IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MPM HOLDINGS INC. :
APPRAISAL AND STOCKHOLDER : C.A. No. 2019-0519-JTL
LITIGATION :

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Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, January 13, 2022
9:15 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

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ORAL ARGUMENT RE DEFENDANTS' MOTIONS TO DISMISS
AND THE COURT'S RULING
HELD VIA ZOOM

CHANCERY COURT REPORTERS
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09:15:57 THE COURT: Welcome, everyone. Good to see you all.

09:16:00 Who is going to be speaking today for the plaintiffs?

09:16:08 ATTORNEY HIRZEL: Good morning, Your Honor. Sam Hirzel on behalf of plaintiffs and petitioners. Mr. Hecht, with whom I understand Your Honor is familiar, will be making the presentation.

09:16:19 THE COURT: And how about for the defendants?

09:16:27 ATTORNEY MASON: Good morning, Your Honor. Dan Mason of Paul Weiss's Delaware office. I'm joined on the Zoom by my colleagues from New York, including Jaren Janghorbani, who has been admitted and will speak on behalf of the individual defendants.

09:16:33 THE COURT: All right. And other defendants?

09:16:37 ATTORNEY SCHNEIDER: Good morning, Your Honor. Abe Schneider of Potter Anderson & Corroon on behalf of the Apollo defendants. With me this morning is my colleague, Matthew Davis, as well as our co-counsel, Jonathan Rosenberg, Andy Bednark, Asher Rivner, and Chris Burke from O'Melveny & Myers. And Mr. Rosenberg has been admitted *pro hac*, and with

Your Honor's permission, he will be speaking today.

09:17:03 THE COURT: All right.

09:17:04 ATTORNEY MOULTRIE: Good morning, Your Honor. Samuel Moultrie from Greenberg Traurig here on behalf of the investment group defendants. With me this morning from our New York office is Hal Shaftel and Ben Shiffman. With Your Honor's permission, Mr. Shaftel will be making the presentation this morning on behalf of the investment group defendants; and he has been admitted *pro hac*.

09:17:21 THE COURT: Thanks very much. That's all very helpful.

09:17:24 Ms. Janghorbani, are you going to lead off?

09:17:27 ATTORNEY JANGHORBANI: I am, Your Honor. Good morning.

09:17:28 We sent over some slides about half an hour ago. And with Your Honor's permission, I'm going to share those as well, if that works.

09:17:35 THE COURT: Please do, because I haven't found them yet.

09:17:39 ATTORNEY JANGHORBANI: All right.

09:17:40 THE COURT: Anne, could you go out and look at my credenza and see if they're around?

09:17:45 LAW CLERK RABON: Yes.

09:17:53 ATTORNEY JANGHORBANI: And you now see our deck?

09:17:58 THE COURT: Yes.

09:17:59 ATTORNEY JANGHORBANI: Wonderful.

09:17:59 There is a lot to cover this morning in our motion, Your Honor. I'm going to try to move as efficiently as possible but, obviously, stop me if you have any questions or anything that you'd like to jump to. I'm happy to accommodate.

09:18:23 I'm just going to begin with a brief overview of the merger. MPM is a global leader in manufacturing specialty silicones and silanes products. This is a highly cyclical industry. It alternates between boom and bust. And that really influenced how the sales process played out here and what sort of interest buyers were willing to express.

09:18:44 MPM was spun off from General Electric. At that point, Apollo was a controlling shareholder with about 90 percent of MPM's equity. In 2014, MPM filed for and emerged from bankruptcy. At that point, Apollo's ownership reduced to around 40 percent. Oaktree became MPM's second-largest stockholder, ultimately with a 21 percent stake. On

the board, there were three Apollo employees and one Oaktree employee.

09:19:12 The sales process here began in August 2016 when there was an unsolicited indication of interest from a potential strategic acquirer. Those negotiations lasted seven months. After those fell apart, MPM engaged both Goldman Sachs and Moelis as its financial advisors to explore a broader process. That process spanned many months.

09:19:36 From February 2017 to May 2018, MPM approached 38 potential acquirers. They approached financial partners. They approached strategic partners. Twenty-two different approached entities entered into confidentiality agreements. Fourteen received confidential information memoranda. Eight attended meetings with management. Only six of those parties provided preliminary indications of interest. Those ranged in value from 8.75 to $25 a share. Two SPACs also made offers at approximately 24.50 and 25.

09:20:09 The board considered all of these offers to be too low. So Moelis identified a major concern driving these low bids, and that was the cyclicality of both MPM itself and the silicones business generally.

09:20:23 MPM considered doing an IPO. A preliminary prospectus was filed in November of 2017 for a target price of 23 to $25 per share. The board decided not to proceed with that because of adverse market conditions, namely the fact that no buyers were interested in investing at that price.

09:20:42 Subsequently, MPM received two offers, and these were for the investment group, who are codefendants here in this action, and Party A. The preliminary offers ranged from 25 to $28 per share. Both offers exceeded the highest offer MPM had ever received previously as well as the IPO target price.

09:21:04 MPM then proceeded to negotiate both bids significantly upwards. The investment group offer got up to $34 per share contingent on subsequent diligence. Party A offered 27 in cash plus contingent valuation rights up to an additional $3 per share. Both offers were subject to diligence.

09:21:25 At this point, MPM also solicited additional bidders, reached out to its investors, and canvassed the market in order to ascertain whether anyone else was interested in participating in this process.

09:21:36 The investment group reduced its offer

to 32.25 based on issues it identified during diligence. Party A then withdrew from bidding, citing concerns about projected developments in the industry. After Party A dropped out, MPM continued to push for a higher price from the investment group, and the investment group increased its offer to 32.50 per share. That was $5.50 higher than Party A's previous offer.

09:22:04 And I will note, Your Honor, that in the period prior to when MPM began exploring a strategic transaction, if you look at MPM's stock price, it hovered in the low single digits, and it never climbed above $20 a share.

09:22:19 Prior to the merger agreement being signed, two fairness opinions were provided by both Goldman and Moelis. The board unanimously approved the agreement, the merger agreement was signed, and then the merger agreement was approved by written consent. And many months later, the merger subsequently closed.

09:22:42 Now, the arguments, I'm going to go through today, Your Honor. First, the business judgment rule applies under *Corwin* and warrants dismissal of all the claims. Second, if Your Honor

disagrees, the complaint does not state a nonexculpated claim against any of the individual defendants. The complaint doesn't adequately allege director interest or lack of independence, and the complaint doesn't allege bad faith. The aiding and abetting claim against my clients fails because they're fiduciaries, and the complaint doesn't state a claim against Defendant Boss, as he is an officer, which plaintiffs didn't even contest in their briefing.

09:23:23 So let's begin with *Corwin*. As Your Honor well knows, *Corwin* stands for the proposition that where there is a fully informed shareholder vote, the litigation challenging the transaction is subject to dismissal under the business judgment rule. And I'll start with one point, which is that it's not, by its terms, in any way limited to a shareholder vote only. So, in *Corwin*, the Court alternates between approve and vote.

09:23:50 And in the *Volcano* case, Your Honor, this Court held that the Supreme Court did not intend its holding in *Corwin* to be limited to stockholder votes only. Indeed, that would undercut Section 228 of the DGCL, which sets forth a multitude of ways that

shareholders can approve corporate action, including acting by written consent in compliance with that provision.

09:24:14 Now, there are exceptions to *Corwin*'s application. First, *Corwin* doesn't apply if there is a controlling shareholder and if that controlling shareholder's motives are in conflict with those of the other shareholders. I would submit plaintiffs have made neither showing here, Your Honor.

09:24:30 Apollo was not a controlling shareholder. Apollo was a minority shareholder, owning 40 percent of MPM post-bankruptcy. It didn't have a board majority; three of the 11 directors were Apollo employees.

09:24:44 And I'll note, Your Honor, that you also don't see in this case any of the sort of plus factors that Your Honor has articulated in numerous other cases where a nonmajority shareholder may nevertheless be a controlling shareholder due to such things as contractual rights. Right? We don't have a stockholder agreement here where Apollo had the ability to veto a transaction or to remove management or to remove members of the board.

09:25:12 So the only thing that plaintiffs

point to here as a sort of plus factor is the shared services agreement. That didn't give Apollo any leverage over MPM. Again, it was simply a mutual agreement for Hexion to provide back-office functions in a way that lowered MPM's costs. It wasn't conditioned on Apollo continuing to be an investor in MPM. In fact, it continued to apply after the merger. And it excluded key executive services. Right? These are the sort of functions that are being shared that don't rise to a level of control of the corporation.

09:25:55 Second, Apollo was not conflicted *vis-a-vis* the other shareholders. It had no independent interest. And I would submit that plaintiffs, both in their complaint and their brief, spill a lot of ink on trying to create a narrative that suggests that Apollo had some conflicting interest. But based on the facts alleged and the reasonable inferences drawn therefrom and based on this Court's case law, I would submit they simply haven't made that showing, Your Honor.

09:26:23 First, Apollo received the same consideration as all of the other stockholders in this deal, which, as Your Honor has noted, should lead the Court to look at the deal in such a way as to assume

that they're motivated by the same financial interests motivating all other shareholders.

09:26:40 Now, the plaintiffs talk about the bankruptcy, but the bankruptcy had no specific benefit or detriment to Apollo. First, MPM, not Apollo, bore the liability risk in connection with the bankruptcy, so MPM was responsible for any of the additional interest, et cetera, that those senior lienholders would receive E.

09:27:04 That had a potential effect on shareholders, but that would be an effect that was shared equally among all shareholders. So to the extent that the bankruptcy had an impact on the stock value of MPM, that was the same for any shareholder.

09:27:19 Additionally, the plaintiffs point to this other litigation, the intercreditor litigation, but Apollo was indemnified in anything arising out of the bankruptcy litigation by virtue of a backstop agreement that was executed around the time of the bankruptcy.

09:27:40 Further, there was a court-approved bankruptcy plan that released Apollo from direct claims.

09:27:45 So I would submit, Your Honor, the

Harcum case is instructive here. Plaintiffs can't just allege that there's some potential litigation liability risk without more. First of all, there's no compelling risk in these litigations at all, but second of all, the litigation risk doesn't even flow through to Apollo, which is the link that they have to establish, the reasonable inference that they're asking this Court to draw. And I would submit on the record pleaded here, it's simply not a reasonable inference.

09:28:18 Now, the plaintiffs also sort of tack onto that bankruptcy argument a suggestion that Apollo had some sort of secret debt instrument. I'll submit -- and I know my colleague at O'Melveny is going to cover this in more detail -- that the facts aren't there to support that at all. But even if we credit plaintiffs' allegations as written, the plaintiffs concede in their brief that the fact that Apollo may have had a separate debt interest in the company does not, in and of itself, create any sort of disabling conflict. Plaintiffs attempt to tie that to the bankruptcy but, again, there was nothing specific about what plaintiffs have alleged in terms of either the swap or the bankruptcy that in any way flows

through to Apollo in such a way that would create a conflict, as with other shareholders.

09:29:10 Now, the sort of lead argument the plaintiffs make -- and I'm handling it last because I think it's the simplest factually -- is that Apollo had some sort of liquidity crisis. And they treat as another potential motive for Apollo the fact that there was a need to unlock performance fees. But I would submit, Your Honor, that unlocking performance fees is part and parcel with liquidating a fund, so it's really just lipstick on the pig of the liquidity crisis.

09:29:37 And the Court has really been very clear that the sort of routine nature of fund investments -- the fact that they need to be exited, the fact that they have intended timelines that may or may not be met -- is not the type of exigent circumstance that would drive a stockholder to abandon his or her own financial interests or diverge from the interests of the other stockholders.

09:30:05 Now, the other exception to *Corwin* applying is if the vote wasn't adequately informed or if it was interested or coerced. There are no allegations that the vote here was coerced. All of

the stockholders received the same price per share. I'll note, Your Honor, that Apollo and Oaktree, while they approved this by written consent, this is not a circumstance where they had signed stockholder voting agreements agreeing that they would. They weren't bound to. They made the choice to approve this by written consent. And there is simply no allegation that either Oaktree or Apollo were uninformed.

09:30:48 The information statement was not deficient. So plaintiffs suggest a number of infirmities, and I'll walk through them briefly. But the information statement provided sufficient information for the vote and for other shareholders to determine whether or not to exercise their appraisal right.

09:31:06 I'll note that plaintiffs themselves here sought appraisal. In fact, roughly 9 percent of all outstanding shares of MPM are the subject of the appraisal actions pending before Your Honor.

09:31:18 Plaintiffs don't identify any defect in the information statement let alone any defect that would be indicative of bad faith on the behalf of the independent directors.

09:31:30 They complain about the fiduciary out

provision. The fiduciary out provision was clear. It was stated in the information statement. The description was accurate. And an accurate description can't form the basis of a disclosure claim.

09:31:46 Plaintiffs suggest that it somehow misled shareholders because it was there even though the information statement acknowledged that the company could no longer walk away from the merger because it had been approved by stockholders. That's not a reasonable inference, Your Honor.

09:32:02 I'll also note that plaintiffs spill a lot of ink suggesting that it's a nullity. It really isn't. Again, the written consents were not obligatorily. So to the extent that once this deal was signed, either Oaktree or Apollo determined not to vote for the deal, either Oaktree or Apollo determined to go out and see if they could get another financial partner to put forward a better deal if they thought the value of this company was higher, that all could have happened. But it didn't because this was clearly the best price available for this stock.

09:32:36 Now, they also complain about the methodology of Goldman Sachs' fairness opinion, which, again, is not a disclosure claim. So the information

statement provides accurately the projections that Goldman used and the valuation ranges generated. They allege that Goldman used the wrong tax rate assumptions and a defective through-the-cycle average EBITDA approach. This is an improper methodological attack on Goldman's work styled as a disclosure claim.

09:33:07 They also alleged that MPM didn't disclose Apollo's material conflicts. No conflict existed for the reasons that I've already stated to Your Honor. To the extent -- you know, again, and none of the conflicts that plaintiffs alleged in any way tainted this sale process, this extensive, long, searching sale process; and so they would be immaterial. And there's certainly no allegation that the individual directors knew of any such conflict and nevertheless failed to disclose it.

09:33:43 So unless Your Honor has questions on *Corwin*, I'm happy to move to the *Cornerstone* analysis.

09:33:52 MPM's charter includes an exculpatory provision. So, obviously, as to each of the individual directors, plaintiffs must plead a nonexculpated claim. They can't escape dismissal by alleging the defendants failed to satisfy *Revlon*. The Court's cases are clear that even if that's the case,

you nevertheless have to have a nonexculpated claim as against the relevant fiduciaries.

09:34:17 So in order to establish that, as Your Honor well knows, they have to plead either interestedness, lack of independence, or bad faith, and the allegations have to be specific as to each individual defendant, so I'm going to go through them each one by one. But the end result is the merger was approved by a majority of disinterested directors. So even if Your Honor finds that *Corwin* doesn't apply, the claims here fail.

09:34:44 Plaintiffs have to allege that six of the 11 MPM directors breached their duty of loyalty. Plaintiffs make no allegations as to four of the directors. Four of those directors aren't defendants in this action.

09:34:55 The next two, Bradley Bell and Jack Boss. As to Bell, plaintiffs plead essentially nothing at all. As to Boss, there are allegations of interestedness, but those fail for reasons I'll walk through in a moment.

09:35:11 They also contend that Mr. Nodland and Mr. Schlanger are somehow affiliated with Apollo, but the allegations don't bear that out.

09:35:18 And then, finally, they allege that the three Apollo employees themselves are interested. And Your Honor, I would submit that fails for the same reason that the allegations that Apollo is a conflicted controller fail. But, obviously, those rise and fall on the same analysis.

09:35:33 So Mr. Bell was the chairman of the board of directors. He is an experienced director. These are all savvy experienced directors, Your Honor, all with prior experience in the chemical industry.

09:35:46 There is no allegation that Bell had any interest whatsoever in the merger apart from his role as a fiduciary for the shareholders. There is no allegation of any prior relationship with the investment group, in relationship with Apollo, in relationship with any other MPM director.

09:36:01 And in fact, the email record that plaintiffs point to in their complaint show Bell actively questioning and seeking to understand the deal and pushing back on different decisions that are occurring and doing so successfully. So he is taking the role that we want a board chairman to take.

09:36:23 Mr. Boss. Mr. Boss was the director and the CEO of MPM. Plaintiffs' first allegation is

that he was installed in the CEO role by Apollo. Simply not true, Your Honor. He was hired at the company in a different role pre-bankruptcy, when Apollo was a controller. There is no allegation that Apollo had anything to do with that. There's no allegation that Apollo selected him for that role. And there is no explanation for how having that lesser role somehow made him beholden to Apollo. But he was appointed as CEO post-bankruptcy when Apollo is no longer a controller.

