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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE ORACLE CORPORATION DERIVATIVE LITIGATION	No. 139, 2024 Case Below: Court of Chancery of the State of Delaware Cons. C.A. No. 2017-0337-SG

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDING

This appeal challenges the Vice Chancellor's unwarranted deference to two sets of outside directors of Oracle Corporation ("Oracle") respecting a conflicted merger. *First*, the Vice Chancellor allowed a special litigation committee ("SLC") of Oracle's board of directors (the "Board") to hide its interview memos from Plaintiffs' counsel. *Second*, the Vice Chancellor held post-trial that the business judgment rule protected the decision of a special committee of the Board (the "Special Committee") to approve the conflicted merger.[1]

The conflicted merger is the 2016 acquisition by Oracle of NetSuite Corporation ("NetSuite") for $109 per share, or approximately $9.3 billion (the "Acquisition"). (A381 ¶1; A398 ¶98.) Larry Ellison—Oracle's "visionary leader" (A1275:1701 (Catz)), founder, Chairman of the Board, Chief Technology Officer, former longtime Chief Executive Officer, and then-28.4% stockholder (A389 ¶¶44, 46)—stood on both sides of the Acquisition. Ellison co-founded NetSuite, and he beneficially owned, along with affiliated entities, family members, and trusts for their benefit, over 46% of NetSuite's common stock. (A389 ¶48; A391 ¶57.)

[1] The Vice Chancellor's memorandum opinion of December 4, 2019 (Ex. A hereto) is cited herein as "12/4/19 Op. __"; the memorandum opinion of July 9, 2020 (Ex. B hereto) is cited herein as "7/9/20 Op. __"; the post-trial memorandum opinion of May 12, 2023 (Ex. C hereto) is cited herein as "Op. __."

This action survived a motion to dismiss under Court of Chancery Rules 12(b)(6) and 23.1 as to Ellison and Oracle co-CEO Safra Catz. (A383 ¶8.) This action then survived the scrutiny of the SLC. After investigating the claims and engaging in a failed mediation with Ellison/Catz, the SLC determined in August 2019, contrary to all known precedent respecting SLCs, that Plaintiff and its counsel should pursue this action. (A383-84 ¶¶10, 16; A1916-18.)[2]

The SLC prepared no report, refused to cooperate in the prosecution of this action, and asserted wholesale objections to Plaintiff's subpoenas directed to the SLC and its counsel. The Vice Chancellor erred in upholding the objections and in not applying the enhanced scrutiny of *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), to the SLC's determination to assert work product protection and attorney-client privilege against Plaintiffs' counsel—the litigation counsel authorized by the SLC to pursue Oracle's claims. The Vice Chancellor improperly deferred to the SLC's unexplained "business judgment" in blocking discovery of the SLC's interview memos. 7/9/20 Op. 10, 26. Consequently, Plaintiffs lacked a trove

[2] 12/4/19 Op. 46 n.246 ("I note that the Lead Plaintiff and the Defendants have identified no case pertinent to the issues here, where a special litigation committee has found that it is in the best interests of the corporation for a particular derivative plaintiff to proceed with the litigation.").

of potential impeachment material when taking depositions and cross-examining trial witnesses about factual issues adjudicated post-trial.

For example, the Vice Chancellor allowed the SLC to bury the interview memo of Oracle co-CEO Mark Hurd, who died in late 2019, before he could be deposed. (*See* A384-85 ¶¶17, 21; Op. 10 n.31.) The Vice Chancellor's repeated references to Hurd throughout the post-trial opinion reflect Hurd's active participation in the Acquisition. Op. 10-11, 16, 19, 31, 57-59, 62, 66, 88, 90-92.

The Vice Chancellor also deprived Plaintiffs of interview memos bearing on unauthorized price discussions in January 2016, before the formation of the Special Committee. The opening bids of the Special Committee and NetSuite were $100 and $125 per share. Op. 32-33. After the public announcement of the proposed Acquisition, NetSuite CEO Zachary Nelson told representatives of NetSuite's largest institutional investor, T. Rowe Price, about his early discussions with Catz, prompting T. Rowe Price to write to NetSuite: "In our recent meeting, Mr. Nelson described the initial contact with Oracle as a loose, pre-due-diligence, exploratory conversation where a price range of $100-$125 was discussed." (A1861.) The Vice Chancellor credited the July 2022 trial testimony of Catz and Nelson in finding that they had *not* discussed a price range of $100-$125. Op. 17 & n.80. There is ample

reason to believe that the SLC interview memos shed light on the credibility of Catz's and Nelson's trial testimony.

After a 10-day trial and post-trial briefing on liability and damages, the Vice Chancellor concluded that the Acquisition was protected by the business judgment rule. Op. 100. According to the Vice Chancellor, Ellison "did not control Oracle" and he was "recused from the acquisition process," which was adequate to "cleanse Ellison's conflict." Op. 1, 5, 100. The Vice Chancellor further concluded that the Acquisition was "negotiated at arm's length by a fully empowered Special Committee." Op. 100.

The Vice Chancellor erred as matter of law in holding that Ellison was not a controlling stockholder. The Vice Chancellor found by a preponderance of the evidence that Ellison "likely had the *potential* to control the transaction at issue." Op. 74 (emphasis in original); *see id.* 5, 58, 60, 69. The Vice Chancellor also quoted then-Vice Chancellor Strine's post-trial opinion in *In re Cysive, Inc. Shareholders Litigation*, 836 A.2d 531 (Del. Ch. 2003), respecting the legal effect of potential control:

> [I]t cannot be that the mere fact that [the controller] did not interfere with the special committee is a reason to conclude that he is not a controlling stockholder.… the analysis of whether a controlling stockholder exists must take into account whether the stockholder, as a practical matter, possesses a combination of stock voting power and

> managerial authority that enables him to control the corporation, *if he so wishes*.

Op. 72 (emphasis added) (quoting 836 A.3d at 552-53). Yet, the Vice Chancellor repudiated *Cysive sub silentio* by holding that the Acquisition "is not a controlled transaction" because the Special Committee "completed the transaction unmolested by [Ellison's] influence." Op. 60, 74.

The Vice Chancellor further erred in not considering as part of the controlling stockholder analysis how Ellison exercised influence without openly interfering with the Special Committee. Ellison promoted the idea of buying NetSuite and determined its timing. He conceived a strategic plan for NetSuite that he would implement post-closing. He disclosed his plan to NetSuite co-founder and Chairman Evan Goldberg, but kept silent within Oracle about his plan and its rationale. Ellison knew that his longtime, highly compensated lieutenants, Catz and Hurd, would recommend the Acquisition to the Special Committee and oversee the creation of projections and valuations that would seemingly justify paying a multi-billion-dollar premium.

The Vice Chancellor erred as a matter of law in analyzing the question whether Ellison's withholding of information is itself a ground for entire fairness review of the Acquisition. This Court mandates entire fairness review if a fiduciary

who sponsors a conflict transaction keeps silent about a fact that reflects negatively on the deal price. *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279, 1283-84 (Del. 1989). By analogy, Section 144 of the Delaware General Corporation Law creates a safe harbor from conflict transaction invalidity that is conditioned on the board being informed of all "material facts … as to the … transaction." 8 *Del. C.* § 144(a)(1).

The Vice Chancellor's test for entire fairness review improperly included unnecessary elements, such as whether the Special Committee was "inattentive," "ineffective," "supine," or "naïve," or whether it was sufficient that Oracle followed its "usual practice in M&A transactions" or "its M&A playbook." Op. 75, 85, 88, 99. The Vice Chancellor failed to recognize that the business judgment rule is unavailable if Ellison concealed material information about the Acquisition from the Special Committee.

The Vice Chancellor improperly analyzed the materiality of Ellison's undisclosed plan for operating NetSuite post-closing. The Vice Chancellor erred in not applying Chancellor Allen's influential opinion in *Kahn v. Tremont Corp.*, 1996 WL 145452 (Del. Ch. Mar. 21, 1996), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997), which looks to the impact of an undisclosed fact on valuation. The Vice Chancellor did not analyze Ellison's undisclosed plan through the prism of

valuation. The Vice Chancellor ignored pertinent testimony of Plaintiffs' financial experts.

Ellison's plan entailed reorienting NetSuite's growth strategy to focus on smaller customers globally. Ellison believed that NetSuite needed to change its growth strategy because Oracle was rolling out a new product known as "Fusion" that would out-compete NetSuite for larger customers. Had Ellison disclosed his plan and its rationale to the Special Committee in advance of price negotiations, Oracle management could have developed realistic projections, unlike those presented by Catz to the Special Committee. Catz projected that NetSuite would achieve non-GAAP EBIT of ***$374 million*** for fiscal year 2018 under Oracle ownership. (A1948.) Oracle's post-Acquisition budget, which reflected the added costs and altered target market associated with Ellison's undisclosed plan, projected that NetSuite's non-GAAP EBIT for NetSuite in fiscal year 2018 would be just ***$141 million***. (*Id.*)

SUMMARY OF ARGUMENT

1. The Vice Chancellor erred in allowing the SLC to withhold its interview memos from the counsel it authorized to litigate Oracle's claims:

   a. Court of Chancery precedent supports producing to derivative plaintiffs non-opinion work product in SLC interview memos;

   b. under *Zapata*, an SLC is not entitled to business judgment rule deference for a determination that impedes the prosecution of a derivative claim, especially in the absence of a proffered business justification;

   c. the SLC waived objections to producing its interview memos to Plaintiffs by providing post-investigation mediation statements to Ellison and Catz, Oracle's true litigation adversaries; and

   d. Plaintiffs had a compelling need for the interview memos because Hurd had died and because the memos are a source of impeachment evidence respecting Ellison and his key lieutenants at Oracle and NetSuite.

