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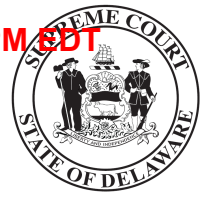

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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' REPLY BRIEF

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DATED: June 25, 2024

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PRELIMINARY STATEMENT

This is an appeal from a post-trial dismissal under the business judgment rule of a challenge to a conflicted acquisition. The answering briefs[1] help make clear that the appeal presents three issues of law as applied to core facts that were (i) found by the Vice Chancellor, (ii) admitted by Ellison or Catz, and/or (iii) essentially undisputed:

1. Was the SLC entitled to withhold its interview memos from the counsel selected by the SLC to litigate Oracle's claims, thereby preventing Plaintiffs' counsel from deposing and cross-examining Ellison and his lieutenants based on their recorded recollections, (i) without the SLC having tendered a business justification for withholding the interview memos, (ii) without a judicial finding that the SLC acted in good faith or reasonably in withholding them, and despite (iii) one key interviewee having died and (iv) the SLC having educated Ellison/Catz through confidential mediation statements about the facts gathered by the SLC, without any similar summary document having been provided by the SLC to its chosen litigation counsel?

[1] The respective answering briefs of Ellison/Catz and the SLC are cited herein as "E/C __" and "SLC __". Plaintiffs' opening brief is cited herein as "POB __".

2. Did the Vice Chancellor err in concluding that Ellison—Oracle's founder, Chairman, CTO, "visionary leader," and 28% stockholder—was not a controlling stockholder, despite (i) the Vice Chancellor having found that he "likely had the *potential* to control the transaction at issue," Op. 74, and (ii) the Vice Chancellor having quoted, but not followed or distinguished, *In re Cysive, Inc. Shareholders Litigation*, which applied the following test: "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 531, 553 (Del. Ch. 2003) (emphasis added).

3. Was the Acquisition protected by the business judgment rule despite Ellison having withheld from Oracle management and the Special Committee a set of material facts bearing on NetSuite's valuation—*i.e.*, Ellison's plan to change NetSuite's strategic direction and product positioning vis-à-vis Oracle Fusion, including a new focus on rapid international growth, broader functionality, and mass marketing aimed at smaller customers—thereby preventing the presentation to the Special Committee of realistic cash flow projections for NetSuite under Oracle control?

ARGUMENT

I. THE VICE CHANCELLOR COMMITTED REVERSIBLE ERROR BY ALLOWING THE SLC TO WITHOLD ITS INTERVIEW MEMOS FROM ITS SELECTED LITIGATION COUNSEL

Argument I of Plaintiffs' opening brief explained how the Vice Chancellor erred as a matter of law in allowing the SLC to withhold its interview memos from Plaintiffs, thereby impairing the prosecution of Oracle's claims by the SLC's chosen counsel. The Vice Chancellor's denial of Plaintiff's motions to obtain the SLC interview memos is inconsistent with:

(i) *Zapata*'s enhanced scrutiny of SLC determinations that impair litigation of derivative claims;

(ii) Court of Chancery precedent restricting assertions of work product doctrine and attorney-client privilege as to interview memos in derivative litigation; and

(iii) waiver, given the SLC's provision of post-investigation mediation statements to Ellison/Catz.

The derivative claims against Ellison and Catz turn significantly on the credibility and recollections of Ellison and his present and former lieutenants at Oracle and NetSuite. Plaintiffs were forced to depose and cross-examine these witnesses without the benefit of "fertile impeachment material" in the interview

memos. 7/9/20 Op. 16. The Vice Chancellor similarly lacked this information when making factual findings about the credibility of Nelson and Catz respecting their January 2016 discussion of price, and when making factual findings about the role of Hurd, which bear on whether Ellison acted as a controller. (POB 38-40.)

This brief replies on these issues, and also responds to the new argument of Ellison/Catz and the SLC that Plaintiff purportedly waived any argument respecting the import of the unavailability of Hurd, who died in 2019 (E/C 29; SLC 30-32), as well as the new argument of Ellison/Catz that any error respecting the interview memos should be deemed harmless. (E/C 30.)

A. Hurd's Unavailability Was Fairly Presented Below

The Vice Chancellor upheld the SLC's invocation of attorney/client privilege and work product doctrine because Plaintiff's counsel "will have the opportunity to depose almost all of the SLC's interview subjects." 7/9/20 Op. 16. This "almost all" formulation is explained in a footnote:

> The Lead Plaintiff does note that two interview subjects—Hurd and former Oracle director Hector Garcia-Molina—have since died. However, the Lead Plaintiff has failed to argue substantial need and undue hardship specifically regarding Hurd's and Garcia-Molina's interview memoranda.

Id. 16 n.61.

The SLC and Ellison/Catz interpret footnote 61 as a finding that Plaintiff waived any argument about Hurd. (E/C 29; SLC 25 n.6, 30-31.) Footnote 61 actually reflects that the significance of Hurd's unavailability was argued below. The "mere raising of the issue is sufficient to preserve it for appeal." *Watkins v. Beatrice Cos., Inc.*, 560 A.2d 1016, 1020 (Del. 1989). The SLC and the Defendants had a "fair chance" to respond below respecting the significance of Hurd's unavailability. *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017).