09:37:00 And even if that weren't the case, the mere fact of being installed as CEO by a controlling shareholder, in and of itself, isn't enough to create interestedness. There is no suggestion that Apollo could remove him. There is no suggestion that he was in any way beholden to Apollo.

09:37:15 They complain in their brief about preexisting equity awards that he had that would vest as a result of the merger. That just aligns his interests with the stockholders. The case law is clear that that's not enough to create any sort of disabling conflict. And I would submit the plaintiffs waived this point because it's not even addressed in their brief.

09:37:37 He remained CEO until after the merger. He retired about two years ago. Plaintiffs suggest somehow that the fact that he remained CEO -- obviously, this is in tension with the severance payments that they're also arguing about -- but they contend that the fact that he remained CEO suggests he had some sort of interest, as you see in some of the cases, in continuing employ. But there's no allegation here that either his continuing employment was negotiated, determined, guaranteed, prior to the merger being signed. And there's certainly no allegation and nothing to support an inference that his post-closing employment was better, let alone materially better, than his existing position.

09:38:22 Mr. Nodland. So, again, this is a gentleman who served extensively on boards of other chemical companies and has real expertise in this space. The plaintiffs allege that he has ties to Apollo basically because of the many, many boards this man has served on. He served on boards of two companies that Apollo invested in. But those directorships ended three years before the merger. And there's nothing further, Your Honor, to suggest that he's in any way beholden to Apollo. There is not

a narrative of his being handpicked, appointed, that Apollo was a controller at those companies. All of that is absent, Your Honor.

09:39:00 And there is certainly no allegation that his MPM director stipends were material in light of the fact that he was the full-time CEO of a company that was unaffiliated with either Apollo or MPM in addition to other directorships.

09:39:12 Mr. Schlanger, very similar. Experienced in chemical manufacturing, both as an executive and a director. On multiple boards in this space. Expert in this space. Similarly, plaintiffs allege ties to Apollo. Previously employed at two Apollo-affiliated companies, but, again, the most recent was four years prior. Because Apollo is not conflicted, this is all immaterial. But regardless, there's not enough in the record here to suggest that he's beholden to Apollo.

09:39:45 And then I'll just go very quickly through the Apollo-employed directors: Mr. Feinstein, Mr. Kaslow-Ramos, and Mr. Kleinman. These all suffer from the same flaws. There was no conflict in Apollo's interests even if Apollo were deemed to be a controller, which, as submitted, Your Honor, it simply

was not. Apollo was incentivized to receive the maximum sale price, received no unique benefit. To the extent that Apollo had a financial interest in exiting MPM, it was incentivized to get the highest possible value for that.

09:40:25 There is no allegation of a fire sale. And I know the Court has said that "fire sale" is a bit of an overstatement, and certainly that's true, but there's no evidence of a liquidity crisis in a $300 trillion company, that it really needed to unlock these specific performance fees. There is no allegation that Apollo instigated the initial sales process. There is no allegation that they caused MPM to abandon its proposed IPO. And there's no allegation that they cut short the sales process in any way, which was thorough and involved outreach to many, many companies.

09:40:58 So the plaintiffs need to allege six or more directors in order to succeed here, and they simply have not, Your Honor. I would submit the four that are not even at play are obviously easy. I think the next two are just as easy. And then I think Mr. Nodland and Mr. Schlanger, you just have to look closely, and there is not enough there to give rise to

an inference of control. But certainly, as to the remaining five, to the extent Apollo is not a controller and Apollo is not conflicted, obviously, they are neither.

09:41:29 The complaint doesn't allege bad faith. The complaint doesn't use the words "bad faith." The complaint doesn't use any words that are synonymous with bad faith. They have to show an intentional dereliction or a conscious disregard of duty by each of the directors.

09:41:43 The three theories that they have as to bad faith simply fail. They fail to plead bad faith in the sales process. So again, here, they have to allege that the individual directors consciously disregarded their duties, and they simply haven't done so.

09:42:02 Again, if you look at this slide, Your Honor, this is the process that the MPM board engaged in in order to extract a substantial premium over any prior offers over the unaffected trading price of the stock. They had sophisticated financial advisors.

09:42:21 Now, plaintiffs complain about Goldman, but both Goldman and Moelis evaluated MPM's business. Both provide fairness opinions. Documents

show that Moelis provided advice throughout the sales process and in particular in connection with the IPO. Plaintiffs make no allegations about Moelis and whether or not they were an adequate advisor to the board.

09:42:46 There are also scattershot attacks on the sales process. They fault the defendants for allegedly allowing Apollo to control the sales process, but I would submit that's simply not true. Failing to address the investment group's difficulty, again, not true. Failing to pursue Party A's offer, again, not true. Failing to pursue an IPO, again, a certainly reasonable, well-informed decision by the board, given that there was lack of interest in such an IPO. And they fault the board for not managing the bankruptcy litigation differently.

09:43:19 The individual defendants didn't allow Apollo to control the sale process. Again, not conflicted nor a controller. Incentivized to maximize the price. The board, the record shows, was attentive to and addressed potential conflicts and board members' interests.

09:43:35 When, as to Party A, there was the potential that Oaktree had an interest in rolling over

its investment should Party A be the purchaser, the board promptly acted to make sure that there was appropriate processes and barriers in place to prevent anyone negotiating in a way that could have been conflicted with the shareholders. So it simply is not a reasonable inference from the facts alleged here.

09:44:00 And the individual defendants were very attentive to the investment group's difficulties. Now, this was a class order transaction, and plaintiffs allege that there was inappropriate behavior, unreasonable diligence requests, infiltration of confidential information, leaking of the deal to the press. The board became aware of each of these issues and promptly responded, investigated, instructed its counterparty to behave differently.

09:44:31 I'll take just one email as an example, Your Honor. And this is Exhibit 6 to the Mason declaration. This is an email from Mr. Bell, chairman. "Our advisors and management have kept me informed on a regular basis, and ... [they'll] keep the Consortium" -- this is the investment group that's alternatively referred to as the Consortium -- "in the process despite difficulties ...." "[These have] been difficult at times ..., though not without extra

effort from our team."

So they talk about how an employee reached directly out to an MPM employee, promptly instructed not to do that. The advisors provided strong feedback that the diligence being requested was inappropriate. There was another strong message in response to inappropriate information requests.

And I'll note, on the leak, that was investigated. No one was ever able to figure out where that came from either. We're also now in this litigation, 2 million pages of documents in, and there's still nothing to suggest that the board knew how to prevent the leak from occurring or didn't take reasonable steps in order to make sure that subsequent issues didn't occur.

The individual defendants also vigorously negotiated with Party A. Plaintiffs take issue with the fact that Mr. Kalsow-Ramos told fellow -- was involved in the actual communications with Party A. I'll submit that's not an issue, Your Honor. Again, same incentive as every other stockholder.

Party A, that was a successful negotiation process. They walked away, but the price

increased, and there was real engagement there. Regardless, the investment group's final offer exceeded Party A's highest bid. But there's no suggestion that the communications between Mr. Kalsow-Ramos and Party A weren't authorized, weren't directed by the board; and in fact, they were.

09:46:25 And in fact, Apollo -- they claim that Apollo didn't prefer Party A, but in truth, there's documentary evidence that Apollo actually encouraged and supported Party A running in parallel to the Koreans' Consortium investment group.

09:46:43 There was a thorough consideration of an IPO. The board considered an IPO. The board put out a preliminary prospectus for an IPO. There is no allegations that Apollo in any way interfered with the IPO. And it simply makes no sense, Your Honor, that an IPO preliminary prospectus would have been filed if it was the case that Apollo was adamantly opposed. Instead, what happened is the preliminary prospectus was filed, and it became clear there was simply no buyer interest. The board just concluded that was not the best path forward.

09:47:14 And again, the bankruptcy litigation. The plaintiffs fail to tie the bankruptcy litigation

to the merger. They suggest that there was a protracted dispute that drove a quick exit, but that's simply not true. They suggest that MPM was somehow obligated to settle the bankruptcy litigation by virtue of the merger. Again, not true. There's nothing in the merger that requires that.

09:47:38 I'll also note, Your Honor, that this minimum cash balance that the plaintiffs refer to, if anything, what that did was sort of limit the discretion of MPM in terms of how it could settle this ongoing bankruptcy dispute, because that cash had to stay on hand through the close of the merger. So the plaintiffs' allegations simply don't stand up to scrutiny.

09:48:05 Instead, the individual defendants negotiated for and accepted the highest price. There is no evidence that the process in any way discouraged any willing bidder. There is no allegation that a higher price or another bidder was actually available. And what we have here is a value-maximizing deal for all shareholders that was properly approved by a stockholder vote.

09:48:28 They fail to adequately plead bad faith as to the merger terms. Now, I referred to the

minimum cash amount, but it's a buyer protection. It's sought by the investment group. And MPM negotiated it down by almost 50 percent. So nothing in the merger agreement allocated that to the bankruptcy liability. And again, once that cash is set aside, MPM couldn't access that cash to try to get rid of its bankruptcy liability in any way, shape, or form. And to the extent that there was any risk there, it was shared by all of MPM's shareholders. And there's nothing to suggest that the board did anything other than try to resolve that litigation in the best interest of its shareholders.

09:49:12 They complain about the approval by written consent. It's certainly not bad faith, Your Honor, to do something authorized by both the corporation's own documents and DGCL 228.

09:49:25 The suggestion that the written consent prevented other stockholders from having any say in the merger is, again, negated by the written consent process. That's simply how it works. And I'll note that plaintiffs seem to have dropped this issue by not addressing it in their answering brief.

09:49:45 And then the disclosure deficiencies that plaintiffs allege, I already walked through

those, Your Honor, in the context of the *Corwin* analysis, but I would submit once again that not only were there no disclosure deficiencies, but certainly there were none that would give rise to any sort of assumption of bad faith. And the lack of material admissions negate any bad faith claim.

09:50:07 Now, two very brief final points. The aiding and abetting claim fails because the individual defendants are fiduciaries and the plaintiffs essentially concede as much in their brief. And the complaint doesn't allege any breach by Mr. Boss in his capacity as an officer, despite the stray use of the word "officer" in the actual count in the complaint. And I would submit that plaintiffs seem to have waived that by failing to address it in their brief as well.

09:50:34 So, Your Honor, I would submit that we have a case here where plaintiffs had access to 250,000 documents, nearly 2 million pages of documents. They have crafted an elaborate and lengthy complaint, but they have failed to show any cognizable claim. I would submit *Corwin* applies. And in any event, even if it did not, *Cornerstone* cleansing would.

09:50:56 So unless Your Honor has any

questions, I'm happy to turn the floor over to my colleague.

09:51:07 THE COURT: Thank you very much. Please do.

09:51:15 ATTORNEY ROSENBERG: Good morning, Your Honor. Jonathan Rosenberg, O'Melveny & Myers, for the Apollo defendants.

09:51:20 My colleague covered a lot of law that applies to the Apollo defendants as well, but I'll touch briefly on points that she made and also fill in some of the gaps and provide a little bit more detail.

09:51:37 The structure of my argument will be that there aren't sufficient control allegations with respect to Apollo. Secondly, that even if they did allege that Apollo was a controlling shareholder, that they haven't alleged sufficient diverging interests to constitute a disabling conflict. And finally, I'll touch briefly on the aiding and abetting claim.

09:52:03 With respect to Apollo, plaintiffs not adequately alleging that Apollo was a controlling shareholder, Ms. Janghorbani showed very well how they haven't alleged that more than -- that a majority of the board, at least six of the 11 directors, were beholden to Apollo. And in fact, as we show in our

papers and as Ms. Janghorbani laid out, there's a very good argument that seven and potentially even eight directors were not beholden to Apollo.

09:52:41 So the 40 percent voting power, while significant, does not amount to *de facto* control under Delaware law. They can't allege -- they haven't sufficiently alleged that Apollo has power over the board. And so the next step is, do they allege Apollo's control over Momentive in general or do they allege Apollo's control over the specific transaction at issue. And they don't allege either, Your Honor.

09:53:19 With respect to control in general over the business and affairs, the one thing they point to is the shared services agreement. And as Ms. Janghorbani pointed out, that shared services agreement, while pre-bankruptcy, it allowed for sharing of the Hexion-owned Apollo's executive and senior management functions with Momentive, post-bankruptcy, when Apollo's voting power went down to 40 percent, it specifically excluded that because Momentive wanted to have its own senior management and executives. So all you have left is just shared administrative functions, which is in the mutual interest of Momentive and Hexion and doesn't provide

an opportunity for Apollo to have undue leverage or be involved in management of Momentive.

09:54:16 This is not like the situations in *Voigt* or *Basho* where the key stockholders agreements in those cases provided the stakeholder with blocking rights. There is no such allegation in this case. Nor do plaintiffs allege that Apollo had control with respect to the specific transaction at issue here.

09:54:38 And what plaintiffs mainly point to is the fact that Platinum reached out to Apollo and that the board, shortly thereafter, authorized Apollo to negotiate with Platinum. Well, it was perfectly sensible for the board to have Apollo continue the conversation with Platinum. Platinum reached out to Apollo because they had previous business dealings. And so it was rational for the board to allow Apollo to continue the process further by negotiating with them. But the board only did so during the May 2018 meeting, after it decided the terms of the counteroffer. It did not leave the terms for Apollo to decide.

09:55:28 And the minutes of the June 2018 meeting, Exhibit 12, show that the board continued at this time to consider other strategic alternatives and

to speak with its advisors about that and maintain control over the financial terms of the negotiations with Platinum. So it didn't advocate anything. Apollo didn't dominate the process.

09:55:55 And in fact, plaintiffs' theory of specific control with respect to the dealings with Platinum makes no sense because Platinum withdrew its offer in August of 2018, citing concerns about recent and projected developments in the company's industry and potential impacts on Momentive.

09:56:15 Well, if Apollo was actually a controlling shareholder and was looking, as plaintiffs say, to jam a transaction down the company's throat, then it would have done everything possible to make sure that Platinum didn't withdraw.

09:56:28 This is not like a situation in Basho where the block holder's representatives spread misinformation or made threats or engaged in combative behavior or abused its relationship with a financial advisor. Again, we have nothing remotely like that in this case.

09:56:50 So now let me turn to the divergent interests prong. Even if plaintiffs had sufficiently alleged Apollo's control, they still wouldn't have a

fiduciary duty claim against Apollo because they haven't alleged a disabling conflict.

09:57:09 Now, plaintiffs try to allege the disabling conflict in four ways: that Apollo's interest was divergent from the other shareholders' because, one, it needed liquidity and management fees from closing out Fund VI; two, that it needed protection from exposure to the senior noteholders' litigation against Momentive; three, that it needed protection from exposure to the senior noteholders' intercreditor agreement litigation against Apollo; and four, that Apollo was looking, allegedly, to get the proceeds of an alleged total return swap. So let me go through them one by one.

09:57:55 First, with respect to liquidity and management fees from closing out the fund, the allegations here that Apollo wanted to get liquidity are analogous to the allegations regarding fund managers that Your Honor found sufficient in *Presidio* and that other courts have found insufficient in *Mindbody*, *Crimson*, and *Morton's*.

09:58:19 And Vice Chancellor McCormick stated in *Mindbody*, "it is [the] rare set of facts that will support a liquidity-driven conflict theory" and "this

court routinely rejects such theories when based on a fund's expiring investment horizon."

09:58:40 So here, Your Honor, plaintiffs allege that Fund VI was in its 12th year by 2017. And so that's two years longer than plaintiffs allege is the usual ten-year life-span of an Apollo fund. And therefore, that incentivized Apollo to liquidate the fund's investments and take the $168 million performance fee that was placed in escrow.

09:59:07 The problem for plaintiffs, however, is not only the law but the facts, because they failed to plead facts showing that any incentive Apollo might have had to close out the fund would have overcome its natural incentive to get the highest price for its Momentive shares.

09:59:25 And in fact, the record shows just the opposite. As you can see by the timeline, the board engaged in a two-year process that began in 2016, the very year that plaintiffs say that the ten-year horizon had expired, but that process didn't begin by Apollo. It began when Momentive received an unsolicited indication of interest in August of 2016, after Apollo's alleged need for liquidity a rose.

09:59:57 And the board subsequently went

through a process. It explored a variety of strategic alternatives, including an IPO in 2017, SPAC transactions, an outreach to 38 potential bidders. And we put up on the screen one of the slides from a board deck that summarized the process. And you can see a variety of the transactions that the board looked at.

