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Case Number 112,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MANTI HOLDINGS, LLC, MALONE MITCHELL, WINN INTERESTS, LTD., EQUINOX I. A TX, GREG PIPKIN, CRAIG JOHNSTONE, TRI-C AUTHENTIX LTD., DAVID MOXAM, JOHN LAL PEARCE and JIM RITTENBURG, Plaintiffs-Below/Appellants, v. THE CARLYLE GROUP INC., CARLYLE U.S. GROWTH FUND III, L.P., CARLYLE U.S. GROWTH FUND III AUTHENTIX HOLDINGS, L.P., CARLYLE INVESTMENT MANAGEMENT L.L.C., TCG VENTURES III, L.P., BERNARD C. BAILEY, STEPHEN W. BAILEY and MICHAEL G. GOZYCKI, Defendants-Below/Appellees.	No. 112,2025 Court Below: Court of Chancery C.A. No. 2020-0657-SG

CORRECTED APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Following a seven-day trial, featuring testimony by seventeen witnesses, Vice Chancellor Glasscock rejected claims brought by Appellants, minority stockholders in Authentix, challenging the 2017 arms-length sale of Authentix to Blue Water Energy as the product of a conflict of interest. All investors received pro rata consideration for their shares, so Appellants sought to impugn the transaction on the ground that it was a fire sale to obtain desperately needed liquidity. The gist of the claim is that Authentix supposedly would have doubled in value in a year's time, but Carlyle "needed" to sell in September 2017 and accordingly sacrificed tremendous value, for itself and other shareholders, to obtain a "timely" exit. Access to this supposed unique need for liquidity, Appellants contended unsuccessfully at trial, constituted a non-ratable benefit giving rise to a conflict between the interests of Carlyle—then the largest holder of Authentix preferred and common shares—and the minority shareholders.

In a detailed post-trial memorandum opinion, the Court of Chancery thoroughly considered and rejected Appellants' implausible assertion that Carlyle short-changed its own economic interest in favor of short-term liquidity.[1] The trial court meticulously addressed each theory invoked by Appellants to suggest that Carlyle had a unique need for liquidity. It explained that the contractual term of

[1] A4000, Jan. 7, 2025 Post Trial Mem. Op. ("Op.").

Carlyle's private equity fund and its investors' expectations did not exert liquidity pressure giving rise to a conflict of interest.[2] Indeed, the fund already had returned to investors over one-and-a-half times their initial investment by the time of the sale.[3] And Carlyle indisputably could continue to hold Authentix indefinitely—as it had done for many other portfolio companies in many other funds.

The court likewise rejected Appellants' argument that the threat of clawback—a mechanism to true-up earlier carried interest distributions based on the fund's subsequent performance—forced a sale.[4] That suggestion, too, was debunked by testimony that the best way to avoid clawback is to build value, if it is possible to do so, not hastily liquidate assets. Finally, the court ruled that the year-long process to sell Authentix, involving outreach to over 100 potential buyers, served as further confirmation that the sale was not done to satisfy an urgent need for liquidity.[5] The Court of Chancery supported each holding with detailed findings based on the voluminous trial record, including testimony from numerous witnesses the court deemed credible.

Appellants take two approaches on appeal.[6] Neither works. First, to

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[2] Op. 42-51.

[3] *Id.* 32.

[4] *Id.* 51-55.

[5] *Id.* 62-64.

[6] *See generally* Appellants' Opening Br. ("OB").

concoct a legal question for review, they superficially accuse the trial court of applying the wrong test to evaluate the purported conflict.[7] They rely on a recent decision of this Court, *Maffei v. Palkon*, __A.3d__, 2025 WL 384054 (Del. Feb. 4, 2025), addressing the sufficiency of allegations that a controller was conflicted in supporting redomestication of a Delaware company because of a hypothetical benefit in the form of reduced prospective liability. That decision primarily focused on the temporal element of an alleged non-ratable benefit to a controlling shareholder. *Id*. at *20-21. It does not bear on the trial court's analysis below. Indeed, *Maffei* acknowledged and left unaltered the case law governing the particular issue here—that is, the "very narrow circumstances" in which a controller's interest in liquidity can "establish a disabling conflict of interest." 2025 WL 384054, at *19 n.172 (second quotation quoting *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1035 (Del. Ch. 2012)). The Court of Chancery correctly applied well-settled Delaware law to conclude that Carlyle had no liquidity-driven conflict.

Second, Appellants reassert the same factual contentions based on the same evidence they featured below, hoping this Court will draw Appellants' preferred inferences in place of the Court of Chancery's findings. But Appellants' strained

[7] OB 32-34.

view of the facts is irreconcilable with this Court's deference to the trial court's factual findings. Appellants can point to nothing approaching clear error, and the Court of Chancery's findings are fully supported by the record.

The Court of Chancery's judgment should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly applied the business judgment rule to the sale of Authentix, in which all shareholders received pro rata consideration, and rejected Plaintiffs' attempt to invoke entire fairness review based on their failure to present evidence supporting their "hypothesis" that "Carlyle had liquidity-based conflicts from fund-life and clawback provisions." Op. 40.

2. Denied. The Court of Chancery correctly assessed, consistent with the presumption applied through decades of Delaware case law, that Carlyle and its affiliates, including the fund that was Authentix's largest shareholder, were economically motivated to maximize the sale price.

3. Denied. The supposed factual "errors" that Appellants reference constitute nothing more than their disagreement with the Court of Chancery's findings after a careful review of the full body of evidence presented at a seven-day trial and, in any event, Appellants fail even to suggest that any purported "error" is reversible.

STATEMENT OF FACTS

These facts are drawn from the Court of Chancery's post-trial findings and evidence in the record.

A. Carlyle's Fund Invested in Authentix in 2008.

1. The Investment in Authentix.

In 2008, Carlyle U.S. Growth Fund III ("CUSGF3" or "Carlyle") purchased $40mm in Authentix's Series A preferred stock, and another private equity fund affiliated with non-party J.H. Whitney & Co., invested $15mm.[8] After the transaction, the two funds together gained a majority interest in Authentix. Many of Authentix's existing shareholders—including Plaintiffs, led by Manti Holdings, LLC and its principal Lee Barberito—chose to roll their equity to acquire common shares.[9] The investors agreed to a Stockholder Agreement, providing for, among other things, drag-along rights requiring that they "consent to and raise no objections against" any sale of Authentix.[10] Carlyle appointed Defendants Steve Bailey and Mike Gozycki to Authentix's Board of Directors, and Whitney appointed Paul Vigano. [11]

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[8] Op. 6, 11.

[9] B151-B152; A1981:19-23. The "B" prefix indicates citations to Appellees' Appendix.

[10] Op. 11; B161-B162.

[11] Op. 9-10.

Authentix provides authentication technologies and services used to prevent illicit trade and ensure product integrity.[12] In 2017, Authentix had three major divisions: (1) downstream oil and gas; (2) currency/tax stamps; and (3) brand (principally pharmaceutical).[13] Oil and gas was Authentix's largest division, and that segment's most significant customers were governments of oil-producing countries. These customers were "volatile business partners due to the exposure of geopolitical risk."[14]

CUSGF3 was interested in Authentix for its "[r]ecurring revenue business model with good visibility."[15] Authentix's management, including its CEO, Plaintiff David Moxam, projected that the Company's annual revenue would grow from $32.1mm in 2007 to $98.1mm by 2011, and EBITDA from $5.1mm to $28.3mm.[16] On the basis of that projected growth, CUSGF3 invested in Authentix.[17]

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[12] Op. 10.

[13] *Id.*

[14] *Id.* 11 & n.45 (citing A1731:5-A1736:23).

[15] B66.

[16] B137; A1647:20-A1648:8; *see also* B1235-B1236.

[17] A2823:21-A2824:21.

2. CUSGF3 Was a Standard Private Equity Fund with No Exploding Deadline.

CUSGF3, a growth buyout fund formed in 2007, invested in middle-market technology companies.[18] It is structured as a Delaware Limited Partnership and, as is typical for private equity funds, has a contractual term of ten years.[19]

During that ten-year period, CUSGF3 followed a standard lifecycle, beginning with a "fundraising period," during which a fund raises capital from limited partner investors ("LPs").[20] It then invests that capital in portfolio companies. Finally, it seeks exit opportunities to monetize its investments before or around the ten-year mark, though the decision when and whether to sell is "a case-by-case assessment of each asset."[21] The discretion to make such an assessment for CUSGF3's assets was vested with its general partner; LPs cannot dictate the timing of a portfolio company sale.[22]

Funds typically "prefer to exit" investments "before or around the ten-year mark," but such timing is not mandatory.[23] CUSGF3 had no deadline to sell its

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[18] B45.

