EFiled: Dec 19 2023 04:54PM EST
Filing ID 71658488
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 **Redacted Version Filed on December 19, 2023**

APPELLANTS' OMNIBUS REPLY BRIEF

OF COUNSEL:

John Vielandi
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005

LABATON SUCHAROW LLP
Ned Weinberger (Bar No. 5256)
Brendan W. Sullivan (Bar No. 5810)
222 Delaware Ave., Suite 1510
Wilmington, DE 19801
(302) 573-2540

(212) 907-0700

Jeremy Friedman
David Tejtel
FRIEDMAN OSTER & TEJTEL PLLC
493 Bedford Center Road, Suite 2D
Bedford Hills, NY 10507
(888) 529-1108

Lee D. Rudy
Eric L. Zagar
J. Daniel Albert
Geoffrey C. Jarvis
Grant D. Goodhart III
KESSLER TOPAZ MELTZER &
CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

Attorneys for Plaintiffs-Below, Appellants City of Sarasota Firefighters' Pension Fund, Steamfitters Local 449 Pension Fund, and Steamfitters Local 449 Retirement Security Fund

Dated: December 4, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

PRELIMINARY STATEMENT

Defendants fail to rebut Plaintiffs' two independent grounds for reversal of the Trial Court's holding that Defendants satisfied *MFW*. Contested fact issues foreclose pleadings-stage *MFW* de-escalation.

Plaintiffs' allegations create a reasonable inference that *MFW*'s *ab initio* requirement was not satisfied. The Board formed the Committee ***after*** (i) Nordic repeatedly signaled to Dunleavy he could roll over his equity and keep his job, and (ii) Dunleavy negotiated the Transaction price. Thus, the Trial Court erred in ruling that no conflict arose—and no *MFW* protections were necessary—until Nordic formally requested Dunleavy's rollover in writing. Defendants' assertion that the Trial Court concluded no conflict existed until the parties engaged in rollover negotiations misstates the Ruling and Delaware law.

Plaintiffs also adequately alleged three material disclosure violations that rendered the stockholder vote uninformed.

First, the Proxy failed to disclose the MIP. Defendants misrepresent the pleadings-stage record to argue the MIP was speculative and not "concrete" and "legally binding." But the Transaction documents unequivocally bound the parties to "implement a MIP on terms and conditions consistent with those set forth in [the] MIP Term Sheet." And even if the MIP were a mere proposal (it was not), it still

required disclosure under Delaware law because the parties committed to implement—after the Transaction's closing—the carefully negotiated MIP terms memorialized in the MIP Term Sheet.

Defendants' alternative assertion—that the MIP was actually disclosed—fails. Defendants claim the MIP was disclosed in a "FAQ" distributed two months before the Proxy's dissemination (and not incorporated by reference into the Proxy), and which was plainly meant for Inovalon's customer-facing ***employees*** rather than its stockholders. Stockholders are not required to rummage through prior SEC filings and even if they had done so here, the FAQ's passing references to a profit-sharing plan would clearly not have informed them about the MIP.

Defendants also disingenuously argue that the Proxy disclosed the MIP through certain discussions regarding equity incentives. Even a cursory review of the minutes referenced in the Proxy shows that the Committee's discussions concern treatment of unvested equity under the Company's existing incentive plan, ***not the MIP***. The Trial Court erred by inexplicably granting a contrary inference in Defendants' favor.

Second, the Proxy failed to disclose that JPM and Evercore each had several concurrent Consortium engagements and JPM earned over [redacted] in fees from the Consortium shortly before the Transaction. Defendants' argument that the

concurrent engagements and fees were immaterial because they were earned by Evercore/JPM affiliates or performed for Consortium affiliates is unsupported by the record, and inconsistent with Delaware law. And Defendants' argument that the Trial Court could rely on its due-care finding regarding the Committee's conflict management to summarily dismiss Plaintiffs' disclosure claims contravenes black-letter Delaware law requiring disclosure of ***potential*** advisor conflicts.

Third, the Proxy falsely stated that Evercore participated alongside JPM in market outreach, legitimizing a tainted market check conducted by JPM alone. Unable to rebut that fact, Defendants misstate Plaintiffs' allegations and improperly cite the Proxy for the truth of the matter asserted. The Committee's minutes contradict the Proxy and confirm that JPM acted alone. The Proxy's false statement that Evercore and JPM jointly conducted a market check is particularly material because Evercore was hired specifically to ameliorate JPM's conflicts.

Finally, dismissal under *Cornerstone* (unaddressed by the Trial Court) is improper because Plaintiffs' well-pled allegations create a reasonable inference the Board knew about—but failed to disclose—the MIP and the fees JPM received from the Consortium. Nor do alternative grounds exist to dismiss Plaintiffs' Charter claim. The Transaction violated the Charter by providing Class B holders (including Dunleavy) differential treatment, and the Transaction's uninformed stockholder

approval cannot cure that violation. Further, the very precedent Defendants cite to argue for affirmance on alternative grounds indicates that, at most, the Court should remand so the Trial Court may address the arguments in the first instance.

