which the Company's stockholders would receive $40.25 per share in cash, which included a combined rollover from Dunleavy and Cape Capital SCSp. SICAR Inovalon Sub-Fund ("Cape Capital"), another major stockholder controlled by Andre Hoffman, of $1.1 billion.[97] Nordic reiterated that its proposal was conditioned on approval by the Committee and an informed vote of the unaffiliated stockholders.[98] Based on the Committee's instructions, JPM informed Nordic that the Committee would not consider this proposal or any further proposal unless it (1) included a higher price per share and (2) limited Dunleavy's rollover to $700 million.[99]

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[94] AOB, 20.

[95] A267.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

Between August 11 and 13, 2021, the Committee instructed JPM, with Evercore's support, to reach out to ten potential buyers and strategic partners, including [redacted], to assess whether any would be interested in a transaction with the Company at a price above Nordic's revised proposal.[100] Some responded with varying degrees of interest, but none ever submitted concrete bids to acquire the Company—let alone for a price at or above Nordic's offer with reasonably comparable terms.[101]

On August 13, 2021, the Committee met to discuss the ongoing market check and agreed that any potential counterparty would need to offer at least $41 per share to proceed with negotiations.[102] Because no counterparty had done so, the Committee authorized JPM to resume negotiations with Nordic, while simultaneously continuing to reach out to and negotiate with other potential buyers.[103]

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[100] *Id.*; A710-A711.

[101] A593.

[102] A710.

[103] A710-A711.

Later that day, Nordic submitted an updated offer to purchase the Company for $41 per share, financed in part by a rollover by Dunleavy for $700 million and by Cape Capital of $300 million.[104]

On August 15, 2021, Nordic submitted an updated offer that included the previously discussed rollover by Dunleavy of $700 million, and an increased rollover by Cape Capital to $600 million.[105] The Committee met again that day, and JPM provided an update on negotiations with the three other bidders that remained in the process.[106] Although one bidder could not present an offer above $41 per share, JPM indicated that two others were progressing in their preliminary analyses.[107]

The Committee met again on August 16, 2021 to discuss the ongoing market check and negotiations with Nordic.[108] The Committee agreed to remove the "go shop" provision from the draft merger agreement with Nordic because (1) JPM and Evercore had already conducted an extensive market check, and (2) Nordic conceded a number of other material outstanding points in the merger agreement, such as a

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[104] A267.

[105] AOB, 22.

[106] A820.

[107] *Id.*

[108] A267.

smaller termination fee, a larger reverse termination fee, and an extended outside date.[109] At this meeting, JPM also updated the Committee on its negotiations with the two other companies remaining in the process, noting that one was unlikely to be able to offer more than $41 per share due to its "internal processes," but that the other expected to present a preliminary offer later that day.[110]

The Committee met again on August 17, 2021. JPM informed the Committee that the final alternative buyer did not offer a price above $41 per share, nor did it provide a commitment to pursue a transaction in the immediate future.[111] JPM confirmed that no other potential buyers were conducting preliminary analyses at that time, and that no preliminary or written offers submitted by potential buyers other than Nordic included both (i) a plausible potential for a price above $41 per share and (ii) a reasonable expectation of leading to a transaction in the immediate future.[112]

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[109] A267-A268.

[110] A715.

[111] A722.

[112] *Id.*

H. The Committee Approves the Transaction, and the Unaffiliated Stockholders Overwhelmingly Vote to Approve It

After meeting 23 times throughout late July and August 2021,[113] the Committee met twice with its advisors on August 18 to review Nordic's proposal to acquire the Company for $41 per share in cash.[114] During its second meeting on August 18, the Committee reviewed the finalized transaction documents and unanimously recommended their approval to the Company Board.[115]

The Committee also reviewed and considered proposals regarding the treatment of equity incentives for employees in the post-merger entity, including the MIP.[116] A non-specific framework for the MIP was set forth in a term sheet that was "not legally binding," did "not contain all of the terms and conditions," was "subject to material change," and was distributed "for discussion purposes only."[117] The term sheet proposed setting aside 5% of the post-close entity for employee equity grants at the closing of the Transaction, with an additional 3% of the post-close company's equity reserved for potential "future grants," including a potential grant to "any

[113] A264.

[114] A268.

[115] A268.

[116] A621; A264, A266, A275.

[117] A621.

subsequent CEO of the Company."[118] The term sheet did not identify any individual employees of the post-close company who would receive an equity incentive award, nor did it identify the size of the grants that particular employees would receive.[119]

Inovalon's independent directors also met on August 18, 2021 (after the Committee's meeting) to discuss the finalized merger agreement. During this meeting, both Evercore and JPM presented their opinions that the proposed transaction was fair to the Company's minority stockholders.[120] Following discussion, the Committee conveyed its recommendation that the Board approve the final merger agreement with Nordic.[121] Dunleavy recused himself from the meeting, after which the independent members of the Board unanimously approved the Transaction.[122]

The Transaction represented a premium of 25.3% over the closing price of the Company's Class A Common Stock on July 26, 2021, the last unaffected trading day prior to media speculation regarding a potential transaction.[123]

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[118] *Id.*

[119] A621-A628.