[19] A24-A25; Op. 12-13 & n.55 (citing A2297:6-14; A2300:17-20).

[20] Op. 12.

[21] A3394:19-A3395:7.

[22] A53-A54; A3395:10-13.

[23] Op. 13.

portfolio companies at the ten-year mark.[24] Funds can, and Carlyle funds often do, continue to hold investments well beyond that point.[25] The term's main consequence is that once it runs, the fund can no longer call capital from its LPs to further invest in its portfolio companies.[26] But even that limitation can be addressed through fund term extensions.[27] Testimony at trial identified seven examples of Carlyle funds, including CUSGF3, whose terms were extended, and there was no evidence of any fund whose term was not extended due to investor opposition.[28]

CUSGF3's LPs were entitled to a return of 100% of their invested capital, plus a "preferred" return of 7% per annum, before "carried interest" distributions could be made to Carlyle and its affiliates and personnel.[29] As Plaintiffs' expert testified, carried interest "was created in the first place to incentivize the general partner to maximize returns to the limited partners."[30] Because proceeds are distributed to Carlyle and LPs on an ongoing basis, and because LPs' preferred

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[24] A3384:12-22.

[25] A2820:11-16;A3387:15-A3388:10.

[26] A3391:18-A3393:4; A3497:20-3498:17.

[27] A24-A25; A3386:13-A3387:2.

[28] A2816:18-A2817:19; A3387:15-21; B1157; B1245.

[29] Op. 15.

[30] A2336:23-A2337:5.

return continues to accrue while capital is deployed in portfolio companies, circumstances can occur in which a "clawback" provision will require Carlyle and its deal team to return to the LPs excess carry distributions.[31] But if the value of remaining assets grows at a rate in excess of the preferred return, then Carlyle's carried interest increases and holding the asset imposes no risk of clawback.[32]

[31] Op. 15-16.

[32] A2948:4-A2950:1; A3500:20-A3501:13; *see also* A2340:9-A2341:12 (agreeing that if a company's value increases faster than the preferred return rate, the carry will increase).

B. Authentix Performed Abysmally Under Manti's Management.

Contrary to the growth forecasted by Moxam, Authentix's performance deteriorated in the four years following Carlyle's investment. The Company's $32.1mm in annual revenue in 2007 declined to $21.2mm by 2012, and the Company posted bottom-line losses in 2011 and 2012.[33]

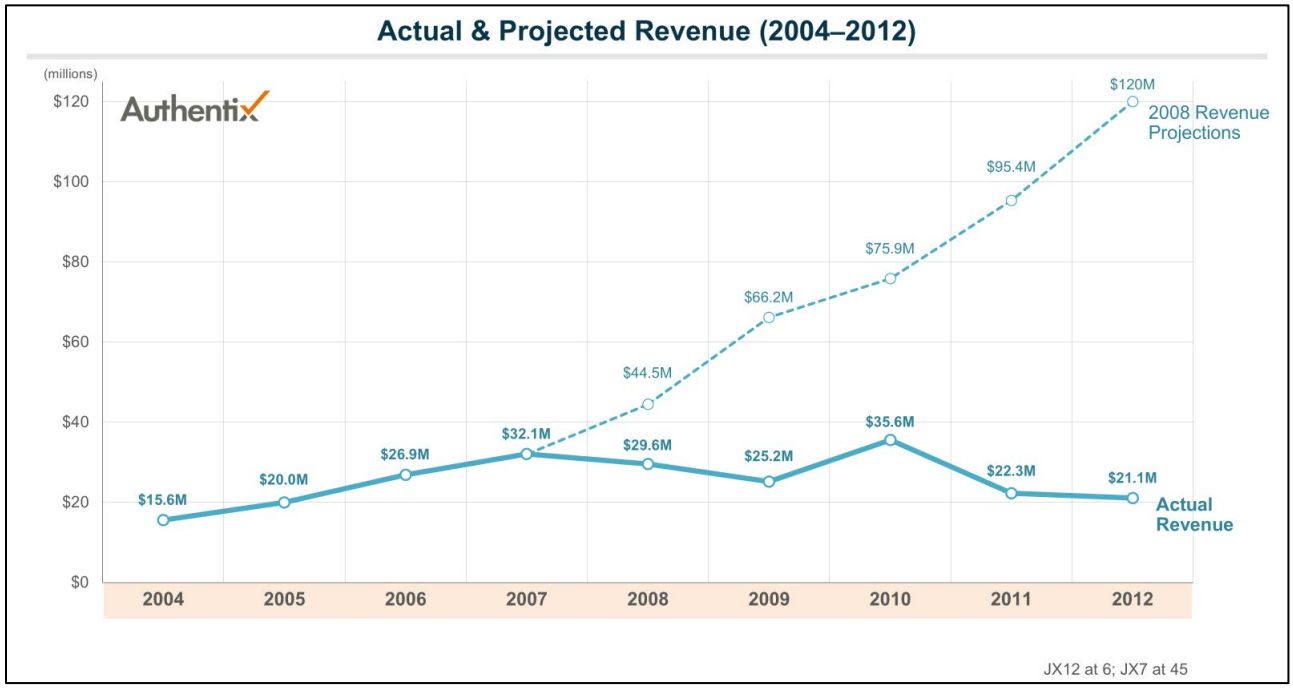

Figure 1[34]

Authentix's poor performance laid bare inherent vulnerabilities in its business. It lost its two largest customers in the span of three years. In 2009, India

[33] Op. 17; B133-B134; B1220.

[34] B1223.

stopped paying Authentix.[35] In 2011, Malaysia followed suit, ceasing payments even for services and products Authentix already had delivered.[36] Malaysia's decision to walk away forced Authentix to reverse $2.7mm in revenue booked for services rendered.[37] These cancellations demonstrated the volatility of working with developing governments and the potentially disastrous consequences of a highly concentrated customer base.[38]

Authentix's poor financial performance also caused multiple covenant defaults on its bank debt.[39] To avoid foreclosure, Authentix issued four rounds of preferred stock, open to all Authentix shareholders on a pro rata basis, between 2009 and 2013.[40] Carlyle was the largest participant in each round and, when other investors declined to participate, it filled the gap.[41] All told, Carlyle invested an additional $20mm, on top of its initial $40mm investment in Authentix.[42] As a

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[35] Op. 17 & n.83 (citing A1676:14-A1677:3; A1733:7-20; B339). India accounted for $4mm of the Company's $30mm 2008 revenue. B339.

[36] Op. 17 & n.84 (citing A1674:19-A1675:5; B339). Malaysia was a nearly $5mm account in 2008.

[37] A1674:19-A1675:5; A3064:11-A3065:14; B250.

[38] A1731:9-A1736:23. Between 2008 and 2012, Authentix's top 10 customers generated between 55% and 77% of its revenue. A3168:22-A3169:23; B339.

[39] *E.g.*, B215-B216; A1672:12-15; A3472:19-A3473:2.

[40] Op. 17.

[41] A3472:2-18.

[42] B1243.

result, by 2017, CUSGF3 held 70% of Authentix's preferred stock.[43] It also became the largest holder of common stock by virtue of conversion of the Series C.[44]

While Authentix's performance deteriorated, its CEO, Moxam, decided to work part-time to devote more energy to pursuits for Manti.[45] The Board told him he could resign or be fired, and Moxam left Authentix in 2012.[46] Bernard Bailey started as Authentix's CEO in October 2012.[47]

Under Bernard's leadership, Authentix's performance began to improve.[48] After completing a successful pilot program with Saudi Aramco in 2013, Authentix won a fuel-marking contract with Aramco in June 2015. That deal generated $19mm in revenue in 2015 and helped the Company grow its EBITDA to $13mm that year.[49]

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[43] Op. 17-18.

[44] B234; A1405-A1407.

[45] Op. 18; A1680:10-A1681:11.

[46] Op. 18 & n.92 (citing A1680:10-A1681:11); A1681:23-1682:4.

[47] Op. 18. To avoid confusion between Steve Bailey and Bernard Bailey, who are unrelated, this brief refers to them as "Steve" and "Bernard."

[48] *Id.*

[49] *Id.* 19.

C. Authentix Commenced a Sales Process in October 2015.

In 2014, the Board engaged an investment bank to explore a divestiture of Authentix's currency/tax stamp and brand businesses.[50] After receiving interest for the whole company, Authentix stopped the divestiture process.[51] The Board, with Plaintiff Barberito's support, decided in October 2015 to pursue a sale of Authentix and hired Baird to lead the process.[52]

The Company intended the sales process launch to coincide with the expected renewal of the Aramco contract in May 2016.[53] But rather than renew the contract for two years, Aramco extended the program for two months, and then in August, provided another short-term extension.[54] Even more concerning, the second extension came with a 30% price cut, a reduction in volume, and news that Aramco would open the program to competitive rebidding.[55]

Baird recommended that Authentix nevertheless start a scoping process in the fall of 2016.[56] After evaluating the likely financial impact of losing its largest

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[50] *Id.* & nn.101-02 (citing B489; A2846:6-20; A2056:10-A2057:6; A3182:4-18).

[51] *Id.* & n.103 (citing A3182:19-A3183:7).

[52] *Id.* 19-20 & nn.104-05 (citing B7; A2057:13-19; A2857:4-20).

[53] *Id.* 20 & nn.111-12 (citing A3186:24-A3187:22; B560; B557).

[54] Op. 20-21 & nn.113-14 (A2868:6-22; B589-B590; B600).

[55] *Id.* 21 & nn.114-15 (A2871:4-A2872:12; A3194:4-3195:12; B600; B593).

[56] *Id.* & n.118 (citing A3103:8-A3105:6; A3803:8-A3804:19; A3112:13-20; B622).

customer, Authentix's management and Board concluded that the uncertainty surrounding Aramco "was unlikely to improve."[57] Baird prepared a list of 127 potential buyers and began contacting them.[58] To preserve credibility, Baird's talking points acknowledged the uncertain status of the Aramco contract,[59] and explained the timing of the sale by reference to the fact that Carlyle had held Authentix for eight years, which was "standard information that potential buyers want."[60] Buyers who declined to proceed cited numerous reasons, including contract renewal risk, customer concentration, and geopolitical and FCPA risks attendant to the international customer base.[61]

Baird's outreach yielded four initial indications of interest.[62] Rather than advance only the highest bid, Authentix moved forward with all four.[63] Two, Intertek and Innospec, provided second round bids in February 2017 that were

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[57] *Id.* & nn.119-20 (citing A3202:13-20; A2887:21-A2891:22; B642; A339).

[58] *Id.* 22 nn.125-27 (citing B642; B655; A495-A496; A501-A502; B644).

[59] *Id.* n.128 (citing A349; A3128:17-A3130:5).

[60] *Id.* nn.129-30 (citing B636; A349; A2893:8-A2894:6; A3107:16-A3108:1; A3476:2-15); Op. 60-61 & nn.318-319 (crediting Steve's testimony, A2893:21-A2895:8, that talking points typically reference "hold period," which "conveys the seriousness of the seller in the transaction").

[61] *Id.* 23 & n.132 (A399).

[62] *Id.*

[63] *See id.* & n.134 (citing A2910:10-A2911:13; A3225:22-A3226:8; A495, A501).

lower in price and/or comprised a higher proportion of contingent consideration.[64] The other two first-round bidders dropped out.[65]

Although by March 2017 the sales process had been underway for several months, Authentix allowed Barberito to enter the process mid-stream, to make what he previewed as a superior bid to buy the Company—despite Baird's cautioning there would be "no guarantee" the existing bidders would stick around while Authentix accommodated Barberito.[66] Acting through Manti, Barberito partnered with White Deer Energy to submit a $105mm bid for Authentix on March 15.[67] Authentix awarded Manti and WDE exclusivity after they increased their bid to $107mm but, within days, WDE dropped out.[68] On April 1, UK-based private equity firm Blue Water Energy, led by Tom Sikorski, took WDE's place in the Manti partnership, but shortly thereafter, BWE opted instead to pursue a deal on its own, making a $107mm indication of interest on April 13, 2017.[69] Despite

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[64] *See id.* 23-24.

[65] *Id.*

[66] *Id.* 24 & nn.139-42 (citing B695; A1923:2-A1925:16; A2919:6-A2921:15; A3233:13-A3235:15; B699; B715; B701; B710; B707-B708).

[67] *Id.*

[68] B710; B777.

[69] Op. 25 & nn.145-153 (citing B780-B781; B14; A3244:20-A3246:16; A3246:21-A3248:1; B788; A767; A2141:2-16; A2927:19-A2928:20.

Barberito's boasting that Manti had the "capability to swallow the Authentix deal easily," it never submitted its own bid to buy the Company.[70]

Leveraging the new bid, Authentix negotiated with BWE and Intertek to increase their respective offers. By the end of April, both had offered $115mm.[71] BWE would be faster to close because it had agreed to drop CFIUS regulatory clearance as a closing requirement.[72] Intertek had an advantage on value, however, having completed more diligence and a higher likelihood of maintaining its bid.[73] Authentix awarded exclusivity to Intertek. After performing more intensive diligence, though, Intertek was unable to confirm its bid.[74] The Company then awarded exclusivity to BWE because of its superior June 7 $105mm indication of interest.[75]

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[70] B779; A2125:6-12. Along with the opportunity and means, Barberito had a purported belief that Authentix was worth over $200mm. A2125:13-22, A2139:1-16, A2157:8-10; B1119.

[71] Op. 25-26 & nn.154-55 (A2928:2-A2929:1; B795; A2930:19-A2933:3).

[72] *Id.* 26 n.156 (citing A2933:4-A2934:23; A2781:20-A2783:7).

[73] *Id.*

[74] Intertek maintained a headline price of $115mm but repositioned $30mm of that consideration as a contingency. *Id.* n.158 (citing A819-A820).

[75] *Id.* n.161 (citing A968; A2944:17-A2945:11).

D. Due Diligence Raised Concerns About Authentix's Business.

After securing exclusivity, BWE engaged advisors, including accounting firm KPMG, to assist in due diligence on Authentix.[76] KPMG's quality-of-earnings analysis revealed that Authentix's accounting methods had caused the Company to overstate the profits from its Ghana Tax Stamp program by almost $5mm.[77] This fundamental error would have been observable to any buyer, and Intertek likewise identified it during diligence.[78] PricewaterhouseCoopers, Authentix's accountant, largely agreed with KPMG's analysis that the Company's profits were overstated.[79] Given the host of issues BWE identified, it concluded at the end of June 2017 that "the range of possible outcomes going forward" was "very challenging to narrow."[80] Bernard told Sikorski during this period that Authentix's owners were happy to hold the Company if BWE could not confirm its

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[76] *Id.* 27-28. Appellants mischaracterize BWE's diligence as having occurred in April, OB 20; the trial court found that BWE's earlier diligence focused on Manti and Authentix's management team, not Authentix's financial performance, Op. 27 n.163 (citing A767; A3748:19-A3750:24).

[77] B817; B832; A3484:18-A3485:1, A3487:15-A3488:7.

[78] B798; A3488:8-A3489:8

[79] B876; A3488:2-7.

[80] B817.

bid.[81] After diligence, BWE's internal analysis concluded that the fair upfront price was between $60mm and $70mm.[82]

Meanwhile, Authentix won the Aramco technical trials and presented a final bid, with unanimous Board approval, for the program.[83] The Company knew that the decision would turn on price, and it felt confident in its position, albeit at pricing and volumes far diminished from the initial contract Authentix had won in 2015.[84] Authentix communicated the terms of its Aramco bid to BWE, which then incorporated those details into its financial model.[85] Authentix also told BWE that it was confident that it would renew the Ghana Tax contract on current terms, and BWE similarly accounted for that renewal in its model.[86] BWE shared its model, disclosing its EBITDA expectations on a program-by-program level, with Authentix.[87] Based on this information, BWE ultimately only reduced its bid to $85mm upfront in July 2017 (rather than the earlier $60-$70mm valuation).[88]

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[81] Op. 27 & n.166 (citing B813; A3274:21-A3276:13).

[82] *Id.* & n.167 (citing B818).

[83] *Id.* & n.168 (citing B843; A2017:11-24, A2019:10-A2021:21).

[84] *Id.* 27-28 & n.169 (citing B842; A2021:10-21; B849).

[85] *Id.*; A3490:23-A3491:17; B877.

[86] Op. 28 & n.170 (citing B839); B849; A3490:23-A3491:17; B877.

[87] B863.

[88] Op. 28 & n.171 (citing B857).

Throughout July and into August 2017, Authentix and BWE aggressively negotiated the terms of the transaction. The parties exchanged four counteroffers during that period.[89] Authentix secured an increase in purchase price, from $85mm to $87.5mm,[90] on top of $3.5mm in below-the-line adjustments.[91]

On August 21, 2017, Authentix won a new, one-year contract with Aramco.[92] Although substantially worse than its original contract, the terms of the new contract "mirror[ed]" the bid shared with BWE.[93] Authentix did not seek to obtain further concessions from BWE based on this news, as the new contract "matched BWE's assumptions" for the Aramco program, and were reflected in the financial model that BWE already had disclosed to Authentix.[94]

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[89] *Id.* & nn.171-75 (citing B856; B892; A2955:7-A2956:7; A2956:16-A2957:3, A2957:4-12; B906; B934; B946).