10:00:24 Simply stated, there is no case in which the Court of Chancery has deemed allegations about a shareholder's incentive to close out a fund in these circumstances sufficient to plead a disabling conflict.

10:00:38 Now, the second disabling conflict that plaintiffs rely on is Apollo's need to get protection from exposure to the senior noteholders' litigation against Momentive. And plaintiffs allege in paragraph 71 of the complaint that on October 20, 2017, when the Second Circuit remanded to the Bankruptcy Court the senior noteholders' claim that the interest rate on their replacement notes was too low, Apollo at that point was incentivized to eliminate the exposure that litigation presented, and it did so through the merger agreement. And that theory fails for many reasons, but let me just tick

off a couple of the key ones.

10:01:24 First, and most importantly, Apollo had zero exposure to the senior noteholders' claims regarding the interest rate for the replacement note. First of all, the lawsuit wasn't against Apollo. It was against Momentive.

10:01:38 And secondly, to the extent plaintiffs speculate that Momentive, if it had liability, it would have had a right of contribution over to Apollo, well, that fails because Momentive broadly released Apollo as part of the bankruptcy plan of reorganization. And that's in Exhibit 3, Section 12.5 of the plan. And in any event, the complaint identifies no claim that Momentive would have had against Apollo, a so-called contribution claim, in any event, especially since Apollo received only stock in the bankruptcy.

10:02:16 And in any event, the second reason is, apart from the fact that Apollo had no exposure, it didn't force a settlement, assuming it could have done so on the theory that it was a controlling shareholder, which they haven't adequately pleaded anyway, but it didn't force a settlement of the transaction in the wake of the Second Circuit's

decision, as evidenced by just two weeks after the Second Circuit's decision, the company filed for the IPO in November of 2017; and secondly, the board's continuation of the strategic process for almost a full year after the Second Circuit's October 2017 decision.

10:02:57 So the third alleged disabling conflict that plaintiffs say Apollo had was that it wanted protection from the other senior noteholders' lawsuit. This is a lawsuit regarding the intercreditor agreement. And this was against Apollo. They allege that in paragraph 57.

10:03:19 But this, too, is dead on arrival for many reasons. The two key reasons are that even though this lawsuit was against Apollo, Apollo effectively had zero exposure as well, because Momentive was obligated under the restructuring and backstop commitment agreements to indemnify Apollo for any claim arising out of or in connection with the plan of reorganization or the transactions it contemplated. And that falls squarely into the intercreditor agreement litigation that the senior noteholders brought against Apollo.

10:03:56 And in any event, these claims against

Apollo couldn't get out of the starting gate. The Bankruptcy Court dismissed the complaint against Apollo in 2014, denied two motions to amend the complaint in 2015; and the District Court affirmed all three decisions, the dismissal and the denial for leave to amend, in January of 2019. So there's no reasonably conceivable basis that theoretical exposure to the senior noteholders' litigation against Apollo, the intercreditor litigation, would have provided any disabling conflict to Apollo.

10:04:37 And the fourth and final alleged disabling conflict that plaintiffs point to is the most speculative and the most unreliable for this Court. Plaintiffs spin an elaborate theory that Apollo had a total return swap agreement with Goldman Sachs that gave Apollo an interest in the senior notes.

10:05:05 Plaintiffs' entire theory stems from two words, two words that appear on two documents in the 1.8 million pages produced in the appraisal action in this case. Now, the first, and it's up on the screen, is from Exhibit 16, which is dated as of December 31, 2017. And it's a template. It's called a "future cash flow template." And on the third page,

under Fund VI, there is a single entry for $110 million with the comment "TRS Cash." Those are the two words, and that's it. No explanation. No elaboration.

10:05:51 And then the other document, the same two words, "TRS Cash," show up. And that's Exhibit 21. And it's an October 2017 portfolio review from Momentive and Hexion. But rather than list the alleged total return swap investment that plaintiffs allege as one of Momentive's investments, Slide 1 expressly excludes TRS cash in Footnote 2. Nothing in the slide shows that Fund VI had actually invested in a total run swap tied to the senior notes. And the same words "TRS Cash" appear on Slides 13 and 16 of Exhibit 21, again, without elaboration. No mention of TRS cash in the remaining 22 slides and no mention of having any interest in the senior notes.

10:06:48 Now, the other two documents on which the complaint relies in paragraphs 79 and 83 of the complaint don't even mention total return swaps and don't mention the senior notes.

10:07:06 In paragraph 83, plaintiffs point to another "future cash flow template." This one is dated not in 2017 but March of 2019. And it has an

entry for 110 million but no comment for TRS cash. And that's Exhibit 17.

10:07:27 And then the other document, the final document I want to talk about with respect to this speculative theory, is a June 2019 draft distribution notice for Fund VI investors. And it's referred to in paragraph 79 of the complaint. It doesn't mention a total return swap either. And that's in Exhibit 18.

10:07:50 And this draft distribution notice actually blows plaintiffs' theory out of the water, because after talking about the proceeds that would be returned to investors, the proceeds from the sale of Apollo's Momentive stock, about 620 million, it says that Fund VI is returning to investors 113 million of capital, which was called to support debt purchases over time. It identifies no debt and no purchases and no, most significantly, total return swap proceeds. So it's talking about called but not used capital. The author describes the distribution as SPV, or special purpose vehicle cash, not TRS cash, and describes it as a return of capital, not profits or proceeds.

10:08:49 If, as plaintiffs allege, Fund VI had just received and planned to distribute proceeds from

a total return swap investment tied to senior notes in that litigation settlement, the distribution notice to investors is the place you'd expect Apollo to describe it, but it's not there at all. Instead, Apollo is returning investor capital that was in the fund or called to support potential debt facilities, such as a line of credit, that the fund could draw on to make other investments in the portfolio.

10:09:28 Another component of this speculative allegation that plaintiffs make with respect to the total return swap is that they make the information and belief allegation that Goldman was the swap counterparty to this phantom TRS. And all they have in making that allegation is that in an offering memorandum for a different fund, Fund IX, it says that Goldman is one provider of TRS in the market. That's it. No swap documents, no evidence of payments to or from Goldman, no emails talking about a TRS connected to the senior noteholders' litigation or the notes at all. It's not reasonably conceivable based on these allegations that Fund VI invested in a TRS tied to the senior notes.

10:10:27 As we show in our brief and as Ms. Janghorbani touched on, even if plaintiffs had

adequately pleaded this speculative theory, it wouldn't show a disabling conflict because it wouldn't have impaired Apollo's interest as a shareholder to get the highest price for its shares.

10:10:48 Now, the Court need not go there, but it's clear that there is no conflict because Fund VI would have received the proceeds of this hypothetical TRS via a settlement in any context. If the board had done an IPO, if the board had done a different transaction, if the board had maintained the status quo, a settlement of the total return -- of the noteholders' litigation wouldn't have interfered with Apollo's interest in getting the highest price for its shares.

10:11:22 And as Ms. Janghorbani touched on, plaintiffs get nowhere with their argument that the Consortium sale facilitated the settlement with the noteholders because the Consortium was the only bidder to agree to a minimum cash amount. There had to be $250 million available at the time or the stock price, the consideration, would have been reduced. And so the minimum cash amount would have potentially complicated rather than facilitated Momentive's settlement of the senior noteholder litigation that is

the supposed event that would have triggered payment on these hypothetical total return swaps.

10:12:04 And the unreasonableness, Your Honor, of this entire line of speculation is highlighted by the undeniable fact that if Apollo truly controlled Momentive and wanted Momentive to pay the senior notes liability, it could have caused Momentive to settle the senior note litigation at any point during or after Momentive's 2014 bankruptcy, long before the 2018 merger agreement with the Consortium.

10:12:32 Finally, Your Honor, with respect to the aiding and abetting claim against Apollo, plaintiffs plead this claim in the alternative, that if they haven't adequately pleaded, which they haven't, that Apollo was a controller, well, then Apollo must have aided and abetted the directors' breaches.

10:12:55 It fails for a number of reasons, first and foremost because, as Ms. Janghorbani pointed out, the directors didn't breach any of their fiduciary duties so there was no breach to aid and abet. But it's also inadequately pleaded because the theory of aiding and abetting is really the faulty premise that Apollo controlled the board, which, in

any event, plaintiffs disclaim for purposes of this alternative claim. They disclaim that Apollo did control the board.

10:13:22 They say that Apollo blocked the IPO. They say that Apollo ran an unfair sales process. And they say that it caused Momentive to issue a misleading information statement. But the allegations there fall of their own weight because there's no allegation that Apollo had the power as a noncontrolling shareholder to block the IPO, to run the sale process, or to have any influence over Momentive's information statement.

10:13:57 So the aiding and abetting claim is inadequately pleaded as well.

10:14:03 That's all I have at this point, Your Honor, unless you have any questions.

10:14:07 THE COURT: Thank you very much.

10:14:08 Anyone else?

10:14:19 ATTORNEY SHAFTEL: Yes, sir. Good morning, Your Honor. Hal Shaftel from Greenberg Traurig for the investor group, sometimes referred to as the Consortium. As the Court knows, my clients, we're the folks who ultimately bought the company, bought MPM.

10:14:36 I want to embrace at the outset that I am last and least in this. And that's not only because only one of the five I guess six claims is directed at the investor group aiding and abetting Count v. It's not only because I think the plaintiffs-petitioners spent, oh, a page or page and a half, the last page and a half, in their 77-page opposition brief. It's primarily because the allegations as directed at the investor group are not only so scant -- they're in two paragraphs, essentially, actually, two paragraphs entirely, in terms of any alleged aiding and abetting liability, paragraphs 128 and 129 of the pleading -- but when you unpack those paragraphs -- and we'll do that quickly in a moment -- they actually undercut, indeed refute, any suggestion that there was collusion, conspiratorial aiding and abetting between the defendants.

10:15:47 Just to set the landscape, I'm going to rely on just a handful of slides. Just like at home in the living room, my clicker is not working. There we go.

10:16:08 So we, of course, acquired the company. We sat on the other side of the table. We

weren't litigation adversaries. We were negotiating adversaries. And the significance, of course, is that there are no affirmative obligations, were no affirmative obligations on the investment group to the plaintiffs, petitioners, or to the plaintiffs-petitioners' fiduciaries. The investment group, three Korean entities, the economics weren't evenly divided. They formed a Delaware entity which ultimately acquires MPM.

10:16:43 As my other defense colleagues already pointed out, so we're not going to belabor it, Your Honor, but the face of the pleading itself, plaintiffs' own allegations show a robust arm's-length negotiating process. The plaintiffs frame two primary components: the price per share and this, quote, unquote, minimum cash requirement.

10:17:10 Over the negotiating process, multiple bidders for four-plus months, if not longer, our, the investment group's bidding, improved, got sweeter, from the perspective of the company. The price per share went up 30 percent over time. The minimum cash requirement went down. Ms. Janghorbani, on the individual defendants' debt, had a slightly different number how much the minimum cash requirement went down

over time. I trust her math over mine.

10:17:48 But the fact of the matter is, plaintiffs' own pleading, when fairly read -- put aside the conclusory allegations in that stuff -- plaintiffs' own pleading, far from smacking of any rate collusive process, shows healthy negotiations.

10:18:05 On part of -- in addition to the price per share going up and the minimum cash requirement going down, as the individual defendants' deck -- I think there was a slide or two on this -- also points out, the defendants were policing the process. When there were issues about due diligence, issues about weeks, not only is there not a scintilla of any allegation of coordination and collusion between my clients and any of the other defendants, but the allegations in the pleading themselves show that the defendants were trying to play traffic cop.

10:18:48 Let me turn first to the governing standards for aiding and abetting. I don't want to, again, dwell too much on black-letter law. And then turn to the meat of the allegations, again, essentially two paragraphs as related to my clients or, really, the lack of meat to those allegations, in the M&A context, perhaps, in particular. Because

where the acquirer is being charged with aiding and abetting liability, the standards, the pleading standards, are quite stringent. Stringent, difficult to prove. These aren't my words but the words from the cases, *Buttonwood, In re Hansen*, and others.

10:19:36 The four elements, of course, the first two already are covered, were covered by my defense colleagues. You need to have an underlying fiduciary infraction. That's been covered. I don't need to touch on that.

10:19:50 In addition, what is more specific to my clients, to the investment group, is you need to have the nonfiduciary knowingly participating -- I want to pause on that in a moment -- in the breach, plus you also have to have independent damages -- which I'll just touch on in a moment as well.

10:20:09 Knowing participation, this courthouse puts real teeth into that. Specific allegations about scienter, about substantial assistance, about coordination and collusion. There is none of that here. And of course, why is it that we put teeth into those words, indeed, at the pleading context? And our brief has a whole roster of cases, aiding and abetting claims, particularly against an acquirer, being tossed

at this stage.

And for the obvious reasons -- I guess it's not a case I cited in this deck, but it's in our brief -- the *Comverge* case, law and logic, I think those are the words from *Comverge*, law and logic are going to be very cautious before you lather on conflicting obligations on the acquirer, who has its own obligations to get the best deal it can, its own obligations to its own constituents.

And when these stringent high standards get applied to the allegations in plaintiffs' complaint, there is no aiding and abetting liability, certainly not against the investment group.

Now, in the M&A context, aiding and abetting liability, there's really two paradigms. One is the trusted advisor, the financial advisor. It's *RBC*, *Rural Metro*, it's even in the case that plaintiffs rely on, *Chester County*, where the trusted advisor dupes the fiduciaries for its own conflicted reasons. That shoe obviously does not fit the foot of the investment group. We were no advisor, obviously, to the company, to the stockholders of MPM.

So here, the paradigm is did we act in collusion, real, specific allegations of collusion,

with the fiduciaries. And when you go to paragraphs 128 and 129, again, there is no "there" there.

10:22:34 The main points that the plaintiffs try to flag is a conversation we purportedly had with the then-MPM CEO, Mr. Boss, about his continued role in the company, continued employment. I think this may be a refrain for all these bullet points, Your Honor. So what? There is nothing wrong with that. In fact, the cases which we cite, *BJ's Wholesale, McGowan, Frank*, they don't find anything wrongful if there's even an agreement for future employment, which there's not even any allegation here there was.

10:23:24 When do you get tripped up? When a plaintiff can argue there was excessive, grossly, inherently, inflated, excessive compensation being offered. There is no allegation, because there can't be any allegation, of any of that here.

10:23:43 What else did the plaintiffs try to flag? That we reached out, we, the investment group, reached out to Apollo, the largest shareholder. Again, under the cases, that, standing alone, a big so what. Specifically discussed *In re Hansen* and also other cases that we cite, Your Honor, in the briefing.

10:24:09 Plaintiffs, in paragraphs 128 and 129,

say, well, somebody leaked information about a potential deal in Korea. And I guess since the leak was in Korea, the plaintiffs are pointing the finger at the investment group. There is no what, when, who, or where with respect to that leak tying it to the investment group. Be that as it may, there certainly is not a scintilla of an allegation that the investment group somehow collaborated, coordinated, acted in concert with any of the defendants, with any of the fiduciaries, with respect to any leak. Far from it.

10:24:57 As the individual defendants in their slides and their presentation pointed out, the very allegations in plaintiffs' complaint have the board saying, what? There's a leak going on? There's a problem. We have to look into this. That refutes collaboration, acting in concert. Far from supports it.

10:25:21 And lastly, the plaintiffs focus on some internal MPM board or executive communications where there was concern expressed that the investment group had learned about the status, had learned confidential information about the status of the bidding process and other bidders. Again, there's no

who, what, where, when, that, in fact, anybody, anyone, any party within the investment group, indeed, learned or obtained such confidential information.

10:26:04 Even if you want to credit for purposes of today that somebody somewhere did, the fact that somewhat improperly received confidential information, that's not the stuff of an aiding and abetting claim. Maybe there's some separate breach. Plaintiffs-petitioners can't allege that, and there's no facts there, that we, my clients, actually breached any confidentiality. But just for today, if we want to credit that, that's not the stuff of aiding and abetting. The stuff of aiding and abetting is we acted in concert with one of these fiduciaries.

10:26:42 And again, not to keep going back to the point, plaintiffs' own allegations, as the individual defendants' deck pointed out, show that these same fiduciaries, the same folks that, in conclusory language, we acted in concert with, were quite concerned about the leaks, were quite concerned about do we, might we -- we, the investment group -- have access to information about the bidding process.