Plaintiff's motion to compel production of the interview memos argued that Plaintiff had a "substantial need" for them under Court of Chancery Rule 26(b)(3). (A318-21.) In doing so, Plaintiff argued lack of access to what Hurd told the SLC:

> Lead Plaintiff lacks any insight into what the 37 interviewees told the SLC's counsel…. Interviewee and former Oracle CEO Mark Hurd is deceased. Absent production of the interview memos, the evidentiary value of what the 37 interviewees told the SLC's counsel is forever lost. Avoiding that loss presents a "substantial need."

(A321 ¶30.) Plaintiff's reply in support of the same motion argued specifically that the SLC had no basis to withhold Hurd's interview memo:

> The SLC does not mention that former CEO Mark Hurd and former director Hector Garcia-Molina both died in late 2019. It is hardly Plaintiffs' fault that we lack their deposition testimony. Yet, the SLC refuses to produce their interview memos and claims privilege over what former [CEO] Hurd told the SLC's counsel.

(AR4-5.) At oral argument on the same motion, Plaintiff's counsel emphasized that the SLC's position could not be squared with the SLC's unwillingness to produce Hurd's interview memo:

> And the undue hardship of not having – you know, they're not even willing to turn over interview memos of witnesses who died, the former CEO, Mark Hurd; Mr. Garcia-Molina, the outside director who's been on this board for a long time. So, even their argument, like, "Oh, you can just depose these people," they know that's not even true; but they just have this blockade of, like, "We're not willingly turning over anything, period. We're not willingly turning over anything."

(B3675-76.)

The Vice Chancellor asked the SLC's counsel to address "the distinction between those witnesses who are available to the plaintiff and those witnesses who would be poor deposition subjects because they're dead." (B3687.) The SLC's counsel responded that Plaintiff's counsel had not "made a separate argument" as to the deceased interviewees, while acknowledging that "there very well may be a better argument that could be made for those witnesses." (B3688.) In reply, Plaintiff's counsel noted that no SLC member had attended any interview other than Ellison or Catz, which eliminated any alternative source of information about what Hurd had said. (B3702.)

This back and forth demonstrates that the legal significance of Hurd's unavailability was fairly presented in the Court of Chancery. Plaintiff made the

readily apparent "separate argument" that Hurd's recollections could only be obtained from his interview memo.

B. Erroneous Withholding of the Interview Memos Is Not Harmless

Plaintiffs' opening brief described two ways in which the Vice Chancellor's factual findings could be undermined by production of the SLC interview memos: (i) the interview memos of Catz and Nelson could undermine the Vice Chancellor's credibility findings about what Catz and Nelson said to each other about deal price in January 2016; and (ii) the interview memos of Hurd, Catz, and Ellison could undercut the Vice Chancellor's factual findings respecting Hurd's role in the Acquisition. (POB 3-4, 39, 40-41.) Ellison/Catz argue that non-production of the interview memos on these subjects—whatever they may say—can only constitute "harmless error." (E/C 30.) This argument is untenable.

"Error is harmless if it would not substantively affect the outcome of the proceedings or a party's substantive rights." *Walls v. Ford Motor Co.*, 2017 WL 1422626, *4, 160 A.3d 1135 (Del. Apr. 21, 2017) (Table). The beneficiary of the error bears the "burden to demonstrate that any error was harmless." *Hansley v. State*, 104 A.3d 833, 837 (Del. 2014). This Court has explained its task as follows:

> [W]hen reviewing claims for harmless error, the reviewing court considers the probability that an error affected the [factfinder's] decision. To do this, it must study the record to ascertain the probable

> impact of error in the context of the entire trial. As a result, any harmless error analysis is a case-specific, fact-intensive enterprise. This approach indicates that the reviewing court must consider both the importance of the error and the strength of the other evidence presented at trial.

Id. (cleaned up).

The procedural posture is a post-trial dismissal under the business judgment rule. Ellison/Catz must establish that the withheld interview memos likely would not undermine factual findings underlying the conclusions that (i) Ellison did not exercise control over Oracle or the Acquisition or (ii) neither Ellison nor Catz materially misled the Special Committee. Op. 100. Ellison/Catz cannot meet this burden.

As to Hurd, Ellison/Catz do not argue harmless error. They only argue that the issue of Hurd's interview memo is waived. (E/C 31.) But that is incorrect, as discussed above. Contrary to any suggestion of harmless error, Ellison/Catz repeatedly invoke Hurd, seemingly to enhance his role and thereby diminish Ellison's stature. Ellison/Catz quote the Vice Chancellor about how Hurd was "not 'cowed or overawed' by Ellison." (*Id.* 8.) Ellison/Catz also characterize Hurd's role in February 2015 in "determining that the timing was not right" to acquire NetSuite (*id.* 11; *see id.* 43), Hurd's role in discussing with Catz and Ellison a potential acquisition of NetSuite in January 2016 (*id.* 43), Hurd's supposed decision whether

to "retain NetSuite management and run NetSuite as a separate business unit within Oracle" (*id.* 44, 51), "Hurd's responsibility to decide" how to operate NetSuite post-closing (*id.* 51), and "Hurd's post-closing directive to grow NetSuite's revenues as fast as possible, even if it lowered profits in the short term" (*id.* 22). Hurd and other interviewees presumably were asked about the virtually undocumented question of Hurd's actual role.

As to Catz and Nelson's discussion of price in January 2016, the Vice Chancellor found that "Catz and Nelson did not negotiate a price for NetSuite," and that, "[w]hile Catz should have informed the Committee of the 'Concur multiple' suggested by Nelson, Catz's actions did not materially mislead the Oracle Special Committee or corrupt its proceedings." Op. 96-97. Ellison/Catz incorrectly state that "Plaintiffs do not challenge" the Vice Chancellor's factual finding that there was no "anchoring conversation" between Catz and Nelson. (E/C 31.)