[90] *Id.* & n.173 (citing B906; A2956:16-A2957:3).

[91] *Id.* & n.176 (citing B946; B993).

[92] A1113; B1023.

[93] Op. 29.

[94] *Id.* & n.178 (citing A3726:5-14; A2959:2-A2960:9; A3288:21-A3289:8); A3490:23-A3491:17; B877.

E. Authentix Closed a Sale to Blue Water Energy in September 2017.

On September 12, 2017, the Board voted 4-0 to approve the sale of the Company to BWE for $87.5mm upfront with a $17.5mm earnout.[95] These four Directors supported the sale because it was the best possible price they could get for the Company and the best outcome for shareholders.[96]

Barberito did not attend the Board meeting but expressed his opposition by letter.[97] He claimed, without any concrete plan, that a 12-month deferral of the sales process would allow the Company to increase shareholder value "exponentially."[98] His fellow Directors were unpersuaded.[99] As Steve testified at trial, restarting the marketing process based on the Aramco contract would have been risky, showcasing the program's rocky history of short-term extensions and serial price cuts.[100] Vigano similarly testified that there was an "equal or higher likelihood" that delay of the sale process would have resulted in "lower valuations."[101] The sale closed on September 13.[102]

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[95] Op. 29 & n.180 (citing B1114; B948).

[96] A2963:2-16; A3094:1-5; A3296:13-A3299:3; A3502:1-18.

[97] B1109.

[98] *Id.* (emphasis added).

[99] A3094:6-A3095:2; A3296:23-A3297:14; *see also* B1113.

[100] A2960:10-A2961:11.

[101] A3095:3-17.

[102] Op. 30.

The terms of the deal entitled the selling shareholders to additional proceeds if Authentix's 2018 EBITDA met or exceeded $15mm. It failed to generate even $10mm in 2018 EBITDA.[103]

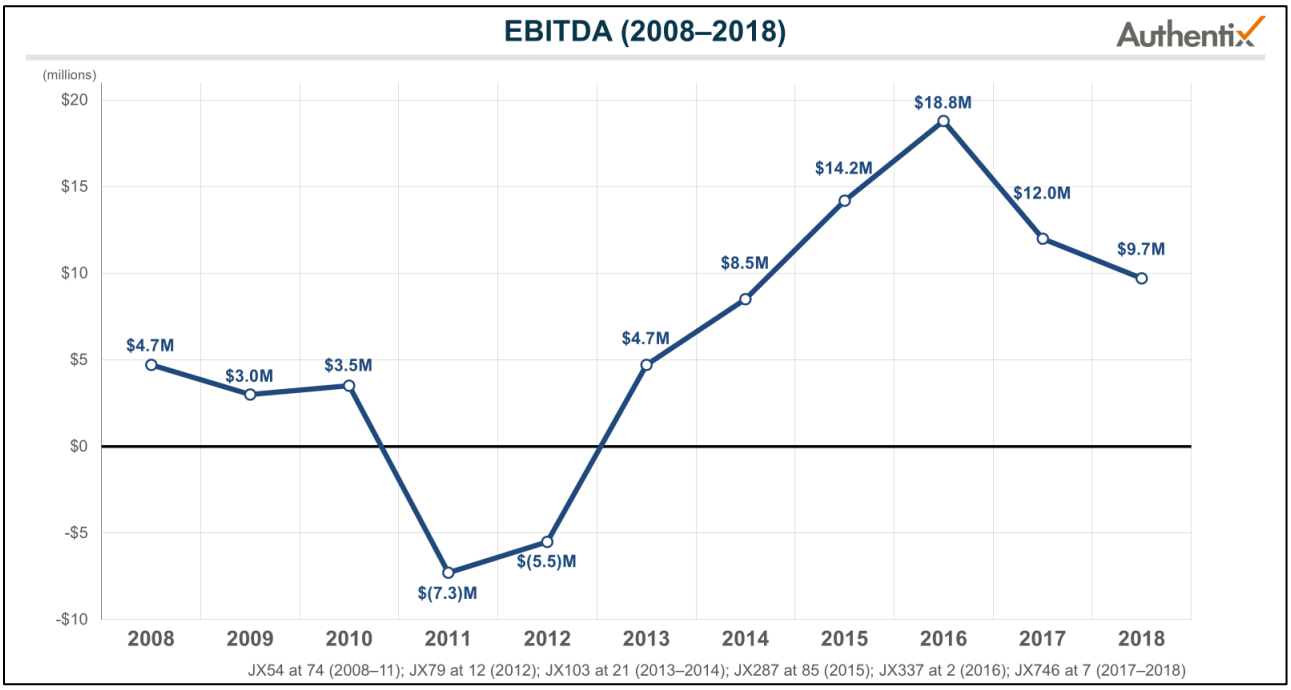

Figure 2[104]

F. The IAC Extended CUSGF3's Term.

As of June 2017, before exiting Authentix, CUSGF3 had returned $840.2mm—or 1.54x invested capital—to its LPs.[105] CUSGF3's return on

[103] Op. 30 & nn.190-91 (citing B979; B1165).

[104] B1238.

[105] Op. 32 & n.201 (citing B1129).

Authentix was 0.89x, worse than the fund's overall performance, a bad outcome, and a net loss.[106]

Shortly after the Authentix sale closed, CUSGF3's IAC approved a two-year extension to the fund's term.[107] That extension was sought and granted because the fund continued to hold two investments that its leadership believed had the potential to appreciate.[108]

G. Court of Chancery Proceedings.

Appellants filed this breach-of-duty suit on August 7, 2020, and amended their complaint on November 3. After the Court of Chancery largely denied Defendants' motion to dismiss in June 2022, the parties proceeded through discovery.

The Court of Chancery conducted a seven-day trial in January 2025. The trial court heard live testimony from eight fact witnesses, including: each of the Director Defendants (Steve, Bernard, and Gozycki); Brooke Coburn, CUSGF3's Fund Head; Sikorski; and Barberito and his associates Moxam and Pearce. Both sides presented expert opinion testimony. Vigano, who supported the sale of Authentix as Whitney's designee to the Board, testified by deposition, as did

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[106] Op. 32 & n.202 (citing B1108; A2963:17-A2965:12. A2966:5-23).

[107] B1157.

[108] B1157; B1021; Op. 54.

Baird's Trisha Renner and David Steinkeler, Authentix CEO Kevin McKenna, and Schuyler Tilney of WDE. The Court of Chancery received extensive pre- and post-trial briefing, and held post-trial argument on June 20, 2024.

In a 68-page memorandum opinion issued on January 7, 2025, the trial court rejected Appellants' theory that the sale of Authentix was tainted by a liquidity-driven conflict, concluding that the "factual record does not demonstrate that Defendants were operating under such time pressure" to exit their investment.[109] The court thus applied the business judgment rule to the sale. This appeal follows.

[109] Op. 42.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY APPLIED THE BUSINESS JUDGMENT RULE TO THE AUTHENTIX SALE.

A. Question Presented

Whether the Court of Chancery committed legal error in ruling that the sale of Authentix to BWE was unconflicted, and thus applied the business judgment rule, based on its findings that CUSGF3 had no deadline to sell, its investors did not pressure an early sale, and Authentix and its advisors ran a comprehensive sale process designed to maximize value. Op. 2, 39-64.

B. Scope of Review

This Court reviews *de novo* whether the Court of Chancery properly formulated the legal framework under which it concluded that Appellees received no non-ratable benefit in connection with the Authentix sale. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993), *as modified*, 636 A.2d 956 (Del. 1994). The trial court's "fact dominated" findings "upon application of" that framework are "entitled to substantial deference unless clearly erroneous or not the product of a logical and deductive reasoning process." *Id.* "When the determination of facts turns on a question of credibility and the acceptance or rejection of 'live' testimony by the trial judge, his findings will be approved upon review." *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 699 n.113 (Del. 2023) (quotation omitted).

C. Merits of Argument

1. The Court of Chancery's Findings Mandate that the Business Judgment Rule Governs the Authentix Sale.

The Court of Chancery's application of the business judgment rule to the arms-length sale of Authentix to BWE, based on its findings following a seven-day trial, should be affirmed. Appellants challenge the sale of Authentix to BWE as conflicted, but do not contend that Carlyle used corporate control to obtain different or better consideration than minority shareholders. Rather, as they argued below, Appellants again urge "that the sale was not for the good of the" shareholders "but instead was timed to drive a unique benefit to Carlyle."[110] Unless the Appellants could establish at trial an "unusual crisis" giving rise to a liquidity-driven conflict of interest, the sale was a valid exercise of business judgment. *See Larkin v. Shah*, 2016 WL 4485447, at *17 (Del. Ch. Aug. 25, 2016).

In a detailed post-trial memorandum opinion, the Court of Chancery considered and rejected each basis on which Appellants claimed that the year-long effort to sell Authentix was tainted by Carlyle's supposedly urgent need for liquidity. The court meticulously canvassed the record and found that CUSGF3's structure and investors imposed no undue liquidity pressure, the fund's clawback

[110] Op. 36.

provision did not encourage the deal team to sell Authentix at less than fair value, and that the comprehensive marketing and sales process disproves Appellants' theory of conflict.

To gin up a legal issue for appellate review, Appellants claim that the Court of Chancery applied the "wrong legal standard" to reach the conclusion that the Authentix sale was conflict-free. OB 31-33. They are mistaken. Appellants' argument mischaracterizes the trial court's analysis, which applied well-settled Delaware law. Appellants also half-heartedly urge that the trial court erred by finding that Carlyle—whose fund was the largest holder of Authentix preferred and common stock—was incentivized to maximize the sale price and thus its returns.[111] Their criticism is makeweight. The court's findings are amply supported by the record and in line with Delaware's fundamental presumption that investors are rational. There is no basis to deviate from that presumption here.

a. The Court of Chancery Applied the Correct Standard.

A consistent body of case law provides that "it is a rare set of facts that will support a liquidity-driven conflict theory." *Flannery v. Genomic Health, Inc.*, 2021 WL 3615540, at *17 (Del. Ch. Aug. 16, 2021) (quoting *In re Mindbody, Inc.*, 2020 WL 5870084, at *18 (Del. Ch. Oct. 2, 2020)).[112] The Court of Chancery

[111] OB 35-37.

[112] *Accord Firefighters' Pension Sys. v. Presidio, Inc.*, 251 A.3d 212, 255-56 (Del.

most recently reiterated the difficulty of proceeding under such a theory of conflict earlier this year in *Krevlin v. Ares Corporate Opportunities Fund III*, explaining that "Delaware courts have been reluctant to find that a liquidity-based conflict rises to the level of a disabling conflict of interest when a large blockholder receives pro rata consideration," 2025 WL 395035, at *6 (Del. Ch. Feb. 3, 2025) (quotation omitted).

Appellants needed to prove at trial that Carlyle and its affiliates "manipulate[d] the sales process and subordinate[d] the best interests of the corporation and the stockholders as a whole" to pursue their "desire to gain liquidity." *Mindbody*, 2020 WL 5870084, at *15 & n. 117 (quotation omitted). Their liquidity theory required Appellants to show some "desperate need [for] liquidity," *N.J. Carpenters Pension Fund v. Infogroup, Inc.*, 2011 WL 4825888, at *10 (Del. Ch. Sept. 30, 2011), an "unusual crisis," *In re Morton's Res. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 668 (Del. Ch. 2013), or some "other driver that would prompt self-sacrificing urgency," *Flannery*, 2021 WL 3615540, at *18. That liquidity need, under Delaware law, must be more than the typical "cyclical process" followed in private equity: "because investment managers cyclically raise and liquidate funds on a somewhat predictable schedule, the pattern suggests

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Ch. 2021); *Larkin*, 2016 WL 4485447, at *17.

that the monetization phase does not necessarily create a problematic interest." *Firefighters'*, 251 A.3d at 258; *Larkin*, 2016 WL 4485447, at *15-16. Delaware courts also consider the extent to which controllers support lengthy market checks involving numerous potential buyers, as such efforts refute the suggestion of an urgent liquidity need. *Morton's*, 74 A.3d at 662.

The Court of Chancery applied the correct legal framework and concluded that Carlyle had no urgent need for liquidity that differentiated its interests from those of other stockholders. The trial court made numerous findings to determine that Carlyle did not face "time pressure" or "liquidity pressure" driving it to sacrifice value in the sale of Authentix. *See* Op. 41 & n.243; *id.* 42-43 ("I find that the factual record demonstrates that the sale of Authentix was not a fire sale driven by Carlyle acting under time pressure or liquidity pressure from the end of CUSGF III's fund life, in conflict to the minority stockholders' interests."). The court asked the correct question underlying Appellants' claim—whether Carlyle had a uniquely urgent need for liquidity, *see Firefighters'*, 251 A.3d at 257-58 & n.10; *In re Crimson Exploration Inc. S'holder Litig.*, 2014 WL 5449419, at *19 (Del. Ch. Oct. 24, 2014) (requiring "need for liquidity")—and answered in the negative after comprehensively surveying the record, *see* Op. 43 ("[T]he facts do not demonstrate that Carlyle *needed* to exit its investment in Authentix or that Carlyle was

otherwise driven by time pressure to exit that would cause it to accept less than fair value.").[113]

Appellants failed to present the type of evidence required by the prevailing standard, so on appeal they seek to lower the bar for themselves. They claim that a "desire" or "want" for liquidity suffices to trigger entire fairness. OB at 32 (citing *Infogroup*, 2011 WL 482588, at *10). That is not the law. Majority stockholders are not required to hold stock indefinitely—they have a right to sell when they wish, so long as that timing does not favor the majority to the minority's detriment. *See Flannery*, 2021 WL 3615540, at *18. Thus, wanting, without needing, to sell does not create a conflict. *Id.*; Op. 43. The case (*Infogroup*) on which Appellants rely undermines their argument because it involved a director "in desperate need of liquidity" because he had millions of dollars in debt, capital needs for a new business, and "no discernible, significant sources of cash inflow." *Infogroup*, 2011 WL 4825888, at *9-10.

[113] Against this consensus of authority, Appellants rely on the motion to dismiss decision in *Answers Corp. Shareholder Litigation*, 2012 WL 1253072 (Del. Ch. Apr. 11, 2012). They omit, however, that the court rejected the liquidity-driven conflict claim at summary judgment because the evidence showed that the board tried to maximize value in the face of "uncertainty surrounding the Company's future profitability." *In re Answers Corp.*, 2014 WL 463163, at *14-16 (Del. Ch. Feb. 3, 2014).

Appellants do no better by invoking this Court's decision in *Maffei*, 2025 WL 384054. That decision rejected the sufficiency of allegations that a controller was conflicted in supporting redomestication of a Delaware corporation to Nevada because the company's officers and directors might (hypothetically) face reduced risk of future liability. *Id.* at *26. The focus of that decision was the holding that temporality of litigation risk is a relevant factor in determining whether a given benefit is "material," therefore giving rise to entire fairness review. The Court's only mention of the liquidity-based theory at issue here was to reference ***approvingly*** the Court of Chancery's analysis in *Synthes*, noting that such conflicts are among the "very narrow circumstances" in which a "transaction [that] treats all stockholders equally" may nevertheless trigger entire fairness. *Id.* at *19 n.172 (second quotation quoting *Synthes*, 50 A.3d at 1035).[114]

The "materiality" standard analyzed in *Maffei* is not new, as demonstrated by, *inter alia*, the Court of Chancery's application of it in *Infogroup*, a 2011 decision on which the trial court here relied.[115] Appellants never argued below that

[114] This Court's recent reliance on *Synthes* pours cold water on Appellants' suggestion that it is no longer good law. *See* OB 34. The trial court committed no error by citing *Synthes*, along with numerous other Court of Chancery decisions applying the same framework.

[115] "A benefit was material when it was significant enough in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the shareholders without being influenced by

entire fairness applied because the supposed non-ratable benefit conferred on Defendants was "material." Accordingly, Appellants waived any (meritless and futile) argument based on materiality. In any event, as discussed below,[116] the trial court's factual findings refuted every basis on which Appellants urged that a purported "personal interest" in liquidity overrode Carlyle's duty—to itself, its LPs, and all shareholders—to maximize value from the sale. *See, e.g.*, Op. 41 n.243 (citing B16-B17), 42-43, 46. Thus, even if *Maffei* could be construed to impose a new or different "materiality" standard for a purportedly unique benefit to a controller, the trial court's well-supported findings demonstrate that Carlyle did not obtain a "material" non-ratable benefit from the timing of the Authentix sale.

b. The Court of Chancery Considered and Rejected Appellants' Theories of Conflict.

The trial court directly addressed every theory advanced by Appellants in support of their claim that the Authentix sale was the product of a liquidity-driven conflict. Appellants' complaint that the court required them to show a "legal obligation" to sell woefully mischaracterizes the decision.[117] The trial court did

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her overriding personal interest." 2011 WL 4825888, at *9 (internal quotation and alteration omitted); *see* Op. 36 & n.220.

[116] *Infra* § I.C.1.b.

[117] *Compare* OB 33-34, *with*, *e.g.*, Op. 42-43 ("I find that the factual record

not apply a "legal obligation" standard; it rejected their claims because Appellants failed to present the evidence needed to demonstrate that Carlyle "had a unique need for liquidity" causing it to force an early sale. Op. 64.

i. The trial court correctly found no evidence that LPs pressured an early sale.

The Court of Chancery correctly concluded, "based on the evidence developed at trial," that Carlyle was not "driven by investor pressures and expectations to sell Authentix as soon as possible" instead of waiting for "a value-maximizing transaction."[118] Appellants relied at trial on an investor email asking for a status update about exits, and internal Carlyle communications about investment reporting to LPs, but the trial court found that those requests did "not demonstrate investor pressure."[119] The evidence lacked "any direct indication that limited partners were insisting on a quick sale."[120] Neither Steve nor Gozycki ever received an LP demand for immediate liquidity or pushback on projected timing of exits.[121] Even Appellants' private equity expert testified that he had never seen a

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demonstrates that the sale of Authentix was not a fire sale driven by Carlyle acting under time pressure or liquidity pressure from the end of CUSGF III's fund life, in conflict to the minority stockholders' interests.").

[118] Op. 45.

[119] *Id.* 45-46 (discussing A1097, B415).

[120] *Id.* 46.

[121] A2855:11-A2856:3; A3499:3-10.

situation in which one LP pressured a private equity fund to execute an early exit to free up liquidity.[122] Appellants do not identify any evidence of investor pressure to sell Authentix more quickly that the trial court overlooked; instead, they ask this Court to reweigh the same evidence and draw different inferences. *See* OB 43. That request should be rejected. *See Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 438 (Del. 2000) ("[W]e defer to the determination of the trial judge if the findings are supported by the record and the conclusions are the product of an orderly and logical deductive process.").

ii. The trial court found no evidence that clawback avoidance motivated the sale.

The court found that Appellants failed to show that avoiding clawback "was a potential motivator that colored" the Carlyle deal team's "judgment."[123] That holding rested on an analysis of the same communications Appellants cite on appeal,[124] which were "just general discussions of the clawback provision," indicating no "personal pressure to avoid a clawback."[125] This Court should not draw different inferences from Appellants' efforts to rehash the same arguments

[122] A2307:16-A2308:18.

[123] Op. 52; *see Infogroup*, 2011 WL 4825888, at *9.

[124] Op. 51-52 (discussing A530-A531, A1029; A1027-A1028, B826, A1032); OB 45.

[125] Op. 52 (internal quotation omitted). That finding is further supported by Steve and Gozycki's testimony that they were not concerned about clawback. A2946:20-2950:1; A3499:11-19; *see also* A3423:1-13 (Coburn).

and evidence. *See Bank of N.Y. Mellon Tr. Co. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011) (deferring to the Court of Chancery's inferences from the evidence).

Moreover, the trial court recognized that the risk of clawback aligned the deal team's incentives with the shareholders' because had Authentix been expected to grow at a rate exceeding 7% per year, then continuing to hold the asset would only increase carried interest.[126] The "best way" to "avoid clawback and generate more carry is 'to build value in your companies.'"[127] But, in testimony credited by the trial court, the Directors (except Barberito) explained their view that "Authentix was more likely to decline further financially than grow," and so it was in all shareholders' best interest to sell while the Company could. Op. 54-55 & n.298; *see Cede & Co. v. Technicolor, Inc*., 884 A.2d 26, at 35-36 (Del. 2005) (Court of Chancery "is the sole judge of the credibility of live witness testimony," and this Court accepts "factual determinations" that "turn on a question of credibility" (quotation omitted)).

[126] Op. 54-55.

[127] Op. 54 (quoting A2948:5-A2950:1).

iii. The robust sales process undermines Appellants' claims.

The trial court explained that the "very length and breadth of the sale process demonstrate[d]" that Carlyle and Authentix neither needed nor intended "to sacrifice maximized present value for an immediate sale."[128] The process lasted "a full year," during which the Company "contacted a total of 127 potential buyers" and conducted "18 fireside chats."[129] Such extensive marketing efforts demonstrate an absence of liquidity pressure. *See* Op. 63; *accord Morton's*, 74 A.3d at 668 (no liquidity-driven conflict where seller contacted 100 potential buyers over nine months); *Synthes*, 50 A.3d at 1037 (seven-month process). Throughout that process, Authentix repeatedly made decisions to prioritize value over speed. To take just a few examples:

- Despite an initial decision to grant exclusivity to one of the bidders in March 2017, Authentix paused the process, delaying the other bidders, so Barberito could submit a bid with WDE.[130] Authentix accepted this delay despite being warned that doing so risked losing existing bidders.[131]
- In April 2017, the Board rejected a faster BWE bid, which waived regulatory approval, in favor of a bid from Intertek, which would require a months-long regulatory process.[132]

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[128] Op. 63.

[129] Op. 49 & nn.279-80 (citing B642; B5; B17; A496).

[130] B694; B699.

[131] B715; A2920:17-A2921:15.

[132] A529; B795; A808-A809; A2933:4-A2935:2.

- When Intertek subsequently lowered its bid based on diligence findings, the Board decided against proceeding with a sale, and instead went back to BWE in an effort to achieve a higher price.[133]

Appellants fail even to question the trial court's finding that the length and extent of the sales process belie any liquidity need.

iv. Generic criticism of the PE industry cannot amount to a liquidity-driven conflict.

It is black-letter law that "sweeping characterizations" of the private equity "industry writ large" will not suffice to establish a liquidity-driven conflict. *Larkin*, 2016 WL 4485447, at *16-17. The "basic theory" that a private equity firm "wanted to sell because under its private equity business model, the time had come . . . to harvest its investment" simply does not cut it. *Firefighters'*, 251 A.3d at 257. The general private equity cycle of exiting investments and raising new funds occurs "on a regular basis, and therefore is hardly unique, is not some unusual crisis, requiring a fire sale." *Morton's*, 74 A.3d at 668. The trial court recognized these principles and appropriately concluded that Appellants' generalized attack on the private equity model failed to establish a conflict.

Appellants protest that their "lawsuit is not an attack on the PE industry's business model." OB 4. Yet their brief shows the opposite. Plaintiffs identify nothing unique about Carlyle or CUSGF3; instead, they exclusively rely on the

[133] B800-B801; A2944:18-A2945:2.

supposed "strong norm ***in the private equity industry*** that investors will have substantially received back their capital and any gains within ten years." OB 6 (emphasis added).[134] Appellants' theory is that the PE industry's business model created a conflicted transaction.

Appellants' reliance on their private equity expert's testimony is equally generic. Those opinions are based on "investors' ***general*** expectations" and "the private equity industry ***generally***." Op. 47 (emphasis added). The trial court considered the expert's vague commentary about what LPs expect from funds and how funds supposedly earn "a five-star rating" when they timely return capital, and it appropriately concluded that the evidence was "insufficient to demonstrate specifically CUSGF3's investors' expectations were such that Carlyle caused the Board to run a fire sale." *Id.* 47-48. This finding is entitled to substantial deference. The trial court's holding is right in step with Delaware law because the PE lifecycle is "not so formulaic and structured that the cycle itself [can] support an inference of a liquidity-based conflict." *Id.* 48 (quoting *Firefighters'*, 251 A.3d at 257).

In a fruitless attempt to link their broad criticism of private equity to CUSGF3 specifically, Appellants rely on a textbook article by Marco De

[134] Appellants offer no citation for this "strong norm," which contradicts the trial court's findings that fund terms are frequently extended. Op. 14.

Benedetti, citing him eight times and characterizing his article as an "admission" by Carlyle. *Id.* 6, 8-9, 11, 35-36, 37, 43. Given his outsized prominence in their brief, one might think De Benedetti was involved in the underlying sale and a key trial witness. Appellants fail to mention, of course, that De Benedetti had no involvement in CUSGF3 or Authentix and provided no testimony in any capacity (Plaintiffs never sought to depose him). He was the "Co-Head of European Buyouts at" Carlyle. Op. 48 n.273. His article was "written for a private equity textbook generally, and not specific to CUSGF III and the sale of Authentix." *Id.* In view of the legal framework above, it is unsurprising that the trial court was unmoved by Appellants' "generalized industry and textbook explanations of private equity." *Id.* 49.

2. Delaware Law Presumes that Carlyle and Its Affiliates Are Rational Economic Actors and the Trial Court's Findings Are Owed Deference.

Delaware law presumes that investors act to maximize the value of their own investments. *Katell v. Morgan Stanley Grp.*, 1995 WL 376952, at *12 (Del. Ch. June 15, 1995); *see Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1380-81 (Del. 1995). A controlling stockholder has a "motivation to seek the highest price" and "a personal incentive" to consider the "trade off between selling now and the risks of not doing so." *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010). The court rightly recognized this bedrock principle of Delaware law: "As

the largest stockholder, CUSGF III had 'an inherent economic incentive 'to negotiate a transaction that [would] result in the largest return for all shareholders.'"[135]

Appellants argue that the trial court's analysis of Carlyle's incentives was flawed because it failed to appreciate the distinction between Carlyle, the private equity firm, and CUSGF3, the fund that owned Authentix stock.[136] Like their other arguments, this assertion hinges on an erroneous reading of the lower court opinion. In fact, Vice Chancellor Glasscock well understood that CUSGF3 "is the private equity fund that purchased common and preferred stock in Authentix between April 2008 and 2013,"[137] and recognized that "Carlyle," as a private equity firm, invested in Authentix "through CUSGF III."[138]

The suggestion that Carlyle and CUSGF3 did not have an incentive to maximize price because "[e]ighty percent of the profits of the fund went to the limited partners and not to Carlyle" is perplexing.[139] Carlyle owes its investors a fiduciary duty to maximize returns—and, of course, the "only 20%" returns to

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[135] Op. 43 (quoting *Firefighters'*, 251 A.3d at 255).

[136] OB 35-37.

[137] Op. 6 & n.22 (citing B10).

[138] Op. 8, 11 & n.46 (citing B15). The trial court defined "Carlyle" to include its affiliates, including CUSGF3, which purchased and held Authentix shares. Op. 1.

[139] OB 35.

Carlyle itself are larger if each individual investment generates more profit. The balance of the returns is distributed to the fund's LPs, who invest in private equity for purposes of earning returns. Carlyle's ability to deliver those returns bolsters its reputation and helps it maintain strong relationships with its LP investors.[140]

Delaware cases therefore do not support Appellants' artificial distinction between a retail investor who holds shares for herself and a private equity fund that invests LPs' capital; both investors have an incentive to maximize value. *Firefighters'*, 251 A.3d at 255 (private equity firm had incentive to maximize price); *Morton's*, 74 A.3d at 662 (private equity investor presumed to "have strong incentives to maximize the value of their shares in a change of control transaction"). And Appellants acknowledge that Carlyle stood to benefit proportionally with any increase in sale price.[141]

Otherwise, Appellants resort to misdirection to quibble with the trial court's well-founded assessment of Carlyle's incentives. Appellants' citation to De Benedetti does not bear on Carlyle's incentives here because, again, the author had

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[140] A3397:9-16; A2343:13-A2344:14.

[141] OB 36. Appellants suggest that Carlyle's holdings of preferred stock, through which it recovered 89% of its capital investment, B1108, incentivized it to walk away from greater returns. *See* OB 37. But the evidence at trial confirmed that Carlyle is not in the business of almost breaking even on its investments; the 0.89x return on investment was a "bad outcome" for the deal team and the fund. A2963:17-A2965:12, A2966:5-23.

no involvement in the sale at issue.[142] The evidence at trial refuted Appellants' speculation that Carlyle improved its standing with investors by executing a "timely," yet unprofitable, exit. Returns, not timing, are paramount. Steve testified that the money-losing investment in Authentix was a "black mark" for him, financially and professionally, and that he would have held the company longer if he thought Authentix was poised to improve in value.[143]

Appellants' theory is that Carlyle ignored these economic and reputational benefits because the firm was beholden to LPs' desire for more immediate liquidity.[144] But there is no evidence of a liquidity need among the LPs, let alone evidence that any pressured Carlyle to exit Authentix on threat of withholding future investment. As Vice Chancellor Glasscock noted, Carlyle had already returned the full amount LPs had invested in CUSGF3, plus an additional 50% more.[145] Moreover, Carlyle funds are commonly extended past their 10-year

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[142] Indeed, Plaintiffs' expert agreed that the considerations discussed in the De Benedetti article affect "[e]very private equity organization." A2256:12-15.

[143] A2966:5-23; *see* A2964:3-A2965:12.

[144] They likewise suggest that Carlyle sacrificed value on Authentix because the investment was small relative to the firm's total management fees. OB 36. This speculation is based (loosely) on generic testimony unmoored from the fund and asset at issue. *See* OB 36 n.145.

[145] Op. 32.

terms, and frequently continue to own portfolio companies years after expiry.[146] Indeed, CUSGF3 continued to hold two other companies well after the sale of Authentix.[147]

Instead, Appellants attempt to rely on an email from a principal at a different private equity firm (a potential Authentix buyer) expressing concern that that firm's investors would not like the deal and might in turn decide not to invest in a subsequent fund.[148] That communication has nothing to do with *Carlyle*'s incentives with respect to maximizing its returns from the Authentix investment.

Worse still, Appellants ignore the evidence at trial that even if a CUSGF3 LP had needed liquidity (there was no evidence any did), there were numerous options, as their own expert acknowledges, short of forcing a portfolio company sale. These include moving Authentix (and the other "stub" assets) into a continuation vehicle;[149] conducting a secondary sale of those remaining investments;[150] and conducting a secondary sale of the LPs' interest in the fund.[151] In no situation would CUSGF3 resolve a (hypothetical) demand for liquidity by

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[146] Op. 44 & nn.252-253 (citing A2816:17-A2818:1; A3387:15-A3388:10; A24-A25; A3386:13-A3387:2; A2819:18-A2820:3, A2820:10-15).

[147] Op. 44.

[148] OB 36 (quoting A519).

[149] A2309:7-10.

[150] A2309:19-23; A3444:16-A3445:4; B787.

[151] A2312:1-15; A3397:17-A3398:12; B529.

conducting a fire sale,[152] and so Appellants' theory of Carlyle's incentives is wrong.

The trial court examined the evidence and concluded that Carlyle was motivated to maximize price.[153] That holding should stand undisturbed.

[152] A3396:11-A3397:8.

[153] Op. 2, 42, 45, 62; *see also, e.g.*, B363; A3137:21-A3138:7, A3138:16-24; A2905:22-A2907:8; A2930:19-A2931:18, A2932:4-20; B795; A2965:1-A2966:23; A2337:18-A2338:12.

II. PLAINTIFFS' DISAGREEMENTS WITH THE COURT OF CHANCERY'S FACTUAL FINDINGS ARE MERITLESS.

A. Question Presented

Whether the Court of Chancery committed reversible error in evaluating Baird's advice on the timing of the sale, considering certain of Authentix's contract wins in the lead-up to the sale, addressing certain communications emphasized by Appellants at trial, or referencing CUSGF3's term extension. *E.g.*, Op. 48-63.

B. Scope of Review

The trial court's factual findings are entitled to substantial deference and will not be set aside unless "clearly wrong" and justice requires their overturn. *DV Realty Advisors LLC v. Policemen's Annuity and Benefit Fund of Chi.*, 75 A.3d 101, 108 (Del. 2013).

C. Merits of Argument

The Court of Chancery rested its conclusion that Carlyle had no conflict on numerous factual findings made after hearing seven days of trial testimony and reviewing the documentary evidence. Appellants complain that the trial court "erred in its handling" of the facts. OB 38. But their brief leaves no mistake that their true request is for this Court to reweigh the facts and substitute Appellants' view for the trial court's. That is not how appellate review works in this Court. The Court of Chancery committed no clear error.

1. The Court of Chancery Thoroughly Considered the Record and Made Amply Supported Factual Findings.

a. The trial court accounted for Baird's advice on the sale.

Appellants launch into a tedious argument about why Carlyle supposedly failed to take Baird's advice, pretending the trial never happened and findings never issued. *See* OB 38-40. Their attempt to relitigate factual questions on appeal should be rejected.

For starters, the Court of Chancery held that "Baird's advice during the sale process does not indicate that Baird believed that Carlyle was sacrificing value for timing pressures." Op. 58. Appellants fail to explain how that holding turns on whether Baird recommended a "scoping" or "broad" process. Either way, contrary to what Appellants urge, the trial court found that "Baird recommended Authentix begin the scoping process in Fall of 2016 in advance of a broad sales process in 2017."[154] That finding rested on the trial court's determination that Renner's testimony was credible, *id.*, and as such, must stand, *Tesla*, 298 A.3d at 712.[155] Moreover, the trial court considered internal Baird documents, its communications

[154] *Id.* (citing A3103:1-23).

[155] Appellants set up a game of gotcha by whining that the trial court did not "reconcile" Renner's testimony that what started as a scoping process morphed into a broad process. OB 40. But Appellants tacitly concede that Renner never testified that Baird advised Authentix to stop at scoping, as opposed to proceeding based on feedback received in the process. Thus, they fail to identify even a purported "error," let alone explain why the supposed failure to "reconcile" rises to reversible error.

with Authentix and buyers, and testimony from Renner and the Directors to reject Appellants' argument that liquidity pressure on Carlyle resulted in timing pressure on Baird.[156]

Appellants' suggestion that Baird's talking points reflected some "time pressure," OB 40, also flatly ignores the Court of Chancery's decision. The trial court credited testimony that Baird talking points referencing CUSGF3's "hold period," as a rationale for the sale timing, did not "mean Carlyle was sacrificing value for timing objectives." Op. 60. That finding should stand. *See Tesla*, 298 A.3d at 712.

b. The trial court explained why it was reasonable that Authentix did not restart the sales process after winning the Aramco and Ghana contracts.

The Court of Chancery, contrary to Appellants' argument, explicitly found that "Authentix did not attempt to re-negotiate with BWE because the new contract matched BWE's assumptions for its bid, based on the information Authentix had previously communicated to BWE."[157] That finding rested on the court's assessment of testimony from Sikorski, Bernard, and Steve, each of whom testified that BWE had already baked into its financial model—which it shared with

[156] Op. 57-58 & nn.309, 311 (discussing A328; B592; B635; A358; A356; A1126; A858; A3103:1-23).

[157] Op. 29 & nn.177-78 (citing A1113; B1023; A3726:5-14; A2959:2-A2960:9; A3288:21-A3239:8).

Authentix—every last dollar Authentix expected to receive from Aramco and Ghana Tax.[158] The court also recognized that the renewal "was on diminished terms" and still left the Company "fac[ing] volatility in their customer base."[159]

The trial court also considered Appellants' contention that Authentix should have delayed the sales process in September 2017 after the contract wins and restarted it months later. Op. 50-51. The court explained that there were "of course risks with either course of action," so the Board's decision to conclude the long-running sales process did not demonstrate liquidity pressure. *Id.* 51.

Appellants' argument merely restates Barberito's contemporaneous opposition to the deal. It fails to identify any clear error in the Court of Chancery's full and fair consideration of Appellants' view that the Board should have remarketed Authentix after two contract wins.

c. The trial court disagreed with Appellants' mischaracterization of various emails.

Appellants desperately resort to an exhibit-by-exhibit critique of the Court of Chancery's decision, ignoring that its judgment was based on a "consideration of the entire factual record." Op. 41 n.243. In any event, Appellants are wrong in asserting that Vice Chancellor Glasscock did not consider their favorite documents.

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[158] *Id.*; *see also* A3490:23-A3491:17; B877.

[159] Op. 55 & nn.300-01 (citing A1113; B1023; B600; B593; A3194:4-A3195:12; B842; B849).

The crux of their appeal is that the trial court did not share Appellants' strained reading of these materials, and so they ask this Court to reinterpret and reweigh the evidence based on the same arguments rejected below. Their approach fails. *Bank of N.Y. Mellon.*, 29 A.3d at 236.

The trial court considered and drew appropriate inferences from each category of documents cited on appeal:

- ***De Benedetti article***:[160] The trial court recognized that the passage in question was "written for a private equity textbook generally, and not specific to CUSGF III and the sale of Authentix," and thus logically declined Appellants' invitation to construe the textbook article as an articulation of Carlyle's motivations with respect to Authentix. Op. 48 n.273 (citing A433-A434).

- ***Internal Carlyle communications***:[161] The trial court explicitly considered each of these documents in the post-trial decision. Op. 56 n.306 (citing B570; B522; A326; A333; A348; B653; A384; A488; A484). After describing each communication, it rejected Appellants' interpretation that the documents suggested Carlyle was "willing to sell Authentix at less than fair value to liquidate CUSGF III." Op. 56. The documents instead showed that Carlyle preferred to sell within CUSGF3's term, but a "preference" does not create a conflict.[162] Appellants place particular emphasis on A1032, Coburn's July 12, 2017, email to Steve, but ignore that the trial court credited Steve's testimony that the point of the message was that Authentix risked depreciating in the future so it would be advantageous to close a sale "at valuations close to expectations."[163] That understanding is far from illogical, especially considering "Authentix was facing a year over-year

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[160] A433.

[161] A488; A331; A333; A348; A484; A1032.

[162] *See supra* § I.C.1.a.

[163] A1032; Op. 54-55 & nn.297-98 (citing A2948:5-A2950:1; A3043:5-16 (Vigano); A3295:1-6; A3500:20-A3501:13.

decline in revenue and EBITDA" in 2017.[164] *See Cede*, 884 A.2d at 35-36. Appellants' argument reduces to a request to choose their inference over the Court of Chancery's, and that comes nowhere close to constituting clear error. *See Bank of N.Y. Mellon*, 29 A.3d at 236.

- ***Bernard emails***:[165] The trial court explicitly considered Bernard's email to a customer—not a buyer—referring to a non-existent "by-law" requiring liquidation within ten years and explained that it did not support Appellants' position that there was a deadline to sell Authentix.[166] Op. 61-62. This finding is unsurprising, as not even Appellants contend that CUSGF3 had an obligation to sell portfolio companies. Similarly, the trial court considered a broad collection of communications with Baird,[167] and found—based on Renner's credible testimony[168]—that Baird did not recommend halting the sales process and the exchanges did not evince a need for liquidity.[169]

- ***BWE communications***:[170] Appellants are wrong that the Court of Chancery did not address BWE's communications: it did so directly.[171] The trial court reasonably concluded that BWE's "impressions of Carlyle's situation" do not show that Carlyle in fact had a need to liquidate Authentix.[172] Appellants similarly fail to acknowledge that the trial court found, based on the documentary evidence and Sikorski's testimony, that Carlyle's communications with BWE only show it wanted to "consummate a deal process that had been ongoing for months."[173]

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[164] Op. 55 & n.299 (citing A2943:11-A2944:2; A3493:11-23; B811; B684; B1165).

[165] A1030; A356; A370; A376-78.

[166] Op. 61-62 & nn.323-24 (discussing A1030).

[167] Op. 57-58 & n.309 (citing A328; B592; B635; A358; A356; A1126; A858).

[168] Op. 58 & n.311 (citing A3103:1-23).

[169] Op. 58.

[170] A788; A807.

[171] Op. 25 n.151 (citing A788); Op. 63 n.326 (citing A807).

[172] Op. 62 & n.325 (citing A788; B742, B749).

[173] Op. 63 & nn.326-328 (citing A807; A3741:15-16, A3742:6-7).

In short, the Court of Chancery's decision was not just comprehensive and well-reasoned, it also took into consideration all the evidence and arguments Appellants invoke on appeal. Their transparent attempt to revisit amply supported findings should be rejected. *Int'l Telecharge*, 766 A.2d at 438.

d. Appellants' argument about the term extension is beside the point.

Appellants' final grievance is that the Court of Chancery referenced the fact that CUSGF3's term was extended. OB 46-47. They do not argue that the term was not extended (it was[174]), but argue that it is "reasonable to infer" some unspecified investor may have "been unhappy if Authentix remained unsold after September 2017." OB 47. Appellants' complaint that the trial court was not moved by their speculation about a counterfactual hardly rises to error, let alone clear error. Moreover, the trial court made explicit that it did not rely on events that occurred after the September 13, 2017, sale of Authentix in reaching its decision.[175]

[174] B1157.

[175] Op. 46-47. As for the one investor that—after the sale of Authentix—opposed extending CUSGF3's term, its position was an outlier, as all four remaining IAC members supported the extension. *Id.* 47 & n.266 (citing A1200; A3386:13-A3387:2; A3392:4-18).

2. Any Alleged Factual "Error" Would Be Harmless.

Appellants have failed to show that any of the Court of Chancery's findings were unsupported or illogical, so cannot clear the high hurdle of demonstrating grounds for reversal on a factual dispute. *See SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 37 A.3d 205, 209-10 (Del. 2011). Even if there were some factual error, Appellants include no argument in their brief as to how any of their fact-intensive quibbling could rise above "harmless" and constitute reversible error. *See DV Realty*, 75 A.3d at 108, *see also, e.g.*, *Betterbox Commc'ns Ltd. v. BB Techs., Inc.*, 300 F.3d 325, 329 (3d Cir. 2002) ("In a civil case, an error is harmless if it is highly probable that it did not affect the complaining party's substantial rights."). The Court of Chancery's determination that Carlyle did not receive a non-ratable benefit turns on numerous findings supported by an expansive record. Appellants offer no basis—in logic or law—as to how any specific fact weighs so heavily as to be dispositive in that analysis.

CONCLUSION

The Court of Chancery's judgment should be affirmed.

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