10:27:13 I want to compare the allegations that are pled against the investment group with the

allegations in the one -- I'm not misspeaking -- the one case that the plaintiffs rely on in their opposition with respect to their Count V, the aiding and abetting claim against my folks. And it's the *Chester County against KCG* Chancery Court case.

10:27:47 And in that case, the acquirer, Virtu, acquired another stock trading platform. And Jefferies in that case was the largest shareholder and also provided banking/financial advisory services to the target, to KCG.

10:28:11 Unlike here, way unlike here, there were specific allegations pled. Jefferies supported Virtu's acquisition. They had an agreement to support Virtu's acquisition before Jefferies said anything to the board, an agreement to support the acquisition. In connection with that, the allegations were the banker, Jefferies, provided specific types of proprietary financial information that allowed Virtu to do its modeling. Nothing like that is alleged here. No specifics like that.

10:28:49 And on the flip end, the deal was made -- true, it was alleged in the complaint -- that Virtu said, oh, and if we acquire the company, you, Jefferies, will be the banker when we spin off or we

sell this main asset or trading platform. Those are concrete allegations these plaintiffs don't, because they can't, make.

10:29:13 The other item in *Chester County*, the one case plaintiffs focus on, cite, is that Virtu, the acquirer, put together a specific bonus pool, $13 million -- these are specifics alleged in that case, unlike here -- in order to entice one particular board member who had otherwise been a holdout to support the transaction. Those are the types of allegations which, in that case, worked that may give rise to a viable aiding and abetting claim.

10:29:48 If you have look at -- when the Court has a chance and considers again paragraphs 128 and 129, that's it. That's it against the investment group. They are so far -- not only are they so far from the types of stringently applied pleading standards that are required, but they actually fall under their own weight because it shows the other defendants, the fiduciaries, policing, expressing concerns, to make sure the process was -- the sales process was fair.

10:30:25 Just in passing, and then I can rest, other than any questions the Court may have, there is

that element number four. There does need to be independent damages attributable to the aiding and abetting breach, not the same overlapping damages as with any underlying fiduciary breach. And none of that is purported to be pled here.

10:30:51 So, Your Honor, I will -- we will otherwise rest and rest on the briefing unless the Court has any questions.

10:30:58 THE COURT: All right. Thank you.

10:30:59 We've been going for about 90 minutes. Let's take a 10-minute break, and then we'll resume with Mr. Hecht.

10:31:06 We'll come back at 10:40.

10:31:10 (A brief recess was taken.)

THE COURT: Let's get back underway.

ATTORNEY HECHT: Good morning, Your Honor. May I proceed?

THE COURT: Please do.

ATTORNEY HECHT: So I thought it would make sense, Your Honor, to address the three legal standards. So we could talk about entire fairness, Apollo being a controller, and then get to the *Revlon* enhanced-scrutiny standard, and then discuss conspiracy.

So this is a minority block holder acting as a controlling stockholder case. We do think the legal standard that should apply is entire fairness for this reason. Apollo received nonratable benefits. And certainly, at this pleading stage, we're entitled to the benefit of that inference.

And, you know, the defendants have made a lot of hay about the fact that there are some 250,000 documents produced, but the real story here, Your Honor, is we really need more real discovery, deposition testimony under oath. Lawyer arguments are fine to try to explain away things in the documents, very suspicious things in the documents, but I think our complaint tells the story enough that we now know

where the bodies are buried, and we should be given a chance to exhume them and really develop what seems to be some compelling theories.

11:50:51 Apollo had a series of unique motivations that set it apart from the other stockholders. It had some 170, $168 million of performance fees that were trapped. And an important thing, Your Honor unlike *Presidio*, unlike *Morton's*, in this case, the allegations are based on things that the defendants themselves are saying. Don't take my word for it. Apollo makes a point of saying that multiple investor decks were presented repeatedly to the board to the point that the other directors know it's true that Apollo's goal is to liquidate, is to monetize.

11:51:29 Separately, they had a secret debt position. It's a nonratable benefit worth $113 million, which equates to only $6 per share. I thought it was very striking, Your Honor, during defense counsel's presentation that he focused on these two words, the "TRS Cash," or the SPV, the total return swap or the special purpose vehicle. That is an important part of our theory.

11:51:58 But I think what the defendants are

asking Your Honor to do is just ignore those words in their documents. And the documents say what they say. I don't know why you would ignore those words. They're important. But then we should get the benefit of discovery and take a deposition. Because one thing that people are smart enough to do is to not say things in documents that you shouldn't say in documents, such as, we have a secret debt position we didn't want anybody to know and kept it out of the documents. That's the kind of thing that you find out in testimony at deposition.

11:52:32 And then, thirdly, Apollo clearly wants to close its Fund VI, not just because we're suggesting it's past its sell-by date. This is not *Presidio*. It's not all we have. It's Apollo telling you that's the case.

11:52:45 And then, lastly, Apollo needs to eliminate that bankruptcy liability, because we can be cavalier about it, we can act like Apollo is indemnified, we can pretend it's not a real exposure, but it is. Their behavior in the real world suggested that it is, as I'll get to in a moment. The settlement of that litigation is tied very closely to the merger to the point that it drove the merger

discussions. It caused Apollo to tilt the discussions in favor of the Consortium.

11:53:14 The minimum cash balance was, in effect, a subsidy that allowed the settlement to happen. And most of all -- the defendants admit this in their briefs and it's true in the documents -- that settlement was required -- that's a quote -- required for the merger to close.

11:53:28 The other thing, I think, that bears emphasis, Your Honor, and it didn't get a lot of air time in this morning's discussion so far, is there were far better options available to Momentive than to sell to the Consortium at this point in time. Namely, the stock's currently trading at $42. Let's remember, this is a take-under. This is that very rare class of case where the merger price is below the stock trading price. The remaining standalone company that trades at $42 per share, that's a good option. That's a real option. There is no urgency to sell.

11:54:07 And separately, the IPO option is real. The financial advisors have decks suggesting that value could be upwards of in the 40s of dollars or 50s or even 60s. So you have two very real alternatives to a merger that are not only not pursued

but that are foreclosed by this acquisition. And let's remember, there are no shareholder protections in this case, no special committee, no stockholder vote, and there was a no-shop.

11:54:43 Let me talk about Apollo's control, Your Honor. That's really perhaps the heart of the inquiry. There are two expressions of control, Your Honor. They've laid out the law very clearly in cases like *Voigt*. I don't need to repeat that here. But I want to first talk about day-to-day operational control, and we'll talk about control over the board *vis-a-vis* the transaction.

11:55:01 And first off, we talked about this in the briefs, but I really want to emphasize this here in argument. The shared services agreement was an extremely important vehicle by which Apollo had control over the operations of the company.

11:55:18 As I talk about this, let's keep in mind the case we cited in the brief, the *Reith versus Liechtenstein* case, where the Court did find as an indication of control a management services agreement very similar to the one here.

11:55:29 So the shared services agreement, which I pulled from the argument, and we looked at it,

as we did in the briefing, has a long list of services. This is not just a couple of back-office services like the defendants suggest. In fact, it includes executive and senior management services. That's the first item in the description.

11:55:48 The only thing that it excludes -- and this was the change in the 2014 amendment -- is that it now carved out the type of services provided by a CEO, CFO, and the GC. Those three carve-outs are the only carve-outs. The rest of the executive and senior management is governed by the shared services agreement.

11:56:07 And the shared services agreement, let's be clear, is a shared services agreement with Hexion, an Apollo-controlled company. So this is what Apollo does with its portfolio companies. You can say it's for efficiency. You can say it helps save costs, it's a good thing, whatever. Whatever the other purposes are, the effect of this agreement is to exert control over the company, because the moment you pull the plug on any one of these services, the company doesn't operate. And that's a known open secret to everybody, both within and outside the company.

11:56:41 Just to highlight a few of the

services, Your Honor, after the executive senior management services that are included, this shared services agreement includes treasury, audit and tax, financial services, legal affairs, accounting and records -- I'm only reading a few, by the way -- credit and collections, accounts payable, financial statements, it does have IT, investor and public relations, engineering, payroll, risk management, insurance, and human resources. And I want to really, really underscore this one, because for a specialty chemicals company, this one matters a lot: procurement of requirements of raw materials, supplies, freight, equipment, electricity, and insurance.

11:57:24 Again, they can downplay this as just something to help save money, but that means Apollo, through another company, controls these functions. And the moment Apollo is unhappy, it pulls these functions. And that's a lot of leverage to exert over a company. It also includes export services and contract manufacturing. So Apollo could cripple Momentive if it pulls all the support away. This is not just back-office kind of services.

11:57:50 And I really want to make the point that this isn't lawyers talking. In the outside

world, if you ask somebody who runs this company, the answer is "Apollo." It's not a coincidence. It's hugely significant that both buyers here, the actual buyer and the other contender, approached Apollo in the first instance.

11:58:12 And one of those facts, by the way, we didn't know until the last couple of weeks, which is also hugely significant. But we alleged in paragraph 113 that we knew that Platinum -- we've been saying the name, so I guess I can say that Party A is Platinum -- Platinum sent its indication of interest to Kalsow-Ramos, to the Apollo person, seeing if the proposal is of interest to Apollo. That's how they cast their initial overture: is this of interest to Apollo? And it was directed to Apollo.

11:58:39 Again, the defendants try to downplay that in the papers, and they say, oh, what's the big deal? They had a preexisting relationship. It's a very big deal, because the outside world knew that Apollo controlled this company.

11:58:54 Now, separately, until today, all we alleged in the complaint about this fact is that Steve Lim for the Consortium emailed Kalsow-Ramos directly also seeking a separate meeting, trying to meet up

with Apollo, at the same time it was meeting with company representatives.

11:59:10 But what is hugely significant -- and I'd like to put it on the screen. We don't have a whole slide show, Your Honor. We just want to present this document and a couple others. I'd ask my colleague, Ms. Randolph, to share this document. This is the document we sent to Your Honor the other day. Just to give a drop of background, it was produced to us in Korean after the time we filed our complaint.

11:59:32 I should point out that some 40 percent or so of all of the prior documents we were given were in Korean, so it's taken a lot of effort to translate. It cost us a few hundred dollars per document to translate, by the way, and it's very time-consuming.

11:59:50 And in all events, we don't have all of their production, I should say. In fact, one of the buyers only gave us documents starting December 2018. So we don't even have the operative documents that precede the time of the merger. So we're operating from a bit of an information void. And you keep hearing about the many, many documents we were given, but there were a lot of documents that we were

not given.

12:00:10 But let me walk through this document. So it's on March 30, 2018. Let me also point out, for Your Honor to keep in the back of his mind, that the first indication you will ever get that the Consortium approached the company is from the information statement telling you that it was on April 3rd that the Consortium approached the company or its financial advisors. One thing you were never told is that prior to the time the Consortium approached the company, that it directly approached Apollo.

12:00:49 And I cannot overstate the significance of this. So if you look down to the bottom of the page, K.C. Park of the Consortium reflects the call with Apollo this morning. "[It] went well." Mr. Kalso-Ramos was one of the people from Apollo on that call.

12:01:04 So I focus on the bullet, and I ask my colleague to highlight it, in the second page. And before you even get down to there, if you look at the second bullet, in reflecting the conversation that the Consortium had with Apollo, the Consortium is reporting to its other members of the Consortium that "Rob" -- and Rob is Kalsow-Ramos, the Apollo designee

on the board, one of the three -- "Rob said thank you for suggesting an interesting idea. Apollo [] responded favorably to our proposal." We do not know this from any real-world disclosure. We only know this because we obtained the document and we translated it.

12:01:38 So the fourth bullet is highly impactful. In the context of debriefing with his colleagues about the call he just had with Apollo, the Consortium is telling you what they talked about with Apollo and what Apollo told it. And he's relaying here that "Apollo said that they will encourage [the] Momentive Board to contact our consortium soon to proceed to the next step."

12:02:04 And this next highlighted excerpt is hugely impactful to our theory of the case. Frankly, it stems from the inferences we would ask Your Honor to draw. And the good news is we now have much more explicit evidence that you should draw those inferences. Because of the 11 board seats at Momentive -- and here's my, you know, big focus -- five seats are appointed by Apollo.

12:02:27 Let me stop right there. That's not a small fact. Apollo likes to tell you, and they did it

all morning, they have three designees on the board. We've already alleged that Nodland and Schlanger were followed as Apollo designees. They were within the Apollo orbit. They are bench directors who serve on Apollo boards. Apollo even recognized Schlanger as one of their own designees in an internal worksheet from December 2018, where Schlanger is listed alongside of Feinstein, Kleinman, and Kalsow-Ramos as being on the board as an Apollo director. So we already knew they included Schlanger in the orbit.

12:03:09 And here, they are telling the Consortium, prior to the time we even know that the Consortium contacted the company, that Apollo told the Consortium they have five seats. And now that we get to the end of this sentence, this is even more impactful. They have five seats and they "can indirectly control Board seats. Thus," and this is really the money shot, "they control the board, effectively." "Apollo will support our consortium idea." Look at what you're being told. The process hasn't even started yet, and Apollo has told the buyer, don't worry. I've got five seats and I control the board.

12:03:46 So I'll take this one piece of paper

over any 75-page slide deck to ask Your Honor to draw the inferences that we've been asking: that Apollo controls this company; and they said it to the buyer. What more evidence do we need than what Apollo said?

12:04:14 Now, the next bullet of also great significance -- and we may want to highlight that -- the discussion continues where Apollo is telling the buyer that when Apollo makes M&A decisions in this case, there are a number of factors it looks at, and they prefer to sell the company 100 percent. This is Apollo talking. Apollo is telling the buyer what it thinks about when it makes M&A decisions and how it plans to sell this company. Apollo is telling the buyer it's in control, controls the board. Here's how the sale is going to go down.

12:04:48 So I can put this document aside, but I really don't want it to ever leave our memory, to be absent from this discussion, when it comes to what I find is highly compelling evidence that Apollo controls the board.

12:05:03 And I have to say, Your Honor, what my clients find troubling and what should concern us all is that there seems to be a very striking disconnect between what Apollo is out there telling the world,

the things Apollo says in the real world about its control over the company, and what it's saying here in our courtroom about what appears to be more limited control. They're not even admitting control.

12:05:25 But if I didn't have this document, it would be going -- you'd have to be taking them at face value. And thank goodness we have this document. We got it. It wasn't gifted to us. We translated it. And it just happens to help really put a fine point on the inferences that we think should already be drawn. But there's really no doubt Apollo controls this company with their five seats. Don't take my word for it. That's what they told the buyer.

12:05:55 Now, another fact worth mentioning -- and we said this in the complaint at paragraph 28 -- Apollo is no stranger to the Consortium. The National Pension Service, which is a limited partner of Apollo, is also a limited partner of SJL, who is a Consortium member, and also has a 12.2 percent interest in KCC, another Consortium member. So it's not like this all came out of the blue. There may well have been a preexisting relationship.

12:06:30 But Your Honor has said this repeatedly, recently in *Voigt*, that numerical majority

voting power is not required. You can have a 40 percent ownership stake and the ability to appoint only three of 11 directors, and in this case, control five of them, and still have effective control. And that was also recognized in *Presidio*, where four of nine directors and a 42 percent block was sufficient to give it control.

12:07:02 But, again, I really just don't want to get past that March 30 document which is hugely significant and which we really should be able to take depositions about to understand more of what Apollo told the buyer, what Apollo was telling anybody else, about its control of the board, which it said to the Consortium before the Consortium ever officially approached the company.

12:07:21 And other examples of Apollo's domination over the board process are laid out in the complaint, but I thought I would highlight a few here.

12:07:29 In paragraph 100 of the complaint, as we alleged, on April 6th -- this is now shortly after the Consortium formally, officially, approached the company, and now about a week after their more secretive phone call that we only just learned about -- Mr. Kalsow-Ramos, who is one of the Apollo

designees, told the board that one of the reasons, the overall reason for the meeting, was to provide updates on and consider alternatives for liquidity or monetization events for the company's shareholders. That's what the point of that meeting was.

12:08:05 You now have an offer to buy the company, and one of the Apollo members of the board is telling the board that here we are to consider alternatives for liquidity and monetization. Notice that the goal of maximizing fair value is not even addressed.

12:08:22 And later on -- and this is a theme throughout. We allege more examples than these, but I'll point out this one. On May 31st, there is a discussion of the board about the offers being discussed, about a possible IPO. And this is in paragraph 105 of the complaint. The board had said that even if the IPO might "not [be] an immediate or one-time liquidity event for [share]holders," there's always a possibility that it would make for a higher stock price with the shareholders participating in an increase in value.