[120] A268-A269.

[121] A268.

[122] A269.

[123] A296.

On August 19, 2021, Inovalon announced the Transaction.[124] On October 15, 2021, the Company filed the Proxy, which was supplemented on October 27 and November 5, 2021. On November 16, 2021, 99% of the Company's minority stockholders approved the Transaction.[125]

I. The Court of Chancery Dismisses Plaintiffs' Complaint

Plaintiffs filed their Complaint on August 9, 2022, asserting breach of fiduciary duty claims against the Board for approving the Transaction, and against Dunleavy as an officer for securing the rollover agreement.[126] Plaintiffs also asserted claims for unjust enrichment and a breach of the Company's charter. The Committee moved to dismiss the Complaint, arguing that the Board implemented the protections of *MFW* and the Transaction should therefore be reviewed under the deferential business judgment rule.[127] Chancellor McCormick heard oral argument on April 5, 2023 and, on July 31, 2023, issued a telephonic bench ruling granting Defendants' motions to dismiss with prejudice. The Chancellor held that Plaintiffs failed to plead facts supporting a reasonable inference that the challenged *MFW* elements—namely,

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[124] A269.

[125] A117 ¶ 188 n.186 (citing Inovalon Form 8-K (filed Nov. 16, 2021)); A178.

[126] A27-A141.

[127] A142-A218.

the *ab initio* requirement, the Committee's exercise of due care, and the fully informed stockholder vote—had not been satisfied.[128]

Ab Initio. The Chancellor held that that the Transaction was conditioned *ab initio* on approval by both a special committee and a majority of the minority stockholder vote.[129] The Chancellor explained that *MFW* protections are "unnecessary" before "a conflict arises," and "conflicts did not arise until Nordic formally requested that Dunleavy roll over a portion of his equity as part of its written offer," which occurred "after the [Committee] was formed."[130]

Due Care. The Chancellor concluded that Plaintiffs' allegations failed "to impugn the [Committee's] exercise of due care" where the "[C]ommittee convened 23 times between July and August of 2021," "engaged with its advisors" throughout the Transaction process, "considered its advisors' feedback" to develop its negotiation strategy, "conducted extensive third party outreach," and successfully negotiated with Nordic to "bid up the deal price to $41 per share with favorable non-economic terms" and secure a premium transaction for stockholders.[131]

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[128] Tr., 23, 48. Plaintiffs did not contest three *MFW* elements: independence and disinterestedness of the Committee; the authority of the Committee to say "no" and retain independent advisors; and the absence of coercion.

[129] *Id*. at 27.

[130] *Id*.

[131] *Id*. at 37-38.

Fully Informed Vote. Chancellor McCormick concluded that "the precise information that plaintiffs deem a disclosure deficiency" concerning Evercore's and JPM's purported conflicts was not material and would not have "altered the total mix of information available to stockholders."[132] With respect to the MIP, Plaintiffs failed to plead an actionable omission because Inovalon "apprised stockholders" of the MIP, and its specific terms were "not legally binding, subject to material change," and would be "negotiate[d] further."[133] Finally, Plaintiffs failed to plead a disclosure claim based on the Proxy's accurate description of Evercore's and JPM's roles in conducting market outreach, which disclosed that JPM, who was "retained by Inovalon a full month before the special committee hired Evercore[,] … continue[d] to spearhead with Evercore's involvement."[134]

[132] *Id*. at 38-39.

[133] *Id.* at 42-44.

[134] *Id.* at 45-46.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFFS FAILED TO PLEAD THAT *MFW'S AB INITIO* REQUIREMENT WAS NOT SATISFIED

A. Question Presented

Did the Court of Chancery correctly hold that Plaintiffs failed to plead that the *MFW* conditions were not adopted *ab initio*?[135]

B. Scope of Review

This Court reviews *de novo* a decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6).[136] Rule 12(b)(6) requires dismissal where the plaintiff cannot recover under any "reasonably conceivable set of circumstances susceptible of proof" based on the complaint's well-pleaded facts.[137] The Court must "not blindly accept as true all allegations, nor must we draw all inferences from them in [plaintiff's] favor unless they are reasonable."[138]

C. Merits of Argument

The Court of Chancery correctly held that the Company, Dunleavy, and Nordic committed *ab initio* that any transaction in which non-ratable benefits

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[135] A181-A184.

[136] *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019).

[137] *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251 n.16 (Del. 2019).