ARGUMENT

I. ENTIRE FAIRNESS GOVERNS THE TRANSACTION BECAUSE IT FAILS *MFW*'S *AB INITIO* REQUIREMENT

MFW's *ab initio* requirement was not satisfied because Dunleavy was conflicted while he engaged in substantive economic negotiations with Nordic ***before*** the Board formed the Committee.

Defendants' insistence that "no conflict or potential conflict" existed before Nordic's formal written rollover request to Dunleavy[1] defies the pleadings-stage record and Plaintiffs' well-pled allegations. On July 5, 2021, Nordic told Dunleavy it "would typically request" management's rollover participation.[2] A reasonable inference is Nordic did so to signal to Dunleavy it held the same expectation here. Nordic's July 12 and 14 offers likewise (i) explicitly raised the potential for [redacted][3] consistent with Nordic's typical practice; and (ii) left no doubt that Nordic would keep Inovalon's management (*i.e.*, Dunleavy).[4] Thus, Defendants cannot seriously contend that "no

---

[1] Answering Brief of Appellees Pulido, Green, and Teuber ("PGTAB") 33.

[2] A58-A59, ¶72.

[3] A547; A553.

[4] A61-A62, ¶81 [redacted]
Emphasis is added unless otherwise noted.

conflict or *potential* conflict" existed before Nordic's July 21 formal written rollover request.[5]

Indeed, on July 13, the Board itself recognized the "likelihood that … Dunleavy [may] participate in a rollover" given "the statements made during the July 5 meeting" and in the "July 12, 2021 indication of interest," as well as the "Board's understanding [that rollovers are] typical market practices for financial sponsors[.]"[6] Despite acknowledging the need for a special committee,[7] the Board did not yet form one, instead allowing Dunleavy to continue negotiating directly with Nordic and reach agreement on the Transaction price.

Defendants claim Dunleavy's negotiations with Nordic regarding the Transaction price did not violate *MFW* because "in transactions like this one, where the parties have not yet engaged in any 'substantive economic negotiations' *about unique consideration for the controller*, no conflict yet exists and 'the *MFW* protections are unnecessary.'"[8] That is not the standard. *MFW*'s procedural protections must be imposed "before there has been any economic horse trading"[9]

---

[5] PGTAB 33.

[6] A262.

[7] *See* A262-A263.

[8] PGTAB 34-35 (citing Tr. 25-27).

[9] *Flood v. Synutra Int'l, Inc*., 195 A.3d 754, 756 (Del. 2018).

or the parties "engage[] in a joint exercise to value" the company and "set the field of play for the economic negotiations to come by fixing the [price] range …."[10] And despite Defendants' contention, the Trial Court did ***not*** hold that *MFW*'s protections need not be implemented until negotiations begin "about unique consideration for the controller,"[11] only that *MFW*'s protections are unnecessary until a conflict arises.

Martha Stewart is not to the contrary. There, the court addressed whether *MFW* applies to a "one-sided controller transaction" where "the controller is a ***seller only***" and plaintiff pled Stewart had diverted merger consideration through side deals "dressed up as an employment agreement and various intellectual property-related agreements."[12] Here, once Dunleavy (and the Board) understood he would likely be rolling over equity and remaining CEO, he was no longer a "seller only" but also a potential buyer who stood on both sides of the Transaction with interests directly adverse to minority stockholders. Permitting Dunleavy to engage in substantive economic negotiations over the transaction price ***after*** that conflict arose and ***before*** the Board formed the Committee violated *MFW*'s *ab initio* requirement.[13]

---

[10] *Olenik v. Lodzinski*, 208 A.3d 704, 717 (Del. 2019).

[11] PGTAB 34-35.

[12] *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig*., 2017 WL 3568089, at *2, *10 (Del. Ch. Aug. 18, 2017).

[13] *Supra* nn.9-10.

Further, the allegations in *Martha Stewart* were exceedingly weak. Indeed, the court held Stewart had not even "engaged in a conflicted transaction."[14] And as to *MFW*, "[n]o conflict or potential for conflict" existed before the procedural protections were imposed because Stewart and the buyer had not yet "even hinted that they might engage in separate negotiations."[15] Here, Nordic strongly and consistently signaled—before the *MFW* protections were imposed—that it would separately negotiate with Dunleavy, rendering him conflicted. Thus, the Trial Court erred in holding that Dunleavy's conflicts "did not arise until Nordic formally requested" a rollover.[16] That overly formalistic rule ignores the unambiguous signals Nordic conveyed to Dunleavy during economic Transaction negotiations and permits controllers to evade entire fairness review through unwritten understandings.

[14] *Martha Stewart*, 2017 WL 3568089, at *13.

[15] *Id.* at *18.

[16] Tr. 27.