12:08:51 So, A, the board recognized even then that an IPO could be a better or a value-maximizing

transaction, but they constantly recognize that Apollo has expressed an interest in a liquidity event. This is not *Presidio* and our just speculation that there's some liquidity event motivation here. Apollo has said it. They communicated it to the other directors.

12:09:13 One of the more powerful emails which we've discussed and I'd like to highlight is in paragraph 106. On June 4, the chairman of the board, that's Bell, has an exchange with John Dionne, one of the independent directors. And he acknowledges in this email that there's a likelihood that the present value of the IPO was higher than any offers that Momentive had been receiving. And in fact, it could have been upwards of $70 a share if you use the 2019 EBITDA estimate that was provided in the information statement.

12:09:56 So throughout the process, there's more discussion about the IPO possibly providing higher offers to the point that on June 14, it culminates in Ted Butz telling his fellow board members -- this is in paragraph 107 -- this very important language. Ted Butz, independent director, says, "I would decline the [Party A] and [Consortium] offers as being inadequate in terms of value."

12:10:23 He goes on to say, "I am comfortable with having the management team get back to running the business and putting our pencils down for the next 18 [to] 24 months. This may be an appropriate time to look at an IPO again."

12:10:36 Now, he continues to say -- another very telling recognition of Apollo's concerns, Mr. Butz goes on to say, "I understand that certain investors may want to liquidate all or part of their ownership position at present so we [have] to think of other creative ways for that to happen outside of an outright sale."

12:10:57 So, clearly, Mr. Butz thinks that an outright sale at this point in time is not a good idea. We should go pencils down, run the business, and maybe in 18 or 24 months, let's consider the IPO option again later. Not the time to sell. Other investors who want to liquidate are pushing a sale: read Apollo. They've told you that already. Independent Director Butz thinks it's not a good idea.

12:11:29 And what does fellow Independent Director John Dionne say in response to Ted Butz' email? This is in paragraph 108 of our complaint. Does he say, gosh, Ted, that's crazy. What are you

talking about? This offer on the table is the best thing we ever had. You're out of your mind. He doesn't say anything like that. He says, "[t]hanks, Ted. Very well articulated." So that's Dionne and Butz talking with each other, just the two of them in the room, about the wisdom of proceeding with an offer at this point in time.

12:11:59 Now, also in our complaint, but it bears highlighting, in paragraph 123, we allege this, on May 31st, Mahesh Balakrishnan, who is the designee from Oaktree on the board, he had asked the financial advisors for an IPO timeline. He was also thinking about the value of an IPO. But he didn't get a response. And his response in an email is very telling. He says, "it's almost a trend that they" -- he's talking about the financial advisors -- "it's almost a trend that they are not responsive on avenues Apollo doesn't want to pursue."

12:12:41 The discussion -- and Mr. Balakrishnan's frustration continues. Let me ask my colleague, Ms. Randolph, to put on the screen a couple of other documents that we referenced in the complaint. These are worth getting a visual over because this is not say-so in a complaint. This stems

from a very real communication that a director is having with another independent director about Apollo dominating the board.

12:13:05 If we can get the document -- yeah, this is referenced in paragraph 132 of our complaint. On August 12, 2018, Mahesh Balakrishnan says to John Dionne, who is an independent director -- he says a number of things, but I want to focus on that highlighted language. He's keeping John in the loop. And he has "very serious concerns about no one looking out for investors outside of Apollo here." He goes on to express those concerns. Let me -- which are self-evident. And we put all this into the pleading.

12:13:39 At this point in time, let me note some context also. He's interested in talking with Platinum about a potential rollover of shares, but he's also frustrated that he can't have that discussion because the board is thinking he should be recused from that discussion. He's talking about the irony of it all.

12:13:58 And the irony that we would like to point out, which is in the complaint, is that if anyone should have been recused, it's Apollo, who controls this company, who has told the world they

control this company, and has expressed an interest in liquidating at a time when two independent directors think it's a bad idea. If anyone should be recused from discussions with buyers, it's Apollo. And instead, the board actually had Apollo talk to Platinum about its offer. The ultimate fox guarding the henhouse.

12:14:26 Now, let me get the response to this. If you could, Ms. Randolph, put on the August 12th response to John Dionne, responding to Balakrishnan's frustration over Apollo.

12:14:40 There is a typo here that I'm going to read through. It says "listed," which I think should be "listen." John Dionne, independent director, responds to Mr. Balakrishnan to say, "and I don't think we ought to [listen] to Apollo and their lawyers on selling a company well below trading value." "We should hire another firm and get their view as well as litigation exposure and ranges."

12:15:03 This is not a small point. Now, John Dionne is expressing in August precisely what Ted Butz expressed back in May: this is not the right time to sell. And why are we listening to Apollo on selling the company in a take-under? The trading value is at

$42.

So if two independent directors are having misgivings and are expressing their frustration at Apollo, who is driving the bus? Well, I think it's the entity that told the buyer on March 30 that they control the company. Because if it were up to Dionne and Butz, it sure appears that they're not in favor of a sale at this time. They would rather go pencils down.

I'll also point out, as the defendants put the *Harcum* case in front of Your Honor this week, I was reviewing that case, and it reminded me of the *Gilmartin* decision from 1990s where the Chancery Court found that a proxy statement is materially misleading when it fails to indicate that two of the company's directors express to other board members that they believed it's a bad time to sell. This is *Gilmartin*. Two directors have expressed to other directors that they believe it's a bad time to sell.

So there's more. Our complaint says more. I'm sure Your Honor is familiar with the complaint, but we think it tells the full story of Apollo's control. And again, even if you didn't listen to the complaint today, the email I put on the

screen from March 30 says it all. Apollo tells the buyer and the rest of the world that they're in control.

12:16:41 I'd like to address the bankruptcy litigation issue, if I may, Your Honor. So, first off, let's remember the timing of all this. The intercreditor action as well as the bankruptcy appeal litigation, both of those streams of litigation are viable threats. They are live threats during the time of the deal signing. They proceed to hang overhead during the time that Apollo is negotiating -- Momentive is negotiation the deal with the buyer.

12:17:43 I apologize, Your Honor. I just have to check my notes on something.

12:17:56 So Apollo is party to the intercreditor action, and they are a party to the other bankruptcy litigation. They have intervened in that, in fact, so they can come into court today and say, oh, we weren't really in trouble. We were indemnified. We didn't face any risk. That's not what they seem to be saying to the outside world. And for this, I'd like to make a couple of points, also just to highlight things we've cited in the complaint, but just to bring them into sharper focus.

12:18:28 In Apollo's 10-Q filed in November of 2018, it lists out -- there is a disclosure of litigation, including the litigation involving this bankruptcy proceeding, both the intercreditor and the bankruptcy litigation. When they conclude the disclosure -- and it's in here. Let's be clear. It's in here as a risk factor. Apollo is telling its investors, we have been sued. We are at risk. They close the disclosure by saying, "Apollo is unable at this time to assess a potential risk of loss." Right? They don't say there is no risk of loss. That's why it's in here. It is a risk of loss.

12:19:12 It's worth underscoring that in the disclosures that precede and come after this disclosure, statements about other litigations, Apollo knows how to say what it's telling Your Honor today.

12:19:23 In relating prior litigation related to Arvco and disclosure on Arvco, Apollo says, after the disclosure agreement, they say, there is "no estimate of possible loss, if any, can be made at this time". "No estimate of possible loss, if any, can be made at this time." That "if any" language is not included in the bankruptcy litigation statement.

12:19:49 And likewise -- and this was even more

interesting -- a couple of litigations down from the bankruptcy litigation, in describing the Carige case, Apollo says, same language here, that there is "no reasonable estimate of possible loss, if any, can be made." And they never say that about the bankruptcy case.

12:20:09 So most of all, with regard to this other Carige litigation, Apollo says, "Apollo believes that there is no merit to Carige's claims." Okay. They said it. Where is that disclosure -- where is all that disclaiming language in the notice about the bankruptcy litigation? It never once says, we're indemnified, not to worry, this isn't really a risk for us. They don't say that. They say that here today, but that's not how it appears to be how they were holding themselves out in the real world. And just because the deal went down as they orchestrated it doesn't mean that they weren't at risk for that exposure.

12:20:46 In fact, I thought it would help Your Honor if we tried to put some numbers around what the risk is. And the way that we did it -- and it's not very difficult math to intuit here -- if you think about the shares that were issued in the bankruptcy

plan to the second noteholders in exchange for their debt, the second noteholders as a collective were given some 11.8 million shares. Apollo got 4.6 million of those shares. And ultimately, the bankruptcy litigation was settled for $175 million. The risk, by the way, the exposure of Judge Drain's interest ruling was higher but the settlement amount was less -- this is often true -- less than the amount of full exposure.

12:21:30 But let's just take that $175 million figure as an example. This all ties to what the bankruptcy judge said on plan approval. The bankruptcy judge said, I'm approving these plans, but I'm recognizing that there's going to be continued litigation over the make-whole payments and over the interest. And depending on how those suits resolve, there may well be a recalibration of the consideration provided to the second lien noteholder. The bankruptcy judge said that.

12:22:00 So we can talk all day about the indemnification rights and the release that Apollo got, but the bankruptcy judge said there could be a recalibration. And that's what was haunting Apollo and the second noteholders as the life of those

litigations proceeded.

And what that means as a matter of dollars risk is -- the theory is -- the fact is the senior noteholders were shortchanged, let's say by $175 million. If you went back and took that -- if the senior noteholders were shortchanged, that means the second noteholders were overpaid. That's the recalibration the bankruptcy judge is thinking about.

So if you were to take that $175 million that the senior notes were shortchanged, and instead, take that out of what the second noteholders got in the bankruptcy, that would change the distribution of shares that they really got. Instead of those 11.8 million shares, they really should have only gotten 3.1 million shares.

And Apollo's stake -- they had a 39 percent stake of the second notes at that time. That means they should have only gotten 1.2 million shares, when, in fact, they got 4.6 million shares. So if they were forced to disgorge the difference, which is some 3.3 million shares, valued at the merger price of 32.50, that's liability of $109 million.

So we can say here in court today that that's not really a risk and Apollo was never really

worried and they are indemnified, but they're a party to litigation where there is a possibility that they are on the hook for disgorgement valued at $109 million. Maybe that doesn't mean they cough up shares, but that could well mean that a company that wasn't controlled by Apollo can be called to work on an indemnification claim they may have against Apollo, who really drove the bus on that cram-up that caused the second noteholders to get more than the senior noteholders in the first place. So the exposure to the bankruptcy litigation is very real and worth a lot of money. On a per-share basis, by the way, the $109 million is worth about $5.75 a share.

12:24:05 So there are all these other factors going on that give value to Apollo that other shareholders don't get if you do a deal with the Consortium now at 32.50. The other shareholders are very happy to stay at their $42 trading price or think of participating in an IPO down the road that can get them upwards of 40, 50, $60 or more. It's Apollo who wants to monetize now to do away with the bankruptcy risk and capture those trapped performance fees and to capture the value of that total return swap, which I'll get to in a moment.

12:24:42 The significance of the bankruptcy litigation settlement also, I cannot overstate this fact, it's required as a condition of closing the merger. Now, in the complaint, what we said on this -- and I was going over the briefing last night and I was struck that the defendants think we made an admission when we did no such thing. All we say is the express terms of the merger agreement, the express terms, don't require some kind of payment or settlement of the litigation prior to closing. But what happened over time is that settlement of the litigation did become a requirement to closing the merger.

12:25:17 And the best indication of that is a document that we reference in the complaint. I'm going to ask Ms. Randolph to put it on the screen. This is a May 9, 2019, email from the CEO, Jack Boss, to other members of the board. Paragraph 183, 186 is what we're talking about in the complaint.

12:25:47 And what's significant is -- and I'm going to underscore how many different times Mr. Boss makes clear that the bankruptcy litigation is required. He uses that word three times. It's required before the merger can close.

12:26:05 If you walk through the document -- look at the very first clause in the second paragraph. As part of the process to close, the Company will need -- "need" is another telling word -- the Company will need to finalize and approve a settlement agreement with the indenture trustees. And that will be paid at closing. Even the payment mechanism is tied to the merger closing. The next sentence continues, this is "required to get the liens released at closing."

12:26:38 Now, I recall in the papers, and I'm sure I'll hear it later today, the defendants will try to downplay the way that sentence ends. Okay. Yeah, the liens are required. It's "required to get the liens released at closing." What really matters is -- it's an ancillary reason. It doesn't matter why. They're required, but just to get the liens released at closing. This is in the briefing papers.

12:27:01 At page 47 of their moving brief, they said it was necessary. This was the word the defendants used. It was necessary to release the liens at closing. They admit the connection to the merger. Why was this necessary? I'm sure we'll hear reasons why. It just has to do with the liens and

it's no big deal. The bottom line is it's required. It was needed.

12:27:23 In fact, in the next paragraph, Jack Boss goes on to say that this is a required step. And in this final paragraph, he talks about the board being on a critical path. This board approval is needed for the critical path to closing. So somewhere along the way, this bankruptcy settlement was required for closing. It is a condition to the closing. They can't close without it. I don't know why we're downplaying the defendants using the word "required" and "need" in talking about the need, the requirement, to settle this bankruptcy litigation prior to closing.

12:28:01 And the flow of funds was all handled through closing. It's actually a very insidious way to achieve what was not set forth expressly in the merger agreement, kind of get the flow of funds hidden through the sources and uses of funds without being an express condition of the written merger agreement.

12:28:24 What's also telling, and we allege this in paragraph 189, is that the settlement agreement released Momentive and its stockholders. So again, we can downplay that. We can say that's routine. We can try to minimize the significance of

that factor. So Apollo is already indemnified, and we keep hearing how they had no exposure. What's the point of having the stockholder released under the settlement agreement? It mattered hugely to Apollo that they got released by that settlement agreement.

12:28:54 Now, let me get to that secret debt position. I was really struck today -- it's funny, Your Honor, if I were to give Your Honor a presentation on that $113 million debt position, I don't think my presentation would look very different from what defense counsel showed you. They did me a favor by getting the documents on the screen. It's very funny, Your Honor. I have to chuckle. I was of a mind to put the documents on the screen, and they did, so they saved us a step.

12:29:21 So let me say a couple of things on this. First of all, I don't know why we're being flippant about the language that's in the Apollo spreadsheets. I didn't make it up. If all we had is the complaint and I cooked up words like "TRS" and "SPV," maybe Your Honor would be skeptical and think, yeah, what's this Hecht guy doing? This is another -- this is just crazy talk. But this comes from Apollo's documentation. And it's not an accident. It's not

incidental. We spent time in the complaint talking about Apollo's MO. It's an MO. It's a *modus operandi*. It's something they do. They trade in total return swaps. It's something they do. It's not a secret. That aspect of their trading is known.

12:30:13 What's not known here is that they were doing it to capture exposure to the senior notes. And let's be clear, there's only one species of debt that's left at this period of time, and that's the senior notes. If you're getting exposure to Apollo debts, it's the senior notes. The junior notes have been extinguished.

12:30:31 So they can try to -- not even play with words. I think they're just asking Your Honor to ignore the words "TRS Cash" and ignore the word "SPV." I don't know how we can do that, certainly at a stage in the game when we're looking at allegations and we're entitled to the benefit of reasonable inferences from those allegations.

12:30:51 And the inference that we think is more than conceivable, it's very reasonable, is Apollo had a total return swap that gave it exposure to the senior debt. It cashed in on that debt when it directed the payment of $175 million from the company

to the senior debt to satisfy the bankruptcy litigation. And in that respect, it stood on both sides of the bankruptcy settlement. And it really cashed in on the risk it was trying to hedge against about what might happen in that bankruptcy litigation in the first place.

12:31:26 But that is a strategy Apollo deploys. Why would we not give an inference that they're doing here what they did elsewhere, like in Fund IX and in other disclosures where they talked to their investors about total return swaps that they participated in?

12:31:41 Also, we noticed -- and the document was on the screen earlier this morning, but I'll call attention to it; the defendants didn't -- that total return swap was set to expire in June of 2019. That's exactly the column it was under. So they're rushing to close this litigation settlement and the merger settlement to get ahead of the expiry of the swap.

12:32:01 Everything in the distribution notice that we alleged and that was highlighted this morning is consistent and favors the inferences to be drawn as we're suggesting. That distribution notice from June '19, the fund is distributing $733 million. That $113 million difference does reflect the debt holding.

Nothing in the language of that notice betrays our theory. You would have to erase the TRS language from Apollo's own documents for it to make sense what they told you this morning.

12:32:34 This is a nonratable benefit. It's almost 18 percent above the merger price that the other stockholders are getting.