The operative question is whether the withheld interview memos of Catz and Nelson could create a basis for challenging the Vice Chancellor's fact-finding about what Catz and Nelson said to each other. Catz had been instructed by the Board not to discuss price with NetSuite, and she told the Board that price had not been discussed. (POB 40.) Yet, near-contemporaneous writings reference their discussion of a price range between $100 and $125, which Catz and Nelson

characterized as a reference to the "Concur multiple." Op. 17. A supplemented record could allow for a finding that Catz and Nelson actually "set the field of play for the economic negotiations to come by fixing the range in which offers and counteroffers might be made." *Olenik v. Lodzinski*, 208 A.3d 704, 717 (Del. 2019). Such a finding would preclude a business judgment rule dismissal.

C. The Vice Chancellor Erred

The answering briefs cite no contrary authority respecting the three legal doctrines discussed in Plaintiffs' opening brief.

1. *Zapata* Scrutiny

The SLC does not cite any judicial authority or secondary authority supporting business judgment review of an SLC determination that impairs prosecution of a derivative claim. (SLC 24-26.)

When an SLC determines to seek dismissal of a derivative claim, *Zapata* has been interpreted to allow discovery into "the quality of the Committee's determinations, as well as the Committee's compliance with the good faith and independence requirement," which encompasses "all documents reviewed and relied upon by the Committee," including "transcripts, notes and summaries of witness interviews conducted by the Committee." *Kindt v. Lund*, 2001 WL 1671438, *2 (Del. Ch. Dec. 14, 2001).

Zapata enhanced scrutiny also applies when an SLC determines to propose a settlement of a derivative claim. *Carlton Invs. v. TLC Beatrice Int'l Hldgs., Inc.*, 1997 WL 305829, *2 (Del. Ch. May 30, 1997). The permissible scope of discovery into an SLC's determination to settle includes documents provided to the members of the SLC and interview memoranda redacted for opinion work product. *Sandys v. Pincus*, 2018 WL 3431457, *1 (Del.Ch. July 13, 2018).

Here, the SLC made three distinct determinations: (i) Oracle's claims against Ellison/Catz had to be litigated; (ii) Plaintiff should litigate them; (iii) the SLC would not provide any documents to Plaintiff. (SLC 10-11.) Judicial intervention was needed for Plaintiff to obtain several hundred documents that the members of the SLC had reviewed and relied upon in reaching their determination that Plaintiff should litigate the claims. (12/14/19 Op. 47; SLC 14.) Apart from those underlying documents, the Vice Chancellor deferred to "the business judgment of the SLC" to withhold its interview memos. 7/9/20 Op. 26. The Vice Chancellor applied no scrutiny to the SLC's decision beyond that the SLC "may well have good faith reasons to keep the work product done on the SLC's behalf confidential." *Id.*

This deference was unwarranted. The SLC's determination not to share any documents with Plaintiff's counsel called into question the SLC's good faith. An SLC's determination that corporate claims need to be litigated cannot eliminate

scrutiny of an SLC's good faith in making determinations about how the claims are prosecuted. Otherwise, an SLC would have license to litigate the case itself and instruct its counsel not to use the SLC's interview memos. Or the SLC could retain new litigation counsel and withhold the SLC's interview memos from that counsel. Functionally, that is what the SLC did. The SLC forced Plaintiff to litigate Oracle's claims without the benefit of the SLC's interview memos.

The SLC asserts, without explanation, that withholding impeachment material does not impair prosecution of Oracle's claims. (SLC 24-25.) The SLC offers no response to the treatise about how a utility of SLC interview memos is that they create a basis for impeachment: "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).

The SLC offers no rationale for why its good faith should not be assessed. The SLC says only that such judicial inquiry "threaten[s] to set aside any remaining deference to the committee's independent business judgment[.]" (SLC 25.) *Zapata* inquiry is premised on the idea that an SLC cannot be trusted respecting the disposition of well-pleaded derivative claims. "The corporation should have the burden of proving independence, good faith and a reasonable investigation, rather

than presuming independence, good faith and reasonableness." *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788 (Del. 1981).

The SLC's determination to withhold all documents from Plaintiff, including the interview memos, cannot withstand inquiry into the SLC's good faith. The SLC offers no good-faith justification for its determination. The SLC does not dispute that it was under pressure from Ellison/Catz and Oracle senior management. A senior Oracle executive proclaimed publicly that the claims were meritless, and Ellison/Catz and Oracle joined in seeking to block discovery by Plaintiff from the SLC. (POB 34.) SLC Chair Parrett claimed not to understand that the SLC could have litigated the claims and used its interview memos for impeachment purposes: "Never thought about it that way." (A343:55; POB 35.) Parrett was instructed by the SLC's counsel not to testify about his business understanding of why it was in Oracle's best interest to withhold the interview memos. (A344-45.)

The SLC makes no effort to support the Vice Chancellor's suggestion that the good faith of an SLC should be litigated in a separate action that names the members of the SLC as defendants. (SLC 26 n.7; 7/9/20 Op. 26-27.) *Zapata* supplies an appropriate framework for testing the SLC's good faith.