[138] *Dunlap v. State Farm Fire & Cas. Co*., 878 A.2d 434, 439 (Del. 2005) (internal quotation marks, citation, and alterations omitted).

inured to Dunleavy would be contingent on approval by both a special committee and a majority of the minority stockholder vote. Chancellor McCormick observed that the parties implemented *MFW*'s procedural protections at the "get-go of the process"—*i.e.*, prior to Nordic's request that Dunleavy participate in a rollover.[139] Before that time, no conflict or potential conflict existed, and so "the *MFW* protections [we]re unnecessary."[140] There is no basis to overturn the Court of Chancery's well-reasoned decision.

1. Plaintiffs' Appeal Rests on an Unsupported Expansion of *MFW*

The Chancellor correctly held that "the *MFW* protections operated as they should have in this circumstance" because the Board formed the Committee before "Nordic formally requested that Dunleavy roll over a portion of his equity as part of its written offer."[141] That holding is supported by well-settled law defining *MFW*'s parameters: *MFW only* applies once a conflict arises, and even then, so long as the protections are in place prior to "substantive economic negotiations," the *ab initio* requirement is satisfied. *See Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 763 (Del. 2018).

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[139] Tr., 24.

[140] *Id*. at 27.

[141] *Id*. at 27-28.

Plaintiffs argue that conflicts arose (and *MFW* conditions were required) *as soon as* Nordic and Dunleavy "exchanged an offer and counter-offer" and "reached agreement" on price[142]—but these early negotiations involved *no* discussion of any unique consideration Dunleavy might receive in any potential transaction. Plaintiffs' unprecedented approach would collapse the *MFW* framework entirely. It also, as the Chancellor explained, ignores that "[t]he purpose of the *ab initio* requirement is to implement the procedural requirements of *MFW in time to disable conflicts and simulate arms'-length transactions*."[143] That is why the law "delineat[ing] the boundaries of the *ab initio* requirement," like *Olenik v. Lodzinski*, 208 A.3d 704 (Del. 2019)—which Plaintiffs rely on again here[144]—does not apply to the early (entirely arm's-length) negotiations.[145] In *Olenik*, the controller stood on both sides of the transaction *from the outset*, and so the parties needed to implement the *MFW* conditions at the outset of the process to simulate an arm's-length transaction. That is not what is alleged here.

As Chancellor McCormick observed, in transactions like this one, where the parties have not yet engaged in any "substantive economic negotiations" *about*

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[142] AOB, 29.

[143] Tr., 26-27 (emphasis added).

[144] AOB, 28-29.

[145] Tr., 24-25.

unique consideration for the controller, no conflict yet exists and "the *MFW* protections are unnecessary."[146] This holding is consistent with *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig*., 2017 WL 3568089 (Del. Ch. Aug. 18, 2017), which similarly considered whether the parties timely implemented the *MFW* conditions after the controller became conflicted midway through the process. Up to that point, "[n]o conflict or potential for conflict … exists."[147] The "correct time" to initiate the *ab initio* safeguards is when "the controlling stockholder actually sits down with an acquiror to negotiate for additional consideration."[148] That did not happen here until *after* the Board formed the Committee.[149]

Plaintiffs nonetheless claim that the Chancellor's statement that "the conflicts did not arise until Nordic formally requested" a rollover on July 21,

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[146] *Id.* at 25-27.

[147] *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig*., 2017 WL 3568089, at *18 (Del. Ch. Aug. 18, 2017); *see also In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 662 (Del. Ch. 2013) ("Delaware law presumes that large shareholders have strong incentives to maximize the value of their shares in a change of control transaction.").

[148] *In re Martha Stewart*, 2017 WL 3568089, at *19; *see also* Tr., 24 ("[T]he 'get-go' of the process in a disparate consideration case is the moment that the conflict arises.").

[149] A264.

2021[150] was in error because a "formal[] request[]" is not required to create a conflict.[151] But the Chancellor did not base her ruling on whether Nordic made a formal or an informal request: the record before the Chancellor did not show that Nordic made *any* request—formal or otherwise—that Dunleavy roll over his equity before July 21.[152] And equally problematic for Plaintiffs, even accepting their view that a conflict arose at some earlier unspecified time, it is undisputed that no *economic negotiations* regarding the rollover took place prior to the Committee's formation. This timeline dooms Plaintiffs' claims.

2. Nordic's Early Offers Did Not Give Rise to a Conflict

Faced with this dispositive timeline, Plaintiffs resort to mischaracterizing their own allegations. *First*, the very documents underlying their Complaint confirm that Nordic's offers in early July expressly disclaimed any rollover. At most, on July 5, 2021, Nordic told Dunleavy that "in transactions of a similar size and assuming an advanced stage of discussions, Nordic Capital X *would typically*

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[150] Tr., 27.

[151] AOB, 29-30. Plaintiffs' own authorities confirm the basis for the Chancellor's holding. *E.g.*, *Firefighters' Pension Sys. of City of Kansas City, Missouri Tr. v. Presidio, Inc.*, 251 A.3d 212, 239, 267 (Del. Ch. 2021) (finding conflicts arose when bidder "formally requested to share a roll-over agreement and a term sheet with respect to a management equity plan" with controller).

[152] Tr., 26-27.

request that members of management participate in a rollover of their investment."[153] But as the Court of Chancery correctly observed, how Nordic "typically" finances other transactions did not mean that Nordic would finance *this* Transaction under a similar structure, particularly since "it was not part of Nordic's formal proposal."[154] Far from Nordic "ma[king] clear its expectation" that Dunleavy would participate in a rollover, or showing that Dunleavy "knew a rollover was on the table,"[155] the record shows that (1) Nordic's earliest offer on July 12 stated that it "was *not* contingent on any member of management participating in a rollover," and that if such a rollover were to be proposed, its offer would be conditioned on both the formation of a special committee and approval by a majority of unaffiliated stockholders;[156] and (2) Dunleavy told Nordic he would "[redacted]" and "[redacted]"[157]

[153] A59 ¶ 72 (emphasis added).

[154] Tr., 27.

[155] AOB, 29-31.

[156] A262 (emphasis added).

[157] A261.

Nor does Nordic's "numerous compliments for management," or the fact that it did "not foresee any changes" to Inovalon's organization post-close, mean that Dunleavy had been offered employment by this point.[158] "[C]omplimentary statements" that a bidder is interested in working with management, absent evidence that "any employment offers were extended or that employment discussions were had," do not establish a conflict under Delaware law.[159] Plaintiffs' cited authorities only serve to illustrate what is lacking here: there are no allegations that Dunleavy was guaranteed employment in the post-close entity, or that he steered the Committee towards Nordic's offer to secure post-transaction employment.[160]

Second, Plaintiffs isolate snippets from the Proxy to claim "the Board itself recognized the likelihood" by July 13 that Dunleavy would "participate in a

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[158] A60-A62 ¶¶ 76, 81.

[159] *City of Warren Gen. Emps.' Ret. Sys. v. Roche*, 2020 WL 7023896, at *13 (Del. Ch. Nov. 30, 2020).

[160] *See, e.g.*, *Presidio,* 251 A.3d at 232, 282 (CEO preferred bid that "made clear" the fiduciary secured "post-transaction employment of [himself] and his brothers" over competing bids with "existing management team, meaning that [CEO] might not keep his job"); *Teamsters Loc. 237 Additional Sec. Benefit Fund v. Caruso*, 2021 WL 3883932, at *1 (Del. Ch. Aug. 31, 2021) (CEO was "under threat of removal by activist stockholders" so he "steer[ed] the sale process toward the acquirer" to "remain[] as CEO post-merger").

rollover."[161] But the rest of the disclosure makes clear that the Board resolved to form a special committee "*in the event*" Nordic "proposed transaction terms" requiring that Dunleavy roll over his equity, which to that point had not happened—and would not happen until July 21, 2021.[162] It thus made perfect sense that the Board allowed Dunleavy to continue negotiations with Nordic over the per-share price of a transaction on July 13 and 14.[163] At that time, "[n]o conflict or potential for conflict … exist[ed]."[164]

[161] AOB, 30 (citing A262).

[162] A262 (emphasis added).

[163] *Id*.

[164] *In re Martha Stewart*, 2017 WL 3568089, at *18.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFFS FAILED TO PLEAD FACTS SHOWING THAT THE STOCKHOLDER VOTE WAS NOT FULLY INFORMED

A. Question Presented

Did the Court of Chancery correctly hold that Plaintiffs failed to plead facts showing that the stockholder vote was not fully informed? [165]

B. Scope of Review

See Section I.B, *supra*.

C. Merits of Argument

The Chancellor correctly held that Plaintiffs failed to show that the Proxy misrepresented or omitted any material facts. Plaintiffs challenge the Chancellor's holding as to three disclosures: disclosures pertaining to (1) the MIP, (2) Evercore's and JPM's purported conflicts, and (3) Evercore's role in conducting third-party outreach. Plaintiffs' criticisms of the Proxy's disclosures fail to identify any material misstatement or omission.

1. The Company Disclosed All Material Information About the MIP

The Court of Chancery rejected Plaintiffs' claim that the Proxy's disclosures regarding the MIP were insufficient for several reasons: (1) the MIP was "merely a term sheet" that was "not set in stone"; (2) while Dunleavy "qualified for the MIP

[165] A197-A211.

under the parties' understanding that he would continue as CEO, the benefit was not his alone"; and (3) "stockholders could readily conclude that Dunleavy would receive part of [the] incentive."[166] Plaintiffs' challenges to these holdings are unavailing.

As a threshold matter, Plaintiffs' assertion that the Proxy did not disclose the existence or negotiation of the MIP at all is wrong.[167]

First, on August 19, 2021 (*i.e.*, a few months before the stockholder vote), the Company disclosed in a supplemental proxy filing that certain employees would participate in a "profit share equity unit incentive program" in the post-close entity.[168] Although Plaintiffs concede this point, they challenge it on the basis that it appeared in a "'FAQ' document attached as an exhibit to a lengthy proxy supplement."[169] But that is precisely where one would expect to find more information—in a section entitled, "FAQ."[170] And the proxy supplement was not hidden: it was filed publicly two months before the Proxy, available on the SEC's

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[166] Tr., 42-44.

[167] AOB, 39.

[168] A673.

[169] AOB, 40.

[170] *See, e.g.*, *Orman v. Cullman*, 794 A.2d 5, 35 & n.100 (Del. Ch. 2002) (information listed "[u]nder the section entitled 'WHERE YOU CAN FIND MORE INFORMATION"' was "sufficiently disclosed").

website, the Company's website, and to any stockholder that requested a copy from the Company. Delaware law does not require companies to "repackage and restate information in a proxy that they are simultaneously and conspicuously providing to shareholders in another filing."[171] And far from the "scavenger hunt" cases Plaintiffs rely on, in which stockholders were required to perform quantitative analyses or infer hidden meaning from multiple documents to divine the significance of the disclosures,[172] the Company's disclosure here was clear and easily accessible to stockholders.

Second, on October 15, 2021, the Company disclosed (multiple times) in the Proxy that the Committee discussed equity incentive plans during its July and August 2021 meetings.[173] Plaintiffs concede the existence of these disclosures but claim that the Committee's discussions "concerned not the MIP" but "the treatment of unvested equity under *existing* employee incentive programs."[174] There is no

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[171] *Zalmanoff v. Hardy*, 2018 WL 5994762, at *5-6 (Del. Ch. Nov. 13, 2018) (finding no disclosure violation where company disclosed material information in a document outside the transaction proxy statement), *aff'd*, 211 A.3d 137 (Del. 2019).

[172] *Cf. Voigt v. Metcalf*, 2020 WL 614999, at *24 (Del. Ch. Feb. 10, 2020) (requiring stockholders to identify and add inputs found on different pages to calculate material equity valuations).

[173] A264-A266, A275, A362.

[174] AOB, 39.

basis to interpret the Proxy's disclosures so narrowly. And Plaintiffs' own cited authorities confirm that when considering disclosure of equity incentives, the critical issue is whether the disclosure fairly apprises stockholders of management's "expectations regarding the treatment they could receive" in the post-close entity.[175] That's precisely what was disclosed here: that the Committee considered the equity incentive benefits management could receive "in connection with a potential sale transaction."[176] As the Chancellor correctly held, "stockholders could readily conclude" from these disclosures that Dunleavy, Inovalon's CEO, would receive some portion of that equity incentive plan.[177]

Plaintiffs' fallback argument—that even if the MIP was disclosed, Inovalon should have disclosed more details about it[178]—fares no better. The crux of Plaintiffs' argument is that because Dunleavy's rollover agreement—which was included in its entirety in the Proxy—stated that the Company "will implement a[n] MIP on terms and conditions consistent with those set forth in [the MIP Term Sheet]," the MIP was therefore a "concrete" and "legally binding condition of the

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[175] *Maric Cap. Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1179 (Del. Ch. 2010).

[176] A266; *see also, e.g.*, A264 (Committee discussing a "proposal regarding treatment of equity incentives for employees" as part of "the sale process").

[177] Tr., 44.

[178] AOB, 35.

Transaction."[179] But the MIP term sheet itself makes clear that the MIP "*does not contain all of the terms* and conditions applicable to the contemplated arrangements," "is *subject to material change*," and "is being distributed *for discussion purposes only*."[180] Even Plaintiffs concede that its terms were "still subject to negotiation."[181] As the Chancellor held, "the Company was not obligated to disclose a hypothetical future scenario."[182]

The speculative nature of these terms underscores the Court of Chancery's related conclusion: that "the benefit was not [Dunleavy's] alone" as "[o]ther employees would get a piece of the surviving entity's pie."[183] That is precisely the point—no determinations had been made regarding exactly how much of the pie to give to any particular individual. But it should have been obvious to any reasonable stockholder that Dunleavy, who was staying on as CEO, might receive some of it.[184]

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[179] *Id*. (emphasis omitted).

[180] A621 (emphasis added).

[181] AOB, 36.

[182] Tr., 40-43 (citing *City Pension Fund For Firefighters & Police Officers in City of Miami v. The Trade Desk*, 2022 WL 3009959 (Del. Ch. July 29, 2022)); *see also Kohls v. Duthie*, 765 A.2d 1274, 1288 (Del. Ch. 2000) (disclosure reflecting expectation to obtain financing not misleading for not disclosing a signed term sheet on potential financing arrangement).

[183] Tr., 44.

[184] *Id*.

Finally, Plaintiffs take extreme and unsupported leaps to suggest that the Chancellor's well-reasoned decision would "erode" the duty of candor and create precedent "requiring disclosure of only completely finalized side deals."[185] The Chancellor carefully analyzed Plaintiffs' claims, correctly applied controlling law, and concluded that Plaintiffs failed to identify any disclosure violation. This Court should affirm.

2. The Proxy Disclosed All Material Information Concerning Evercore's and JPM's Purported Conflicts

The Court of Chancery found that the Proxy fully disclosed all material facts regarding Evercore's and JPM's professional history with Inovalon, Nordic, and other Consortium members. Plaintiffs do not dispute that the Proxy disclosed the terms under which the Committee engaged Evercore and JPM to provide advisory services in connection with the Transaction.[186] Nor do Plaintiffs challenge the Proxy's disclosures of Evercore's and JPM's prior work on behalf of Nordic and other Consortium members, or the amount of fees earned in connection with that work.[187] Instead, Plaintiffs isolate snippets of meeting minutes and the advisors' conflict disclosures to claim that the Proxy somehow misled stockholders as to the

[185] AOB, 41.

[186] A283, A290.

[187] A283, A290.

work the advisors and their *affiliates* performed—or *might* perform—for Consortium members and their *affiliates*, and any associated fees they earned. The Chancellor correctly held this information would not alter the total mix of information available to stockholders.

The Court of Chancery applied the correct legal standard. As an initial matter, Plaintiffs are wrong that the Chancellor applied an incorrect legal standard to reject Plaintiffs' disclosure claims.[188] In evaluating the materiality of the alleged omissions, the Chancellor held that she already determined that the conflict allegations about JPM and Evercore "weren't entirely persuasive" in the context of Plaintiffs' due care claim, and thus "the precise information that plaintiffs deem a disclosure deficiency" would not have "altered the total mix of information available to stockholders."[189] This makes sense: the crux of the due care claim was that the Committee selected materially conflicted advisors who were incentivized to steer the process toward Nordic and other Consortium members.[190] And the alleged Proxy omissions were based on the *exact same allegations*.[191] Specifically:

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[188] AOB, 42.

[189] Tr., 39.

[190] A68-A70 ¶¶ 94-96, A74-A75 ¶ 106.

[191] AOB, 42.

Due Care Claim	Disclosure Claim
The Committee failed to "address … that ***Evercore had concurrently represented Nordic and Insight***." A971.[192]	"[T]he Proxy failed to disclose that while representing the Committee … ***Evercore was concurrently representing Nordic and other members of the Consortium.***" A987.
The Committee failed to address ***JPM's "concurrent representations of Consortium members in multiple other transactions***." A973-A974.	"The Proxy also failed to disclose … that—***concurrently*** with representing the Committee on the Transaction—***JPM represented both Nordic and GIC on two separate transactions each.***" A989.
The Committee "failed to diligently inform itself" "of the ***nearly $400 million in fees JPM reaped from Consortium members over the preceding two years.***" A974.	"The Proxy also failed to disclose that JPM had ***earned nearly $400 million in fees from Consortium members in just the two years preceding the Transaction.***" A989-A990.

For the same reasons the Chancellor found that those immaterial conflicts were inadequately pled in the context of due care, there was no reason that a reasonable stockholder needed to know about them. *In re Martha Stewart*, 2017 WL 3568089, at *22 n.104, *24 is instructive. There, plaintiffs alleged that the special committee violated its duty of care when it retained a purportedly conflicted financial advisor, and then failed to disclose the advisor's purported conflicts. Having found the advisor's work for a "[buyer]-related affiliate" to be too "remote" to "call into question [the advisor's] independence or the decision … to retain" the

[192] Emphases are added in the chart.

advisor, Vice Chancellor Slights summarily rejected the plaintiffs' related claim "that the stockholders were not informed of [the advisor's] alleged conflict."[193] Just like the Chancellor did here, Vice Chancellor Slights' reasoning comprised a single paragraph: "[A]s I have *already determined*, the alleged [advisor] conflict was no conflict at all."[194] Other courts have similarly held.[195]

Evercore's alleged conflicts. The Proxy disclosed all material information pertaining to Evercore's engagements, including that "Evercore may provide financial advisory or other services" to "Nordic," "Insight" (a member of the Consortium) or "their respective affiliates, in the future" for which it "may receive compensation."[196] To be sure, Evercore did *not* "concurrently" represent Nordic or other Consortium members while advising the Committee.[197] As Plaintiffs admit, any concurrent work was performed by Evercore's *affiliates*, not Evercore itself, on

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[193] *Id.*

[194] *Id.* at *24 (emphasis added).

[195] *In re Match Grp., Inc. Derivative Litig.*, 2022 WL 3970159, at *28 (Del. Ch. Sept. 1, 2022) ("*As explained above*, because [plaintiff] failed to allege [directors] were conflicted, disclosures related to [their] supposed conflicts are immaterial.") (emphasis added, internal quotation marks and citation omitted); *Franchi v. Firestone*, 2021 WL 5991886, at *6 (Del. Ch. May 10, 2021) (same).

[196] A290.

[197] AOB, 44.

entirely unrelated matters.[198] No additional disclosure obligation arises in these circumstances.[199]

Critically, Plaintiffs allege no facts showing that either engagement overlapped with Evercore's work for the Committee,[200] or that either engagement was a material (or even significant) source of revenue to Evercore, which made nearly [redacted] in revenue during the relevant period.[201] Plaintiffs fault the Chancellor for observing the "business reality" of Evercore's relationships "with major private equity firms," which informed its holding that Evercore "did not have any material [undisclosed] conflicts."[202] But "shareholders can reasonably be expected to possess basic common business sense" and understand that Evercore, "like most rational business people, seek repeat business" from major private equity firms.[203] Plaintiffs' own authorities confirm that the information allegedly omitted

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[198] A68-A69 ¶ 94, ¶ 96; A108 ¶ 176; A1136, A1137.

[199] *Harcum v. Lovoi*, 2022 WL 29695, at *21 (Del. Ch. Jan. 3, 2022) ("Plaintiff has not alleged that [advisor's] prior representation of [buyer's affiliates] was related at all to its representation of [seller] leading up to the Merger.").

[200] A68-A69 ¶ 94 & n.68 (Nordic's Vizrt Group exit occurred in December 2021); A109 ¶ 177 (Insight engagement took place during an unspecified period of time).

[201] A1137.

[202] AOB, 46 (citing Tr., 31).

[203] *Rosser v. New Valley Corp.*, 2000 WL 1206677, at *5 (Del. Ch. Aug. 15, 2000).

would not have altered the total mix of information available to stockholders.[204] And *Tornetta v. Maffei*, C.A. No. 2019-0649-AGB, Tr. at 18-19 (Del. Ch. Feb. 23, 2021) (TRANSCRIPT) (AOB, 44) highlights what is lacking here. There, the seller's advisor simultaneously advised the buyer's affiliate in "a $6.4 billion transaction" that was "almost twice the size of the [challenged] transaction." *Id.* The court found the relationship material because the buyer and its affiliates collectively constituted the advisor's "single largest source of revenue." *Id.* Plaintiffs have not alleged *any* level of materiality with respect to these engagements, much less that they were the "single largest source of revenue" for Evercore.

JPM's alleged conflicts. Plaintiffs' arguments regarding JPM fare no better. Plaintiffs point to "four other engagements" the Proxy allegedly failed to disclose.[205]

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[204] *Kihm v. Mott*, 2021 WL 3883875, at *18 (Del. Ch. Aug. 31, 2021) (disclosure that "Citi has represented and still represents GSK on a variety of matters … exceed[ed] what is necessary to disclose"), *aff'd*, 276 A.3d 462 (Del. 2022); *In re Rouse Props., Inc*. *Fiduciary Litig.*, 2018 WL 1226015, at *23-24 (Del. Ch. Mar. 9, 2018) (no disclosure violation where "Proxy disclosed that Bank of America had provided services to" counterparty and "may continue to do so"); *In re Saba Software, Inc. S'holder Litig*., 2017 WL 1201108, at *10 (Del. Ch. Mar. 31, 2017) (considering "Morgan Stanley's conflicts of interest arising from its *prior relationship* with Vector" and rejecting disclosure claim) (emphasis added); *cf. Ortsman v. Green*, 2007 WL 702475, at *2 (Del. Ch. Feb. 28, 2007) (allowing limited discovery to assess UBS's potential conflicts arising from past engagements).

[205] AOB, 44-45.

Yet these alleged engagements involved either work performed by JPM's *affiliate* or on behalf of entities *affiliated* with a Consortium member, not the member itself, or work that had not yet started[206]—and none was related to JPM's representation of the Company.[207] Those relationships were not material.[208] And even if they were, the Proxy expressly disclosed that JPM and its affiliates "have had and *continue to have* commercial or investment banking relationships" with "Nordic" and "certain affiliates of … GIC."[209] That was more than enough to "alert[] the stockholders" as to JPM's potential conflicts.[210]

Nor did the Proxy omit the compensation JPM allegedly earned from Consortium members.[211] The Proxy disclosed that in the two years preceding its fairness opinion, JPM earned $15.2 million from Nordic, and had no "material financial advisory" relationship with any other Consortium member.[212] The Proxy also disclosed that JPM has "received, or will receive, customary compensation" in

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[206] *See* A105-A106 ¶ 171.

[207] *Id.*; A283.

[208] *Harcum*, 2022 WL 29695, at *21; *In re Rouse Props.*, 2018 WL 1226015, at *24.

[209] A283 (emphasis added).

[210] *Appel v. Berkman*, 2017 WL 6016571, at *3 (Del. Ch. July 13, 2017), *rev'd on other grounds*, 180 A.3d 1055 (Del. 2018).

[211] AOB, 45.

[212] A283.

connection with any ongoing work for Consortium members and their affiliates.[213] The fees Plaintiffs claim were omitted were those JPM purportedly earned from Consortium members' *affiliates*.[214] Delaware law does not require their disclosure—especially where, as here, the existence of JPM's relationships with these entities had already been disclosed.[215]

3. The Proxy Accurately Described Evercore's Role in the Transaction Process

The Court of Chancery correctly held that the Proxy accurately disclosed Evercore's role in the Transaction process. As an initial matter, Plaintiffs misleadingly claim that the "Trial Court seemingly agreed that the Proxy falsely characterized Evercore's participation."[216] The Chancellor never "agreed" that the Proxy contained any false statement—let alone one describing Evercore's role. On the contrary, she observed that "Evercore did, in fact, engage in the [Transaction]

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[213] *Id*.; *see also In re Om Grp., Inc. S'holders Litig*., 2016 WL 5929951, at *16 (Del. Ch. Oct. 12, 2016) (disclosure that advisor received "significant fees" from counterparty was sufficient).

[214] A571-A572.

[215] *English v. Narang*, 2019 WL 1300855, at *13-14 (Del. Ch. Mar. 20, 2019) (proxy disclosure that a financial advisor performed work for transaction counterparty and its affiliates, without detailing the compensation earned, is sufficient under Delaware law); *Appel*, 2017 WL 6016571, at *3 (same).

[216] AOB, 48.

process," as reflected in the Proxy.[217] The Chancellor also agreed that the Proxy accurately described each advisor's role in that process.[218] Indeed, the Proxy is clear that the majority "of the bidder outreach [was] conducted" by JPM,[219] which of course, "make[s] sense"[220]—JPM had already contacted more than twenty parties before there was any need to form the Committee (who then retained Evercore). After that, Evercore worked in concert with JPM during the Transaction process. The Proxy does not imply otherwise.

Plaintiffs' claim centers on three Proxy disclosures describing events that occurred between August 11 and August 17, 2021, where the Committee instructed both JPM and Evercore to conduct buyer outreach.[221] Plaintiffs try to manufacture a disclosure claim by cherry-picking quotes from Committee meeting minutes to suggest that JPM conducted bidder "outreach alone," thereby showing the Proxy misleadingly stated that JPM and Evercore performed this outreach together.[222] But the record does not support this inference. The Proxy states that before August

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[217] *Id.* at 52.

[218] Tr., 46.

[219] A264

[220] Tr., 45-46; A260, A262, A264.

[221] AOB, 48 (citing A107-A112 ¶ 178).

[222] *Id*, 48, 50.

11, Evercore performed valuation analyses, "assess[ed] … bidder outreach," and shared with the Committee its "views regarding the outreach … conducted by [JPM]."[223] It further states that from August 11 and on, Evercore participated in market "outreach" to at least "10 potential counterparties," and "reported" back to the Committee on its efforts.[224] Even the Committee minutes, which Plaintiffs claim show "only JPM … perform[ed] that outreach,"[225] directly refute Plaintiffs' claim.[226]

To the extent Plaintiffs argue that Evercore should have been more directly involved in buyer outreach because of JPM's purported conflicts,[227] Plaintiffs' own authority is clear: whether "the Board's oversight of [the controller's financial advisor] fell outside the range of reasonableness … is not a disclosure claim."[228] The Chancellor agreed that the Committee's decision to task JPM with leading the

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[223] A264-A267.

[224] A266-A267.

[225] AOB, 26.

[226] A705 (describing Evercore's updates on its own buyer outreach, separate from JPM's updates); A711 (Committee instructed Evercore to "coordinate with [JPM]" and "be directly involved in … discussions with Nordic Capital and other potential buyers").

[227] AOB, 49-50.

[228] *Presidio*, 251 A.3d at 290.

bulk of buyer outreach did not undermine the Committee's exercise of due care,[229] and Plaintiffs do not challenge that holding on appeal. There is no reason to disturb the Court of Chancery's conclusion that the stockholder vote was fully informed.

[229] Tr., 35.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Chancery's ruling.

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CERTIFICATE OF SERVICE

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