II. ENTIRE FAIRNESS GOVERNS THE TRANSACTION BECAUSE THE PROXY WAS MATERIALLY MISLEADING

A. The Proxy Failed to Disclose the MIP, which was a Material Non-Ratable Benefit that Independently Rendered Dunleavy Conflicted

The Trial Court erred by ruling the Proxy need not disclose the MIP—a material, non-ratable benefit Dunleavy obtained via the Transaction.[17] On appeal, Defendants assert the same legally and factually infirm arguments the Trial Court erroneously accepted below: (i) the MIP was so hypothetical and speculative that it need not be disclosed;[18] and (ii) the MIP's existence was actually disclosed to Inovalon's stockholders.[19] Both arguments fail.

1. The MIP Was Neither Hypothetical Nor Speculative

The MIP was a legally binding Transaction term. The LP Agreement mandated: "Upon or as soon as practicable after the Closing, the Company ***will implement a MIP*** on terms and conditions consistent with those set forth in [the] MIP Term Sheet."[20]

---

[17] Appellants' Opening Brief ("OB") §II(C)(1).

[18] PGTAB 4, 43-44.

[19] PGTAB 41-43.

[20] A620.

Defendants falsely state "the MIP term sheet itself makes clear that ***the MIP***" was speculative.[21] The MIP Term Sheet actually states: "***This Term Sheet*** [*i.e.*, not the MIP's existence] … is subject to [] change" and "being distributed for discussion purposes only."[22] That makes sense because term sheets exist to allow parties to "agree on certain major terms, but leave other terms open for further negotiation."[23] The MIP Term Sheet's "non-binding" label and inexhaustive list of terms and conditions is fully consistent with the parties' commitment to implement an MIP on terms consistent with the MIP Term Sheet.[24]

These circumstances are nothing like *Trade Desk*, where a special committee merely ***considered*** granting stock options to a controller,[25] or *Kohls v. Duthie* where the court ruled disclosure of a financing term sheet would not alter the mix of information concerning a disclosed valuation where, *inter alia*, that valuation

---

[21] PGTAB 44.

[22] A621.

[23] *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 349 (Del. 2013).

[24] *See id.* at 346-47 (holding non-binding term sheet's incorporation into transaction documents reflected intent to negotiate consistent with term sheet and finding breach where party proposed terms inconsistent with term sheet).

[25] OB 37.

already "reflect[ed] an expectation that a term sheet for financing would be obtained[.]"[26]

And even if the MIP was a mere proposal (it was not), its disclosure would still be obligated because Delaware law does not require that non-ratable benefits be "concrete" or "legally binding" to be material.[27] The MIP Term Sheet detailed—with specificity—the parties' understandings of the MIP that would be implemented if the Transaction closed, reserving 8% of the post-close entity's equity for the MIP, with 5% for employees and 3% for future issuances, "including a grant to any subsequent CEO of the Company," *i.e.*, Dunleavy.[28] It also memorialized other key MIP terms, including the profit interest pool tranches, profit participation waterfall, tranche vesting schedules and mechanics of profit interest repurchases.[29]

Ignoring this, Defendants resort to misstating the crux of Plaintiffs' case, implying—as the Trial Court erroneously held below—that only legally binding, fully executed agreements memorializing non-ratable benefits require disclosure.[30]

---

[26] 765 A.2d 1274, 1288 (Del. Ch. 2000).

[27] *See* OB 36 & n.139 (citing *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 720 (Del. 2020); *Maric Cap. Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1179 (Del. Ch. 2010)).

[28] OB 24-25 (citing A99-A100, ¶¶159-60).

[29] A621-A626.

[30] PGTAB 4, 34, 43-44.

That is false.[31] But even so, Plaintiffs adequately alleged a legally binding commitment to implement an MIP on terms consistent with the MIP Term Sheet.[32]

2. The MIP Was Not Disclosed to Stockholders

The MIP was not disclosed to stockholders specifically or generally.

Defendants again misstate the record by implying that the publicly-filed version of Dunleavy's Rollover Agreement disclosed that Inovalon would implement the MIP.[33] False. The Proxy included an "execution version" of Dunleavy's Rollover Agreement that required finalization of an LP Agreement "reflect[ing] the terms as set forth on Annex B hereto[,]"[34] but then completely omitted both Annex B—which required Inovalon to "implement a MIP on terms and conditions consistent with those set forth in [the] MIP Term Sheet"[35]—and the MIP Term Sheet.[36]

---

[31] *Supra* n.27.

[32] *Supra* nn.20-24.

[33] *See* PGTAB 43 ("Dunleavy's rollover agreement—which was included 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]'….").

[34] A451-A452.

[35] A620.

[36] A621-A626.