2. The Vice Chancellor erred in analyzing whether Ellison exercised control over Oracle and the Acquisition. The Vice Chancellor erred in not following *Cysive*: "the analysis of whether a controlling stockholder exists must take into

account whether the stockholder, as a practical matter, possesses a combination of stock voting power and managerial authority that enables him to control the corporation, *if he so wishes*." 836 A.2d at 553 (emphasis added), *quoted in* Op. 72. The Vice Chancellor also erred in analyzing whether Ellison exercised control over Oracle and the Acquisition without regard for the influence Ellison exerted by conceiving and implementing his concealed plan to alter NetSuite's strategic direction due to the new competitive threat posed by Oracle.

3. The Vice Chancellor erred as a matter of law in formulating the legal test for analyzing whether Ellison's withholding of his plan from the Board and the Special Committee warranted entire fairness review of the Acquisition. The Vice Chancellor improperly required Plaintiffs to demonstrate that the Special Committee was not well-functioning. The proper test is whether Ellison withheld material information about the Acquisition.

4. The Vice Chancellor's materiality analysis was clearly erroneous. The Vice Chancellor did not follow *Kahn v. Tremont*, which requires an interested fiduciary to disclose all material facts relating to (i) the use or value of the asset in question to the corporation and (ii) the market value of the asset in question. The Vice Chancellor improperly deemed Ellison's undisclosed plan for operating NetSuite immaterial because Oracle management typically waits until after an

acquisition agreement is signed before drawing up an operating budget. The Vice Chancellor also ignored evidence put forward by Plaintiffs' experts bearing on the valuation implications of Ellison's undisclosed plan for operating NetSuite. Additionally, the Vice Chancellor's materiality analysis incorporates two unsupported factual findings: (i) that the Special Committee and its advisors "were apprised of the level of competition between NetSuite and Oracle"; and (ii) that NetSuite was "in the process of implementing" Ellison's critique of NetSuite's up-market strategy. Op. 77, 83, 98.

STATEMENT OF FACTS

A. Oracle Rolls Out Fusion in Competition with NetSuite

By 2015, after many years of research and development, Oracle had gained a foothold of customer references for a product known internally as "Fusion" that delivered business financial software over the Internet, a concept known as "Cloud ERP." (A1293-94:1772-76 (Ellison).) Former Oracle senior sales executive Rod Johnson testified:

> I would say beginning of 2015, we were sort of at the juncture that [Fusion] was finally mature. We had a number of references. It was still very incomplete. It was primarily just financials, procurement. The manufacturing modules or some of the other industry modules weren't available yet. But, say, the base level of functionality was available in 2015, and viable.

(A944-45:383-84.)

A May 12, 2015 presentation deck from Oracle President Thomas Kurian to Ellison, Catz, and Hurd depicted how, in the North America Cloud ERP market, Fusion was a "Moderate" fit for companies with fewer than 1,000 employees and an "Excellent" fit for companies with 1,000-5,000 employees and 5,000+ employees, while NetSuite was a "Primary Player" in the customer segments of fewer than 1,000 employees and 1,000-5,000 employers and was "moving up" to the 5,000+ employee segment. (A1636.)

An August 6, 2015 presentation deck to Catz displayed that 26% of Fusion's wins were against NetSuite and 38% of new Oracle customers had moved from Quickbooks. (A1644, A1646.) Those numbers reflected that Fusion was finding initial success in targeting smaller, growing companies—a category of customers that NetSuite was also targeting. (A853-54:18-24 (Henley).)

B. Ellison Criticizes NetSuite's Up-Market Growth Strategy

Former NetSuite CFO Ron Gill testified that NetSuite was "steadily moving up-market" in part because the sales organization "want[s] to sell a larger deal" and "larger customers will pull you towards features and functions for larger customers." (A1029:722-23.) In particular, NetSuite's OneWorld product "facilitated international structures, foreign currency, consolidation and things like that." (A1028:718.) Former NetSuite CEO Nelson similarly testified that NetSuite "would gladly go" up-market if a customer "felt that we had a solution that fits and can solve their problems …. And there were a couple of particular areas where our solution was really well-suited for going up-market." (A1113:1056-57.) Former NetSuite President James McGeever testified that he pushed internally for the development of up-market financial functionality because he believed "the fundamental thing of [NetSuite's] value proposition was that we needed to be very strong in pure financials." (A848:78-79.)

On July 8, 2015, Ellison angrily criticized his NetSuite co-founder Goldberg for NetSuite's poor growth metrics and growth strategy. Op. 12. Ellison proclaimed that NetSuite could not compete successfully against Fusion in NetSuite's up-market. (A1640; A1924-27; A1047:794 (Goldberg).) In September 2015, Ellison was deeply dismayed to learn that NetSuite had significantly lowered its internal growth projections for the next three years. (A1650; A1052-53:815-16; A1335:1943.) Ellison convened a meeting with Goldberg and Nelson in October 2015 to discuss NetSuite's growth strategy. (A1641; A1656)

Ellison was frustrated that NetSuite did not take his advice (i) to build expanded functionality for smaller customers (*e.g.*, human capital management ("HCM") functionality; customer relationship management ("CRM") functionality; functionality for discrete industry micro-verticals) and (ii) to not build financial features for up-market customers better served by Fusion. (A1334-35:1937-40; A841-42:96-98 (Ellison).) Ellison testified:

> Obviously, they weren't [convinced about HCM] because they didn't do it for a long time. They weren't convinced about micro-verticals.
>
> * * *
>
> Yeah, I – I don't think there was a broad understanding at NetSuite that Fusion was going to be a very good product.
>
> * * *
>
> They didn't accept … my information that Fusion was actually a pretty good product and would be very competitive.

(A1335:1940; A1337:1949.)

Oracle Executive Vice Chairman of the Board Jeffrey Henley, a former Oracle CFO whose primary role is to meet with Oracle customers (A851:10-11), expressed a similar critique of NetSuite's growth strategy. Henley wrote to Oracle sales executives in March 2016 that NetSuite was "absolutely out of their league" competing for Spotify, a customer with $1 billion in revenues and international operations. (A1666; A854-55:24-25.) Henley testified that NetSuite's real opportunity was "to go global in small companies, probably 50 million and below." (A855:26.)

C. Ellison Decides "The Time Is Now"

Ellison "always believed we [Oracle] should ultimately buy NetSuite" and "I said I tell everyone that over and over again for a period of years …. but it's a matter of the right time, when will it be the right time." (A1345:1980.) In February 2015, Ellison spoke with senior executives at NetSuite, sent Catz an email saying "We need to discuss NetSuite," and then discussed NetSuite with Catz. (A1613; A1614; A837-38:17-19 (Ellison).)[3] That led to another discussion among Ellison, Catz, Hurd, and Oracle's head of M&A, Douglas Kehring, about potentially buying

[3] Goldberg testified about a conversation among himself, Ellison, and Nelson "probably in 2015, where Larry said something like, 'Well, you guys would never want to be acquired, would you?' or something to that effect." (A821:14.)

NetSuite, with Ellison determining that the timing was not right. (A1615; A1201:1407-08 (Catz); A1339-40:1959-63, A838-39:20-24 (Ellison).)

Eleven months later—after Ellison's above-noted expressions of dismay with NetSuite's slowing growth and its growth strategy, and in advance of Oracle's January 14-15, 2016 Board retreat at Ellison's Porcupine Creek estate—Ellison confirmed with Catz that the time to buy NetSuite had arrived:

> Well, I think [Catz and I] had conversations and I think she suspected it, but she was just confirming, okay. It was kind of like, okay, you're saying the time is now. Is the time now? She was just double-checking, I think. And I said, yeah, the time is now. I think the time is now.

(A1345:1982; *see id.* 1980-81.)

D. Ellison Shares His Plan with Goldberg

On January 27, 2016, following initial conversations between Catz and Nelson, Ellison spoke to Goldberg. (A822:191-92 (Goldberg).) Ellison told Goldberg about his growth strategy for NetSuite:

> We wanted to invest more in engineering, so we want to spend more money in engineering. We want to spend more money in sales to increase the growth rate and do some of the projects that we think are critical for NetSuite's growth.
>
> * * *
>
> We want to have NetSuite in a lot more countries. We want to–exactly what you say, build out HCM. We want to build a micro-vertical—you know, accelerate, pick more micro-verticals to go after. Do all of those things while adding more salespeople and getting the growth rates up substantially.

(A1269-70:1679-81 (Ellison).) Ellison assured Goldberg that NetSuite would operate as a business unit inside of Oracle that retained its existing management team, culture, and headquarters. (A1269:1679 (Ellison); *see* A1848 ("Larry committed to me we'll retain significant independence"); A1854 ("If he's true to his word it will remain separate"). Ellison kept his promise. (A824-25:201-02 (Goldberg).)

Ellison testified: "I made a series of predictions of how I thought we would run NetSuite. That's how, in fact, we did run NetSuite." (A1350:2000-01.) That Oracle acted on Ellison's "predictions" was foreordained. Ellison, Catz, and Henley all testified that Ellison is what Catz describes as "the visionary, product visionary, of Oracle." (A1275:1701; *see* A852:13-14 (Henley), A1319:1877 (Ellison).) Ellison would reorient NetSuite's product strategy to broaden its functionality for use by smaller companies in many countries.