12:32:45 Now, we touched on this, but let me underscore Apollo's plans to monetize. Now, I want to distinguish our case, Your Honor, from *Presidio* and from *Morton's* and any other case where there was simple talk about timelines. I respect Your Honor's ruling in *Presidio* -- it doesn't hurt us, and it helps us; it's fine -- that you don't make assumptions based on life cycles of funds. We're not doing that. We already have reasons that we just showed you: the expiry of the swap, the pendency of the bankruptcy litigation. There are reasons that are driving the timing of this deal, a deal that's not maximizing value for shareholders other than Apollo.

12:33:21 But on top of which Apollo has been beating the drum of wanting to monetize and liquidate its position. Some of it springs from their mission statement in their website. We highlighted this in

paragraph 38 of the complaint. They "seek out complexity." For Apollo to be trading on both sides of the balance sheet, to be hiding equity, to be trading the debt and doing so secretly, that's their thing. They "seek out complexity." That's their words. "Structural complexity often hides compelling value," another Apollo statement. "Apollo believes that it has leading structuring and hedging capabilities." And this is really the important point that's in our complaint. "Apollo's strategy is to invest opportunistically across a company's capital structure." They're well aware that there's opportunities to be had on the equity and on the debt side.

12:34:10 Now, as to this $186 million of trapped performance fees, it's true, and we've alleged it, and you shouldn't be belied by the fact that in 2017, they were in year 12 for the fund. But that's not where our allegations stop. That was the problem with *Presidio* and *Morton's*.

12:34:28 Momentive has 85 percent of the remaining value in Fund VI. In the 2017 earnings call, the Apollo CFO says that liquidating is the only practicable way to receive those performance fees.

The other way to do it would be to hit the return ratio of 115 percent; and they recognized they're not going to do that. So the only way to get that money out is to liquidate.

12:34:50 That's why the IPO strategy fails them also. It's over too long a time horizon. They need to liquidate and capture this, and they don't want to do it in drips and drabs over time. And the CFO, in that earnings call, said that the $168 million was trapped. We can't get it out until the end of the fund.

12:35:08 In November 2017 -- this is in paragraph 76 of our complaint -- Apollo said that Fund VI was at the "end of fund." It's in "'turn-off' mode." They are telling you, telling their investors -- who is more important than their investors? They're telling their investors they are turning that fund off.

12:35:25 And in October 2017, same period of time, in their slide on Momentive, the title of the slide is called "Monetization Update." This is in paragraph 76 of our complaint. And they report to their investors they're making significant progress on monetization initiatives. And they also note that in

a traditional IPO, they only monetize 20 percent of their stake. They keep coming back to that.

12:35:51 By the way, Your Honor, why was the IPO initiated in November 2017 and then pulled? We have a theory, and we are asking the Court to draw an inference, which is Apollo was going along with it, and now it's realizing at the same period of time, it's a bad idea. They don't get quick enough monetization, and they pulled the plug. That is the inference. It doesn't suit their purpose.

12:36:12 And Dionne, the independent director who thought about the IPO option during the deal time, they like that option. They think it's attractive. But they know it doesn't suit the needs of those investors who want to liquidate, who want to monetize. This is the tension. This is the conflict that's happening at the board level.

12:36:28 And incidentally, I should add, also in that slide, in paragraph 75 and 76 of our complaint, Apollo is telling its investors that it's making -- it's in a dual-track process. It's in a position to take the company public or sell in Q4 of 2017. That's how anxious they are to do this.

12:36:47 And I think the best legal principle

to put next to all these facts is the pronouncement that Chancellor McCormick made in *Mindbody*. And that is "[t]he court need not infer that [a shareholder] subjectively desired near-term liquidity [because] he said as much himself." This is that situation. We don't have to guess. We don't have to divine what Apollo is thinking, what it wants to do. Why is it driving this deal? Why is it tilting toward the Consortium? The answer is -- because it said so -- it wants to monetize. It wants to liquidate.

12:37:21 And it didn't only tell its investors. It told the other board members, who were not happy. And that's why Butz and Dionne expressed their misgivings about listening to Apollo and thinking they should put pencils down and give more thought to the IPO option, all while the company trades at $42, above the merger price.

12:37:39 I think it also bears noting -- look, we did use some of this language, so I want to be sure to address it -- when we talk about crisis or fire sale, Chancellor McCormick -- Your Honor made this observation, actually, in *Presidio*. Chancellor McCormick correctly cabined in some of that alarmist language from *Synthes* that Chancellor Strine had.

That extreme language about "crisis," a "fire sale," "exigent need," those are not the standard. That's not the general rule. That complaint, the complaint in that case, was deficient regarding liquidity-driven conduct. So then-Vice Chancellor Strine used language that was more extreme than Your Honor and Chancellor McCormick did.

12:38:26 We don't need to show crisis, fire sale, exigency. We need to show motivation. And I've shown that through Apollo telling its investors and the board it wants to liquidate, it wants to monetize. Who but Apollo had a slide in the end of 2017 called "Monetization Update" reporting on the progress of its monetization initiatives and noting the deficiency of a traditional IPO because it only gets to monetize 20 percent of its stake?

12:39:01 Let me address -- I'm not sure if I lost the feed. I assume I did not.

12:39:12 THE COURT: Still here for me.

12:39:13 ATTORNEY HECHT: Thank you, Your Honor. My screen went dark. Sorry.

12:39:18 Let me get to *Revlon* and enhanced scrutiny, which is a related discussion, obviously. I wanted to be sure to address it explicitly. We don't

think we're here. We do think we're at the level of entire fairness, given Apollo's control, its conflicts, its domination of the process, and its driving the deal toward the Consortium. But let me speak to this.

12:39:42 As I've said, there are alternatives to the deal with the Consortium. There's remaining independent. And the company trades high right now. And there is an IPO, which has better value than 32.50. The financial advisors' own decks show that. The advantage to Apollo that no one else shares is that it's got nearly $6 of value in the total return swap, nearly $9 of value in the performance fees, and some 5.75 of risk it avoids from the bankruptcy.

12:40:22 And let me just take a pause. I don't know if I squarely addressed this. What is the attraction of the minimum cash balance? The answer is I should take more deposition discovery and test this theory. The theory, which seems compelling, and it's borne out by the evidence, Platinum was suggesting to "ring-fence" the bankruptcy litigation. To this day, we don't know what that means.

12:40:47 Apollo, who was designated to negotiate with Party A, with Platinum, and develop

that and learn more about it, they were given charges on at least three separate occasions to find out what that means. Never reported back what ring-fencing was really all about. We are still left with questions at the time of their dropping out about what ring-fence really meant. One thing we do know about it is that the financial advisors saw fit to put ring-fencing in a list of risks of the deal. It's not a pro. It's a risk.

12:41:17 And another point that bears mentioning is the defendants were quick in their papers to compare the ring-fencing provision to the minimum cash amount and surmised that they're really just the same thing. That's not at all true. There is no basis to do that in the record. There's none. And none of the debts leading into the August discussions, in the May, June and July and August decks reflecting the negotiations with Party A and Apollo, there's not a side-by-side that says ring-fencing is like minimum cash. Let's just figure out what ring-fencing really means. That doesn't happen. Ring-fencing is a standalone factor listed as a risk.

12:41:55 In fact, there is a slide where the

financial advisors talk about carve-outs relative to the Consortium, but that discussion had nothing to do with the bankruptcy litigation. They were talking about the three slices of the business and how they'll be carved out by the buyer.

12:42:08 Kalsow-Ramos later refers to the minimum cash amount as a subsidy and as working capital. And those are very telling concepts to be sharing because what the buyer is really letting Apollo do is settle up that bankruptcy litigation using the so-called minimum cash amount, which, in fact, proves the lie that it was a minimum cash amount.

12:42:31 What's the point of having a minimum cash amount if it can be depleted by almost $200 million? It's not a minimum cash amount. It's a "don't worry, Apollo, you can settle that bankruptcy litigation" fund. It's not a minimum cash amount. It would be nonsensical if it was because nearly $200 million of it is depleted prior to closing when the bankruptcy case gets settled on May 13. So that's the attraction. The minimum cash amount is a subsidy -- that's Kalsow-Ramos' own word -- that lets him work with it to get the bankruptcy litigation

exhausted or extinguished.

12:43:08 Now, we talked -- it came up in the briefing, and I think it came up today, this morning, initially for a moment. I want to just address this $22 trading price. This is a take-under. In the papers and a little bit today, the defendants tried to downplay that. They say, well, the stock really experienced a run-up because of that leak in Korea, so the stock is really worth a lot less. It's still not the case that the -- first of all, there is no evidence of that. That's the financial advisor's surmise.

12:43:36 They put out a timeline, and that was in the deck this morning, to try to suggest the July leak resulted in the bump in stock price. But the stock price had already been on the rise. It had been tripling since March of 2016. That goes in tandem with the improved performance of the company.

12:43:50 Since 2015, Momentive had grown its segment EBITDA at a 25 percent compound annual growth rate with a current margin of over 400 basis points. EBITDA from 2014, $238 million was improved to over $400 million in 2018, with the expectation that they would hit $704 million in 2022. And that exceeded the

Standard & Poor's estimates for 2016, '17, and '18. So the stock price tripled for good reason from March 2016 through 2018. The company was on the rise.

12:44:21 I think it's important to look at the stock prices immediately preceding this leak that the financial advisors try to say was the reason for a run-up in stock price. The stock price was exceeding the 32.50 merger price before the leak. And if you look at the August 3, 2018, financial advisor deck, one-month volume-weighted average price, we call it VWAP, one-month VWAP was 34.09. That data is as of August 3. Three-month VWAP was 33.16. Both values being ahead of the 32.50. And this is prior to the time that the July leak takes effect.

12:45:05 If you go forward a month into September, the decks show VWAP at closing, closer to the time of closing, one-month VWAP as 39.07; three-month VWAP is 36.10. Those prices obviously well exceed the 32.50.

12:45:19 But if you're -- I don't know why we're drawing inferences in the defendants' favor. That's not what we do on this procedural motion. But if we were to credit their argument that there was a leak that caused -- that the leak caused a run-up in

the stock price in the end of July, that still doesn't account for the fact that one-month and three-month VWAP is trading above the merger price prior to the time of the leak.

12:45:44 So there is real value in staying independent, and it's not just a freaky short-term freak thing. The stock was trending in that direction, and the three-month VWAP bears that out.

12:45:56 In terms of the *Revlon* harms, we do allege all this. There's a conflicted fiduciary. It was insufficiently checked by the board. It tilts the sale process towards personal interests. That's all inconsistent with maximizing value. That was all from the *Mindbody* case's take on *Revlon*.

12:46:14 In the *Columbia Pipeline* case, Your Honor also expressed where self-interest and non-stockholder-motivated influence called into question the integrity of the process, those are species of *Revlon* violations. That's what we have here: all of this contrivance around executing a deal at a take-under value below trading price, less than the expected value of the IPO, just to serve the interests of Apollo getting its other sweeteners, its $110 million in debt back, its $168 million

performance fee, its relief from the bankruptcy.

12:46:52 The nonexculpated conduct consists of a number of species. There's, first off, the fact that the other directors were going along with the thought that Apollo would execute the transaction and get its sweeteners that other shareholders don't experience. The information statement disclosures aren't a species of nonexculpated conduct.

12:47:12 And the entire C suite rolled over its shares. Remember, we alleged this, and it came up this morning. We talked about this in paragraph 128. The Consortium first contacted Boss directly on July 12 of 2018, long before signing, to discuss post-acquisition employment. So we are asking you to draw an inference based on that conversation that the rollover of their shares was discussed prior to the time of deal signing, and that that's a species of nonexculpated conduct.

12:47:49 But we have the Butz discussion I pointed to and the Dionne discussion I pointed to to indicate that this is not the right time to sell. Why are we listening to Apollo? Why are Apollo's interests being favored over others? Why are we selling at a take-under?

12:48:08 The aiding and abetting claims against Apollo arise from the nature of these claims, as to director misconduct, in the form of executing this deal in a way that favors the side interests of Apollo. And Apollo was aiding and abetting and knowingly participating in that breach because it is the one that stands to benefit from those other interests.

12:48:26 I point out here, too -- I'd like to believe we're over the concept of trying to go person by person down the board and group who is an Apollo person and who is not. I'd like to believe we're past that because of that March 30 email that we were able to translate showing that Apollo told the buyer it controls the company. But I also will underscore that under *Mindbody*, the Court made clear that the plaintiff need not plead claims as to every board member or as to a majority of the board to state a claim for *Revlon* liability.

12:48:58 Let me, lastly, Your Honor, touch on the aiding and abetting against the buyer claim. And I do want to just hit *Corwin* for a moment. And Your Honor will educate if I'm out of time, obviously. I don't have much more to go.

12:49:14 So the Consortium -- what makes up the aiding and abetting claim is that the Consortium utilized confidential information regarding Momentive's sale process. They knew the status and the substance of Momentive's negotiation with Platinum and used that information to advantage itself in its negotiations with Momentive. Those are, by the way, the facts of *Chester County* and that's what it's talking about.

12:49:45 So the defendants make a lot about the idea that once the leak happened, that should be -- that should cause a run-up in price, which is an advantage to the seller. And leaks usually cause disadvantages for the buyer because it forces the buyer to pay more. But look at the timeline here. If you accept that intuition, it is totally betrayed by the facts of the case where there's a purported leak in July. They claim a purported run-up in stock price resulting from that. But what happens?

12:50:20 On August 15, Apollo's bidding is in the $34 range. And on August 18, Platinum drops out, after which, Apollo -- I'm sorry -- the Consortium lowers its bid. Lowers its bid. Doesn't raise its bid. If there is a leak, there is a run-up in stock

price, by the defendants' logic, that should mean the buyer increased its bid. What happened in reality is the buyer decreased its bid, and it did so after Platinum drops out, which is highly suspect.

12:50:54 Other board members expected impropriety. On September 5th, they all sat at a board meeting. The Consortium had somehow been informed of the substance and status of the company's prior negotiations with Party A and other interested parties. We alleged in paragraph 15 the Consortium came to learn the nature of Momentive's negotiation.

12:51:14 Now, I recall in the papers the defendants were very dismissive of this. Oh, that's just Bell speculating because he used the word "somehow," but he's reacting to the reality that the Consortium clearly has been informed of the substance and the status.

12:51:31 Now, can I trace for you the information flow from board secrets to the Consortium? That's the thing discovery is needed to finish up and let us do. That is also precisely the kind of information flow that will not be reflected in 250,000 documents. That's the thing you need testimonial evidence on. Lawyers can make arguments all day long

about whether there was a leak, whether that got up to the buyer. I mean, what else will explain, by the way, the buyer dropping its price? I know they're going to say some market factors. Whatever. What really explains the buyer dropping its price after a run-up in stock price but knowing that the other competitor dropped out of the bidding and now it's for them to lower their price, not increase their price?

12:52:24 This is the kind of deposition discovery we would take. Did you really learn of the negotiation status in substance? Look, the answer can be no. We'll accept that. We understand Your Honor denying the motions today isn't giving us a blank check to take this case all the way through trial. There will be another filtration device, another motion, no doubt, if we get past the discovery phase, where they will test the adequacy of our discovery record. And then maybe we will freely accept the fact that we really just can't tie those two things together. But how will we be deprived of that now at the pleading stage where the inferences show suspect conduct by the buyer?

12:52:59 The buyer was already shown to be mischievous. There was prior aggressive bad behavior

that the chairman pled in his July 20 email. That came up this morning. At paragraphs 128 and 129 of the complaint, we talked about this, that Chairman of the Board Bell expressed a range of concerns about various improprieties committed by the Consortium. And we're entitled to an inference that the buyer asked. They sought information they didn't have a right to know. These are the kind of facts we explore with testimony under oath, not in lawyer briefs. It's too early to dismiss something that critical. And that seems to be borne out by the timeline.

12:53:36 And again, if discovery bears out that the buyer really didn't know of Platinum's status and substance, fine. Dismiss that claim down the road. But now you draw the inference, and it's discovery we should be entitled to get. The buyer, who the board felt engaged in -- this is a quote -- "borderline-illegal requests and inappropriate behavior" may well have done something improper to get at that information.

12:54:00 And we are already know --

12:54:05 THE COURT: In 5 minutes, you will have had equal time to the defendants, so I'd like you to think about wrapping it up.

12:54:10 ATTORNEY HECHT: I am, Your Honor. And I'll do it in shorter than 5 minutes.

12:54:13 So I'll just reference, on August 9th, the board also referenced in the minutes, the financial advisors were talking about other unusual issues the company faced because of the Consortium's approach to diligence in negotiations.