Nor was the MIP disclosed to Inovalon's stockholders generally. Defendants cite a FAQ distributed to Inovalon's ***employees*** two months before the Proxy, which merely assured employees there would be a new profit-sharing plan.[37] The Proxy does not incorporate the FAQ by reference.[38] Instead, the FAQ urges its readers to review the forthcoming Proxy "carefully" for "[i]nformation concerning the interests of lnovalon's participants in the solicitation, which may … be different than those of [] Inovalon's stockholders generally."[39]

Thus, this case is unlike *Orman v. Cullman*, where the purportedly undisclosed information was in a 10-K expressly incorporated by reference into the proxy in a "section entitled WHERE YOU CAN FIND MORE INFORMATION."[40] It is also unlike *Zalmanoff v. Hardy*, where the court acknowledged stockholders have no duty "to rummage through a company's prior public filings to obtain information that might be material to a request for stockholder action[]" but concluded "no rummaging [was] required" because, unlike here, a 10-K containing

---

[37] A673.

[38] A362.

[39] A672; A675.

[40] 794 A.2d 5, 35 & n.100 (Del. Ch. 2002).

the purportedly omitted information was incorporated by reference into—and mailed with—the proxy.[41]

Defendants attempt to distinguish *Voigt v. Metcalf* by noting that the "scavenger hunt" there merely involved collecting inputs from different pages of a proxy statement, but that only highlights the "scavenger hunt" required here.[42] Stockholders here would have to: (i) look beyond the Proxy and the documents incorporated therein; (ii) rummage through Inovalon's unincorporated SEC filings to locate the FAQ; and (iii) parse the ~60 bullet points within the FAQ that address employee matters to find two bullet points that obliquely reference a post-closing profit-sharing plan.[43] Even then, stockholders would have no information about the actual MIP, and no idea that Dunleavy could earn tens of millions of dollars through it.[44]

Finally, the purported disclosures Defendants cite in the Proxy are discussions concerning Inovalon's treatment of unvested equity under existing employee

---

[41] 2018 WL 5994762, at *5-6 (Del. Ch. Nov. 13, 2018).

[42] PGTAB 42 & n.172.

[43] *See* A670-A674 (addressing, *inter alia*, employee questions, including "Can our staff maintain their remote work arrangements?" and "What should I tell customers or business partners that ask about this announcement?").

[44] OB 38-39.

incentive programs, ***not the MIP***. Defendants' argument that "there is no basis to interpret the Proxy's disclosures so narrowly" is doubly wrong.[45]

First, the Committee minutes and Nordic's contemporaneous correspondence confirm the discussions disclosed in the Proxy[46] concern the treatment of unvested equity under ***existing*** employee incentive programs.[47] Indeed, while Defendants cite the Proxy's disclosure of an August 2 Committee meeting during which Dunleavy discussed the treatment of transaction-related equity incentives as purported evidence that MIP-related discussions were disclosed,[48] the meeting minutes confirm that Dunleavy discussed the "proposed treatment of unvested ***outstanding equity*** for employees."[49] [redacted][50]

[45] PGTAB 42-43.

[46] *See* A264; A266; A275.

[47] *See* A597 (addressing proposed treatment of unvested outstanding equity awards); A705 (same); A710-A711 (same); A806 (same); A810 (same); A814 (same).

[48] *See* PGTAB 43 & n.176 (citing A266).

[49] A597.

[50] A705.

Second, as noted in Plaintiffs' Opening Brief, Plaintiffs—not Defendants—are entitled to a favorable inference as to any potential ambiguity regarding those discussions.[51] Thus, the Court doubly erred.

B. The Proxy Failed to Adequately Disclose JPM's and Evercore's Conflicts

The Proxy omitted that, concurrently with the Transaction, Evercore and JPM represented Nordic and other Consortium members on several engagements, and that JPM had received hundreds of millions of dollars in fees from Consortium members in the two years preceding the Transaction.[52] Those potential conflicts are plainly material under Delaware law.

Defendants' assertion that disclosure was not required because "any concurrent work was performed by Evercore's affiliates, not Evercore itself"[53] is unsupported by the record. While it is unclear to what transaction the "affiliate" language from Evercore's conflict disclosure refers, (i) the press release for the Nordic/Vizrt Group transaction (cited in the Complaint) states that "***Evercore*** [w]as [Nordic's] financial advisor"[54] and (ii) ***Evercore*** states on its own website (also cited

---

[51] OB 27, 40.

[52] OB §II(C)(2).

[53] PGTAB 48-49.

[54] A68-A69, ¶94 (citing https://www.nordiccapital.com/news-views/press-

in the Complaint) that it advised Insight on the Growth Buyout fundraise.[55] Regardless, Defendants' position that fees earned from affiliated entities is *per se* immaterial is unsupported by Delaware law[56] and the authorities Defendants cite support no such rule.[57]

Defendants similarly state that JPM's concurrent engagements are immaterial because they "involved either work performed by JPM's *affiliate* or on behalf of entities *affiliated* with a Consortium member, not the member itself …."[58] However, the Complaint cites press releases indicating all four concurrent engagements directly involved JPM, and three of those engagements related to work performed

---

releases/nordic-capital-exits-investment-in-vizrt-group-to-a-new-nordic-capital-led-consortium-to-further-support-successful-growth-journey/).

[55] A69-A70, A108-A109; ¶¶96, 176-77.

[56] *See In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *43 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (Table) (finding advisor's "ongoing relationship with [a counterparty]" implicated an advisor's self-interest).

[57] *Harcum v. Lovoi*, 2022 WL 29695, at *20 (Del. Ch. Jan. 3, 2022) (holding plaintiff's disclosure allegations were conclusory and not well-pled as they "devote[d] only two sentences to th[o]se cursory allegations"); *In re Rouse Props., Inc., Fiduciary Litig.*, 2018 WL 1226015, at *24 (Del. Ch. Mar. 9, 2018) (explaining disclosure of advisors' potential conflicts is required but noting that the proxy did so because it "disclosed the aggregate revenues [advisor] received from [buyer] between 2014 and 2016").

[58] PGTAB 51 (emphasis in original).

directly for a Consortium member, not an affiliate (*i.e.*, JPM's work for Nordic on two separate transactions, and GIC on its Arctic Green investment).[59]

Regardless, as explained above, there is no basis to contend fees earned from affiliates on concurrent transactions are immaterial, and Delaware courts have expressly found material advisor engagements with affiliated entities. In *Tornetta v. Maffei*, for example, the Court of Chancery explicitly held that it was a "glaring" deficiency for the proxy to omit a financial advisor's concurrent engagement with the buyer's affiliate.[60] And the *Tornetta* court did not base its decision on the allegation (mentioned once) that the concurrent transaction was larger than the subject transaction, as Defendants contend; it relied on precedent (and common sense) to hold that a concurrent engagement with a counterparty affiliate implicates self-interest and is an "extraordinary fact" requiring disclosure.[61]

Unable to seriously challenge the materiality of concurrent engagements, Defendants halfheartedly deny their existence, stating "Plaintiffs allege no facts showing that [Evercore's] engagement[s] overlapped with Evercore's [Committee]

---

[59] A105-A106, ¶171 (and cited sources).

[60] C.A. No. 2019-0649-AGB, Tr. at 18 (Del. Ch. Feb. 23, 2021) (TRANSCRIPT).

[61] *Id.*

work ….”[62] False. Plaintiffs cite facts showing Evercore’s (i) Vizrt Group transaction was agreed to and announced on December 28, 2021, clearly indicating that Evercore’s work thereon overlapped with its work on the Transaction (which was agreed to on August 19, 2021 and did not close until November 24); and (ii) Growth Buyout engagement “began in or around May 2021 and continued through the Transaction.”[63] Defendants fail to meaningfully challenge that the Consortium’s JPM engagements were concurrent, as three of the transactions were announced between July and September 2021 (*i.e.*, while Evercore was engaged by the Committee), and JPM’s work on Nordic’s Intrum sale began in June.[64]

Defendants’ claim that the Proxy did not omit compensation JPM received from Consortium members is wrong.[65] JPM’s disclosure letter states that JPM is “furnishing … certain information concerning [its] business relationships with … Insight [], GIC [] and 22C” and unequivocally states that JPM, from July 2019 through June 2021, earned [redacted][66] The Proxy omits those fees.

[62] PGTAB 49 & n.200.

[63] A68-A70, A108-A109; ¶¶ 94 & n.68, 96, 176-77.

[64] OB 3, 5, 13-14.

[65] PGTAB 51-52.

[66] A103-A105, ¶¶169-70; A570-A572.

Defendants' assertion that they represent fees from Consortium members' affiliates[67] is completely unsupported by Inovalon's own documents, which make no such statement.[68] But regardless, there is no legal basis to declare them immaterial, as they were [redacted] what JPM earned in the Transaction and clearly implicate JPM's self-interest.[69] Indeed, JPM identified those fees as relevant and requiring disclosure to the Board, which the Board received long before filing the Proxy. The Board simply chose to omit them.

Finally, Defendants' reliance on *Martha Stewart* to defend the Trial Court's misapplication of the standard is misguided. While the *Martha Stewart* court found that the subject information was not a true conflict, the court did not, as Defendants contend, rely on that finding to reject the plaintiff's conflict disclosure claim.[70]

---

[67] PGTAB 52.

[68] *See* A570-A573.

[69] *See Rodden v. Bilodeu*, C.A. No. 2019-0176-JRS, Tr. at 21 (Del. Ch. Jan. 27, 2020) (TRANSCRIPT) (holding that the "omitted fact that [the target] and [the acquirer] paid Barclays north of $9 million in the two years before the merger" was "material because its disclosure helped [target] stockholders to contextualize the magnitude of Barclays' potential conflict") (attached as Exhibit A).

[70] PGTAB 47-48.

Rather, the court explicitly held that the purported conflict ***was disclosed***.[71] That is exactly the opposite of what Plaintiffs allege here.

Further, Defendants argue that "there is no reason that a reasonable stockholder needed to know about [JPM's and Evercore's potential conflicts]"[72] because such disclosure is not needed where the court does not find an actual conflict. That contravenes black-letter Delaware law that ***potential*** advisor conflicts are material and must be disclosed.[73] Indeed, the "oblig[ation] to disclose 'potential conflicts of interest of [its] financial advisors' so that 'stockholders [could] decide for themselves what weight to place on a conflict faced by the financial advisor … cannot be disputed."[74] Defendants' reliance on *In re Match Group* and *Franchi v. Firestone* is thus misplaced as both cases involved allegations of director conflicts, not the potential conflicts of a sell-side financial advisor.[75]

---

[71] *Martha Stewart*, 2017 WL 3568089, at *24 ("Plaintiffs … ignored the Proxy, which clearly disclosed the relationship … that Plaintiffs allege gives rise to the conflict.").

[72] PGTAB 47.

[73] OB 43, 47 & n.184.

[74] *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *11 (Del. Ch. Mar. 31, 2017) (cleaned up); *see also, e.g.*, *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *16 (Del. Ch. Oct. 2, 2009) ("There is no rule ... that conflicts [] must be disclosed only where there is evidence that the financial advisor's opinion was actually affected by the conflict.").

[75] *See* PGTAB 48 n.195.

C. The Proxy Misleadingly Described Evercore's Role in Conducting Third-Party Outreach

Through at least five separate statements, the Proxy falsely conveyed that between August 11 and 17—*i.e.*, the critical period after Nordic reneged on its $44 offer—Evercore participated in market outreach alongside JPM.[76] Each such statement directly contradicts the associated meeting minutes, which establish JPM alone conducted that outreach.[77] The Proxy's false statements were material because they legitimized a tainted market check conducted solely by conflicted Dunleavy's advisor.

Defendants incorrectly claim that by stating "Evercore did, in fact, engage in the [Transaction] process"[78] the Trial Court "held that the Proxy accurately disclosed Evercore's role" in that process.[79] That statement was not a holding on the Proxy's accuracy, but merely the court's response to an argument Plaintiffs never made: *i.e.*, that Evercore did not "perform ***any*** work in exchange for their fee[.]"[80] Evercore

[76] A109-A112, ¶178.

[77] *Id.*

[78] Tr. 46.

[79] PGTAB 52.

[80] Tr. 46.

undisputedly advised the Committee, but the minutes and other documents[81] establish that Evercore never performed market outreach.[82]

Indeed, rather than "agree[] the Proxy accurately described each advisor's role in the [Transaction] process" as Defendants contend,[83] the Trial Court plainly acknowledged the clear discrepancy between the Proxy and minutes:

> The special committee minutes ***do state*** that Evercore's primary function was to review J[PM]'s work. Plaintiffs argue that the proxy, ***which states that the special committee instructed both J[PM] and Evercore to conduct outreach***, is thus materially misleading.[84]

The court then deemed the inaccurate disclosures immaterial because they relied on "the characterization of [JPM] as conflicted[,]"[85] but there can be no serious dispute that JPM—as interested Dunleavy's advisor—was conflicted.[86] Defendants do not even attempt to argue otherwise.[87]

---

[81] A70-A71, ¶98 (noting market outreach was additional service under Evercore's engagement terms for which Evercore was not paid).

[82] OB 48-49, 51-52.

[83] PGTAB 53 & n.218.

[84] Tr. 45.

[85] *Id*.

[86] OB 49-50 (citing Tr. 45); *see also* Tr. 31 ("To the extent that the special committee perceived such conflicts, they hired Evercore to help with the process.").

[87] *See* PGTAB 3, 6, 35-36 (admitting Dunleavy's "'conflicts … ar[o]se'" at least by July 21) (citing Tr. 27)).

Unable to legitimately challenge that the minutes contradict the Proxy, Defendants improperly[88] cite the Proxy for the truth of the matter asserted (*i.e.*, that Evercore participated in the outreach).[89] Indeed, Defendants accuse Plaintiffs of "cherry-picking quotes from Committee meeting minutes to suggest that JPM conducted bidder 'outreach alone,'"[90] but offer no record evidence suggesting otherwise. Defendants ignore the August 11, 16 and 17 minutes that directly contradict the corresponding descriptions in the Proxy, and disingenuously "cherry-pick" two citations—to the August 12 and 13 minutes[91]—which, in context, ***support*** Plaintiffs' position.

First, Defendants misleadingly quote the August 13 minutes to claim the Committee "instructed Evercore to 'coordinate with J[PM]' and 'be directly involved in … discussions with Nordic [] and other potential buyers.'"[92] The information Defendants replace with ellipses is critical, as the minutes actually state:

---

[88] *See, e.g.*, *In re Solera Hldgs., Inc. S'holder Litig.*, 2017 WL 57839, at *8 n.39 (Del. Ch. Jan. 5, 2017) ("[T]he Court may properly consider relevant portions of a proxy statement when analyzing disclosure issues, not to establish the truth of the matters asserted, but to examine what was disclosed to the stockholders.").

[89] PGTAB 52-54 (citing A264-A267).

[90] PGTAB 53.

[91] PGTAB 53 n.226 (citing A705 & A711).

[92] PGTAB 53 n.226 (citing A711) (ellipses added by Defendants).

"[T]he Company should simultaneously (i) continue its negotiations with Nordic … and (ii) ***continue to engage in active buyer outreach through [JPM]***. The Special Committee further indicated that Evercore … should coordinate with [JPM] ***and offer to the extent helpful***, to be directly involved in such discussions …."[93] That confirms Evercore's non-involvement in outreach to that point, and the post-August 13 minutes—which Defendants do not contest—clarify that Evercore ***never*** participated.[94] And Defendants cannot contest that the August 13 minutes confirm JPM, not Evercore—which could not yet have conducted outreach based on Defendants' own citation—"update[d] [the Committee] on the expanded buyer outreach and negotiations" while the Proxy states: "Representatives of J[PM] ***and Evercore*** [] provided an update on their outreach[.]"[95]

Second, Defendants claim that the August 12 minutes "describ[e] Evercore's updates on its own buyer outreach, separate from JPM's updates,"[96] but that is contradicted by Defendants' citation to the August 13 minutes (which, as explained above, confirms Evercore had not performed market outreach). Indeed, the August

---

[93] A711.

[94] A109-A112, ¶178.

[95] A111, ¶178; A711.

[96] PGTAB 53 n.226.

12 minutes say nothing about Evercore's supposed "buyer outreach" and seemingly describe Latham and Evercore's advice to the Committee based on ***JPM's*** ongoing outreach.[97] JPM's exclusive "buyer outreach and negotiations" are then described in the ***next paragraph***, and the minutes later state the Committee "indicated that ***JP[M]*** should simultaneously continue negotiations with Nordic … [and] the buyer outreach[.]"[98] In contrast, the Proxy falsely states that during that time, the Committee "instructed … ***Evercore and*** [JPM]" to "reach[] out to 10 potential counterparties[.]"[99]

Finally, Defendants state that, "[t]o the extent Plaintiffs argue that Evercore should have been more directly involved in buyer outreach because of JPM's purported conflicts," that is a care claim not a disclosure claim.[100] That is not Plaintiffs' argument. Rather, Plaintiffs argue the Proxy falsely stated that Evercore participated in JPM's market outreach, which was material information because

---

[97] *See* A705 ("Latham and … Evercore noted that certain potential buyers may be able to offer a comparable or marginally more favorable price than Nordic [], but that they would require more time to complete their diligence and finalize such offer, during which time Nordic [] may withdraw its non-binding offer ….").

[98] A706; A110-A111, ¶178.

[99] A110, ¶178.

[100] PGTAB 54.

JPM—as Dunleavy's advisor—was indisputably conflicted.[101] Whether the Board ***also*** breached its duty of care is irrelevant to that inquiry.

[101] OB 48-52.

III. DISMISSAL SHOULD NOT BE AFFIRMED AGAINST THE NON-COMMITTEE DIRECTORS PURSUANT TO *CORNERSTONE*

Kohane, Fletcher, and Roberts (the "Non-Committee Directors") argued below that Plaintiffs failed to allege individualized non-exculpated fiduciary breaches, instead relying on "group pleading."[102] Plaintiffs fully responded to those arguments[103] but the Trial Court did not address them, relying instead on its *MFW* analysis. The Non-Committee Directors now raise the same arguments and invite this Court to affirm dismissal based on arguments the Trial Court never addressed below.[104] This Court should decline.[105]

Substantively, the Non-Committee Directors' request fails because Plaintiffs sufficiently pled ***knowing*** disclosure violations against them, which are not exculpated under Section 102(b)(7).[106]

---

[102] A911-A923; A1067-A1079.

[103] *See* A1001-A1009.

[104] Answering Brief of Appellees Inovalon Holdings, Inc., Kohane, Fletcher and Roberts ("NCDAB") §III(C).

[105] *See Unitrin, Inc. v. Am. Gen. Corp*., 651 A.2d 1361, 1390 (Del. 1995) ("[I]t would be inequitable to take the alternative course of action American General advocates in this … appeal. The Court of Chancery should have the opportunity to address those alternative breach of duty arguments in the first instance.").

[106] *See, e.g.*, *In re Hansen Med., Inc. S'holders Litig*., 2018 WL 3030808, at *10 (Del. Ch. June 18, 2018) (finding non-exculpated claims against director who knowingly approved a misleading proxy); *Chen v. Howard-Anderson*, 87 A.3d 648, 692-93 (Del. Ch. 2014) (denying summary judgment on disclosure claims where

First, at its August 18, 2021 meeting, the Board reviewed and approved the Rollover Agreements,[107] which included (i) Annex B, memorializing the parties' agreement to implement the MIP on terms consistent with the MIP Term Sheet; and (ii) the MIP Term Sheet.[108] Yet the Board failed to disclose the MIP and MIP Term Sheet.

Second, JPM delivered its August 30 conflict disclosure to the full Board,[109] stating that JPM had received [redacted] in fees from the non-Nordic Consortium members.[110] The Board did not disclose that material information either. Rather, JPM's Consortium-related fees were seemingly intentionally omitted, as the Board disclosed Evercore's aggregate fees earned from Consortium members but not JPM's.[111]

Those facts comfortably support a reasonable inference that the Non-Committee Directors knowingly approved a materially deficient Proxy.[112]

---

facts "support[ed] a finding that the directors knew" about the omitted information); *Tornetta*, C.A. No. 2019-0649-AGB, Tr. at 24-27.

[107] A100-A101, ¶¶161-62.

[108] A99-A100, ¶¶159-60; A599-A626.

[109] A570-A573.

[110] A104-A105, ¶170.

[111] A69, ¶95.

[112] *Supra* n.106.

Additionally, Plaintiffs sufficiently alleged that Kohane and Fletcher lacked independence from Dunleavy.[113]

[113] A36-A39, ¶¶20-21, 23; A1006-A1009.

IV. PLAINTIFFS' BREACH OF CHARTER CLAIM SHOULD NOT BE DISMISSED ON ALTERNATIVE GROUNDS NOT RAISED BELOW

Inovalon's Charter mandates equal treatment of Inovalon's Class A and B shares in change-of-control transactions absent approval of differential treatment by each stockholder class.[114] The Transaction violated the Charter by providing differential treatment to the Class B shares held by Dunleavy and others, who were invited to roll over their shares. Stockholders' approval of the Transaction did not cure the violation because it was obtained via a deficient Proxy.

Defendants argue—for the first time on appeal—approval by a deficient proxy "would simply mean that there was potential liability for breach of the duty of disclosure" and the Charter's requirements "were undisputedly satisfied."[115] Defendants cite no legal precedent for that assertion because none exists. To the contrary, the Charter contained an implied obligation not to mislead stockholders, which Defendants violated by issuing the false and misleading Proxy to induce stockholders to approve both the Transaction and the Charter's safe harbor.[116]

Further, while "[t]his Court may affirm [a ruling below] on the basis of a different rationale than that which was articulated by the trial court, if the issue was

---

[114] NCDAB 9.

[115] NCDAB 10.

[116] *Dieckman v. Regency GP LP*, 155 A.3d 358, 368 (Del. 2017).

fairly presented to the trial court,"[117] ***Defendants never fairly presented the issue below***. Instead, they argued that the Trial Court should dismiss Plaintiffs' Charter claim because Plaintiffs purportedly "failed to plead a viable disclosure claim against Defendants, and th[e charter] claim thus fails."[118] Defendants' newly-raised argument is thus waived.[119]

[117] *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015).

[118] A920; A1077.

[119] *See, e.g.*, *Smith v. Del. State Univ.*, 47 A.3d 472, 479-80 (Del. 2012).

CONCLUSION

This Court should reverse the Trial Court.

LABATON SUCHAROW LLP

/s/ Brendan W. Sullivan
Ned Weinberger (Bar No. 5256)
Brendan W. Sullivan (Bar No. 5810)
222 Delaware Avenue, Suite 1510
Wilmington, DE 19801
(302) 573-2540

Attorneys for Plaintiffs-Below, Appellants City of Sarasota Firefighters' Pension Fund, Steamfitters Local 449 Pension Fund, and Steamfitters Local 449 Retirement Security Fund

Words: 5,499

OF COUNSEL:

John Vielandi
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
(212) 907-0700

Jeremy Friedman
David Tejtel
FRIEDMAN OSTER & TEJTEL PLLC
493 Bedford Center Road, Suite 2D
Bedford Hills, NY 10507
(888) 529-1108

Lee D. Rudy
Eric L. Zagar
J. Daniel Albert
Geoffrey C. Jarvis
Grant D. Goodhart III
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

Dated: December 4, 2023

CERTIFICATE OF SERVICE

I, Brendan W. Sullivan, certify that on December 19, 2023, that I caused a copy of the foregoing to be served by File&ServeXpress upon the following:

William M. Lafferty
Ryan D. Stottmann
Alexandra M. Cumings
MORRIS NICHOLS ARSHT & TUNNEL LLP
1001 North Market Street
Wilmington, DE 19899

A. Thompson Bayliss
Eric A. Veres
Caleb Volz
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, DE 19807

Kevin M. Gallagher
Raymond J. DiCamillo
Craig K. Ferrere
RICHARDS LAYTON & FINGER PA
920 North King Street, Suite 200
Wilmington, DE 19801

/s/ Brendan W. Sullivan
Brendan W. Sullivan (Bar No. 5810)