E. The Special Committee Is Unaware That Fusion Competes with NetSuite

NetSuite management kept track of the inroads being made by Fusion in the Cloud ERP market. In April 2016, NetSuite's Market and Competitive Intelligence Team created a presentation for CFO Gill discussing how Oracle "threatens existing NetSuite customers" and that Oracle was "Attacking software vertical; leveraging

[customer references] Dropbox, GoPro, Fitbit, Pandora, and Square." (A1679.) A July 2016 report by the same team observed that "Oracle continues to increase its pressure and footprint in [NetSuite's mid-market.]" (A1839.)

Oracle senior management similarly kept abreast of Fusion's success against NetSuite. A March 21, 2016 quarterly report for Hurd on Oracle's North America mid-market Cloud ERP business (*i.e.*, customers with annual revenues of less than $500 million (A958:436 (O'Dowd)) explained why Oracle wins 60% of the time and loses 40% of the time against NetSuite and observed that Oracle sees NetSuite "in 90% of the deals." (A1676.) In June 2016, Johnson wrote that Fusion was "positioned to grab leadership now" in Cloud ERP (A1705), and he testified that Oracle perceived NetSuite to be "vulnerable because they … were lacking some of the same functional capabilities we had around CRM and HCM." (A945:385-86.)

Oracle management did not provide the Special Committee or its financial advisor Moelis with any data on competition. (A1494-95:2573-76 (Goldstein).) Oracle's Kehring told Moelis senior banker Stuart Goldstein to be "careful" about what Moelis wrote about competition, which meant that Moelis wrote nothing on the subject. (A1490:2557-58 (Goldstein).)

Consequently, when Special Committee Chair Renée James was asked if she knew that Oracle and NetSuite competed for the same customers on various

occasions, she testified: "I don't understand how that's possible. NetSuite and Oracle's product Fusion have nothing to do with each other." (A1161:1249.) Special Committee member George Conrades testified that he was "highly skeptical about the point you're making about competition. They are totally different markets, totally different offerings, totally different customers." (A874:101.) Special Committee member Leon Panetta testified that he did not recall any discussion of product overlap between Fusion and NetSuite. (A813:83.) Goldstein testified that he believed Fusion "was finding some level of success, but it was at the much higher end of the market." (A1479:2514.) Oracle's Kurian testified that Moelis was incorrect in advising the Special Committee that Oracle "lacks a meaningful presence in Cloud ERP," elaborating: "We had great strength in some areas." (A1701; A950-51:407-08 (Kurian).)

On July 8, 2016, Moelis sent the Special Committee a package of three lengthy analyst reports on NetSuite. (A1719-833.) The reports each discussed competition with Oracle. (A1722-23, 1725-26; A1754; A1782.) Moelis's cover email stated, "while we won't be covering these overviews on the call, we thought the Special Committee might find them helpful." (A1707.) Special Committee Chair James did not recall any discussion of the analyst reports, or recall reading the

analyst commentary on competition with Oracle. (A832-33:195-97, 203-04.) Nor did Conrades. (A828-29:85-86.)

F. NetSuite Maintains Its Up-Market Growth Strategy

NetSuite's senior executives did not heed Ellison's warnings about Fusion's superiority for customers in NetSuite's up-market. NetSuite's May 5, 2016 due diligence presentation to Oracle touted NetSuite's "Winning Growth Strategy" of "Moving up market and going global with OneWorld." (A1697.) Listed "Key Business Drivers" included "Penetration of $1 billion+ enterprises" and "Enterprise Move to the Cloud," which translated into "Larger deal size." (A1698.) NetSuite's July 18, 2016 presentation to Oracle discussed "Going global with OneWorld" and "Selling to larger, mid-size enterprises." (A1835-36.)

Oracle's M&A team did not discuss the merits of NetSuite's up-market strategy. (A1251:1606-07 (Catz).) Without criticism, Oracle's due diligence presentation to the Special Committee, dated July 27, 2016, noted that a key priority for NetSuite's 2017-2018 product roadmap was "OneWorld 'v2' / Upmarket Financials[.]" (A1852.)

Fusion's competitive strength was not a matter of public knowledge. Oracle's first public demonstration of Fusion's capabilities was at Oracle's OpenWorld convention in September 2016 (A843:143 (Ellison)), *after* the signing of the

Acquisition agreement. Goldberg's engineering lieutenant attended OpenWorld and reported that Fusion appeared to be a true "cloud" product with "broader" functionality than NetSuite and "currently more overlap in the customer targets than I had previously thought." (A1863-65.)

Ellison testified that Goldberg and Nelson had not realized until OpenWorld 2016 that NetSuite should not try to compete up-market with Fusion. (A1338:1952.) Ellison reflected: "And then when they [NetSuite] finally took a close look at Fusion, they were kind of shocked to see, hey, they [Oracle] really have all of these features. It is a complete rewrite. They can do high-end enterprise financials. They can do all of this stuff." (A889:162.) "So when both sides were armed with the same accurate, up to date information, NetSuite came to the same conclusion that I came to, which was that they [NetSuite] shouldn't try to go up-market, you know, there is no way they can compete up-market with us [Oracle.]" (A1337:1951.)

G. Bearish NetSuite Analysts Perceived Fusion's Competitive Strength

Stock analysts who followed NetSuite had wildly disparate views about whether Fusion posed a competitive threat. Economist Matthew Cain, Ph.D., testified without contradiction that "the correlation is quite clear" between analyst

price targets for NetSuite and whether the analyst "felt that competition was really heating up between Oracle and NetSuite." (A1550:2796.)

Analysts with NetSuite price targets between $87 and $100 wrote that NetSuite could compete effectively up-market against Oracle. (A1978-79.) The analyst at T. Rowe Price, who valued NetSuite at over $118, wrote internally that he believed NetSuite possessed the "only credible" Cloud ERP platform. (A1876, A1879.)[4] Meanwhile, analysts with price targets between $60 and $76 pointed to competition from Oracle. (A1980-82.) Morgan Stanley, which had a price target of $60, wrote: "we continue to hear about competition in this segment heating up from vendors like Workday and Oracle (Fusion)." (A1680.)

H. Catz's Special Committee Projections

Catz oversaw management's creation of projections for the Special Committee. (A1853.) Kehring, who prepared the financial model with Catz, testified that his team made "high-level" assumptions "based upon the general strategy" of what Oracle intended to do with the business. (A969:482.) Kehring was unaware that Ellison had a plan for operating NetSuite. (*Id.* 482-83.) Catz similarly testified that she "did not have the benefit of Mr. Ellison's views."

[4] Ellison testified that the T. Rowe Price analyst "had no idea what he was talking about" concerning Fusion's capabilities. (A840:28.)

(A1271:1685.) Kehring assumed that Oracle would operate NetSuite like any other acquired company (*i.e.*, "at significantly lower incremental costs" than the acquired company could operate on a "stand-alone basis"). (A988:556.) This generic assumption that Oracle would operate NetSuite's business at lower cost implied that NetSuite's projected EBIT margins over five years would rapidly approach Oracle's higher EBIT margin. (A988-89:559-60; A1703; A1922.)

Catz's July 27, 2016 presentation to the Special Committee projected base case EBIT of NetSuite under Oracle ownership for fiscal year 2018 of ***$374 million***, which, as applied to the proposed Acquisition price of $109 per share, made it slightly accretive to Oracle's earnings per share. (A1850-51.) According to Catz, "increased EPS, even just a tiny bit … means it's not dilutive, and that was what analysts were looking for." (A1285:1740.) In other words, Oracle paid just under the limit of what was publicly justifiable, assuming the reasonableness of Catz's EBIT projection for NetSuite.

I. Oracle's Post-Signing Financial Planning and Budgeting

After the Acquisition agreement was signed, senior engineers at Oracle and NetSuite met to discuss product positioning. (A1856.) The outcome of that meeting is that Oracle planned on NetSuite only selling to customers with fewer than 1,000 employees and less than $100 million in annual revenue. (A1872, A1874.)

Shortly after the close of the Acquisition, Ellison and Goldberg met to discuss NetSuite's product strategy. Goldberg's meeting notes reflect Ellison's aggressive plans to grow internationally and to build out HCM and CRM functionality. (A1890-92.) Ellison acknowledged that the strategy reflected in Goldberg's notes was "very similar" to what he had told Goldberg on January 27, 2016. (A1332:1928.)

Oracle's post-signing financial planning and post-close budgeting for NetSuite reflected Ellison's new product positioning and product strategy. (A1950-51; A1870; A1885-86; A1896-99; A905-06:226, 232; A910:246; A912:253-54 (Guner).) As of October 28, 2016 (before the closing of the Acquisition), Oracle's model projected NetSuite operating income of ***$219.3 million*** for fiscal year 2018. (A1875.) By December 20, 2016, Oracle's budget projected NetSuite operating income for fiscal year 2018 of just ***$140.6 million*** (A1902; A1948; A1366-67:2065-66 (Atkins)):

Special Committee Projections vs. Operating Budget

($ in millions)

- The Special Committee Projections assumed rapid growth while slashing costs; the Operating Budget projected significantly lower revenue and higher costs.

	Projected Fiscal Year Ending May 31, 2018			
	Special Committee Projections (a)			Operating
	Conservative	Base	Upside	Budget (b)
Saas Revenue	$1,030	$1,079	$1,112	$960
Services Revenue	254	263	271	232
Total Revenue	1,284	**1,342**	1,384	**1,192**
Saas Gross Profit	896	938	968	829
Services Gross Profit	25	30	35	11
Total Gross Profit	921	969	1,003	840
SaaS Gross Profit Margin	*87.0%*	*87.0%*	*87.0%*	*86.4%*
Services Gross Profit Margin	*10.0%*	*11.5%*	*13.0%*	*4.6%*
Total Gross Profit Margin	*71.7%*	*72.2%*	*72.5%*	*70.5%*
Research & Development	120	**125**	130	**158**
% Revenue	*9.3%*	***9.3%***	*9.4%*	***13.3%***
Sales & Marketing	417	**436**	450	**506**
% Revenue	*32.5%*	***32.5%***	*32.5%*	***42.4%***
General & Administrative	32	34	35	35
Non-GAAP EBIT	$352	**$374**	$389	**$141**
EBIT Margin %	*27.4%*	*27.9%*	*28.1%*	*11.8%*

(a) JX1314 at 59-61.
(b) JX1966 at 12.

5

PDX 15

In May 2017, the Board learned of Ellison's plan for NetSuite, when Goldberg presented on how NetSuite's strategic direction had changed post-Acquisition:

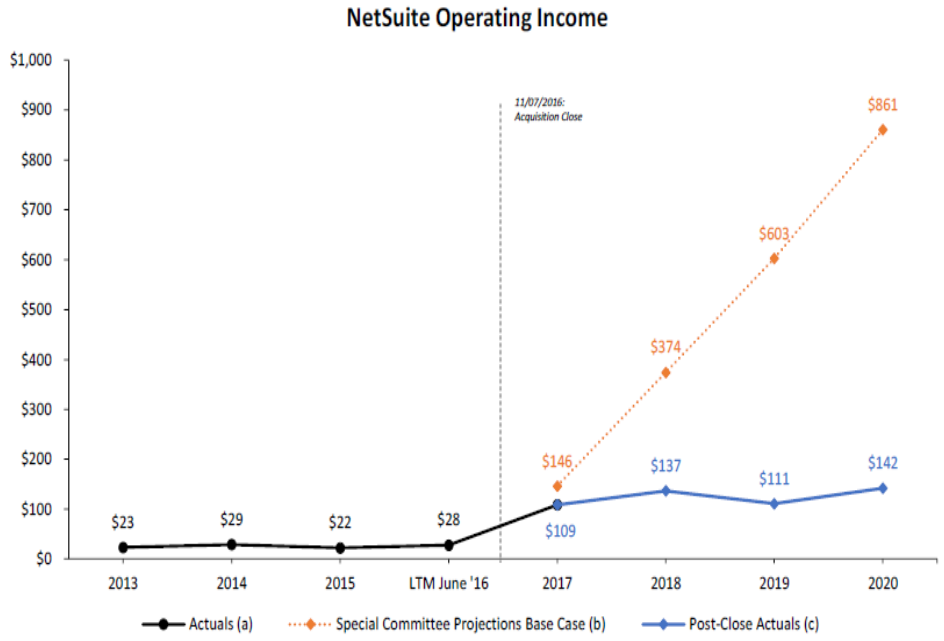
- Pre-acquisition, we were making a big push to move upmarket. Now, we're re-focusing on the mid-market and the Suite.

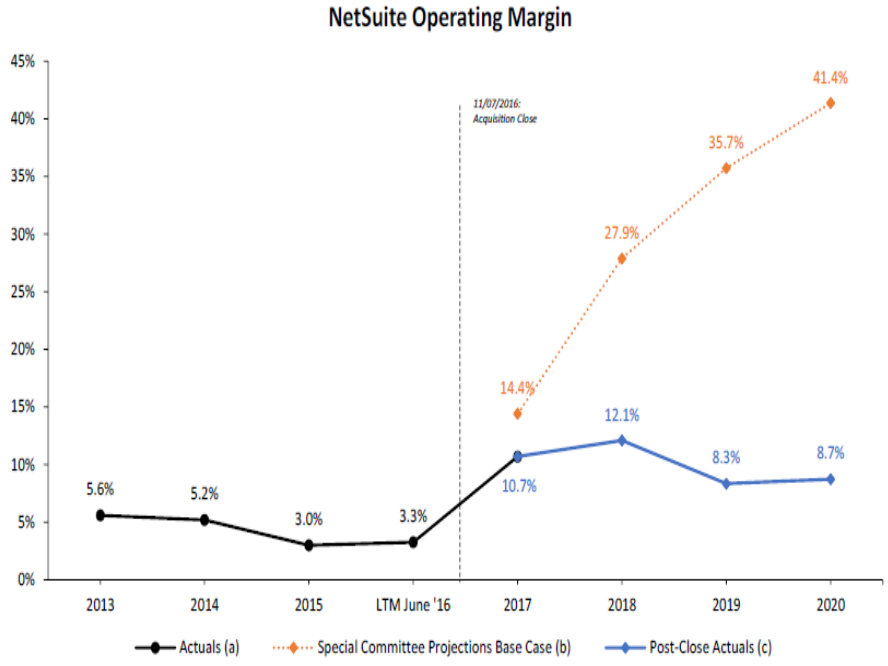
(A1906; *see* A1061:849 (Goldberg).)

J. NetSuite's Post-Acquisition Results

NetSuite's operating income and operating margins for fiscal years 2017 through 2020 (A1928-29) evidence the dramatic variance between the results of the

implementation of Ellison's plan for NetSuite and Catz's projections when recommending the Acquisition to the Special Committee:





ARGUMENT

I. THE VICE CHANCELLOR ERRED IN ALLOWING THE SLC TO WITHHOLD ITS INTERVIEW MEMOS

A. Question Presented

Did the Vice Chancellor err in sustaining the SLC's objections to producing its interview memos, which deprived Plaintiffs' counsel of impeachment material and the observations of deceased co-CEO Hurd, given (i) Court of Chancery precedent ordering production of SLC interview memos, (ii) the SLC's failure to offer any business justification for its objections, and (iii) the SLC's provision of post-investigation mediation statements to Ellison and Catz? (A277-78; A316-24; 12/4/19 Op.; 7/9/20 Op.)

B. Scope of Review

This Court exercises *de novo* review of legal rulings, which includes the proper legal standard for reviewing an SLC's determinations. *Diep v. Trimaran Pollo Partners, L.L.C.*, 280 A.3d 133, 149 (Del. 2022). This Court also exercises *de novo* review on the question whether a trial court correctly applied the attorney-client privilege or the work product doctrine insofar as they involve questions of law. *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1272 (Del. 2014); *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371 (Del. 2011).

C. Merits of Argument

1. Precedent Favors Derivative Plaintiff Access to SLC Interview Memos

Interviews memos are an SLC's official record of what a witness said, and their utility lies in capturing admissions a witness may later want to disavow:

> Unlike more formal legal proceedings, committee interviews are rarely if ever recorded or transcribed, so, by default, the record of what happens at a committee interview is the notes of the committee members and counsel who attend the interview. These notes are often gathered up and transcribed into a memorandum. ***Such a memorandum in turn becomes the committee's official record of the facts it learned from the witness.*** Sometimes, facts disclosed during an interview subsequently take on increased significance; ***it is not entirely unheard of for a key witness to attempt, at a later date, to recant what he told the committee as a more complete record emerges***….

1 GREGORY V. VARALLO ET AL., SPECIAL COMMITTEES: LAW & PRACTICE § 4.04 (2d ed. 2014) (emphasis added). Authenticated interview memos can be admissible evidence: "If a witness does not clearly admit that the witness has made the prior inconsistent statement, extrinsic evidence of the statement is admissible." D.R.E. 613(c). In short, SLC interview memos are "fertile impeachment material." 7/9/20 Op. 16.

The Court of Chancery has ordered SLCs (and a special investigative committee) to produce interview memoranda and interview notes to a stockholder plaintiff, subject to redacting opinion work product. *See, e.g.*, *Sandys v. Pincus*,

2018 WL 3431457, ¶ 2.B (Del. Ch. July 13, 2018) ("the Special Litigation Committee shall produce interview memoranda and interview notes where interview memoranda do not exist, but may redact from the documents material that constitutes opinion work product. Based upon the principles set forth in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), the SLC may not withhold [such] materials … based upon an assertion of attorney-client privilege.") (Bouchard, C.); *Kikis v. McRoberts*, C.A. No. 9654-CB, tr. at 35-36, 44 (Del. Ch. Feb. 4, 2016) ("I drafted a lot of interview memos in my day …. [T]hey reflect what people say in the interviews, which are facts…. I'm going to order the production of interview memos, except that any opinion work product may be redacted."); *Ryan v. Gifford*, 2008 WL 43699, at *4 n.9 (Del. Ch. Jan. 2, 2008) (referring to prior ruling that "plaintiffs have made a showing of good cause to obtain [the] non-opinion work product" of the special committee's law firm, "including its interview notes") (Chandler, V.C.); *Kindt v. Lund*, 2001 WL 1671438, at *2 (Del. Ch. Dec. 14, 2001) (ordering production of "all transcripts, notes and summaries of witness interviews" conducted by SLC) (Chandler, V.C.).

The above-cited rulings reflect the importance of SLC interview memos. Their evidentiary value satisfies the doctrinal bases for overcoming an assertion of non-opinion work product or an assertion of attorney-client privilege in stockholder

derivative actions. Access to non-opinion work product requires a showing of substantial need and the inability to acquire a substantial equivalent. *Espinoza*, 32 A.3d at 370 n.10; Del. Ch. Ct. Rule 26(b)(3). The "substantial need" test of Court of Chancery Rule 26(b)(3) "overlap[s]" with an analysis under *Garner*, which evaluates "the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources." *Wal-Mart*, 95 A.3d at 1281. In *Kikis*, Chancellor Bouchard explained that the stockholder plaintiffs satisfied both *Garner* and *Wal-Mart*:

> My basic rationale here is, frankly, I think these [SLC interview memos and SLC meeting minutes] are – not always but fairly often – produced in cases of this nature. They certainly go to the reasonableness of the investigation that was done by members of the committee, one of the two focuses of the seminal *Zapata* test. And to the extent they contain things that are privileged that don't rise to the level of opinion work product, I think the *Garner* exception would apply here.
>
> The Kikis side of the caption here has 43 percent of this company. Obviously there are meaningful claims here because the SLC has actually concluded there is merit to five of the six claims that are at issue here. These are the primary *Garner*-motivating factors. I reviewed the *Wal-Mart* decision this morning to recall the analysis of the Supreme Court in that case. The same drivers that would apply to *Garner* creating an exception to the attorney-client privilege would equally apply with respect to nonopinion work product.