2. Plaintiffs' Substantial Need and Good Cause for the Interview Memos (Redacted for Opinion Work Product)

As discussed above and in the opening brief, there is no blanket protection of non-opinion work product in interview memos prepared during derivative litigation. The result is the same regardless of the applicability of *Zapata*, either under the *Garner* exception to the attorney-client privilege or the work product doctrine.

In *Ryan v. Gifford*, 2007 WL 4259557, *4 (Del. Ch. Nov. 30, 2007), Chancellor Chandler ordered *in camera* inspection of interview notes from a non-SLC special committee investigation. Contrary to the SLC's suggestion (SLC 29-30), *Ryan v. Gifford* did not turn on any difference between a "good cause" analysis under *Garner* and a "substantial need" analysis under Court of Chancery Rule 26(b)(3). *See Ryan v. Gifford*, 2008 WL 43699, *4 n.9 (Del. Ch. Jan. 2, 2008) ("The Court also directed Orrick to turn over its work-product, including its interview notes, for *in camera* review. Orrick does not seek to appeal any aspect of this Court's ruling, including the ruling that plaintiffs have made a showing of good cause to obtain its non-opinion work product.").

Ellison/Catz and the SLC cite *Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co.*, 2018 WL 346036 (Del. Ch. Jan. 10, 2018), which did not involve interview memos, a board committee investigation, or a derivative claim. The

plaintiff sought "about 1200 documents" containing legal advice sought by a controlling stockholder "in connection with the sale of the company, the 2011 self-tender, and various restructuring options that were considered around this time." *Id.* at *5. Here, Plaintiffs seek documentation of what witnesses told the SLC's counsel, to facilitate effective cross-examination of those witnesses in SLC-authorized litigation.

The SLC cites *Hickman v. Taylor*, 329 U.S. 495 (1947), the case that led to the adoption of the 1970 amendments of Federal Rule of Civil Procedure 26 and Court of Chancery Rule 26 respecting the work product doctrine. *Clausen v. Nat'l Grange Mut. Ins. Co.*, 730 A.2d 133, 139 (Del. Super. Ct. 1997). *Hickman* is inapt. It involved witness statements "secured by an adverse party's counsel in the course of preparation for possible litigation," 329 U.S. at 497, not information obtained by a board committee during derivative litigation.

3. The SLC's Waiver

Ellison/Catz contend that "summarizing information from witness interviews in mediation statements" does not operate as a waiver of work product immunity. (E/C 29-30.) They rely on a single case that is readily distinguishable, *United States v. Omnicare, Inc.*, 2023 WL 7297152 (S.D.N.Y. Nov. 6, 2023).

In *Omnicare*, a *qui tam* action, the company sought to compel the federal government to produce summaries of witness interviews of Omnicare employees. Omnicare argued waiver based on "the Government's relatively minimal reliance on a handful of witness interviews in the complaint." *Id.* at *1. That "minimal reliance" rendered waiver unfair. Additionally, waiver was rejected under the federal counterpart to D.R.E. 502(b) because the interviews did not involve the same subject matter:

> The witness summaries relate to factual information about the experiences of different Omnicare pharmacy employees who worked in different roles, at different pharmacies, during different time periods. Any statements by a particular witness paraphrased or referenced in the complaint would necessarily be specific to that individual's experience at his particular pharmacy.

Id.

Here, unlike *Omnicare*, the interview memos all relate to the same subject matter—the Acquisition. The interviewees worked together on the Acquisition. The interviewees included defendants Ellison and Catz, their fellow directors and subordinates at Oracle, and their counterparts at NetSuite. Moreover, it is reasonable to presume that the SLC's mediation statements drew heavily, not minimally, on facts learned from the SLC's interviews.

Additionally, Plaintiffs are not litigation adversaries of the SLC. (POB 38.) The SLC determined that Plaintiffs should litigate against Ellison/Catz on Oracle's behalf. In this context, waiver is not a "harsh result" that can only be necessitated by "the most egregious conduct." (SLC 34.) The SLC should have shared its interview memos with Plaintiffs voluntarily.

The SLC fails to distinguish *Ryan v. Gifford*, in which the "the relevant factual circumstances [included] the receipt of purportedly privileged information by the director defendants in their individual capacities from the Special Committee." 2008 WL 43699 at *5. The oral delivery of factual findings to individual defendants at a board meeting is analogous to the SLC's conveyance to Ellison/Catz of post-investigation mediation statements.

Finally, the SLC distracts by pointing to the confidentiality of mediation. (SLC 35-36.) Plaintiffs are seeking the interview memos, not the mediation statements. No public policy favors an SLC educating defendants about the results of an SLC investigation and then withholding information about the SLC's interviews from the counsel charged with prosecuting the corporation's claims.

II. THE VICE CHANCELLOR COMMITTED REVERSIBLE ERROR BY NOT RECOGNIZING THAT ELLISON'S ABILITY TO EXERCISE CONTROL OVER THE ACQUISITION AND ORACLE, IF HE CHOSE TO DO SO, RENDERS HIM A CONTROLLING STOCKHOLDER

Argument II of the opening brief argues that the Vice Chancellor misapplied the legal significance of his factual finding that Ellison "likely had the *potential* to control the transaction at issue." Op. 74 (emphasis in original); *see also id.* at 5 ("Ellison is a force at Oracle, no doubt …. he is a respected figure with the potential to assert influence over the directors …."), 58 ("I do find it, however, more likely than not that the [sic] Ellison could have exerted control as to particular transactions, if he had so desired. Ellison was so closely identified with Oracle that an insistence on a particular policy or result had the potential to sway the business judgment of the directors and the executives of Oracle."), 59 ("this potential control"), 60 ("he had the potential to influence the transaction"), 69 ("He was, I find by a preponderance of evidence, a holder of potential control over a transaction in which he was interested."). The Vice Chancellor quoted, but did not follow, *In re Cysive, Inc. Shareholders Litigation*:

> [T]he 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*. Carbonell has that capability and would be perceived as having such capability by

> rational independent directors, public stockholders, and other market participants.