12:54:29 Let me close with this, Your Honor. I want to say this about *Corwin*. *Corwin* cleansing doesn't apply for two reasons, if we're down here -- I don't think we are -- if we're all the way down at the business judgment stage.

12:54:40 First off, *Corwin* applies where there -- this is the language of *Corwin* -- where there's no agency problem. What we are suggesting is you have an agency problem because Apollo is exercising 40 percent of the vote. And they can't speak for the shareholder population when they have so many other interests at stake, the things I keep talking about: covering their debt position, getting the performance fee, avoiding the bankruptcy litigation risk. Their 40 percent vote is not cast as an agent for other stockholders. And that's another problem with *Corwin* because you need to have no agency

problem, and we've raised several.

As a technical matter, I do think it matters. And Your Honor pays attention to these details. I was really struck by the three-page section in the defendants' brief about *Corwin* applying to written consents. That's not the law. *Volcano* says no such thing. *Volcano* is a tender offer case. *Volcano*, in turn, cites *Morton's* and *Zuckerberg*, both of which are also tender offer cases. Within *Zuckerberg*, tucked away in *Zuckerberg* is a discussion about how shareholder consent is meant to be given --

THE COURT: If you had a broad-based consent solicitation for a fully diversified stockholder base, would it matter if it was done through consent rather than by vote?

ATTORNEY HECHT: No, Your Honor. In that respect --

THE COURT: Your point about the consent is that, as you see it, the conflicted pivotal stockholder drops it.

ATTORNEY HECHT: Yes.

THE COURT: So if everybody showed up at the meeting and Apollo was the pivotal stockholder that had a conflict, you would still say that *Corwin*

didn't apply because of what you frame as your agency problem.

12:56:22 ATTORNEY HECHT: Yes, because -- yes.

12:56:26 THE COURT: Whether the vote is delivered by proxy or by ballot or by consent isn't determinative.

12:56:35 ATTORNEY HECHT: No. I'm sorry, Your Honor. I may have misunderstood your point.

12:56:38 If Your Honor is saying that, in an act of shareholder democracy, Apollo takes a side and the rest of the shareholders approve it, no, if by written consent, I wouldn't object to that. But that's not what happened here. That's my point.

12:56:49 THE COURT: No, I get that. But whether or not -- *Corwin* could apply to a consent solicitation. The question is whether the stockholders were acting as what I think of as a qualified decision-maker. And that depends on whether Apollo has some side interest that allows them to be included in the disinterested or not.

12:57:11 ATTORNEY HECHT: Precisely right, Your Honor. That's the point we're making. That's the last point on *Corwin*. So with that, Your Honor, I can close. I think we've identified our issues, and we

ask Your Honor to deny to motions.

12:57:22 THE COURT: All right. So we have tracked an hour and 8 minutes, so I would like to take a 7-minute break until 11:55, and we'll resume then.

12:57:32 (A brief recess was taken.)

11:55:08 THE COURT: All right. Thank you for being back and ready to go. Let's resume.

11:55:13 ATTORNEY JANGHORBANI: Thank you, Your Honor. If I could just briefly rebut a few of the points made by Mr. Hecht in his argument.

11:55:20 So I will say, Mr. Hecht is a compelling storyteller, but the story that he's telling does not hang together on the basis of reasonable inferences from the complaint.

11:55:29 Let me start with the bankruptcy. Mr. Hecht talked about this math that he's done as to what the actual value of some theoretical exposure could be to Apollo, working backwards, *ab initio*, to the point of the bankruptcy approval when the shares were actually issued. The bankruptcy plan was approved. The shares were issued. A stay was sought. It was denied. The shares were issued. The only appellate issue was as to the senior lienholders' interest rates.

11:56:04 There is no mechanism that would allow for the type of recovery that Mr. Hecht has articulated. And even if there were, there are the releases and the indemnities and other items that we've already directed Your Honor to. So, again, on

the facts, not a reasonable inference that there was any risk there, regardless of Mr. Hecht's creative math.

11:56:29 Next, as to the bankruptcy, again, prior to entering into the merger agreement, MPM had greater freedom to settle the bankruptcy litigation than it did afterwards. There can be no dispute as to that fact. So to the extent that Mr. Hecht believes that MPM was controlled by Apollo, at that point, accepting his allegations -- which we do not -- but accepting his allegations, Apollo had a greater ability to drive that bankruptcy settlement to its preferred result.

11:57:09 Which brings me to the swap. Again, when I got up before Your Honor, I said let's accept all of the swap allegations as true. To the extent Apollo had, as Mr. Hecht alleges, an interest in this swap that flowed through from the settlement of the bankruptcy litigation, entering into a merger agreement that tied the company's hands in that interim period and certainly once Apollo was no longer a stockholder would have been totally irrational.

11:57:42 Mr. Hecht in his papers alleges that there was a June 2019 expiration of the swap. If

that's the case, why, for the period leading up to that expiration, would you enter into a merger agreement where there is a pool of cash that has to be on hand at the time of closing rather than settling it and then doing whatever else it is you want to do?

11:58:08 Now, he's going to say liquidity. That's why: liquidity. But no interest as to Apollo in liquidity has been pled apart from the routine interest of every fund. And there are cases and cases on this, Your Honor.

11:58:22 And he says that this case is special because the interest was stated. Apollo had stated it had a liquidity interest. I'll submit, Your Honor, that's true in almost all of the cases, that the fund at issue had stated an expiration date, the desire to close the fund, the desire to exit an investment. That's not the test. The test is whether the liquidation interest is of such a magnitude, such a type, that it outweighs the otherwise assumption that we make that these large investors are behaving in a way that's financially rational: that they want to maximize the value of their investment.

11:59:02 And I agree with Mr. Hecht that *Mindbody* is a great case on this. In that case, you

have one individual who is found because of a liquidity conflict to be conflicted. The nature of that conflict was that he had specific debts outstanding; he couldn't access the funds that he needed to live his life, pay off his debts; and he was very clear about that.

11:59:24 Also in *Mindbody* there was a separate individual that they alleged was conflicted who was the representative of a fund that wanted to exit its investment. Same as here. And if anything, I would submit, Your Honor, that the facts in that case around -- and his name is L-i-a-w; and I'm not going to risk pronouncing it wrong, as someone who is a victim of that a lot -- who somehow wanted to get out of the fund, the Court found that no conflict had been pled there. That's where we are in this case, Your Honor. There are simply no reasonably drawn inferences to suggest that there was a conflict here.

12:00:04 Now, Mr. Hecht also walked through a bunch of emails and a bunch of, you know, things that he says people say. I would encourage Your Honor to look closely at the timeline of the things that he's pointing you to. He implied that there are board members who did not support this deal. Again, the

board voted unanimously to approve this deal, including the independent directors, whose virtues he's holding up to you in reading to you their emails from early June, when the prices being offered were in the mid-20s, about whether it would make sense to continue to go it alone.

12:00:49 And that's just one example. I think basically every fact he walked you through, you can do that and see that it just doesn't hold together. It's a nice story, but it's not a reasonable inference from the facts as pled.

12:01:04 And then, finally, Your Honor, I would just turn to the email that the plaintiffs submitted earlier this week. Now, first of all, he says he didn't know until recently -- and I have no reason to believe that he's misrepresenting when he got the translation, but the plaintiffs received those documents in November of 2020. So it's not like they didn't have the ability to get that information.

12:01:36 Now, that document is still not in their verified pleading. And I'll submit that's no accident, Your Honor. There are elements of that document that are false on its face and that I don't think even plaintiff would allege are an accurate

description of what happened here.

That said, even if you look at that document, even if you credit everything in that document, what are you left with? You're left with Apollo saying that they're going to encourage the board. That's the exact quote. You're left with the statement -- which, again, I think is incorrect, but even if we credit it -- five out of 11 of the directors are somehow controlled by Apollo. That still leaves the six required by *Cornerstone* that are not.

And nothing in that email suggests that even if Apollo is a controller, that it's a conflicted one. And once that's true, we are back in *Corwin*, Your Honor.

And I'm happy to address any questions that you might have, but those were the points that I wanted to respond to.

THE COURT: Great. Thank you.

Does any of the other defense counsel have anything to add?

ATTORNEY ROSENBERG: Your Honor, Jonathan Rosenberg for the Apollo defendants. Just very briefly, to supplement what Ms. Janghorbani said,

first of all, plaintiffs' counsel focused on the shared services agreement and cited the case of *Reith versus Liechtenstein* as finding control based on a shared services agreement. But in that case, it was alleged that the controller's affiliation with the company's top executives, including the CEO and CFO, supported the inference of control of day-to-day management. Here, as plaintiffs' counsel concede, there was a carve-out for the CEO, the CFO, and general counsel.

12:03:39 Mr. Hecht relies on boilerplate disclosures in Apollo's SEC filings about litigation. Apollo has scores of litigation that it has to disclose in its SEC filings. If you were able to parse each one of them to see, well, which ones did they use the phrase "if any," which ones did they say "we can't predict at this point," which ones did they say is without merit, you'd have disabling conflicts all over the place, and you'd just blow the doctrine of disabling conflicts out of all proportion.

12:04:11 They don't point to any document in which Apollo says, "we need to settle the noteholder litigation." There's no evidence of any application for recalibration that Mr. Hecht talked about. And

plaintiffs don't dispute that Apollo was fully indemnified.

12:04:30 And, finally, with respect to the swap, Mr. Hecht obsesses about TRS cash, but the story is still woven out of whole cloth because there is no connection between the TRS and the senior notes and the senior noteholder litigation. And Exhibit 18, which is incorporated by reference in the complaint, tells what it is. It's the return of capital to the fund. It's not proceeds from some kind of interest in the notes.

12:05:07 That's all I have, Your Honor.

12:05:10 THE COURT: Thank you.

12:05:10 Mr. Shaftel, I can't hear you. You may be double-muted.

12:05:26 ATTORNEY SHAFTEL: Your Honor, can you hear me now?

12:05:34 THE COURT: Yes.

12:05:35 ATTORNEY SHAFTEL: I assure the Court I was very eloquent at the moment that you could not hear the presentation.

12:05:40 At the end of plaintiff-petitioners' argument, they finally did touch upon the investor group. All that was said, consistent with my opening

point, is "we utilized confidential information." There was no who, what, where, when, how. Indeed, Mr. Hecht admitted that the only source of that information is speculation by some of the very defendants, the very people we allegedly were acting in concert with. It doesn't make sense.

12:06:19 Mr. Hecht then says, "well, I can't" -- he admits, "well, I can't trace the flow of information. Let me go get some discovery." That's not the way it works. You state a viable claim, you're entitled to discovery. You don't, end of the story. Look at and compare the allegations in *Chester County*.

12:06:40 And if you want to credit some, as plaintiff puts it, utilization, I guess misutilization of confidential information, maybe that's a breach of an NDA contract. It's not the basis for an aiding and abetting claim. It's not in their pleadings.

12:06:59 Second point, I don't want to pile on, except Mr. Hecht did invite it. I know the individual defendants referenced a March 30 email that the plaintiffs have had for 14 months, including before briefing started. And Mr. Hecht said -- I wrote it down -- "you can't overstate the significance." "It's

highly compelling." "You can't overstate the significance." They very well did. When the Court has the opportunity to further review it, it's all about the Consortium introducing itself to a large shareholder. Nothing wrong with that.

12:07:40 The concept that it's a Consortium and not one single buyer was a concern to the investor group, hence the outreach. There's references throughout that the investor group needed to get presented to and put in contact with the board, consistent with proper corporate governance.

12:08:02 There is no suggestion of any secret sauce being conveyed, any confidences being improperly conveyed. I think Mr. Hecht pointed out one bullet where the investor group understood Apollo to favor valuation speed and certainty as major factors. Those are factors for every shareholder, far from any confidence, far from any secret sauce.

12:08:30 But perhaps most importantly, we heard Mr. Hecht say -- I stopped counting after three and a half times -- that from the mouth of Apollo, they controlled the board. It's not what the document says. There's no reference. Put aside there is no quotation. There is no attribution. You have,

frankly, non-U.S. business people, a non-U.S. business person author of this internal memo, evidently accounting his understanding of affiliations to get to five of 11 in making whatever supposition he had, the investment group had, about board dynamics. But any suggestion that somehow there was any confidential information or even any attribution to Apollo about the board dynamics is not fairly reflected in the document.

12:09:25 With that, Your Honor, I'll come to rest.

12:09:31 THE COURT: Great. Thank you all very much.

12:09:32 I don't need to hear anything more, Mr. Hecht. Thank you.

12:09:35 ATTORNEY HECHT: Thank you, Your Honor.

12:09:38 THE COURT: All right. I'm going to go ahead and give you my ruling now. I appreciate all of your time and presentations.

12:09:45 We're here today because the defendants have moved to dismiss the complaint. I'm going to grant the motion as to Bell and the Consortium. Otherwise, I'm denying it.

12:09:54 This is a lengthy and detailed complaint. It pleads evidence. It pleads an account that goes beyond the reasonably conceivable. It is an account that is both plausible and logical.

12:10:05 Now, in the interest of transparency, I will say that the defendants have a good story too. Their account is also plausible and logical. They have alternative explanations for specific points. Today, they have collectively made what would be a great post-trial argument, both in substance and in level of detail and in length. But we are at the motion to dismiss stage. And at the motion to dismiss stage, when there is a reasonable inference to be drawn, the plaintiffs get it. When there is a reasonable view of the facts, the plaintiffs get it. And all the plaintiffs have to do is make a claim that is reasonably conceivable. They don't have to establish their story by a preponderance of the evidence.

12:10:54 Because of the detail and scope of the complaint and its allegations and the documents that it incorporates by reference, I am not going to attempt to summarize the facts. I'm going to state the obvious. Notwithstanding the defendants' desire

for me to do otherwise, I am accepting the allegations of the complaint as true, and I am granting the plaintiffs the reasonable inferences to which they are entitled.

12:11:23 I'm also not going to give you chapter and verse on case citations. I really don't think the law is unsettled on this. The question is the sufficiency of the plaintiffs' allegations and whether they move the needle.

12:11:43 Given the details that the parties have gone through, I could honestly write an 80- to 100-page opinion that would sound like a post-trial ruling, but that's not where we are. And because I think the outcome is sufficiently clear, I'm not going to burden the world with the type of opinion that my colleagues and I have issued in closer cases.

12:12:07 I think the first question, and really the question that drives much of the analysis, is whether Apollo was a *de facto* controller. I think there's more than enough evidence to infer for pleadings purposes that Apollo was a *de facto* controller.

12:12:24 I think it's a holistic analysis. It's like a diagnostic model. There is a list of

symptoms a doctor considers when he's trying to figure out if you're sick. Some systems may point in one direction. Some symptoms may be ambiguous. Some symptoms may point in a different direction. Rarely is there one symptom that decides everything. It's often a mix, and a doctor has to think about the whole thing and decide whether, on balance, they're worth that diagnosis.

12:13:03 Here, I'm not even diagnosing control. I'm assessing whether it's reasonably conceivable that I could later diagnose control.

12:13:18 Let's start with stock ownership. If it exceeds 50 percent, then that can be effectively a single factor, although even there, if there are measures that undercut control, that can be taken into account. But for a less-than-majority controller, stockholder ownership carries weight. The simple fact is that the more shares you have, the more likely you are to get your way at a stockholder meeting, and the more heft you have in the boardroom because you can point to the economic weight of your stake, et cetera.

12:13:48 Apollo owned 41 percent of the shares. At standard levels of turnout, that is enough to enable Apollo to dictate the outcome of a vote

unilaterally. With any type of normal voting splits, Apollo invariably wins. It would take extreme supermajorities going the other way for stockholders to unite and oppose and, at a minimum, they would have to swing the second-largest holder over to their side. Here, Apollo and the second-largest holder were aligned.

12:14:27 Apollo had the right to appoint three directors and had two other directors on the board that had longstanding affiliations with Apollo. Apollo had also been involved in the CEO's promotion. Given the timeline, it's reasonable to infer at this stage that Apollo could expect loyalty from the CEO.

12:14:59 The surface cut at the board is consistent with the email that Mr. Hecht discussed this morning. Contrary to the most recent defense lawyer's argument, it absolutely is evidence of something Apollo said. Yes, it may be a non-American, non-native-English speaker, but that email says Apollo is telling us this. It is putting the statement in Apollo's mouth. Ultimately, I may not credit it, but it is, A, relevant because it tends to make that factual finding more likely; and, B, something that reinforces the overarching inference from the factual

allegations.