Id. 44-45.[5]

Below, the Vice Chancellor declined to follow Chancellor Bouchard and then-Vice Chancellor Chandler. In a footnote, the Vice Chancellor deprecated *Kikis* as a transcript opinion with "no precedential value" and deprecated *Sandys* as "simply a court order" and a "brief ukase." 7/9/20 Op. 15 n.60. The Vice Chancellor noted that the stockholder plaintiffs in *Ryan v. Gifford*, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007), had made a showing of good cause under *Garner* respecting the interview notes of the Special Committee's law firm due in part to "the unavailability of this information from other sources." 7/9/20 Op. 17 n.63 (quoting *Ryan*). According to the Vice Chancellor, Plaintiffs' ability to take fact depositions obviated any need for the SLC interview memos. *Id.* 17.

The Vice Chancellor's reasoning is erroneous on three levels:

First, the Vice Chancellor erroneously held that *Zapata* was inapplicable, and erroneously granted business-judgment-rule deference, to the SLC's unexplained determination to invoke the work product doctrine and attorney-client privilege against Plaintiffs. In the words of the Vice Chancellor: "The SLC has apparently

[5] A subsequent SLC voluntarily produced its interview memos to a derivative plaintiff. *In re Baker Hughes Deriv. Litig.*, 2023 WL 2967780, at *9 (Del. Ch. Apr. 17, 2023), *aff'd*, 2024 WL 371962 (Del. Feb. 1, 2024).

determined in its business judgment not to share such privileged and protected documents with the Lead Plaintiff." 12/4/19 Op. 59.

Second, the Vice Chancellor erred in holding that the SLC had not waived its work product and attorney-client protections when it provided Ellison and Catz with opening and reply mediation statements, which necessarily summarized the most damaging information in the interview memos to justify the SLC's settlement demands.

Third, the Vice Chancellor erred in holding that taking depositions is the "substantial equivalent" of obtaining interview memos, for purposes of Court of Chancery Rule 26(b)(3).

These levels of error, discussed below, combined to create a gaping hole in judicial oversight of SLCs. The SLC delayed the litigation. It recorded the recollections of 37 witnesses and presented a summary of the investigatory record to Ellison and Catz in the form of mediation statements. Knowing that Oracle's claims needed to be litigated, the SLC then hid recorded recollections from Plaintiffs. The Vice Chancellor allowed the SLC to compile a narrative for the sole benefit of the defendants, without finding that the SLC's determination to do so was in good faith or reasonable. Production of the interview memos is required to rectify the SLC's misuse of Delaware's processes governing derivative litigation.

2. Business Judgment Deference to the SLC Was Error

SLCs are not deserving of business judgment review. The case law respecting judicial treatment of SLC determinations reflects the following pronouncements:

> We are not satisfied, however, that acceptance of the "business judgment" rationale at this stage of derivative litigation is a proper balancing point….
>
> The context here is a suit against directors where demand on the board is excused. ***We think some tribute must be paid to the fact that the lawsuit was properly initiated***….
>
> Moreover, notwithstanding our conviction that Delaware law entrusts the corporate power to a properly authorized committee, ***we must be mindful that directors are passing judgment on fellow directors*** in the same corporation and fellow directors, in this instance, who designated them to serve both as directors and committee members. The question naturally arises whether a "there but for the grace of God go I" empathy might not play a role. And ***the further question arises whether inquiry as to independence, good faith and reasonable investigation is sufficient safeguard against abuse, perhaps subconscious abuse.***

Zapata, 430 A.2d at 787 (emphasis added).

Ever since *Zapata*, this Court has required heightened judicial scrutiny of an SLC's motion to terminate litigation deemed meritless by the SLC. *Diep*, 280 A.3d at 151. Heightened judicial scrutiny is also applied when an SLC determines that derivative claims are valuable and meritorious and should be settled for a proposed amount. *Electra Inv. Tr. PLC v. Crews*, 1999 WL 135239, at *6 (Del. Ch. Feb. 24,

1999); *Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc.*, 1997 WL 305829, at *2 (Del. Ch. May 30, 1997).

It is anomalous and mischief-enabling to demand a showing of reasonableness and good faith for an SLC's determination to dismiss or settle corporate claims, but to defer blindly to an SLC determination that impairs litigation of a claim. The animating concern of *Zapata* about potential conscious or unconscious bias logically applies to any SLC determination that impairs prosecution of a corporate claim, such as burying a trove of evidence or retaining unsuitable litigation counsel.[6] Here, the SLC selected litigation counsel who lacked access to material investigative information created by the SLC.

The Vice Chancellor acknowledged that the SLC's invocation of privileges or protections over the interview memos may have deprived Plaintiffs of "fertile impeachment material" 7/9/20 Op. 16, and that the SLC's position forced Plaintiffs "to replicate the SLC's work at great expense," 12/4/19 Op. 60. Nevertheless, the Vice Chancellor deferred to the "apparent[] … business judgment" of the SLC. 12/4/19 Op. 59. "The SLC is composed of fiduciaries for Oracle, who may well

[6] *Cf. Chamison v. HealthTrust, Inc.*, 735 A.2d 912, 922 (Del. Ch. 1999) ("by unreasonably restricting Chamison's defense through manipulation of the counsel selection provision, HealthTrust violated its implied covenant of good faith and fair dealing"), *aff'd*, 748 A.2d 407 (Del. 2000).

have good faith reasons to keep the work product done on the SLC's behalf confidential." 7/9/20 Op. 26. The Vice Chancellor concluded that Plaintiff's "assertion of bad faith is not to my mind, self-proving" and was unsupported by a separate pleading "against members of the SLC." 7/9/20 Op. 26-27.

The SLC's determination to withhold its interview memos cannot withstand any form of heightened judicial scrutiny. The SLC did not demonstrate good faith or reasonableness in hindering Plaintiffs' prosecution of Oracle's claims:

- The SLC deferred to Ellison and Catz when opposing Plaintiffs' demands for documents from the SLC and its counsel. The SLC argued that it was "required to preserve" its privileges or protections and would only release documents "that all parties will agree should be made available to everyone." (A302-03.)
- The SLC then remained silent when an Oracle senior executive publicly disparaged this action (and thus the SLC):

> Oracle spokeswoman Deborah Hellinger says the suit is without merit. "Anyone who watched the NetSuite transaction—inside or outside of Oracle—knows nearly everything in that narrative is strung together fiction masquerading as fact," she told us. "We are confident this case has no merit." (She also lobbed an insult at Business Insider for writing about the lawsuit and at the lawyers who are suing.) (A295.)

- Oracle and the individual defendants joined the SLC in seeking to block Plaintiff's subpoenas, 12/4/19 Op. 31-32, 54, evidencing the pressure upon the SLC members from their fellow directors and senior management. Oracle's motion was denied as incompatible with the SLC's authorization of this litigation. *Id.* 53, 62.
- SLC Chair William Parrett, who had attended the interviews of Ellison and Catz, gave deposition testimony reflecting an unwillingness to shed any light on the merits of the claims. Parrett claimed to be unaware of the issue whether Catz and Nelson discussed a price range in January 2016, or what Catz said on that subject, or the price negotiations generally. (A341-42:46-51; A346-47: 66, 70). Parrett recalled Ellison saying he was totally uninvolved in the idea of acquiring NetSuite or in any communications with NetSuite. (A347:71-72.) Parrett also claimed not to understand that the Plaintiffs were the only parties lacking knowledge of what said in the SLC interviews (A350:82-84), or that the SLC's counsel could have used the interview memos if it litigated the claims (A343:54-55).

- The SLC's counsel argued that "the SLC concluded that it would be in Oracle's best interests for the parties to litigate the case in the normal course, unencumbered by the Committee's investigation." (A375.) Only Plaintiffs were encumbered. The SLC's counsel also referenced "unproductive distractions and disputes concerning the completeness and accuracy" of the interview memos. (A376.) In other words, the SLC did not want Ellison and his lieutenants to be confronted with the SLC's impeachment material.

3. The SLC Waived Protections for the Interview Memos by Providing Mediation Statements to Ellison and Catz

Waiver of work product protection and the attorney-client privilege occurs when a privilege holder "intentionally discloses or consents to disclosure of any significant part of the privileged or protected communication or information." D.R.E. 510(a). *See also Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995) ("In the context of the attorney-client privilege, waiver rests on a rationale of fairness, *i.e.,* disclosure of otherwise privileged information by the client under circumstances where it would be unfair to deny the other party an opportunity

to discover other relevant facts with respect to that subject matter.") (internal quotation omitted).

In *Ryan v. Gifford*, "the Court could find no case where a board's Special Committee disclosed its findings on the misconduct of director defendants to those defendants themselves *and* to their individual, outside counsel and later successfully claimed that such disclosure did not constitute a waiver." 2008 WL 43699, at *6. The act of waiver was the delivery of a "final oral report" at a board meeting. 2007 WL 4259557, at *3.

Here, the SLC provided Ellison and Catz with mediation statements that summarized the investigatory record supporting the SLC's settlement demands. The Vice Chancellor erroneously held that waiver could not occur in the context of a confidential mediation because the "SLC had a strong expectancy of privacy when it engaged in mediation with Ellison and Catz." 7/9/20 Op. 23.

An SLC cannot hide investigative material from a derivative plaintiff after laundering it via mediation to the individual defendants. Mediation communications are confidential. Ch. Ct. R. 145(g). But the decision to supply Ellison and Catz with post-investigation mediation statements has consequences for analyzing whether the SLC could hide its underlying interview memos from the counsel the SLC authorized to litigate against Ellison and Catz on Oracle's behalf.

"The work product privilege … serves a … purpose … related to *the adversary system* of litigation—the protection of an attorney's private files and recorded impressions from discovery by *opposing counsel*." *Zirn v. VLI Corp.*, 621 A.2d 773, 782 (Del. 1993) (emphasis added). "[T]he focus of the doctrine is upon preventing discovery of the work product from an *opposing party in litigation,* not necessarily from the rest of the world generally." *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *3 (Del. Ch. Nov. 13, 2002) (emphasis in original) (internal quotation omitted). Ellison and Catz are the opposing parties. The SLC improperly treated Plaintiffs as the SLC's adversaries.

The Vice Chancellor's ruling stands the concept of waiver on its head. The "harsh result" of waiver is the disclosure of "the fruits of an attorney's trial preparations" to a litigation adversary. *Id.*, *cited in* 7/9/20 Op. 21. The logic of waiver rests on fairness. It is fair, and not harsh, to compel production of the SLC's interview memos to the SLC's chosen litigation counsel after the SLC chose to provide Ellison and Catz with investigatory summaries.

4. The Asserted Protections Must Yield to Plaintiffs' "Substantial Need" and "Good Cause"

The SLC's assertion of work product protection over its interview memos is not dispositive. Plaintiffs had a "substantial need" for non-opinion work product in

the SLC interview memos under Court of Chancery Rule 26(b)(3), and good cause for the same information under *Garner*.

The Vice Chancellor ruled that it was sufficient that Plaintiffs possessed "the opportunity to depose almost all of the SLC's interview subjects." 7/9/20 Op. 16. The "almost all" formulation reflected the death of Hurd. *Id.* 16 n.61. Hurd was a material witness. Hurd consulted with Ellison and Catz about buying NetSuite, and he bore responsibility for the roll-out of Fusion and the post-closing operations of NetSuite. (A1271:1684 (Catz); A1314:858-59, A1327-28:1910-13, A1340:1962 (Ellison).) Hurd's knowledge and unavailability should have dictated production of all interview memos reflecting on him. The Vice Chancellor nevertheless made fact findings about Hurd, such as that he supposedly (i) supported the purchase of NetSuite in February 2015 (Op. 10-11), (ii) "did not appear cowed or overawed" by Ellison (Op. 57), and (iii) helped "set the assumptions underlying" the Special Committee projections (Op. 31, 91).

The SLC produced no documents reflecting what any interviewee said (*e.g.*, interview memos, draft reports, or mediation statements). 7/9/20 Op. 19. The testimony years later of Ellison and his lieutenants, after full document discovery, and without Plaintiff possessing impeachment material, is not the "substantial equivalent" of the interview memos. *Id.* at 18. Relevant circumstances supporting

discoverability of witness statements are if the witness would be "available to the party seeking discovery only a substantial time thereafter" or if the witness "may be reluctant or hostile," or "may have a lapse of memory" or "may probably be deviating from his prior statement." Fed. R. Civ. P. 26(b)(3) advisory committee's note (1970) (citing cases). *See also United States ex rel. Landis v. Tailwind Sports Corp.*, 303 F.R.D. 419, 425-26 (D.D.C. 2014) ("statements given to FBI agents and other criminal investigators …. are unique sources of both affirmative evidence and impeachment material for which there is no substitute").

A major factual question in this case is what Catz and Nelson said to each other in January 2016 about an acquisition price—a subject the Board forbade Catz from discussing and that Catz told the Board she had not discussed. (A1662; A1668.) T. Rowe Price wrote to NetSuite in September 2016, shortly after meeting with Nelson: "In our recent meeting, Mr. Nelson described the initial contact with Oracle as a loose, pre-due-diligence, exploratory conversation where a price range of $100-$125 was discussed." (A1861.) The SLC probed this subject in their interviews. SLC member Panetta recalled that Catz had referred to "kind of a general range" in her interview. (A814:90; *see* A815:160-61.) Yet, after trial, the Vice Chancellor found, based on "Catz and Nelson's believable testimony," that, "beyond Nelson's mention of the 'Concur-Type' multiple, Catz did not engage with Nelson

in price discussions," and "a specific price range was not discussed." Op. 17 & n.80. The interview memos of various individuals would shed light on the accuracy and credibility of Catz and Nelson, both of whom owed their positions to Ellison. *See infra* p. 45; A818:44-45 (Nelson).[7]

In *Ryan v. Gifford*, unavailability of witness testimony was not the only reason why the Court of Chancery found good cause under *Garner* for production of interview notes. There was no "written final report" and "information regarding the investigation and report of the Special Committee is of paramount importance to the ability of plaintiffs to assess and, ultimately prove, that certain fiduciaries of the Company breached their duties." 2007 WL 4259557, at *3. Those factors existed here. The SLC's interview memos are of paramount importance in proving claims that turn on witness credibility and state of mind.

[7] Nelson drives a Bentley he bought from Ellison in 2007, following a conversation at a birthday party for Goldberg. (A1994; A1995 at 1:06.)

II. THE VICE CHANCELLOR ERRED IN ANALYZING ELLISON'S CONTROL OVER ORACLE AND THE ACQUISITION

A. Question Presented

Did the Vice Chancellor err in ruling that Ellison did not exercise control over Oracle and the Acquisition (i) notwithstanding finding that Ellison had "potential control" and (ii) without regard for Ellison's ability to initiate and implement his concealed plan for NetSuite? (A605-09; A642-43; Op. 54-74.)

B. Scope of Review

This Court reviews the Court of Chancery's legal conclusions *de novo* but sets aside the Court of Chancery's factual findings only if they are clearly wrong and the doing of justice requires their overturn. *Coster v. UIP Cos., Inc.*, 300 A.3d 656, 663 (Del. 2023).

C. Merits of Argument

The Vice Chancellor erroneously analyzed Ellison's control status by reasoning as follows: "He likely had the *potential* to control the transaction at issue, but made no attempt to do so; in fact, he scrupulously avoided influencing the transaction." Op. 74 (emphasis in original); *see id.* 5, 58, 60, 69. The Vice Chancellor erroneously discounted the import of Ellison's "*potential*" to exercise control, despite quoting the analogous case of *In re Cysive*:

> [I]t cannot be that the mere fact that [the controller] did not interfere with the special committee is a reason to conclude that he is not a controlling stockholder.… the analysis of whether a controlling stockholder exists must take into account whether the stockholder, as a practical matter, possesses a combination of stock voting power and managerial authority that enables him to control the corporation, *if he so wishes*.

836 A.3d at 553 (emphasis added), *quoted in* Op. 72. The Vice Chancellor also erroneously discounted how Ellison exerted influence over the Acquisition.

The "possible sources of influence that could contribute to a finding of actual control over a particular decision" include the following factors, which apply here:

> [1] relationships with key managers … who play a critical role in presenting options, providing information, and making recommendations …. [2] ownership of a significant equity stake (albeit less than a majority) … and [3] the ability to exercise outsized influence in the board room, such as through high-status roles like CEO, Chairman, or founder.

Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC, 2018 WL 3326693, at *26-27 (Del. Ch. July 6, 2018) (footnotes omitted), *aff'd sub nom. Davenport v. Basho Techs. Holdco B, LLC*, 221 A.3d 100 (Del. 2019) (Order). There is abundant authority supporting control for high status officers with stock ownership in the vicinity of 20%. *See Tornetta v. Musk*, 310 A.3d 430, 500 & n.556 (Del. Ch. 2024) (collecting authorities, including 8 *Del. C.* § 203(c)(4)).

In *Cysive*, a founder CEO was the company's "inspirational force," held "approximately 35% of the stock of the company," and was close to others who collectively owned stock and options that "controlled about 40% of the voting equity." 836 A.2d at 535, 552. His block was "large enough … to be the dominant force in any contested Cysive election." *Id.* at 551-52. Then Vice-Chancellor Strine concluded post-trial: "Candidly, I think it would be naïve for me to conclude that Carbonell does not possess the attributes of control that motivate the *Lynch* doctrine." *Id.* at 551.

Ellison is a more dominant version of the founder CEO of Cysive. Ellison has always been the "key strategic visionary" of one of the largest companies in the world, as well as its largest stockholder, dwarfing the ownership of any institutional investors. (A1318:1874-75.) Ellison testified that his boardroom authority has remained the same despite fluctuations in his ownership between 20% and 43%. (A1319:1876.) Ellison's voting block was indispensable to re-electing incumbent outside directors who sat on the Compensation Committee in light of (i) Oracle's director majority voting policy (A1654) and (ii) substantial stockholder protests to executive pay at Oracle.[8] In 2013, for example, the "vote withheld" for the re-

[8] Oracle received just 43% support on its Say-on-Pay vote in 2013, 46% support in 2014, 48% support in 2015, and 45% support in 2016. (A1610; A1655; A1868; A1909.) *See also* Paul Hodgson, *Why Oracle Shareholders Keep Rejecting the*

election of directors Chizen, Conrades, and Seligman exceeded the number of shares voted by Ellison, who cast a majority of the votes in their favor. (A1604; A1602.) In 2016, Ellison cast a majority or near-majority of the votes in favor of re-electing directors Bingham, Boskin, Chizen, Conrades, and Seligman. (A1869; A1894.) Longtime outside directors earned several million dollars each in director compensation. (A1930.)

Catz publicly hails Ellison as Oracle's "visionary leader," and she described herself and Hurd as "good executors, good editors" of Ellison's vision. (A1275:1701-02.) Catz had been a senior lieutenant to Ellison since 1999 (A1596), she received executive compensation valued at over $340 million between 2008 and 2015, plus an additional $40 million in 2016 (A1932), and she reputedly became a billionaire by staying in Ellison's good graces (A1910-15; A1919-21; A1275:1703 (Catz)), which her predecessors failed to do (A1587; A1595-99; A1273:1694 (Catz)). Catz lacked independence from Ellison, due to his influence over her full-time employment,[9] and she solidified her expectancy to hundreds of millions of dollars of future compensation by executing on the Acquisition.

Company's Executive Pay, FORTUNE (Nov. 25, 2015, 11:44 AM EST), https://fortune.com/2015/11/25/oracle-shareholders-executive-pay/.

[9] *Sandys v. Pincus*, 152 A.3d 124, 128 (Del. 2016); *Rales v. Blasband*, 634 A.2d 927, 937 (Del. 1993); *Frederick Hsu Living Tr. v. ODN Holding Corp.*, 2017 WL 1437308, at *30 (Del. Ch. Apr. 24, 2017).

Ellison's control over the Acquisition is more extreme than in *Cysive.* Ellison not only possessed the "potential" to exercise control, he used his status as "visionary leader" to promote the idea of buying NetSuite, determine its timing, and implement post-closing his concealed plan for changing NetSuite's strategic direction. Ellison possessed the influence to put the Acquisition into motion without any hard questions being raised about the wisdom of paying a multi-billion-dollar premium to buy an Ellison-affiliated target facing a new competitive threat from Oracle.

Oracle senior management knew that Fusion posed a competitive threat to NetSuite. (A1636; A1644; A1646; A1666; A1676; A853-55:18-25 (Henley); A945:385-86 (Johnson); A1335:1940, A1337:1949 (Ellison).) Yet, they provided no data on competition to the Special Committee, and raised no questions about the value or feasibility of NetSuite's up-market growth strategy. Ellison melted into the background, while Catz made bidding recommendations based on her projection that NetSuite's profitability would rapidly increase post-closing. Op. 31-40.

The major potential obstacle to a high-premium acquisition of NetSuite was Goldberg, who was deeply reluctant to lose his perch at NetSuite and become an employee of Oracle. (A1043:778, A1044-45:783-84 (Goldberg); A1255:1620-22 (Catz); A1307-08:1831-32 (Ellison).) Ellison's undisclosed conversation with Goldberg on January 27 was aimed at overcoming Goldberg's opposition, as were

Catz's undisclosed conversations with Goldberg on May 23 and June 22. (A1704; A1045:784-86, A1058:839, A1095:982 (Goldberg); A1258:1633-37 (Catz); A823:194 (Goldberg); Op. 18-19, 31, 35.) Goldberg conveyed to Catz that Oracle had to pay NetSuite a "good price" to get his support. (A1704; Op. 31). Catz recommended paying a price just below the limit of what she could publicly justify. (A1285:1740.)

III. THE VICE CHANCELLOR ERRED IN FRAMING THE TEST FOR WHETHER ELLISON'S NON-DISCLOSURES NECESSITATE ENTIRE FAIRNESS REVIEW

A. Question Presented

Did the Vice Chancellor err in formulating the test for the application of entire fairness review based on Ellison withholding information from the Special Committee? (A592-605; A681-89; Op. 52, 74-100.)

B. Scope of Review

This Court reviews the Court of Chancery's legal conclusions *de novo*. *Coster*, 300 A.3d at 663.

C. Merits of Argument

The Vice Chancellor fashioned the following test for shifting the standard of review from the business judgment rule to entire fairness due to fraud on the Board:

> ***Plaintiff must prove*** 1) that the fiduciary was materially interested, 2) ***that the board was inattentive or ineffective***, 3) that the fiduciary deceived or manipulated the board, 4) that the deception was material, and 5) that the deception tainted the decision-making process of the board. ***At minimum***, for a fraud on the board claim to result in entire fairness, ***a defendant must have manipulated a supine board***.

Op. 75 (footnotes omitted) (emphasis added). This test paraphrases *In re Pattern Energy Group Inc. Stockholders Litigation*, 2021 WL 1812674 (Del. Ch. May 6, 2021), an inapt case in which Vice Chancellor Zurn sought to draw a line that would

prevent entire fairness review from "swallowing enhanced scrutiny in every paradigmatic *Revlon* case." *Id.* at *34.

The Acquisition is a conflicted merger, not a *Revlon* transaction. A conflicted fiduciary's material non-disclosure respecting a conflict transaction vitiates disinterested director approval. The draft *Restatement of the Law Corporate Governance* articulates the following condition for the cleansing effect of disinterested director approval: "The general rule governing interested transactions requires the interested director or officer to disclose material facts relating to the transaction." RESTATEMENT OF CORP. GOV. § 5.02 cmt. e (Tentative Draft No. 2, Mar. 2024) [hereinafter § 5.02].[10] "This Section accordingly views the disclosure obligation under § 5.02(a) as a key element for satisfying the duty of loyalty." *Id.*

Section 5.02 embraces Delaware law. *Id.* § 5.02 cmt. a. The corresponding statutory safe harbor from invalidity applies only if "material facts … as to the … transaction are disclosed or are known to the board of directors or the committee." 8 *Del. C.* § 144(a)(1). If material facts about the transaction are not disclosed, the only remaining safe harbor is that the "transaction is fair to the corporation." *Id.* This Court's precedents dating back to *Mills Acquisition Co. v. Macmillan, Inc.*, 559

[10] Tentative Draft No. 2 states that it will be voted on by the membership of the American Law Institute by May 22, 2024.

A.2d 1261 (Del. 1989), provide that "fiduciaries, corporate or otherwise, may not use superior information or knowledge to mislead others in the performance of their fiduciary obligations." *Id.* at 1283, *quoted in City of Fort Myers Gen. Employees' Pension Fund v. Haley*, 235 A.3d 702, 718 (Del. 2020).

Macmillan cited common law fraud precedents when holding that senior officers committed "a fraud upon the board" by their "silence" at a "critical board meeting" respecting material tips to an affiliated bidder, which was "misleading and deceptive" and constituted "knowing concealment." 559 A.2d at 1282-83. *Macmillan* and its progeny impose no additional elements beyond those for common law fraud, with the Board, rather than the plaintiff, placing reasonable reliance on a fiduciary's disclosure of material facts.[11] "[W]hen a board is deceived by those who will gain from such misconduct, the protections girding the decision itself vanish." 559 A.2d at 1284. Entire fairness becomes the applicable standard. *Id.* at 1279.

The operative question is straightforward: is entire fairness review required due to Ellison not disclosing material information relating to the Acquisition? "'Material,' in this context, means that the information is 'relevant and of a magnitude to be important to directors in carrying out their fiduciary duty of care in

[11] *See also Firefighters' Pension Sys. of City of Kansas City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 273 n.15 (Del. Ch. 2021) (analogizing elements of non-fiduciary fraud on the board to common law fraud).

decisionmaking.'" *Haley*, 235 A.3d at 718 (quoting *Brehm v. Eisner*, 746 A.2d 244, 259 n.49 (Del. 2000)). Section 5.02 follows an authoritative opinion by Chancellor Allen, *Kahn v. Tremont Corp.*, 1996 WL 145452, requiring disclosure of all material facts relating to valuation:

> A review of cases applying the disclosure requirement supports the following generalizations:
>
> …
>
> (ii) the interested director or officer must disclose all ***material facts*** the director or officer knows ***relating to the use or value of the assets in question to the corporation itself***….; and
>
> (iii) the interested director or officer must disclose all ***material facts*** the director or officer knows ***relating to the market value of the subject matter of the proposed transaction*** (except when such facts are generally available and the fiduciary has no special knowledge regarding them). A director or officer would have to disclose, ***for example***, … ***technological changes that would affect the value of the asset in question*** to the corporation or to others.

§ 5.02 cmt. e (paraphrasing *Kahn v. Tremont*, 1996 WL 145452, at *16) (emphasis added). *See also In re BGC Partners, Inc. Deriv. Litig.*, 2022 WL 3581641, at *24 (Del. Ch. Aug. 19, 2022) (quoting *Kahn v. Tremont*), *aff'd*, 303 A.3d 337 (Del. 2023) (Order); *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *29 (Del. Ch. Aug. 27, 2015) (same).

Plaintiffs repeatedly urged the Vice Chancellor to apply the materiality test of *Kahn v. Tremont*. (A493; A596; A669.) Ellison/Catz avoided citing *Kahn v.*

Tremont. Instead, Ellison/Catz argued in favor of applying the dicta in *Pattern Energy*, which purports to impose the additional requirement that Plaintiffs establish that the Special Committee was "inattentive or ineffective." (A756-57.) No such requirement exists. "[J]udicial reluctance to assess the merits of a business decision ends in the face of illicit manipulation of a board's deliberative processes by self-interested corporate fiduciaries." *Macmillan*, 559 A.2d at 1279. In some cases, the "illicit manipulation of the Board's deliberative processes for self-interested purposes" may be "enabled, in part, by the Board's own lack of oversight[.]" *RBC Cap. Mkts., L.L.C. v Jervis*, 129 A.3d 816, 863 (Del. 2015).

Put differently, the absence of "reasonable inquiry" by disinterested directors would serve as a *separate reason* why disinterested director approval is ineffective. § 5.02(a)(1). "If the approval process is tainted in any way …, a court will review the transaction under the entire fairness standard … because there was no effective authorization by disinterested directors …." § 5.02 cmt. f.

The Vice Chancellor did not squarely analyze whether Ellison's undisclosed plan was material under *Kahn v. Tremont*. The Vice Chancellor concluded that because "Oracle followed its usual practice in M&A transactions," Ellison's thoughts "would have no impact on the Special Committee's deliberations and therefore were immaterial." Op. 88. On the related subject of Ellison's critique of

NetSuite's growth strategy, the Vice Chancellor pivoted to finding that "the Special Committee performed diligence and was not supine or naïve" and "brought their collective experience to bear in the performance of diligence." Op 85.

These findings are irrelevant because the Special Committee was unaware of Ellison's plan. Ellison "creat[ed] an informational vacuum" respecting Oracle's post-closing operation of NetSuite. *RBC*, 129 A.3d at 862. If Ellison had timely disclosed his plan and its rationale, Oracle management could have brought to bear its expertise in financial planning to create realistic projections. Entire fairness review should turn on the materiality (*i.e.*, the valuation impact) of Ellison's undisclosed plan.

IV. ELLISON'S UNDISCLOSED PLAN FOR OPERATING NETSUITE WAS MATERIAL TO THE ACQUISITION

A. Question Presented

Did the Vice Chancellor err in analyzing the materiality of Ellison's undisclosed plan for NetSuite? (A595-97; A669-70; Op. 87-92.)

B. Scope of Review

The materiality of an undisclosed fact involves mixed questions of law and fact, and in an appropriate case, this Court may review *de novo* mixed questions of law and fact, and in certain cases make its own findings of fact upon the record below. *Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996).

C. Merits of Argument

Under *Kahn v. Tremont*, Ellison's undisclosed plan for the operation of NetSuite was material to the Special Committee's decision. *Kahn v. Tremont* requires an interested fiduciary with special knowledge to disclose all material facts "relating to the use or value of the assets in question to the corporation itself" or "relating to the market value of the subject matter of the proposed transaction." 1996 WL 145452, at *16. The latter category includes knowledge of "technological changes that would affect the value of the asset in question to the corporation or to others," *id.*, which would encompass new competition from Fusion. If disclosed to

the Special Committee and analyzed, Ellison's plan would have dramatically reduced Oracle's valuation of NetSuite.

The Vice Chancellor ignored expert financial evidence that answers the question of materiality. Plaintiffs' valuation expert, J.T. Atkins, used Oracle's post-closing operating budget and contemporaneous revenue projections for NetSuite as a starting point for his DCF analysis, which arrived at a concluded value of $74.58. (A1945, A1948-60; A1366-1373:2065-90 (Atkins).) The massive valuation differential between $74.58 and the Acquisition price of $109 attests to the materiality of Ellison's plans. Atkins discussed how the operating budget, compared to the Special Committee projections, "had lower revenues while having higher cost to achieve those revenues," as it reflected Ellison's plan for NetSuite to focus on smaller companies and to increase research and development spending and sales and marketing spending as a percentage of revenues. (A1366-69:2065-71.) Atkins also plotted NetSuite's post-Acquisition performance through fiscal year 2020 (A1965-73),[12] and explained that NetSuite's post-Acquisition operating income provided "great comfort that using the budget-based projections is far better than using the Special Committee projections" for purposes of a DCF valuation. (A1375:2101.)

[12] *See Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 499 (Del. 2000) ("post-merger evidence is admissible to show that plans in effect at the time of the merger have born fruition").

Delaware law recognizes the materiality to stockholders of the best estimate of a company's projected future cash flows. *Maric Cap. Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010); *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 203 (Del. Ch. 2007). Information material to stockholders is often material to directors, given directors' "unremitting obligation to deal candidly with their fellow directors." *Haley*, 235 A.3d at 720 (quoting *Morrison v. Berry*, 191 A.3d 268, 284 (Del. 2018)). In the squeeze-out context, management must supply a special committee with management's current, best projections. *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *30 (Del. Ch. Aug. 27, 2015); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *13 (Del. Ch. May 3, 2004). Here, Ellison concealed his post-closing plan, which prevented Oracle management from creating realistic cash flow projections for the Special Committee.

Without analyzing the valuation import of Ellison's plan, the Vice Chancellor erroneously concluded that "Ellison's thoughts on the post-close running of NetSuite, addressed to Goldberg or otherwise, would have had no impact on the Special Committee's deliberations and therefore were immaterial." Op. 88. The only basis for this conclusion was Oracle's "usual practice in M&A transactions" of not creating an operating budget until after a deal is signed. Op. 88.

Oracle's "usual practice" does not involve situations in which Ellison has formulated his own undisclosed plan to operate a target company. Nothing about Oracle's standard process justifies Ellison's concealment of an operating plan. An Oracle financial model is supposed to be refined based on due diligence. (A1612.)

Catz supervised the creation of unrealistic projections based on a misapprehension of how Oracle would operate Netsuite. (A969:482-83 (Kehring); A1271:1685 (Catz).) The Special Committee projections were based on the false assumption that Oracle's scale would allow it to operate NetSuite more cheaply than NetSuite would otherwise operate. (A987-88:555-56 (Kehring).) Ellison's plan for NetSuite contemplated significant new costs to reach a large number of smaller customers (*i.e.*, investing money to build HCM functionality, make NetSuite usable in more countries, build new micro-verticals, and add sales personnel). (A1890-92; A1269-70:1679-81; A1331-32:1927-28 (Ellison).) Ellison's plan also meant jettisoning NetSuite's up-market sales force and the corresponding projected up-market revenues. (A1061:848 (Goldberg); A1281:1725-26 (Catz).) Kehring acknowledged that if he had been aware of a strategy to operate NetSuite less profitably than NetSuite operated historically, he would have modeled that new strategy. (A969:481.)

The Vice Chancellor concluded his analysis by stating that Oracle's post-closing investments in NetSuite were presumably not taken "to decrease Oracle/NetSuite's value." Op. 92. This comment miscomprehends the import of Ellison's plan. Ellison believed that NetSuite needed to abandon its up-market growth strategy in light of new competition from Fusion, and Ellison conceived and implemented a new strategic plan predicated on not competing with Fusion. (A1337-38:1951-52.) Essentially, Ellison's plan validated those bearish NetSuite stock analysts—at Société Générale, Barclays, Cowen, Macquarie, Goldman Sachs, Piper Jaffray, and Morgan Stanley—who assessed that Fusion posed a competitive threat and placed price targets on NetSuite between $60 and $76. (A1980-82.) The Vice Chancellor ignored that evidence of the materiality of Ellison's plan.

The Vice Chancellor did not analyze competition between Fusion and NetSuite through the prism of valuation. Instead, the Vice Chancellor concluded that Oracle and NetSuite "were not significant competitors," they "competed at the margins" and "excelled in different markets," "there was no indication that NetSuite's win rate against Oracle was on a downward trend," competition in the cloud segment had an "ambiguous nature," "the Special Committee was briefed and aware of the two companies' positions within the market," and "NetSuite was in the process of implementing" Ellison's critique and had "tempered its indiscriminate

move upmarket." Op. 77, 81, 82, 84, 85, 98. None of these findings refute the valuation import of Ellison's undisclosed plan. Data summaries about the extent of recent competition do not speak to the materiality of changing NetSuite's growth strategy.

Two of the above-quoted factual findings are not supported by the record.

First, the Vice Chancellor found that the Special Committee was "apprised of the level of competition between NetSuite and Oracle" and "briefed and aware of the companies' positions within the market." Op. 98. But as discussed in Section E of the Statement of Facts, Oracle management did not provide the Special Committee or Moelis with any data on competition (A1494-95:2573-76 (Goldstein)), and the members of the Special Committee and Moelis expressed consternation about the notion that Fusion and NetSuite competed for any of the same customers (A1161:1249 (James); A874:101 (Conrades); A1479:2514 (Goldstein); A813:82 (Panetta)). The Vice Chancellor improperly relied on Moelis's one-time provision of analyst reports containing information on competition that the Special Committee did not discuss or read. (A1707; A1722; A1782; A832-33:195-97, 203-04 (James); A828-29:85-86 (Conrades).)

Second, the Vice Chancellor found that NetSuite had "tempered its indiscriminate move upmarket" and "was in the process of implementing" Ellison's

critiques." Op. 77, 84. But as discussed in Section F of the Statement of Facts, NetSuite senior management had not implemented Ellison's critique that NetSuite could not compete successfully against Fusion in NetSuite's up-market. The Vice Chancellor pointed to the NetSuite initiative known as Atlas or SuiteSuccess, Op. 83, but that initiative was pursued in parallel with NetSuite's ongoing development of up-market financial functionality, such as OneWorld. (A1852.) Gill testified that NetSuite continued to develop functionality for larger customers and continued to view its up-market as a source of future growth. (A1030:724-25.) The vague testimony of Goldberg cited by the Vice Chancellor about which strategy received more "emphasis" is not to the contrary. (A1087:953; Op. 84.)

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court reverse the dismissal, remand this case for further proceedings under the entire fairness standard, and order production of the interview memos improperly withheld by the SLC.

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CERTIFICATE OF SERVICE

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