836 A.2d 531, 553 (Del. Ch. 2003) (emphasis added), *quoted in part in* Op. 72.

Ellison/Catz argue that "Plaintiffs did not prove that Ellison possessed the extreme combination of voting and managerial powers found in *Cysive* to create actual control over the corporation." (E/C 38.) Ellison/Catz further argue that a finding of "potential control" is insufficient. (*Id.* 38-40.) Ellison/Catz misread *Cysive* and the Opinion.

Cysive did not use the phrase "potential control," but it is another way of describing the *Cysive* Court's reasoning respecting general control. The founder CEO of Cysive held "a large enough block of stock to be the dominant force in any contested Cysive election." 836 A.2d at 551-52. His voting power presented a "threat of 'inherent coercion' … to the independent directors and public stockholders …." *Id.* at 552. He was "involved in all aspects of the company's business, was the company's creator, and has been its inspirational force." *Id.* He possessed "potent retributive capacity." *Id.* at 553. His "combination of stock voting power and managerial authority … enables him to control the corporation, if he so wishes." *Id.* He was "perceived as having such capability." *Id.*

The Vice Chancellor did not distinguish *Cysive* or follow its analysis. The Vice Chancellor observed that the *Cysive* Court did not "assess the minority stockholder's actual control of the company," but rather looked to the factors quoted in the paragraph above. Op. 72. But instead of analyzing Ellison's "combination of stock voting power and managerial authority," *Cysive*, 836 A.2d at 553, the Vice Chancellor erroneously looked at each indicia of control in isolation: "[Ellison] neither possessed voting control, nor ran the company *de facto*. He likely had the *potential* to control the transaction at issue, but made no attempt to do so …." Op. 74.[2]

In concluding that Ellison "could have exerted control as to particular transactions, if he had so desired," *id.* 58, the Vice Chancellor looked at factors Plaintiffs had highlighted–Ellison's status as founder, Chairman, CTO, former CEO, and "visionary leader" with "control over Oracle's product direction," as well as his absolute and relative stock ownership, and the import of that voting block under Oracle's director majority voting policy, which made Ellison's block indispensable for the re-election of certain incumbent outside directors. *Id.* 56-57. This

[2] *Cf. Delaware County Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1021 (Del. 2015) (reversing Rule 23.1 determination that director was independent because Court of Chancery analyzed allegations of personal friendship and business relationship as "entirely separate issues" and "categorically distinct").

combination of factors is what *Cysive* contemplates.[3] As in *Cysive*, if Ellison "becomes dissatisfied with the independent directors, his voting power positions him well to elect a new slate more to his liking without having to attract much, if any, support from public stockholders." 836 A.2d at 552. As in *Cysive*, Ellison is "involved in all aspects of the company's business, was the company's creator, and has been its inspirational force." *Id.*[4]

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[3] *See Tornetta v. Musk*, 310 A.3d 430, 500 (Del. Ch. 2024) (quoting *Cysive* and stating: "The analysis of effective control looks to a stockholders' ability to exert influence as a stockholder, in the boardroom, and outside of the boardroom through managerial roles."); *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, *27 (Del. Ch. July 6, 2018) (citing *Cysive* for how broader indicia of effective control "include ownership of a significant equity stake (albeit less than a majority) … and the ability to exercise outsized influence in the board room, such as through high-status roles like CEO, Chairman, or founder"), *aff'd sub nom. Davenport v. Basho Techs. Holdco B, LLC*, 221 A.3d 100 (Del. 2019); *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 666 (Del. Ch. 2013) (distinguishing *Cysive* because alleged facts in combination did not suggest blockholder "could control the corporation, if it so wished") (cleaned up).

[4] *See, e.g.*, AR14-15 ("The most shocking thing about Thursday's bombshell announcement that Larry Ellison is stepping down as CEO of Oracle is how little will change…. The wondrous thing about Larry Ellison is that he's always done exactly what he wanted to do when he wanted to do it. Now he's turning over the keys to his prized company to two handpicked deputies. Just not completely."); A852:14 ("[Ellison] retained the product development function…. [R]eport is to him as the chief technology officer. But some of the things that – in sales or other things, that he used to be more concerned with as CEO, he delegated now to those – to those two.") (Henley).

The Vice Chancellor quoted Catz's public statements that Ellison is Oracle's "visionary leader," that she and Hurd were "good executors, good editors on his vision," and that she had no agenda other than "to make Oracle successful and to make his vision come true." Op. 58. Under *Cysive*, those admissions needed to be analyzed in "combination" with Ellison's voting power and his powers as Chairman and CTO to determine whether Ellison possessed a "capability" to exercise control "if he so wishes" and whether Ellison "would be perceived as having such capability by rational independent directors, public stockholders, and other market participants." 836 A.2d at 553. If the answer respecting Ellison's "capability" to exercise control is yes, then "it cannot be that the mere fact that [Ellison] did not interfere with the special committee is a reason to conclude that he is not a controlling stockholder." *Id.* at 552.

Ellison/Catz quote the line from *Williamson v. Cox Communications, Inc.*, 2006 WL 1586375, *5 (Del. Ch. June 5, 2006), and repeated in *Basho*, that "Delaware law requires actual control, not merely the potential to control[.]" That line in *Williamson* referred to the veto power of director designees of Cox Communications and Comcast Corporation respecting board decisions at At Home Corporation. The *Williamson* Court acknowledged that "Cox and Comcast's potential veto power is significant for analysis of the control issue" because it could

support a factual showing of their "coercive leverage over At Home." 2006 WL 1586375, *5. In other words, it matters whether a combination of factors about a stockholder would be perceived as a capability to exercise control. *See Basho*, 2018 WL 3326693, *27 n.322 ("[T]he explicit or *implicit threat of retaliation* will carry much more weight if it comes from a (hypothetical) defendant who controls 25% of the voting power of the company, has the right … to appoint one-third of the directors, and serves as Chairman of the Board with the power to call board meetings and set the agenda. Context matters.") (emphasis added).

Ellison/Catz point to the Vice Chancellor's conclusion that Ellison did not "exercise general control." (E/C 39-40.) That conclusion follows from the following finding: "The record does not show that he controlled the day-to-day function of Oracle, or dictated the operation of the company to the Board." Op. 58. That is not the test. Ellison need not have dictated the outcome of every business decision in Oracle history in order for Ellison to be perceived by senior management, rational outside directors, and market participants as capable of exercising control over Oracle, "if he so wishes." *Cysive*, 836 A.2d at 553. Ellison could rationally be viewed as possessing "potent retributive capacity," *id.,* in the event someone opposed pursuit of a conflict transaction Ellison favors from which he and his family stood to receive approximately $4 billion in proceeds.

Ellison/Catz make the same error as the Vice Chancellor by disaggregating the "holistic evaluation of sources of influence," *Tornetta*, 310 A.3d at 500, into a series of discrete arguments. (E/C 40-45.) Nonetheless, each point is addressed below:

First, as noted in *Tornetta*, 310 A.3d at 498 n.556, there exists abundant authority that permits a finding of control for a stockholder with holdings in the general vicinity of Ellison's 28% stake, including the "presumption of control" at 20% found in 8 *Del. C.* § 203(c)(4) for purposes of that statute.[5] Ellison/Catz do not dispute that Ellison's voting block was indispensable for the re-election of incumbent outside directors who sat on the Compensation Committee. (E/C 41.)

Second, as discussed above, Ellison's admission that he has always been the "key strategic visionary" at Oracle, as well as being Oracle's largest stockholder "by far" (A1318:1874-75; POB 44), is a factor in favor of a finding of control, similar to the founder CEO of Cysive, who was that company's "inspirational force." *Cysive*, 836 A.2d at 552. Catz's description of Ellison as "the visionary, product visionary, of Oracle" (A1275:1701; POB 16) meant that no inside director or senior manager

[5] *See* Travis Laster, *Wondering About "Control"? The General Assembly Already Defined It.*, LinkedIn (Feb. 4, 2024), https://www.linkedin.com/pulse/wondering-control-general-assembly-already-defined-travis-laster-4czme/?trackingId=tLAUAlryucM21AuXQo9AYA%3D%3D.

possessed the authority to overrule Ellison about the product positioning of Fusion and NetSuite. The absence of any serious investigation into the strategic and valuation implications for NetSuite resulting from the rollout of Fusion, in connection with a multi-billion-dollar conflict transaction, is itself a reflection of Ellison's control of Oracle. (*See* POB 11-21, 23-24, 46.)

Third, the initiation and timing of the Acquisition is evidence of Ellison's control. "Ellison had been a longtime, vocal proponent of a merger with NetSuite." Op. 62. In Ellison's own words, "it's a matter of the right time," and he told Catz in January 2016 that "the time is now." (A1345:1980, 1982; POB 14-15.)

Fourth, Ellison's January 27, 2016 call with Goldberg is further evidence of Ellison's control. It shows that Ellison possessed the authority to make assurances to Goldberg about Oracle's post-closing operation of NetSuite (POB 15-16), including that Goldberg could report to Ellison if he chose. (A1270:1680 ("If you don't want to report to Mark Hurd, you can report to me. It's up to you.").) At the time of the deal announcement, in response to a concern expressed by a NetSuite colleague that Hurd had made it sound as if the consulting operations of Oracle and NetSuite would be combined, Goldberg texted: "I don't think mark understands it yet and Larry hasn't chimed in. If he's true to his word it will remain separate." (A1854.)

Fifth, Catz's prominent role in advising the Special Committee about projections, valuation, the strategic landscape, and negotiation strategy—despite her lack of independence from Ellison (POB 45)—is further evidence of Ellison's control over Oracle and the Acquisition.

The Vice Chancellor erred in not evaluating control based on "the totality of the facts and circumstances, considered in the aggregate," including "general indicia of control" and the "transaction-specific considerations." *Basho*, 2018 WL 3326693, *28. Applying *Cysive*, Ellison was a controlling stockholder because he was capable of controlling Oracle and the Acquisition "if he so wishes," and he was rationally perceived as having that capability. 836 A.2d at 553.

III. THE VICE CHANCELLOR COMMITTED REVERSIBLE ERROR BY GRANTING A BUSINESS JUDGMENT RULE DISMISSAL DESPITE ELLISON'S FAILURE TO DISCLOSE HIS PLAN FOR OPERATING NETSUITE

A. Material Non-Disclosures Trigger Entire Fairness Review

Ellison/Catz make little effort to support the legal framework of the Vice Chancellor (E/C 46-49)—that they could obtain a business judgment rule dismissal without Ellison disclosing material facts in his possession bearing on the value of NetSuite, so long as the Special Committee was not "inattentive or ineffective" or "supine," or so long as Oracle was following its "usual practice in M&A transactions." Op. 75, 87. This is not the law. (POB 48-53.)

Ellison/Catz do not mention 8 *Del. C.* § 144, which provides that a conflict transaction may be voidable absent a finding of fairness if all "material facts … as to the … transaction" were not disclosed to the board committee. Nor do Ellison/Catz mention *City of Fort Myers Gen. Employees' Pension Fund v. Haley*, 235 A.3d 702, 718 (Del. 2020), which reaffirms the statement in *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1989), that "fiduciaries, corporate or otherwise, may not use superior information or knowledge to mislead others in the performance of their fiduciary obligations." *See also id.* at 1279 ("judicial 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"). Ellison/Catz similarly ignore Section 5.02 of the *Restatement of the Law Corporate Governance* (Tentative Draft No. 2, Mar. 2024),[6] which follows 8 *Del. C.* § 144 and *Macmillan*, as well as *Kahn v. Tremont Corp.*, 1996 WL 145452, *16 (Del. Ch. Mar. 21, 1996), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997), by predicating compliance with the duty of loyalty on a finding of either (i) full disclosure by a conflicted fiduciary of all material facts relating to valuation or (ii) fairness. *See* § 5.02 cmts. a & e.

Ellison/Catz miscomprehend the import of *Kahn v. Tremont*. (E/C Br. 48-49.) Chancellor Allen's opinion is influential respecting the formulation of the materiality standard in the context of a conflict transaction. The Vice Chancellor improperly failed to follow *Kahn v. Tremont* and analyze whether Ellison's plan for the post-closing operation of NetSuite was a material fact relating either to (i) the use or value of NetSuite to Oracle or (ii) the market value of NetSuite. (POB 51-52, 54.)

Ellison/Catz make little effort to develop a proposed alternative rationale for dismissal not reached by the Vice Chancellor—that Ellison's "recusal" (E/C 51) meant that he was protected under Delaware law for having "totally abstain[ed] from

[6] On May 22, 2024, the ALI membership voted to approve Tentative Draft No. 2. The American Law Institute, *Daily Update – Wednesday, May 22*, https://www.ali.org/annual-meeting-2024/updates/wednesday-may-22/.

participation in the matter." (E/C 46 (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).) Abstention is unavailable when a fiduciary "played any role, open or surreptitious, in formulating, negotiating or facilitating the transaction complained of." *In re Tri-Star Pictures, Inc., Litig.*, 1995 WL 106520, at *3 (Del. Ch. Mar. 9, 1995). *See also In re Coty Inc. S'holder Litig.*, 2020 WL 4743515, *9-10 (Del. Ch. Aug. 17, 2020) (discussing *Tri-Star* and "totally abstain" standard). Ellison surreptitiously formulated the Acquisition, and he surreptitiously induced Goldberg to support it. (POB 14-16; Op. 10, 19, 92-94.)

Ellison/Catz incorrectly cite *In re Tesla Motors, Inc. Stockholder Litigation*, 298 A.3d 667 (Del. 2023), for the proposition that it "instruct[s] conflicted fiduciaries" to provide "targeted input only when asked to do so." (E/C 46 (quoting 298 A.3d at 708 and omitting internal quotation of *In re Tesla Motors, Inc. S'holder Litig.*, 2022 WL 1237185, *33 n.397 (Del. Ch. Apr. 27, 2022)). In fact, this Court clarified the advice of the Court of Chancery,[7] to note the importance of obtaining "the technical expertise and strategic vision and perspectives" of a conflicted fiduciary:

[7] The full sentence from the Court of Chancery stated: "First and foremost, Elon should have stepped away from the Tesla Board's consideration of the Acquisition entirely, providing targeted input only when asked to do so under clearly recorded protocols." 2022 WL 1237185, at *33 n.397.

> [W]e also recognize that there may be reasons why a board decides not to employ such devices, including transaction execution risk. Also, a board may wish to maintain some flexibility in the process, as the Tesla Board did here, by having the ability to access the technical expertise and strategic vision and perspectives of the controller.[191]
>
> [191] This is not to say that such access cannot be achieved effectively where a special negotiating committee and proper protocols have been established. *See, e.g.*, *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1, 12, 30 (Del. 2017) (noting that, although not a controlling stockholder, Michael Dell — who had 15% of the equity and pledged that his voting power would go to any higher bidder, voting in proportion to other shares — was available to all parties throughout the go-shop period).

Tesla, 298 A.3d at 709 & n.191.

Hornbook law, as reflected in Section 5.02 and *Macmillan* and its progeny, imposed an affirmative, unremitting duty of disclosure on Ellison, as a conflicted Oracle fiduciary who had not totally abstained from participating in the Acquisition, to disclose all material facts relating to the value of NetSuite. As discussed below and in Argument IV of Plaintiffs' opening brief, Ellison's failure to disclose his plan for Oracle's post-closing operation of NetSuite precludes dismissal under the business judgment rule.

B. The Materiality of Ellison's Plan for Operating NetSuite

Ellison/Catz ignore the cases cited by Plaintiffs about the importance of management disclosing its best estimate of projected future cash flows to a special committee. (POB 56.) As stated in two of the cited cases:

> Accurate and up-to-date information about the company's financial performance is particularly important to a committee's work. Withholding the company's latest projections, and knowledge of their existence, from the Special Committee and its advisors is, without more, enough to render the Special Committee ineffective as a bargaining agent for the minority stockholders.

In re Dole Food Co., Inc. S'holder Litig., 2015 WL 5052214, at *30 (Del. Ch. Aug. 27, 2015) (internal quotation omitted of *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, *35 (Del. Ch. May 3, 2004)) (cleaned up).[8] In *Dole*, management "constructed a set of projections that contained falsely low numbers." 2015 WL 5052214, *30. In *Emerging Communications*, the controller withheld the most recent projections from the special committee. 2004 WL 1305745, *35.

What Ellison did on the buy side is functionally no different. He failed to disclose business strategies that he planned to impose on NetSuite post-closing,

[8] *See also Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 362 (Del. 1997) (valuation as of merger date should incorporate "factors which will likely occur post-merger"); *Maric Cap. Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010) ("management's best estimate of the future cash flow of a corporation that is proposed to be sold in a cash merger is clearly material information").

given his own beliefs about NetSuite's appropriate target market and the successful, ongoing roll-out of Fusion. Ellison's non-disclosure enabled Oracle management to present cash flow projections that unrealistically "assumed rapid growth while slashing costs." (POB 24; *see also id.* 22.) Whether characterized as Ellison's "plan" or his "unsolicited and non-binding opinions about the best way to operate NetSuite post-acquisition" (E/C 51), Ellison's input was needed to create realistic projections and thus realistic valuations of NetSuite under Oracle control. *Dole* refutes the notion that Ellison was entitled to "deliberately withhold material information" bearing on management's projections. 2015 WL 5052214, *30.

Ellison/Catz cite no law or record evidence supporting the Vice Chancellor's reasoning that because "Oracle followed its usual practice in M&A transactions" it somehow follows that "Ellison's thoughts on the post-close running of NetSuite … would have had no impact on the Special Committee's deliberations and therefore were immaterial." (Op. 88; *see* E/C 51.) It is of no consequence that Oracle typically waits until after a deal is signed to decide upon "post-close plans and structuring." (Op. 88.) The Acquisition was atypical.

Ellison was the co-founder and controlling stockholder of NetSuite. (A389 ¶48; A391 ¶57.) He advised NetSuite senior management on product strategy, based in large part on Ellison's knowledge about Oracle's roll-out of Fusion. (POB 11,

13-14, 16-17, 20.) Ellison's insight into both companies led him to conclude that NetSuite should pursue specific strategies: build out HCM and CRM functionality; target more industry micro-verticals; grow rapidly internationally; hire more salespeople; focus on smaller customers; and cease NetSuite's push up-market. (*Id.* 11-14, 15-16, 20, 23.)

Oracle typically lacks this insight into a potential acquisition. Catz and Kehring created projections for the Special Committee based on high-level assumptions grounded in Oracle's historic ability to operate an acquired company at significantly lower incremental costs. (*Id.* 21-22, 24, 69.) There is no basis to conclude that Catz and Kehring would stick to these generic assumptions if told about Ellison's NetSuite-specific insights. Kehring testified that he would model a new strategy if he was made aware of it. (*Id.* 57; A969:481-82.)

The final five pages of the Ellison/Catz brief amount to a fact-based argument that Ellison's undisclosed post-closing plans would not be material to the Special Committee's deliberations. (E/C 46-47, 52-56.) Two points refute this argument.

First, Ellison/Catz make no effort to undermine the Statement of Facts in Plaintiffs' opening brief. There is no dispute that the Special Committee projections did not reflect how Ellison intended to change NetSuite's product strategy and product positioning by expanding NetSuite's functionality (*e.g.*, adding HCM and

CRM and multi-country functionality) and by focusing on smaller customers. As Goldberg summarized the changes for the Board six months post-closing:

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

(A1906; B3478; POB 24; *see* A1061:849 ("I'll definitely agree that there was a push [upmarket].") (Goldberg); A1697 (touting "Winning Growth Strategy" of "Moving up market and going global with OneWorld").)

Second, Ellison/Catz have no answer to the Vice Chancellor's failure to engage with Plaintiffs' expert financial evidence bearing on the materiality of Ellison's plan, which they mischaracterize as putting "the cart before the horse." (E/C 53.) *Kahn v. Tremont* requires an assessment of valuation in the context of materiality. Plaintiffs supplied that evidence.

Economist Matthew Cain, Ph.D. testified about the correlation between stock analysts' price targets for NetSuite and their assessment whether NetSuite's future growth would be constrained by the rollout of Fusion. (POB 20-21, 58.) Ellison's post-closing strategies are material because they reflect the bearish perspective that Fusion would succeed in NetSuite's up-market. Post-closing, NetSuite would diminish its target market to accommodate Fusion. (*Id.* 20, 23.)

Valuation expert J.T. Atkins testified about the great value differential between using the Special Committee projections and the post-closing budget. (*Id.* 55.) Ellison/Catz have no response that explains the totality of the massive divergence between the Special Committee projections and the Ellison-influenced post-closing operating budget. (*Compare id.* 21-24, 55 *with* E/C 21-22, 53-54 *and* Op. 87-91.)

CONCLUSION

For all the foregoing reasons, and those stated in the opening brief, Plaintiffs respectfully request that this Court reverse the dismissal.

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