Apollo also acted like it controlled the company. The complaint alleged that Apollo frequently held board meetings at its offices and had an outside executive of Apollo regularly attend. That's a soft factor. It wouldn't independently sway me, but it's something that adds to the overall context. It's an indication that Apollo is acting like a controller. It supports a reasonable inference that Apollo said, you come to us. We're in charge. You come to our house.

There is contemporaneous evidence that Apollo, in fact, exercised management control. There's an email from Kalsow-Ramos asking the company's chief financial officer to find another million dollars in EBITDA to make the year-end number. In fact, that $1 million in EBITDA is found. Again, is that going to be enough, standing alone? No. But we're talking about an overall picture.

Likewise, the amended services agreement, standing alone, probably wouldn't be enough. But with everything else, it is incremental. It adds to the picture. It is reasonable to infer that it gave Apollo incremental leverage, incremental

influence. It is reasonable to infer that it meant what it said, which is that Apollo directed control of the company's daily corporate functions, including its legal and investor relations department. Yes, it excluded the senior-most officers, but we're talking about a factor.

12:17:24 And then there's evidence that other parties treated Apollo as the company's *de facto* controller. This situation has the look and feel of a world where this company is a portfolio company of Apollo. Platinum and the Consortium both approach Apollo. The board empowers Apollo through Kalsow-Ramos to negotiate directly with Platinum.

12:17:49 Now, the defendants argue that this is all reasonable and makes sense, and perhaps it does. Something can make sense as a business matter and yet also support an inference of control. And it also may make sense for other reasons. But at this point, I have to draw inferences in favor of the plaintiff.

12:18:15 I personally don't think this one is a close call. I get that people can pull sentences out of cases and argue that a 41 percent holder with this level of influence generally and this level of influence in the specific sale process isn't, in fact,

a controller. Maybe at trial, one can prove that Apollo is not a controller. I'm not ruling that out. But at the pleading stage, I think it's reasonably conceivable that Apollo is a controller.

12:18:49 In fact, I think that if you surveyed people who weren't lawyers charged with arguing that Apollo is not a controller, if you just went out to people in New York, Wall Street types, and asked them, "Is it reasonably conceivable that, given these factors, Apollo is a controller?" you would be well beyond four out of five dentists surveyed. The yes votes would be way up there. That's my view. That's the inference I'm drawing. I think it's an easy one.

12:19:17 All right. So then the next question is whether Apollo was conflicted. And this is the second big peg on which the motion turns, because if Apollo is a conflicted controller or even I think if it's a conflicted pivotal stockholder, then *Corwin* cleansing is not available.

12:19:40 We know the law on this. The conflict is obvious when the controller stands on both sides of the deal, but you can also have a conflict when the controller stands on only one side of the deal. It is easier to see if the controller gets differential

consideration or another nonratable benefit. You can also just have interest on the part of the controller, just like interest on the part of any other fiduciary, that would lead the controller to favor something other than what is in the best interests of the company and the stockholders as a whole.

12:20:22 I think it's reasonably conceivable that Apollo had this total return swap and that this total return swap provided an additional benefit to Apollo that was nonratable. There's evidence of this. The plaintiffs have pled evidence.

12:20:43 The defendants' answer in the briefing was to say that all the plaintiffs can muster is the rote assertion that they're entitled to a favorable inference. That's not a rote assertion. That's actually the law. When do lawyers come into a court and describe the operative legal standard as just a rote assertion that we can disregard? That's not reassuring. And it's not just one stray reference. There are a couple different documents. I think we looked at four today, it might be three, that support the existence of this total return swap.

12:21:28 Now, there is another theory. Apollo's counsel points to a different document and

says, no, no. This is about capital being called to support debt purchase over time, and we're returning that capital. Okay. That's something we call a dispute of fact. That's something that can't be decided on a motion to dismiss. Both of these stories, both of these accounts, make sense. At this stage of the proceedings, the plaintiff gets the inference.

12:22:07 So I think it's reasonably conceivable that Apollo had a disparate and divergent interest as a result of the total return swap.

12:22:18 I also think that it's reasonably conceivable that there was a benefit to Apollo in the form of reduced litigation exposure as a result of this deal. This is murky. This is complex. This is the type of complexity that Apollo likes. And a motion to dismiss is a very difficult time to make potentially case dispositive judgments about complex and murky matters.

12:22:50 The defendants have the easy answer, which is that there was an initial release in the bankruptcy plan and that Apollo was indemnified. I give some credence to that, but it strikes me as potentially too simplistic.

12:23:08 The plaintiffs have pointed to disclosures in Apollo's filings that suggest that there was a material risk from this litigation. That's another classic one. Just like the dismissal of the operative motion to dismiss standard as being just a rote thing, the defendants' lawyers propose ignoring these disclosures on the grounds that they're boilerplate.

12:23:39 At the pleading stage, I'm actually going to draw the inference that Apollo is complying with its obligations under the securities laws and that it's actually saying things that are true, which is that these things are or potentially have a material effect.

12:23:58 There's also an evident tie between the settlement agreement and the merger agreement. The settlement agreement is expressly conditioned on the merger closing. And the merger agreement is not conditioned on the settlement, but there's contemporaneous evidence supporting an inference that getting this thing settled was a condition to the deal.

12:24:18 Now, look, this cuts both ways. The defendants come in and say, this is a protection for

the buyer. The buyer wanted this litigation wrapped up. And again, I think that makes some sense. But there's also a question about how it was done and the fact that the company's cash, which was effectively otherwise going to be working capital, was going to be used for this settlement. And I think it does make sense to me or at least it's reasonably conceivable that the resolution of this litigation had a benefit to Apollo.

12:25:03 The idea that, well, Apollo would have done it earlier is another thing that just strikes me as too simple. Generally, defendants like to spin out litigation. You don't want to pay money before you have to. You want the plaintiffs to sweat on whether they're getting anywhere. You're not eager to write checks. It's not clear to me or at least it's not persuasive to me that, automatically, we should be viewing this as a binary world in which initially Apollo could settle or cause the company to settle freely than later one in which Apollo was constrained. I think there's more to it.

12:25:55 All right. Now let's talk about the liquidity idea. Again, we all know the law. It's tough to plead this because what Delaware courts don't

want to do is create a situation where every deal that a financial sponsor engages in gets past the pleading stage simply because the plaintiffs come in and make general allegations about status. In other words, they say that the defendant is a fund manager, that they want to wrap up one fund, or they want to open a new fund. That was really what the allegations were in *Morton's* and not much more than that.

12:26:44 Or in *Synthes*, the allegations were, really, this is just an old guy. I have started to sympathize with those types of allegations. But this is just an old guy, and he wants to sell and diversify and, therefore, he was on some type of liquidity path.

12:27:09 This is steps beyond that. Here, the plaintiffs have pled enough to support a pleading-stage inference that Apollo won by taking a strategic alternative that delivered lower consideration for itself in its stockholder capacity because it was maximizing its total consideration from the positions it held across the capital structure and in the form of this release of performance fees for the fund.

12:27:46 So Apollo was acting rationally. It's acting rationally to maximize on a portfolio basis. Or, as the plaintiffs say, paraphrasing Apollo, it's

maximizing its opportunity by playing in different parts of the capital structure.

12:28:05 Now, that makes sense. That could be what's going on here. If the plaintiffs just said it, based on Apollo's overarching description of how it operates and the statements it makes to sell itself to investors, that wouldn't within enough. But what the plaintiffs have done is they've married that up with specific factual allegations, including Apollo's own statements about what it wanted to achieve.

12:28:38 And again, here, I'm not focusing on any one thing. I'm focusing on the big picture. You've got a fund that was in its 12th year, well beyond the horizon. And not just that, but you've got a fund where this entity, this company, was the dominant remaining position. Apollo couldn't get the 168 million in performance fees until it liquidated the remaining investments in that fund, and this company was the dominant position. I think 85 percent.

12:29:14 You have Apollo explicitly talking about monetizing and saying that it wants to liquidate this position. There's a reference in the briefs that the Court shouldn't infer that this amount of money is

material to Apollo. I am not going to disregard $168 million. It matters what the comparison is. Again, it is overly simplistic to compare the 168 million to Apollo's total assets under management. That's not what we're talking about. I've seen too many documents in which specific fund teams or specific groups of managing directors focus on precisely this type of issue and their desire to liquidate an asset.

12:30:27 And then I view this against the backdrop of the sale process itself. This isn't a pristine deal. This is a take-under where the deal comes in below that trading price. I acknowledge that there is a question of fact about the reliability of that trading price. I acknowledge that it is not necessarily clear that that is the type of trading price that one would give full weight to in a valuation setting. But we're at the motion to dismiss stage.

12:31:13 There's also the option for the full IPO on a major market. And there is evidence -- again, evidence, not just allegations -- that people thought the IPO was a better option for the company as a whole and its stockholders but recognized it didn't

provide liquidity for Apollo. And here, it's not just some outside analyst saying that. It's internal emails from two independent directors that support that inference.

12:31:53 So, ultimately, there will be a dispute of fact as to those other alternatives. Again, we're at the motion to dismiss stage. Plaintiffs get the inference.

12:32:09 That's not all about the sale process. You've got the contemporaneous emails from the Oaktree director, which hits two points: first, that the advisors seem to be only interested in working on things that favored Apollo; and second, that no one seemed to be looking out for investors other than Apollo. There might be explanations for that. Maybe those evidence frustration. Maybe there's other dynamics going on. I mean, frustration about other things as opposed to some legitimate frustration that that's really what was happening. But that's evidence of conflict and a problematic sale process.

12:33:05 And I say this recognizing that the sale process was long. And I say this recognizing that they reached out to a number of folks. But a sale process isn't just a numbers game. And the real

action in the sale process is not how many teasers you send out and not how many initial meetings you have. It's what you do in those third, even fourth phases once it narrows down to a much more concrete set of options.

12:33:41 Here, you've got, I think, detailed facts that suggest that it is reasonably conceivable that Apollo engineered the transaction that served its need for liquidity and maximized its recovery on a portfolio basis at the expense of alternatives that were more favorable to the company's stockholders.

12:34:13 Now let's talk about *Corwin*. The *Corwin* argument I think fails because Apollo was a conflicted controller. That, alone, is enough.

12:34:25 I also think that even if we had a situation where Apollo wasn't a controller, Apollo is the pivotal stockholder in this vote, and it's reasonably conceivable that Apollo has all these side interests. So when all you have is the consents from Apollo and Oaktree, and Apollo is pivotal and Apollo is conflicted, I don't think you have a *Corwin* ratification even absent the controller issue. Our law so far has focused on the controller issue, but theoretically, what you're talking about is a

disinterested vote. So those consents only work if Apollo is disinterested. I think it's reasonably conceivable that Apollo is not, setting aside controller status.

12:35:17 Now let's talk about *Cornerstone*. I think Kleinman, Feinstein and Kalsow-Ramos are easy. They're all dual fiduciaries. They're all employees of Apollo, making it reasonably conceivable that they had a conflict of interest and were acting to further the interests of Apollo. That one doesn't seem to me to be that tough.

12:35:50 Schlanger is not currently employed by Apollo, but I think he had sufficient ties to make the inference reasonably conceivable at this stage. He seems to be a house director of Apollo. He has served as an executive at Apollo companies. There's a lot of ties. It's not just one or two. So I think that he remains in at this stage.

12:36:28 Nodland is in the same boat, but I think he's a closer call. I think he has fewer ties, and they're more dated. I've gone back and forth on what to do about Nodland. It is true that his affiliated positions ended fairly long before the merger, but there are continuing ties in terms of

director service.

This strikes me as the type of situation that Professor Da Lin is talking about in her *Beyond Beholden* article where you can have beholdenness that comes out from this house director phenomenon.

So I'm going to deny the motion as to Nodland, but in the interest of transparency, this one is the close call for me. And unless there's actual evidence that he does things during the transaction process that cut in favor of some disloyal motive, it seems to me that it's likely that he could obtain dismissal later in the case, either on summary judgment or at trial. But at the pleading stage, I think the plaintiff gets the inference.

I'm also denying the motion as to Boss. He was promoted under the period of Apollo's control. He has disparate interests in the merger. He gets severance payments. He gets the rollover. He continues as CEO. Those are all benefits not shared with the stockholders.

There's this offhand citation to the *Novell* case that the defendants use, and I've seen it before, saying that the possibility of receiving

change-in-control benefits pursuant to a preexisting employment agreement does not create a disqualifying interest as a matter of law. I think framed that way, it's over-inclusive. Depending on the nature of the plaintiffs' allegations, that can be true.

12:38:51 So imagine that the argument is that the CEO is interested because he has a change-in-control agreement. And the plaintiff is arguing that you should have taken Deal B rather than Deal A, but both of them would have triggered the severance benefits. Those severance benefits don't create a disparate conflict because they'd be triggered by both options. But when you're talking about something where you have options that trigger and options like the IPO that don't trigger, this is a simple situation where you've got a director who is getting something, getting a form of consideration, that is not shared with the stockholders as a whole.

12:39:37 So I am denying it as to Boss.

12:39:42 As I said at the outset, I'm granting it as to Bell. I don't see anything in the complaint that suggests that a claim for any loyalty-based theory could survive against Bell. In fact, the plaintiffs' complaint and the documents it

incorporates suggest that Bell was on the job and doing the types of things that he should have been doing.

12:40:10 At least as to the disclosure claims in the complaint, I don't think there's anything left to them. Mr. Hecht articulated a disclosure theory today that might have more force.

12:40:27 I've now reached the aiding and abetting claim. I'm granting the motion to dismiss as to the buyers. The pivot here is whether they knowingly participated. I don't think the allegations here are enough to suggest knowing participation in a breach of duty.

12:40:51 The complaint supports an inference that these weren't the greatest people in terms of how they behaved in the deal process at least based on what we understand are U.S. standards of good governance. I think Mr. Hecht used the word mischievous, which I think was appropriate. But what there isn't is any indications that they were being mischievous in conjunction with fiduciaries or that they were using their mischief to induce behavior or misbehavior from fiduciaries.

12:41:29 There's going to need to be discovery

from the acquirers. This is necessarily an interlocutory ruling. Just like in *Mindbody*, where Chancellor McCormick brought Mr. Liaw back in when discovery showed something more than what the complaint alleged, if there really is evidence that these folks were not just being mischievous in general but were inducing folks to back-channel or things of that sort, I'll revisit this. At this point, I don't think it's there.

12:42:09 I will say that I do not understand and affirmatively reject this idea that an aiding and abetting claim has to plead independent damages. There are two cites for that in the defendants' brief. Both of them are post-trial rulings. Both of them are quite fact-specific. Both of them are, frankly, weird and abbreviated in terms of the discussion.

12:42:35 Aiding and abetting generally gives you joint and several liability between any liable fiduciaries and the aider and abettor. By definition, that's liability for the same damages. So it could be that those decisions were dealing with the practicalities of an actual remedy in the post-trial setting where one might well constrain it, but to my mind, those do not translate into the idea that you

have to allege independent damages resulting from the aiding and abetting claim. And I wouldn't want to leave that as something where silence might implicitly endorse that suggestion.

12:43:19 That leaves us with Apollo. Look, I think it's highly unlikely that the aiding and abetting claim against Apollo has heft, but as I suggested, there is a reasonably conceivable path where Apollo has a divergent interest. Apollo is the pivotal stockholder. *Corwin* therefore doesn't cleanse. You're then in enhanced scrutiny. And you have some claim against the Apollo folks that ultimately extends to Apollo via an aiding and abetting allegation.

12:43:57 Is it reasonably conceivable? Yeah, given the structure of our law and the allegations about Apollo's role in the process. It's not the type of claim that I think is likely to ultimately work out. The odds on, if the plaintiffs have their best day, it seems to me, from what I know today, is that Apollo is either going to be a controller and a fiduciary or not. But we're at the motion to dismiss stage, and I'm not going to try to parse in greater detail a theory that may well drop out as the case

proceeds.

All right. I'm going to reiterate the answer that I gave you up front. I'm granting the motion as to Bell and as to the Consortium. Otherwise, I'm denying it.

Thank you all for your time today. I'm very grateful. I appreciate your presentations. And we can move forward. Have a good day.

ATTORNEY HECHT: Thank you, Your Honor.

ATTORNEY JANGHORBANI: Thank you, Your Honor.

VARIOUS COUNSEL: Thank you, Your Honor.

(Proceedings concluded at 12:45 p.m.)

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CERTIFICATE

I, JEANNE CAHILL, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Diplomate Reporter and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 149 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except as revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 16th day of January, 2022.

/s/ Jeanne Cahill

Jeanne Cahill
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter