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Case No. 10865-VCG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GLOBE SPECIALTY METALS, INC. STOCKHOLDERS LITIGATION	))	Consol. C.A. No. 10865-VCG REDACTED VERSION-- FILED: August 24, 2015

GLOBE DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Dated: August 17, 2015

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PRELIMINARY STATEMENT

On February 22, 2015, Globe Specialty Metals, Inc.'s ("Globe") Board of Directors, comprised of Executive Chairman Alan Kestenbaum and five independent directors, unanimously approved a Business Combination with European silicon metal producer, Grupo FerroAtlántica, S.A.U. ("FerroAtlántica"). The Business Combination—valued at $3.1 billion—creates a new company with a global supply chain and customer base that will be a leading silicon metal producer in North America and Europe. Globe management forecasts that the transaction will result in nearly $1 billion in synergistic value that would have been unavailable to Globe's stockholders if Globe remained a standalone company. Industry analysts have praised the deal, which "combines what are arguably the two best run companies in the silicon metal/ferroalloy market, with shareholders of each company retaining a sizeable stake in the new enterprise."[1]

Plaintiffs allege Mr. Kestenbaum manipulated and withheld critical information from the Board to sell Globe at an inferior price. However, Plaintiffs' Motion ignores that Mr. Kestenbaum is the founder and single largest stockholder of Globe, and as such would have the most to lose from any "bad deal." Plaintiffs ask this Court to conclude that Mr. Kestenbaum engineered a transaction that

[1] Ex. 2. References to "Ex. __" refer to the exhibits to the Transmittal Aff. of Elizabeth A. DeFelice, filed contemporaneously herewith.

would intentionally (according to their expert) wipe out more than $40 million of his own equity, to obtain a *potential* bonus that is a fraction of that value. Plaintiffs fail to explain why Globe's five independent directors, each with long and distinguished careers in high-government positions and public company management—and each himself a stockholder—would risk their reputations by assisting Mr. Kestenbaum in such a scheme.

In fact, the independent Board approved the Business Combination after lengthy consideration of a different potential merger, followed by nearly three months of vigorous negotiations with FerroAtlántica, and extensive financial and legal due diligence conducted with the assistance of Goldman Sachs & Co. ("Goldman") and Latham & Watkins LLP ("Latham"). The Board held five separate meetings during which it reviewed the transaction documents and heard presentations from management, Goldman, and Latham, before it unanimously approved the deal. Globe has scheduled a special meeting for September 10, 2015, so that its stockholders may freely vote on whether to approve the Business Combination.

Plaintiffs seek to take that decision away from Globe's stockholders. At its core, this case is a valuation dispute. Plaintiffs disagree with Globe's financial projections and the combined business's potential for recognizing cost savings and synergies. But Plaintiffs' disagreement with Globe's view of the silicon industry

and the business is not a sufficient ground to enjoin the Business Combination. The forum for Plaintiffs to express that view is the September 10, 2015 stockholder meeting. Enjoining the transaction now would enable Plaintiffs to impose their view of valuation on the majority of holders of the nearly 74 million Globe shares, and would risk losing the opportunity for all stockholders to receive the value achievable through the Business Combination.

For good reason, to obtain the "extraordinary" emergency relief Plaintiffs seek, Plaintiffs must carry the heavy burden of demonstrating both a likelihood of success on the merits, and that the relative balance of harms favors granting the requested injunction. Because Plaintiffs have not met their burden, their Motion for Preliminary Injunction should be denied.

BACKGROUND

A. Globe And Its Business

Globe is one of the world's largest and most efficient producers of silicon metal and silicon-based alloys—critical ingredients in a host of industrial and consumer products with growing markets.[2] Mr. Kestenbaum founded Globe in 2004 as International Metal Enterprises, Inc., an investment company established

[2] *Globe Specialty Metals Overview*, GLOBE SPECIALTY METALS, INC., http://www.glbsm.com/Overview.aspx (last visited August 14, 2015).

to acquire operating companies in the metals industry.[3] Mr. Kestenbaum, the Board, and Globe management have grown the Company from $200 million in equity capital in 2005[4] to a market capitalization of over $1.1 billion, and over $750 million in sales in 2014.[5]

Globe's growth has been driven primarily by strategic acquisitions.[6] The Board and Globe management regularly assess Globe's operations and financial performance, business strategy, industry trends, and strategic alternatives, including potential acquisitions and business combinations. The Board tasked Mr. Kestenbaum, aided by management, with identifying strategic M&A transactions and conducting preliminary diligence and negotiations with promising strategic partners.[7] According to independent director Donald Barger, Mr. Kestenbaum "identifies opportunities to create value for the company and for its shareholders, and then he executes on those ideas … assuming that he gets approval by the board."[8]

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[3] *Globe Specialty Metals History*, GLOBE SPECIALTY METALS, INC., http://www.glbsm.com/history.aspx (last visited August 14, 2015).

[4] *Id.*

[5] Ex. 12 at GLOBE_000000528; Ex. 3 at 33.

[6] *Globe Specialty Metals History*, *supra* n. 2.

[7] Barger Dep. Tr. at 16:11-24.

[8] *Id*. at 16:20-24.

The Board is comprised of Mr. Kestenbaum and five independent directors. Mr. Kestenbaum is Globe's largest stockholder, owning 12.6 percent of its stock.[9] The five independent directors all have substantial experience in government and public company management. Stuart E. Eizenstat is senior counsel at Covington & Burling and former Deputy Secretary of the United States Treasury, as well as the former U.S. Ambassador to the European Union.[10] Franklin Lavin is the Chairman and CEO of Export Now, as well as former U.S. Ambassador to the Republic of Singapore and former U.S. Under Secretary of Commerce for International Trade.[11] Donald G. Barger, Jr. served as Vice President and Chief Financial Officer at YRC Worldwide Inc., Hillenbrand Industries Inc. and Worthington Industries Inc.[12] Alan R. Schriber, Ph.D., chaired the Public Utilities Commission of Ohio and was an Assistant Professor of Economics at Miami University.[13] Bruce L. Crockett is the Chairman of the Invesco Mutual Funds Group and serves

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[9] On February 22, Mr. Kestenbaum's shares were worth over $140 million based on Globe's stock price of $15.37. Ex. 1 at 249.

[10] Ex. 4 at 3.

[11] *Id.* at 4; *Gutierrez Lauds Senate for Voting to Confirm Franklin L. Lavin as Under Secretary for International Trade*, UNITED STATES DEPARTMENT OF COMMERCE: COMMERCE NEWS (Oct. 28, 2005), available at http://www.ita.doc.gov/media/PressReleases/1005/lavin_102805.html (last visited August 16, 2015).

[12] Ex. 4 at 4.

[13] *Id.* at 5.

as a director of the Investment Company Institute.[14] Each director owns Globe stock.[15]

B. FerroAtlántica And Its Business

FerroAtlántica is a world-leading Spanish producer of silicon metal, wholly owned by Grupo Villar Mir ("Grupo VM"), one of Spain's largest companies.[16] FerroAtlántica operates fifteen electrometallurgy factories in Spain, France, Venezuela, South Africa and China, and five quartz mines in Spain and South Africa.[17] FerroAtlántica operates fourteen hydroelectric power plants in Spain and France[18] and intends to build the world's largest silicon metal factory in Sichuan, China.[19]

Before the European financial crisis, FerroAtlántica reported 2008 EBITDA of over €430 million (approximately $598 million).[20] REDACTED

[14] *Id.* at 5.

[15] Ex. 1 at 249.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See* GRUPO FERROATLÁNTICA, http://www.FerroAtlántica.es/index.php/en/ (last accessed August 14, 2015).

[20] Ex. 5 at 10.

REDACTED [21] Although profitability declined from 2011-2012, it has grown steadily since and FerroAtlántica is in good position for further growth.[22]

C. In 2014, The Board Reviewed Multiple Strategic Alternatives

Mr. Kestenbaum and Globe management regularly discuss potential strategic transactions with parties in the metals and mining industry.[23] During 2014, representatives of Goldman, Nomura Securities, Inc. ("Nomura"), REDACTED REDACTED and other firms discussed potential strategic transactions with Mr. Kestenbaum, including potential business combinations with FerroAtlántica; REDACTED ("Party A" in the F-4), REDACTED REDACTED ; and REDACTED ("Party B" in the F-4), a producer of ferroalloy.[24]

In March 2014, Mr. Kestenbaum met with REDACTED 's CEO to discuss a potential merger, which would allow Globe to increase its presence in Europe.[25] REDACTED assisted Globe with evaluating that transaction.[26]

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[21] Ex. 12 at GLOBE_000000534.

[22] Kestenbaum Dep. Tr. 196:20-197:12.

[23] Ex. 1 at 66.

[24] *Id*.

[25] Kestenbaum Dep. Tr. 40:25-41:9.

[26] Kestenbaum Dep. Tr. at 42:1-13.

In April 2014, Mr. Kestenbaum met with Javier López Madrid, Vice Chairman of FerroAtlántica, in a meeting arranged by Nomura, to discuss the businesses of Globe and FerroAtlántica and a potential merger.[27] Mr. Kestenbaum believed it "made sense" that Globe consider a combination with FerroAtlántica due to the "complementary nature" of their businesses and the potential for synergies.[28] On May 2, Mr. Kestenbaum reported to the Board regarding preliminary discussions with both Elkem and FerroAtlántica.[29]

On August 19, Mr. Kestenbaum and Globe management presented the status of various potential transactions to the Board. Discussions with REDACTED had progressed to formulating a timeline for negotiating and executing the potential merger, while substantive negotiations with FerroAtlántica had stopped.[30] The Board authorized Mr. Kestenbaum and REDACTED to continue negotiations with REDACTED.[31]

On August 27, Globe engaged Latham to advise regarding the REDACTED negotiations and from August through October performed due diligence of REDACTED

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[27] Ex. 1 at 66.

[28] Kestenbaum Dep. Tr. at 37:2-7.

[29] Ex. 1 at 66.

[30] *Id*.

[31] *Id*.

including touring REDACTED's facilities.[32] On October 7, Mr. Kestenbaum and Mr. Lavin met with REDACTED, the chairman of REDACTED parent company, REDACTED.[33] REDACTED proposed a share-for-share transaction in which Globe stockholders would own 20-30 percent of the combined company.[34] He also indicated that REDACTED—would require control of the combined company and would not accept protections for minority stockholders.[35] On November 4, REDACTED reiterated that REDACTED would accept REDACTED."[36] Mr. Kestenbaum reported REDACTED position to the Board on November 5, and indicated that it presented significant challenges to a transaction.[37] In response to REDACTED xin, Mr. Kestenbaum noted that REDACTED proposal valued REDACTED at REDACTED, while

[32] *Id.* at 67.

[33] *Id.*

[34] *Id.*

[35] *Id.* REDACTED advised Globe that inadequate protections in a deal with REDACTED a REDACTED Kestenbaum Dep. Tr. at 45:17-46:9.

[36] Ex. 13 at GLOBE_000003861-62.

[37] Ex. 1 at 67-68.

valuing Globe at only REDACTED [38] Mr. Kestenbaum suggested to REDACTED that they cancel their next meeting.[39]

Following additional communications between Mr. Kestenbaum and REDACTED. REDACTED[40], Mr. Kestenbaum consulted with REDACTED, who advised that REDACTED REDACTED .[41] REDACTED

furnished Globe management with summary financial information for FerroAtlántica on November 25.[43] Although Globe's discussions with FerroAtlántica continued, REDACTED [44]

Mr. Kestenbaum continued preliminary negotiations regarding an REDACTED merger through February 2015. On February 1, REDACTED

[38] Ex. 13 at GLOBE_000003861.

[39] *Id.*

[40] *Id*. at GLOBE_000003860.

[41] Kestenbaum Dep. Tr. at 82:23-83:5.

[42] *Id.*

[43] Ex. 1 at 68; Ex. 14 at GLOBE_000011329; Ex. 15 at GLOBE_000011476.

[44] Kestenbaum Dep. Tr. at 97:12-20 (it was not in the "shareholders[']' interest to grant such exclusivity").

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D. FerroAtlántica Presents Unique Strategic Opportunities And Potential Long-Term Stockholder Value

FerroAtlántica's leading position in Europe complemented Globe's leading position in North America. The combined business would be a world leader in silicon and specialty metals production, with a strong balance sheet and a global footprint that would support growth and innovation.[49] The combination would yield a diversified low-cost operating platform that would support sales to a broader and more diverse customer base than either company could achieve as a

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[45] Ex. 16 at GLOBE_000004898; Ex. 18 at GLOBE_000014395.

[46] Ex. 17 at GLOBE_000008783.

[47] Barger Dep. Tr. at 39:1-11.

[48] *Id*. at 39:17-23; Ex. 1 at 67-68. Such problems are well-known to this Court. *See, e.g., Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, 2014 WL 5654305 (Del. Ch. Oct. 31, 2014) (legal dispute arising after labor strike disrupted at Chinese joint venture).

[49] Ex. 1 at 76.

standalone company, and would be better positioned to withstand cyclical geographic economic conditions and currency fluctuations.[50] The combination would provide the potential to realize extensive operational and financial cost savings (synergies).[51]

Before Mr. Kestenbaum's meeting with Mr. López Madrid in April 2014,

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.[52] Mr. Mehta, who had ten years of experience in investment banking at UBS and Deutsche Bank before joining Globe, reviewed the materials with Mr. Kestenbaum.[53]

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[50] *Id*. at 77.

[51] *Id.*

[52] Ex. 19 at GLOBE_000015125, 15128.

[53] Kestenbaum Dep. Tr. at 15:9-14. Mr. Kestenbaum was impressed with the detailed methodology Mr. Mehta employed in evaluating M&A deals as an outside advisor, and hired him to assist Globe full time by providing initial analysis of potential strategic opportunities and more thorough, full-scale analysis as those opportunities progressed. *Id*. at 16:3-17:6.

Globe and FerroAtlántica continued discussions in November 2014. Mr. Kestenbaum met with Mr. Villar Mir in Mexico on November 19, and they discussed the businesses of Globe and FerroAtlántica and the synergistic and financing benefits a combined company could realize.[56] Mr. Villar Mir proposed that Mr. Kestenbaum serve as Executive Chair of the potential new company.[57]

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[54] Plaintiffs cite an REDACTED . Mot. at 6-7. This email exchange occurred after Mr. Kestenbaum, acknowledged that REDACTED Ex. 20 at GLOBE_00009256. REDACTED Plaintiffs' Ex. at 55.

[55] Ex. 22 at GLOBE_000015384-91.

[56] Ex. 1 at 68.

[57] *Id.*

Following the meeting, Grupo VM furnished summary financial and operating information to Globe.[58] Mr. Kestenbaum worked with Mr. Mehta, and Globe's CEO, Jeffrey Bradley, and CFO, Joseph Ragan, to review that information.[59]

On November 30 and December 1, 2014, Mr. Kestenbaum and Mr. López Madrid met in Miami to share their preliminary views on valuation and governance.[60] Mr. López Madrid proposed a merger with a 65/35 split in favor of Grupo VM.[61] Mr. Kestenbaum countered that the equity split was unacceptable,[62]

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.[64] After "two days of hard negotiations,"[65] Mr. Kestenbaum and Mr. López Madrid agreed to proceed with negotiations on the basis of a preliminary equity split of 57/43 in FerroAtlántica's favor.[66] REDACTED

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[58] Ex. 1 at 68; Ex. 14 at GLOBE_000011329; Ex. 15 at GLOBE_000011476.

[59] Ex. 1 at 68.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] López Madrid Dep. Tr. at 61:18-62:5.

[64] Kestenbaum Dep. Tr. at 125:13-126:7.

[65] López Madrid Dep. Tr. at 48:19-21.

[66] Ex. 1 at 68.

REDACTED

[67] They agreed any transaction was subject to further negotiation, diligence, and Board approval.[68]

On December 18, the Board met to review the discussions with REDACTED and FerroAtlántica.[69] Mr. Kestenbaum explained the rationale for the merger with FerroAtlántica and described the preliminary term sheet.[70] The Board authorized Mr. Kestenbaum to continue negotiations with FerroAtlántica and to engage a financial advisor to assist the Board.[71]

E. Globe Negotiates For Favorable Economic Terms And Minority Stockholder Protections

Over the next two months, Globe negotiated with Grupo VM. On December 22, Mr. Kestenbaum met with Mr. Villar Mir, Mr. López Madrid, and others in

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[67] Ex. 1 at 69; Ex. 23 at GLOBE_000010634-36. Plaintiffs' brief omits the fact that the term sheet was expressly "non-binding," as indicated by its title. Mot. at 9.

[68] REDACTED

[69] Ex. 1 at 69.

[70] *Id*. at 69-70.

[71] *Id.*

Madrid.[72] Having received approval from the Board to pursue the deal, REDACTED

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REDACTED

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Globe also negotiated for governance terms that would protect Globe stockholders and ensure their ability to participate in the value uplift from the synergies of the combined entity, Ferroglobe PLC ("Ferroglobe"). These minority

[72] *Id.* at 70.

[73] Kestenbaum Dep. Tr. at 139:4-5.

[74] López Madrid Dep. Tr. at 82:17-83:10.

[75] Kestenbaum Dep. Tr. at 140:16-141:2.

[76] *Id.* at 140:16-141:19.

[77] *Id.* at 141:15-142:19. The ultimate equity split was not finalized until the Board approved the transaction on February 22. Gordon Dep. Tr. at 94:13-25.

stockholder protections, discussed *infra* at pp. 68-74, will provide former Globe stockholders with substantial rights vis-à-vis Grupo VM as the majority shareholder of Ferroglobe.[78]

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,[79] and recommended an increase in Board size to nine members "to provide greater flexibility in the appointment of directors to board committees."[80] Globe insisted on the U.K. domicile for Ferroglobe to ensure a strong business, financial, and market environment, and a consistent body of law for stockholder protection.[81]

Finally, Globe and its advisors negotiated FerroAtlántica's demands for deal protections to ensure the Board retained flexibility to accept a superior offer. FerroAtlántica demanded that Globe give it five days to match any unsolicited proposal, pay it $50 million if the Board terminated the merger agreement, and reimburse it up to $10 million in expenses if Globe stockholders did not approve the merger.[82] Globe and its advisors negotiated these provisions down to a two-

[78] Ex. 1 at 77-78, 162-63.

[79] Kestenbaum Dep. Tr. at 219:9-220:3.

[80] Ex. 1 at 73.

[81] *Id.* at 71, 74, 77.

[82] *Id.* at 72.

day matching period, $25 million termination fee REDACTED)[83], and expense reimbursement only in the case of breach.[84]

Over two months of negotiations, the parties exchanged seven term sheets and fourteen versions of the Business Combination Agreement ("BCA").

F. Globe's Compensation Committee Wanted To Retain Globe's Executive Management Team

Globe's Compensation Committee consists of Mr. Barger, its chairman, Alan Schriber and Stuart Eizenstat. Mr. Barger testified that Mr. Kestenbaum was a "capable" and "results oriented" chairman who "works like hell" to increase the value of Globe for its stockholders.[85] REDACTED

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[83] Ex. 18 at GLOBE_000014400.

[84] Ex. 24 at § 9.3(b)-(c).

[85] Barger Dep. Tr. at 15:16-23; 16:5-10.

[86] Barger Dep. Tr. at 130:18-23.

[87] Barger Dep. Tr. at 152:10-11.

Mr. Kestenbaum's employment agreement was due to expire in November 2014.[88] REDACTED

.[93] The Compensation Committee met on February 2 to discuss Mr. Kestenbaum's employment agreement and executive bonus program, and for

[88] Ex. 7.

[89] Ex. 25 at GLOBE_000003505, 3507. Plaintiffs provide a misleadingly truncated citation to REDACTED

Ex. 30 at GLOBE_000011195 (emphasis added).

[90] *See, e.g.*, Ex. 26 at GLOBE_000007607-10; Ex. 27 at GLOBE_000007631-33; Ex. 28 at GLOBE-000014657-84.

[91] Ex. 29 at GLOBE_000019486; Kestenbaum Dep. Tr. at 69:5-6.

[92] Ex. 30 at GLOBE_000011195; Ex. 26 at GLOBE_000007609-10; Ex. 27 at GLOBE_000007632; Ex. 28 at GLOBE_000014659, 14668.

[93] Ex. 28 at GLOBE_000014659, 14677-79.

several weeks counsel for Mr. Kestenbaum and the Compensation Committee exchanged drafts.[94]

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.[99] Mr. Kestenbaum agreed to defer a new long term employment agreement and bonus plan so as not to distract from the negotiations regarding the transaction. Instead, Mr. Kestenbaum informed the Compensation

[94] Ex. 1 at 73.

[95] Ex. 31 at GLOBE_000014618; Ex. 32 at GLOBE_000021280; Kestenbaum Dep. Tr. at 70:16-71:16.

[96] Ex. 33 at GLOBE_000021231.

[97] *Id.* at GLOBE_000021232, 21233, 21237.

[98] Ex. 1 at 74.

[99] *Id.* at 75.

Committee that he would agree to an extension of his current agreement through December 31, 2016.[100] Mr. Kestenbaum requested that the agreement be modified to provide, among other things, that (i) the failure to renew Mr. Kestenbaum's employment agreement by Ferroglobe (other than for cause) at the December 31, 2016 expiration date would constitute a termination "without cause" for purposes of the employment agreement and (ii) "Good Reason" would be defined to include Mr. Kestenbaum's failure to be appointed to the Ferroglobe Board after completion of the transaction and a reduction in authorities, duties or responsibilities as a result of Ferroglobe's ceasing to be a reporting company.[101]

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,,[102]

[100] *Id.*

[101] *Id.*

[102] Ex. 34 at GLOBE_000015092.

G. The Board Engaged In A Lengthy Process To Evaluate And Approve The Merger

After the Board directed Globe management to continue negotiating with FerroAtlántica, Globe formally engaged Goldman and Nomura as financial advisors.[103] REDACTED

. Globe formally confirmed their engagements on January 7.[104]

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,[106] and REDACTED

.[107] REDACTED

.[108] REDACTED

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[103] Ex. 1 at 71.

[104] *Id.*

[105] Gordon Dep. Tr. at 64:1-5.

[106] Gordon Dep. Tr. at 65:20-24.

[107] Gordon Dep. Tr. at 65:19-66:1.

[108] Gordon Dep. Tr. at 62:4-15 ("[T]he financial forecasts were created through diligence of the target as it relates to the analyses and forecasts for FerroAtlántica, as well as diligence on our own client, and the forecast that they've prepared … . Ultimately there was a large diligence team that were involved in providing input into various of the detailed elements of the forecast.").

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.”[109] REDACTED

.[110] REDACTED

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In addition to Goldman’s analytics and research support, Globe employed an expansive team to diligence FerroAtlántica.[112] REDACTED

.[113] REDACTED .[114] REDACTED

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[109] *Id*. at 69:18-23.

[110] *Id.* at 191:21-192:6.

[111] *Id.* at 192:1-2.

[112] The diligence and analysis of FerroAtlántica was conducted by a “very large team” of “a hundred or more” people that included members of senior management and many people in their departments as well as third party consultants. Kestenbaum Dep. Tr. at 18:19-19:23.

[113] Ex. 12 at GLOBE_000000591; Ex. 35 at GLOBE_000021181.

[114] Ex. 12 at GLOBE_000000591.

[115] *Id.*

REDACTED .[116] REDACTED

.[117] In addition to performing its own diligence, Globe also reviewed FerroAtlántica's audited financials and Deloitte's unqualified audit opinion.[118] A summary of due diligence findings was presented to the Board on February 22.[119]

1. Globe Engaged In An In-Depth Process to Forecast Synergies

Because Globe had recently diligenced the potential merger with REDACTED, REDACTED, Globe management had already developed a synergies template and had a good understanding of the types of synergies available with such a partner. These included operational synergies (product/geographic overlap, cost of goods, operational optimization, selling, general and administrative expenses, research and development, and best practices), financial synergies (tax and interest savings from refinancings), and release of cash flow from improved working capital management.[120] REDACTED

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[116] *Id.*

[117] *Id.*

[118] Ragan Aff. ¶¶ 6,8-9.

[119] Ex. 12 at GLOBE_000000504.

[120] Mehta Aff. ¶ 14.

REDACTED [121] REDACTED

[122].

During this process, REDACTED

[123] REDACTED

[124]. REDACTED

[125] Mr. Gordon agreed REDACTED

[126].

Based on this process, REDACTED

[121] *Id.* at ¶ 15.

[122] Bradley Dep. Tr. at 45:12-25.

[123] *See, e.g.*, Ex. 36 at GLOBE_000006818-20; Mehta Aff. ¶ 15.

[124] Mehta Aff. ¶ 16.

[125] Ex. 36 at GLOBE_000006818-20.

[126] Gordon Dep. Tr. at 157:15-158:1.

REDACTED .[127] REDACTED

.[128] REDACTED

.[129]

Apart from its own view of the achievable synergies, Globe management worked with FerroAtlántica to agree on a synergies forecast the two companies could jointly announce. REDACTED

,,[130] REDACTED

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2. Globe Engaged In An In-Depth Process To Project FerroAtlántica's Financial Information

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[127] Ex. 12 at GLOBE_000000535.

[128] Gordon Dep. Tr. at 191:21-192:6.

[129] Kestenbaum Dep. Tr. at 284:15-285:3.

[130] Gordon Dep. Tr. at 158:8-13.

[131] Kestenbaum Dep. Tr. at 281:11-284:3.

REDACTED[132] and resulted in REDACTED

.[133] REDACTED

.[134]

REDACTED

FerroAtlántica had created those projections in February 2014[135] and REDACTED .[136] Further, REDACTED

.[137] REDACTED

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[132] Mehta Aff. ¶ 30.

[133] *See* Transmittal Aff. of Elizabeth A. DeFelice at ¶ 2.

[134] "FerroAtlántica had no current projections that they furnished to us as part of our diligence investigation." Gordon Dep. Tr. at 72:12-18.

[135] Ex. 1 at 84.

[136] López Madrid Dep. Tr. at 18:1-19:2 (the Fitch Presentation was "not the best available information about the financial performance of the company" as of September 2014). Gordon Dep. Tr. at 73:6-13 (There had been "meaningful changes in the macroeconomic environment, both as it relates to foreign exchange and metals pricing that rendered the [projections in the Fitch Presentation] irrelevant at the time [Globe and Goldman] did [their] diligence.").

[137] Mehta Aff. ¶ 22.

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.[139] Globe management was confident in its ability to create such projections because, being in the same business,[140]REDACTED

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[138] *Id.* at ¶ 24. REDACTED

. *Id.* at ¶ 22.

[139] Mehta Aff. ¶ 24. REDACTED , Ex. 37 at GLOBE_000011935, REDACTED Mehta Aff. ¶ 27 n.2. REDACTED . *Id.* Thus, the 2015 Budget was not useful for Globe's projections.

[140] Mr. López Madrid acknowledged that Globe and FerroAtlántica operated "the same business." López Madrid Dep. Tr. at 115:11.

[141] As Mr. Gordon testified, REDACTED

With respect to projected shipping volumes, REDACTED

[142] For FerroAtlántica's sales pricing, REDACTED

.[143] Globe management believed REDACTED

.[144]

With respect to FerroAtlántica's costs, REDACTED

.[145] For example,

REDACTED

,[146] while REDACTED d.[147] Globe therefore requested REDACTED

REDACTED

." Gordon Dep. Tr. at 110:3-20; 111:7-13.

[142] Mehta Aff. ¶ 25.

[143] *Id*. at ¶ 26.

[144] *Id.*

[145] *Id*. at ¶ 27.

[146] *Id.*

[147] *Id.*

REDACTED .[148] Globe then analyzed REDACTED

[149]

When Globe was projecting FerroAtlántica's financials in early 2015, the dollar (relative to the Euro) had strengthened significantly from early 2014 when FerroAtlántica had prepared the projections in the Fitch Presentation.[150] REDACTED

[148] *Id.*

[149] *Id.*

[150] The exchange rate moved from REDACTED . *Id*. at ¶ 28.

[151] *Id*. at ¶ 29.

[152] *Id.*

3. Globe Management And Goldman Provided Frequent Updates And Analysis To The Board

Goldman presented to the Board and answered the Board's questions at four separate Board meetings, including a detailed fairness presentation before the Board's vote. On January 15, the Board met with Globe management, Goldman, and Latham.[155] Goldman reviewed the transaction structure and key terms. It also discussed strategic alternatives, including maintaining Globe as a standalone company, pursuing alternative M&A transactions, or pursuing a sale of Globe for cash.[156] Latham discussed the corporate governance structure of Ferroglobe.[157]

On February 2, the Board met again with Globe management, Goldman, and Latham to review the status of negotiations and to discuss the draft financial projections.[158] Goldman reviewed a pro forma financial model for Ferroglobe that combined the financial projections for Globe and FerroAtlántica, as well as

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[153] *Id.*

[154] *Id.*

[155] Ex. 1 at 71.

[156] *Id.*

[157] *Id.*

[158] *Id.* at 73.

potential synergies.[159] REDACTED

.[162]

During this meeting, management also informed the Board that Mr. López Madrid had been called as "imputado,"[163] along with several other directors of Bankia S.A., in a criminal investigation in Spain. The Board was informed the investigation concerned allegations that Mr. López Madrid had charged personal expenditures of approximately €32,000 to a corporate credit card to be used as a

[159] *Id.*

[160] Ex. 38 at GLOBE_000000474.

[161] *Id.*

[162] *Id.*

[163] *See* Ex. 6 at ¶ 7 ("The status of being imputado is not synonymous with 'guilty' or even 'indicted' in Spain. Rather it is conceived as a legal guarantee which translates into the right of the imputado to be informed of the investigation, to participate in it, and to defend himself or herself prior to indictment.").

Bankia, S.A. director.[164] The Board requested that Latham review the matter further and continue the discussion the following day.[165]

The Board met the next day, February 3. Latham reviewed open issues in the negotiation of the BCA, as well as regulatory and tax considerations.[166] Goldman presented a preliminary financial analysis of the merger.[167] The Board discussed the strategic benefits of the merger, including the opportunity to realize substantial synergies.[168] REDACTED

[164] Ex. 1 at 73.

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] Ex. 39 at GLOBE_000000875.

[170] *Id.* at GLOBE_000000875-76.

[171] *Id.* at GLOBE_000000876.

REDACTED

.[172]

Goldman also reviewed potential strategic alternatives with the Board.[173] Goldman and the Board agreed that none of the potential strategic buyers were likely to offer greater value.[174] Goldman also advised the Board that it would be very challenging for private equity buyers to pay a similar cash value due to their inability to generate the synergies.[175]

As requested by the Board, Latham reviewed the legal inquiry involving Mr. López Madrid, and explained that a judge in Spain was investigating Mr. López Madrid's involvement as "imputado" in the matter, REDACTED

Thereafter, REDACTED

[172] *Id.* at GLOBE_000000874-75.

[173] Ex. 1 at 73.

[174] *Id.*

[175] *Id.*

[176] *Id.*

REDACTED

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On February 22, the Board met to consider the merger. Latham reviewed with the Board its fiduciary duties.[178] Latham and Goldman also reviewed the revised BCA and related transaction documents.[179] Management reported to the Board on the results of its business, financial, accounting, and legal due diligence of FerroAtlántica.[180] The meeting then adjourned briefly so that management could negotiate final issues related to the equity split.[181]

After management concluded its negotiations, the Board reconvened and

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[177] Kestenbaum Dep. Tr. at 216:14-217:7. For example, Section 1.11(a) of the BCA requires that all Grupo VM and Globe designees to the Board shall "at all times be qualified to serve as a director under the applicable rules and policies of [Ferroglobe], NASDAQ, applicable Law and shall have demonstrated good judgment, character and integrity in his or her personal and professional dealings[.]" Ex. 24 at § 1.11(a); *see also* Ex. 40 at § 3.01(e)(i); Ex. 41 at § 25.8(b).

[178] Ex. 1 at 75.

[179] *Id.*

[180] *Id.*

[181] *Id.*

.[183] The Board discussed this analysis, and then requested that Goldman provide its opinion as to the fairness of the transaction.[184]

REDACTED

ns,[185] Mr. Gordon delivered Goldman's opinion that the exchange ratio of 57/43 was fair from a financial point of view to the Globe stockholders.[186] Final discussions ensued among the Board, management, Goldman, and Latham.[187] In light of those discussions and the information considered, the Board unanimously voted to approve the Business Combination.[188]

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[182] Ex. 12 at GLOBE_000000500.

[183] *Id.*

[184] Ex. 12 at GLOBE_000000507.

[185] *Id.*

[186] Ex. 1 at 75.

[187] *Id.* at 75-76.

[188] *Id.*

On February 23, Globe issued a press release announcing the merger.[189] The deal was immediately endorsed by multiple industry analysts.[190] JP Morgan North American Equity noted that "[f]rom a strategic standpoint, we think the deal makes sense as it will further consolidate the silicon metal and alloy industry and allow the combined company to generate meaningful synergies.").

On May 6, 2015, the parties filed a 700-plus-page preliminary proxy statement/prospectus on Form F-4 with the U.S. Securities and Exchange Commission ("SEC") disclosing, among other information, the complete terms of the BCA, the Board's reasons for approving the Business Combination, and the Goldman fairness opinion.[191] Thereafter, the parties filed amendments on June 24, July 21, and August 7. The preliminary proxy statement/prospectus became effective on August 11, and on August 12, Globe filed the proxy

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[189] Ex. 8.

[190] Ex. 10, Michael F. Gambardella & Tyler J. Langton, Globe Specialty Metals: Positive Merger Fundamentals but Stock's Near-Term Upside Looks Limited, JP MORGAN NORTH AMERICAN EQUITY RESEARCH, Feb. 23, 2015, at 1.; *see also* Ex. 9 (Ian Zaffino & Richard Faulkner, Globe Specialty Metals, Inc.: Thoughts from Management Meeting, OPPENHEIMER EQUITY RESEARCH, Feb. 25, 2015, at 1) (The "synergies are large–both above and below the EBITDA line – and understated, in our view.").

[191] *See* Ex. 1.

statement/prospectus as a definitive proxy statement with the SEC (collectively the "F-4"). The F-4 has been mailed to Globe's stockholders.[192]

In the nearly six months since the announcement, no bidders have emerged to offer a superior proposal.

H. The Board Meets To Consider Additional Information And Maintains Its Decision To Approve The Merger

On August 7, the Board met to discuss updates regarding the proposed transaction.[193] REDACTED

[192] *Id.*

[193] Ex 42 at 3-4.

[194] *Id.*

[195] *Id.* at 5.

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ARGUMENT

To obtain a preliminary injunction, Plaintiffs bear the heavy burden of demonstrating: (i) a probability of success on the merits at a final hearing; (ii) the threat of imminent, irreparable harm; and (iii) that the balance of hardships favors Plaintiffs, such that the harm Plaintiffs will suffer if an injunction is denied outweighs the harm that may result if an injunction is granted. *Ivanhoe P'rs v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987). "This test is stringent and the relief is extraordinary." *State of Wis. Inv. Bd. v. Bartlett*, 2000 WL 238026, at *3 (Del. Ch. Feb. 24, 2000). Where, as here, Plaintiffs seek to enjoin a premium merger transaction in the absence of a competing offer, the Plaintiffs' burden is especially heavy. *See Abrons v. Maree*, 911 A.2d 805, 810-11 (Del. Ch. 2006) ("[P]laintiff must make a particularly strong showing on the merits to enjoin

[196] *Id.* at 2.

[197] *Id.* at 6.

a premium transaction without a competing offer because of the risk of significant injury to the stockholders.").

Plaintiffs cannot meet their burden. If the Business Combination is enjoined, Globe stockholders risk losing a unique opportunity to become stockholders in a larger and more valuable company. This Court has justifiably been reluctant to enjoin such transactions in the absence of a superior alternative offer. Plaintiffs' motion should be denied so that Globe stockholders may decide for themselves whether to approve the Business Combination.

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A PROBABILITY OF SUCCESS ON THE MERITS

Plaintiffs do not have a reasonable probability of success on the merits because the transaction was aggressively negotiated, was supervised and approved by independent directors, and presents a premium for Globe stockholders. The Board retained the ability post-signing to fulfill its fiduciary duties if a superior proposal emerges. The deal protections are reasonable and do not deter potentially superior offers. Finally, the disclosures to stockholders contain all material information.

A. Plaintiffs' *Revlon* Claims Are Meritless

There is "no single blueprint" that directors must follow to fulfill their fiduciary duty to seek the best transaction available for stockholders. *Barkan v.*

Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989). *Revlon* requires "(a) a judicial determination regarding the adequacy of the decision making process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing." *In re Dollar Thrifty S'holder Litig*., 14 A.3d 573, 596 (Del. Ch. 2010). "No court can tell directors exactly how to accomplish that goal[.]" *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009). Rather, "directors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there." *In re Dollar Thrifty S'holder Litig.*, 14 A.3d at 595-6; *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005) (the "enhanced judicial review *Revlon* requires is not a license for law-trained courts to second-guess reasonable . . . choices that directors have made in good faith."). Courts thus focus on "whether the directors made a reasonable decision, not a perfect decision." *In re Dollar Thrifty*, 14 A.3d at 595.

Plaintiffs erroneously argue that the Globe Defendants bear the burden of demonstrating their compliance with *Revlon*. Mot. at 34. To the contrary, on a motion for preliminary injunction, "Plaintiffs bear the burden of establishing a reasonable probability that at trial the Director Defendants would be unable to show that they acted reasonably." *In re Plains Expl. & Prod. Co. S'holder Litig*.,

2013 WL 1909124, at *4 (Del. Ch. May 9, 2013); *see also In re OPENLANE, Inc. S'holders Litig.*, 2011 WL 4599662, at *6 (Del. Ch. Sept. 30, 2011) (noting on a motion for preliminary injunction, it is Plaintiffs' burden to "establish a reasonable likelihood that at trial the [members of the Board] would not be able to show that they had satisfied their fiduciary duties.") (alteration in original).

1. The Board Followed A Process Reasonably Calculated To Maximize Stockholder Value

The independent Board pursued a reasonable process with the assistance of Globe management, as well as experienced legal and financial advisors.[198] The Board was fully informed of all material information, and made a reasonable decision to approve a transaction that offers a premium to Globe's stockholders.

[198] *See C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Trust*, 107 A.3d 1049, 1070 (Del. 2014) ("[T]he majority of C & J's board is independent, and there is no apparent reason why the board would not be receptive to a transaction that was better for stockholders than the Nabors deal."); *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 670 (Del. Ch. 2013) (noting that the "transaction itself was approved by a board of independent and disinterested directors"); *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 439 (Del. Ch. 2012) (noting the *Revlon* doctrine does not exist "as a license for courts to second-guess reasonable, but arguable, questions of business judgment in the change of control context" where those decisions are made by a majority of independent directors); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1002 (Del. Ch. 2005) (noting *Revlon* concern not implicated by a "majority independent board").

Plaintiffs' arguments to the contrary depend on strained theories of self-interest on the part of Mr. Kestenbaum and the Globe directors that have no basis in fact.[199]

Plaintiffs' theory seems to be that REDACTED

.[201] To achieve this, Plaintiffs argue, Mr. Kestenbaum made a deal that provided a discount of 15.5 percent to 28.8 percent to Globe's trading price as of February 22. Mr. Kestenbaum owned over $140 million of Globe stock on that date. Thus, Plaintiffs posit that REDACTED

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[199] Plaintiffs' argument in their Amended Complaint (Trans. ID 57406923) that Mr. Kestenbaum "steered the sale to Grupo VM after Grupo VM promised him and Bradley lucrative employment to run the larger combined company" (Complaint at ¶ 39) is completely meritless—Globe has announced that Mr. Bradley is stepping "down as Globe CEO to pursue other interests." *See* Ex. 50.

[200] *See C & J Energy Servs., Inc.*, 107 A.3d at 1065 (finding no conflict of interest where CEO "faced no threat to his tenure, held 10% of C & J's stock, and had a strong interest in maximizing the value of those shares"); *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d at 662 ("Delaware law presumes that large shareholders have strong incentives to maximize the value of their shares in a change of control transaction."); *In re IXC Commc'ns, Inc. S'holders Litig.*, 1999 WL 1009174, at *6-7 (Del. Ch. Oct. 27, 1999) (finding no conflict of interest and denying preliminary injunction as directors' ownership of shares in company aligned their interests with stockholder interests).

[201] Plaintiffs note that the maximum bonus Mr. Kestenbaum can receive is $14 million. Mot. at 2. In 2014, he received a performance bonus of $5.9 million, a difference of approximately $8.1 million. Ex. 4 at 30.

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That defies common sense.

Moreover, the theory that Mr. Kestenbaum's goal was to improve his employment arrangements is contrary to the facts. As an initial matter, the Board valued Mr. Kestenbaum and there was no threat to his tenure at Globe.[203] Plaintiffs argue that Mr. Kestenbaum sought to free himself of "barriers" to greater compensation such as a negative discretion and a say-on-pay vote.[204] Plaintiffs ignore that a say-on-pay vote is merely advisory, whereas if the merger closes, the new majority stockholder will be able to exercise an *actual* "no vote" on Mr. Kestenbaum's pay. Indeed, it has already shown a willingness to do so by rejecting the "substantially complete" employment agreement and bonus plan the Globe Compensation Committee had provided to Mr. Kestenbaum and asking Mr. Kestenbaum to table talks on a new employment agreement until after the

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[202] Plaintiffs also allege that the ability to "liquidate his stockholdings" was central to Mr. Kestenbaum's motivation. Mot. at 10. If Plaintiffs' theory is correct, it is unclear why having traded his shares at a deep discount, Mr. Kestenbaum would then be in a rush to sell them at a loss. Plaintiffs provide no evidence that Mr. Kestenbaum has any sudden need for cash that would justify such bizarre conduct.

[203] *See* Background, *supra* Section F (Mr. Barger's testimony that the Compensation Committee wanted to put "golden handcuffs" on Mr. Kestenbaum); *see also C & J Energy Servs., Inc.*, 107 A.3d. at 1065 (continued employment in new company not a conflict where CEO faced no threat to his tenure at current company).

[204] Mot. at 2.

merger.[205] Mr. Kestenbaum readily agreed, putting the interests of Globe stockholders ahead of his employment interests.[206] To secure the deal for Globe's stockholders, he traded four years of guaranteed employment at Globe for a one-year extension at Ferroglobe.[207] In return, he asked only for certain economic protections if Ferroglobe does not renew his employment agreement at year-end 2016. Those terms were approved by a fully-informed Compensation Committee and FerroAtlántica.[208]

Plaintiffs also lack any coherent explanation for why the five independent Globe directors (each himself a stockholder) would abandon their responsibilities to Globe and its stockholders to aid such a plot. *See In re Plains Expl.*, 2013 WL 1909124, at *4 (Del. Ch. May 9, 2013) (internal quotation marks omitted) ("[W]hile the Plaintiffs thoroughly criticize the Board's actions, they ultimately fail to explain why the disinterested and independent directors would disregard their fiduciary duties presumably to help [the Chairman and only interested

[205] Ex. 1 at 75; Kestenbaum Dep. Tr. 72:1-10.

[206] *Id.*

[207] Ex. 43 at GLOBE_000002944.

[208] Plaintiffs assert that Mr. Kestenbaum secured a "personal guarantee" that he cannot be removed as Executive Chairman for a three-year period. Mot. at 12. That is incorrect. The Ferroglobe Articles of Association require a two-thirds vote to remove the Executive Chairman without cause. Ex. 41 at § 34.3(b)(vii). Furthermore, Mr. Kestenbaum's employment agreement expires on December 31, 2016. Ex. 43 at GLOBE_000002944. There is no guarantee that the Ferroglobe Board will offer him a new employment agreement after that time.

director] achieve his self-interested objectives."). Each of the five independent directors has had a long and distinguished career in government or public company management, the kind of careers built on judgment and reputation. Plaintiffs make the feeble argument that the independent directors have been "incentivize[d]" by Mr. Kestenbaum with the opportunity to become directors at Ferroglobe.[209] But the law is clear that continued tenure as a director is not a conflict of interest.[210] Moreover, as Plaintiffs acknowledge, two directors will *not* have positions at Ferroglobe.[211] Thus, when they voted to approve the merger, each did so knowing he might be voting himself out of a board position. Plaintiffs also take liberties with the facts when they assert that Mr. Kestenbaum will decide who the Ferroglobe directors are.[212] Rather, the Board will designate the Globe

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[209] Mot. at 17-18.

[210] *In re TriQuint Semiconductor, Inc. S'holders Litig.*, 2014 WL 2700964, at *3 (Del. Ch. June 13, 2014) ("In most circumstances Delaware law routinely rejects the notion that a director's interest in maintaining his office, by itself, is a debilitating factor.") (internal quotation marks omitted); *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 996 (Del. Ch. 2014) ("It is well-settled Delaware law that a director's independence is not compromised simply by virtue of being nominated to a board by an interested stockholder.").

[211] Mot. at 17.

[212] Mot. at 17-18.

independent directors to the Ferroglobe board.[213] Mr. Kestenbaum has a single vote and does not control the outcome.[214]

The process that Globe's directors followed leading up to their vote was reasonable by any standard. Mr. Kestenbaum had already been exploring a variety of transformative transactions, with the Board's full knowledge and approval, when this opportunity arose. He first informed the Board of the potential for a FerroAtlántica deal in May 2014, nine months before the Board voted to approve the merger.[215] *See In re Smurfit-Stone Container Corp. S'holder Litig*, 2011 WL 2028076, at *17 (Del. Ch. May 4, 2011) (upholding sales process involving three-week time span between when the acquirer made its first "indication of interest" and the date the Board approved the transaction). He again apprised the Board of

[213] Ex. 24 at § 1.11(a).

[214] Plaintiffs' Motion is bereft of any support (or even argument) for the notion that Mr. Kestenbaum somehow dominates or controls the other independent directors, or that they are personally beholden to him. Furthermore, Plaintiffs' inability to identify any disabling interest of Mr. Kestenbaum or the five other directors, or to articulate any coherent motivation for why they would pursue a bad deal for the sale of Globe, is emphasized by the inconsistent and contradictory nature of Plaintiffs' theory. That theory shifts to suit Plaintiffs' needs. Sometimes Plaintiffs allege Mr. Kestenbaum has deceived the other Board members by providing incorrect financial projections in order to gain their votes. Mot. at 3. Other times it is the Board ordering Mr. Kestenbaum and Globe management to "slash the projections" in order to "justify the deal." Mot. at 20. Plaintiffs cannot present a consistent, logical theory of self-interest because no such evidence exists.

[215] Ex. 44 at GLOBE_000015320.

the possibility of a FerroAtlántica deal in August 2014.[216] After Mr. Kestenbaum had preliminary discussions with Mr. López Madrid in late November 2014, he informed the Board of those discussions and the strategic rationale for a merger with FerroAtlántica in a December 18, 2014 Board meeting.[217] The Board then authorized him to pursue REDACTED "[218] with FerroAtlántica on December 22.[219] Over the next two months, the Board convened four more times to review the status of negotiations and to consider the merger terms and economics. *See In re Plains Expl.*, 2013 WL 1909124, at *5 (finding Plaintiffs' allegations that the board violated its duty of care "are inconsistent with the numerous board meetings that the directors attended during which they discussed the proposed merger and participated in the decision-making process").

The Board took substantial time to consider the transaction and conducted numerous meetings where it received advice, considered voluminous amounts of information, and engaged in substantive discussions. *See Toys "R" Us Inc.*, 877 A.2d at 1004 (finding the board's decision making process was reasonable where it involved "multiple board meetings . . . and frequent opportunities for the independent directors to meet . . . with experienced, independent M&A counsel

[216] Ex. 45 at GLOBE_000015511.

[217] Ex. 1 at 69-76.

[218] Kestenbaum Dep. Tr. at 139:3-4.

[219] Ex. 1 at 70.

retained precisely to help them, as independent directors, fulfill their duties"). During this time the Board was continually advised by Goldman and Latham. *See In re Smurfit-Stone Container Corp.*, 2011 WL 2028076, at *16 (finding an informed process where the board "obtained financial counsel from" a financial advisor "with significant experience" working with the company and legal counsel from "an established leader in the M & A space"). Goldman presented its final financial analysis and its fairness opinion. *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *10 (Del. Ch. Oct. 13, 2011) ("a board's receipt of a fairness opinion typically supports a factual inference that the board acted properly when deciding to proceed with a transaction").

Delaware law does not require a board to consider all possible information related to a transaction, only "material information" that is reasonably available to it. *Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000). This standard does not require that the Board be informed "of *every* fact." *Id*.. In total, the Board reviewed detailed financial analysis from Goldman, including financial projections, synergies forecasts, and contribution and sensitivity analyses on the value of the merger to Globe stockholders, four separate presentations by Latham on its fiduciary duties, insurance coverage, due diligence, and legal and regulatory

issues involved with the BCA and the merger.[220] In its final meeting the Board reviewed the full terms of the business combination agreement.[221] During each meeting the Board was actively engaged, asked questions, and provided feedback and direction to management.[222]

The Board also informed itself regarding potential alternatives, including remaining a standalone company or pursuing transactions with strategic or financial buyers.[223] *See In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 90 (Del. Ch. 2014) (stating that a reasonable decision requires "having information about possible alternatives" and having "a reasonably adequate understanding of the value of not engaging in a transaction at all"). Thus, the Board was fully informed when it voted to proceed with the business combination. As discussed below, Plaintiffs' various criticisms do not alter these facts.

a. The Projections Goldman Presented To The Board Were Globe Management's Best Estimate Of Ferroglobe's Future Performance

Globe management required a current, best-estimate of FerroAtlántica's financial projections, presented in US dollars, to evaluate the business

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[220] *See, e.g.*, Ex. 38 at GLOBE_000000477-97; Ex. 12 at GLOBE_000000510-65, 567-607; Ex. 39 at GLOBE_000000920-70.

[221] Ex. 1 at 75.

[222] *See, e.g.*, *id.* at 73-74.

[223] *Id.* at 71, 73.

combination. REDACTED

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Plaintiffs are wrong that Globe's projections of FerroAtlántica's business are "unrealistic," "speculative," or "unsupported by historical performance." Before the European financial crisis, FerroAtlántica reported 2008 EBITDA of *$598 million*, an amount *higher* than Globe projected for FerroAtlántica in *any year* of

[224] Mehta Aff. ¶ 24.

[225] Ex. 1 at 84

[226] Gordon Dep. Tr. at 73:6-13; Mehta Aff. ¶ 22.

[227] Mehta Aff. ¶¶ 22, 27, 32.

the projections period.[228] REDACTED

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Plaintiffs' assertion that FerroAtlántica was the "most knowledgeable" to create those projections is also wrong.[230] Mr. López Madrid testified that Globe and FerroAtlántica run "the same business" and thus were in an equal position to forecast synergies.[231] REDACTED

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Any argument that the Board should have nonetheless reviewed and considered the stale Fitch Presentation projections is moot. REDACTED

[228] Ex. 5 at 10.

[229] Ex. 12 at GLOBE_000000534.

[230] Mot. at 38.

[231] López Madrid Dep. Tr. at 115:7-15.

[232] Gordon Dep. Tr. at 110:6-20; 111:7-13.

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Plaintiffs make several misleading assertions based on selective or incomplete cites to the record. REDACTED

.[235] Plaintiffs' representation to this Court is wrong. Mr. Kestenbaum did not testify that the exhibit was "Globe's merger model." Rather, he testified: REDA

.]"[237] Plaintiffs' attempt to represent a draft spreadsheet from Mr. Kestenbaum's files as "Globe's merger model" is highly misleading, and their

[233] Ex. 42 at 5. As Mr. Mehta explained, the "2015 Budget" did not contain data regarding the key inputs to Globe's projections for FerroAtlántica (or in the case of costs, was duplicative of data Globe already had). Mehta Aff. ¶ 27 n.2. Thus, the "2015 Budget" was not a useful document for Globe's projections.

[234] Ex. at 5-6.

[235] Mot. at 14, 37.

[236] Kestenbaum Dep. Tr. at 155:5-6.

[237] Kestenbaum Dep. Tr. at 188:23-25.

assertion that such a draft was required to have been disclosed to the Board is absurd.[238]

Plaintiffs also misrepresent that Mr. Kestenbaum testified that the Globe ***projections*** for FerroAtlántica were "wrong" or contained a "mathematical error."[239] REDACTED

.[241] When Plaintiffs asked Mr. Kestenbaum whether the REDACTED

[238] In support of their assertion that this model represented Mr. Kestenbaum's true view of the merger, Plaintiffs cite to his testimony that the model has "calculation integrity." Mot. at 14. Far from affirming the model's outputs, Mr. Kestenbaum testified that it contained "a major [input] error" that rendered the output (i.e., the purported showing of a discount) "misleading." Kestenbaum Dep. Tr. at 168:11-25.

[239] Mot. at 21-22.

[240] Ex. 12 at GLOBE_000000534.

[241] Kestenbaum Dep. Tr. at 270:14-18. REDACTED

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[242] Kestenbaum Dep. Tr. at 270:19-22. There are no mathematical errors in the FerroAtlántica projections on slide 12, according to Mr. Kestenbaum. Kestenbaum Aff. ¶ 9.

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b. The Synergies Forecast Goldman Presented To The Board Was Globe Management's Best Synergies Estimate

Globe analyzed the potential synergies across the two companies, reviewed its own internal data, and engaged in multiple iterations of analysis that included discussing the assumptions with Goldman and diligencing them with FerroAtlántica management. Mr. Kestenbaum encouraged this process and thought it REDACTED .[244] Goldman agreed that the synergy forecast, which projected operational run-rate synergies of REDACTED and working capital release of REDACTED , was reasonable.[245] REDACTED

.[246]

Separate and apart from its internal view of the achievable synergies, Globe management issued a joint press release with FerroAtlántica that announced

[243] Kestenbaum Aff. ¶ 9.

[244] Ex. 36 at GLOBE_000006818.

[245] Gordon Dep. Tr. at 191:16-192:6.

[246] Ex. 38 at GLOBE_000000474; Ex. 39 at 000000875.

operational synergies of approximately $65 million annually and working capital release of $100 million.[247] REDACTED

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Contrary to Plaintiffs’ assertion that Globe “abandoned” its synergies forecast, REDACTED

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c. Globe Management Presented A Summary Of All Material Diligence To The Board

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[247] Ex. 8 at 2.

[248] As Mr. López Madrid testified, this view was not necessarily purely objective on the part of FerroAtlántica management. REDACTED

López Madrid Dep. Tr. at 114:11-115:17. REDACTED

Kestenbaum Dep. Tr. at 280:4-6. REDACTED

Id. at 281:20-21. REDACTED

Id. at 282:16-17.

[249] Kestenbaum Dep. Tr. at 284:22-24.

[250] Mehta Aff. ¶ 19.

Globe employed a large team of professionals to analyze and perform diligence of FerroAtlántica and the Business Combination over a period of nearly thirteen weeks.[251] At the February 22 board meeting, Globe management presented a summary of the material aspects of this diligence.[252] REDACTED

s.[254] Plaintiffs argue that the Board was not adequately informed because it did not consider MorganFranklin's findings at a granular level. Delaware law, however, does not require a board to consider each and every piece of information related to a transaction, only "material information" that is reasonably available to it. *Brehm*, 746 A.2d at 259. This standard does not require that the Board be informed "of *every* fact." *Id.*

Further, the REDACTED

[251] Ex. 1 at 68-76; Kestenbaum Dep. Tr. at 19:21-23.

[252] Ex. 12 at GLOBE_000000504.

[253] *Id.*

[254] *Id.* at GLOBE_000000591.

REDACTED .[255] For example,

REDACTED

.[257] In any event, REDACTED

[258] The directors asked questions and determined that the information did not change their views.[259]

d. The Board Considered All Material Information Reasonably Available Regarding The Investigations Involving Mr. López Madrid

Plaintiffs claim the Board breached its *Revlon* duties with regard to the unproven allegations involving Mr. López Madrid.[260] This claim is unavailing.

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[255] Ragan Aff. ¶¶ 8-10.

[256] *Id*. at ¶ 8.

[257] *Id.* at ¶ 10; Ex. 24 at § 7.14.

[258] Ragan Aff. at ¶ 13.

[259] Ex. 42 at 6. Moreover, Mr. Barger confirmed that based on his subsequent review of the MorganFranklin report, he "has concluded that the MorganFranklin report does not present material issues that would cause [him] to change [his] recommendation in support of the proposed Business Combination." Barger Aff. ¶ 9. *See also* Ragan Aff. ¶ 14.

[260] Mot. at 47-48.

Globe and the Board acted reasonably and swiftly with regard to these matters. When the Board first learned of the Bankia investigation, it requested Latham investigate and report back the very next day.[261] As a result of this report, the

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k.[262] When the Board became aware of additional investigations relating to Mr. López Madrid, the Board promptly met and considered this information.[263] The Board

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for

REDACTED [264] Globe also issued extensive supplemental disclosures to inform stockholders of these investigations.[265]

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[261] Ex. 1 at 73.

[262] *See* Background, *supra* Section G(3) at 35-36.

[263] Ex. 42 at 3-4.

[264] *Id.* at 6.

[265] Ex. 1 at 193-94.

2. The Board And Globe Management Obtained A Premium Transaction That Provides The Best Value For Globe's Stockholders

a. The Business Combination Provides A Premium To Globe's Stockholders

The Board made a reasonable decision to accept a deal that provided the best value reasonably available to Globe stockholders. First, the deal provides Globe stockholders with a premium over the current value of their shares. REDACTED

[266] Even if the Court were to credit Plaintiffs' primary REDACTED

[267] REDACTED

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[266] Ex. 46 at 11, Table 1.

[267] In his Reply, REDACTED

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.[268]

In addition to the immediate value the merger provides to Globe stockholders, the Board reasonably determined that the merger provides valuable strategic benefits.[269] *Equity-Linked Inv'rs, L.P. v. Adams*, 705 A.2d 1040, 1058 (Del. Ch. 1997) (finding transaction price reasonable under *Revlon* where Board took "long-term value creation" into consideration). The combination would also provide the potential to realize extensive operational and financial cost savings

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Id.

[268] If the Court went even a step further and accepted *all* of Mr. Jeffers' assumptions REDACTED

. Mr. Jeffers' CV does not suggest that he has experience in the silicon or metals and mining industries, nor does it suggest any other reason why he is in a better position to forecast potential synergies in those industries than either Globe or FerroAtlántica. REDACTED

[269] Ex. 1 at 76-77.

(synergies) that neither company could achieve on its own.[270] *In re Plains Expl.*, 2013 WL 1909124, at *7 (noting a board, in a change of control transaction, can consider strategic rationales such as "to leverage a better credit rating and stronger balance sheet into a lower cost of capital").

Based on management's best estimate, as approved by the Board, the combined business could provide nearly REDACTED .[271] Globe stockholders' 43 percent stake in Ferroglobe translates into REDACTED .

Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1143 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995) ("The components of value in an acquisition might be considered to be two: the going concern value of the firm as currently organized and managed and the 'synergistic value' to be created by the changes that the bidder contemplates (e.g., new management, cost efficiencies, etc."); *In re Wheelabrator Techs. Inc. S'holder Litig*., 1990 WL 131351, at *3 (Del. Ch. Sept. 6, 1990) (holding merger price was fair where directors considered the "unique synergistic benefits" of the proposed transaction and the creation of a "more stable company with greater financial resources").

[270] Ex. 1 at 77.

[271] Ex. 12 at GLOBE _000000543.

Plaintiffs dispute Globe's and Goldman's quantifications of this value.[272] Under Delaware law, however, disputes over valuation do not support a preliminary injunction. *See In re Smurfit-Stone Container Corp.*, 2011 WL 2028076, at *24 (recognizing that "valuation is an art and not a science," and "a dispute over valuation between two financial advisors will not support a preliminary injunction"); *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 500 (Del. Ch. 2010) ("[A] vigorous disagreement between two financial experts will not support a preliminary injunction.").

While Plaintiffs may have a different view of valuation, they can point to no alternative that would provide more value to Globe's stockholders. As such, an injunction is not appropriate. *See C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Trust*, 107 A.3d. 1049, 1070 (Del. 2014) ("[A]s the years go by, people seem to forget that *Revlon* was largely about a board's resistance to a particular bidder and its subsequent attempts to prevent market forces from surfacing the highest bid."); *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d at 669 ("There is no hint in the allegations that the board refused to

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[272] Mr. Jeffers once again back-pedals from his original report, REDACTED Ex. 48 at 11, 16. REDACTED Ex. 46 at 42.

consider or rejected a deal that was worth more than Fertitta's offer."); *id.* at 676 ("[This] is an example of a now too common invocation of the iconic *Revlon* case in a circumstance where the key problem in *Revlon*—board resistance to the highest bidder based on a bias against that bidder—is entirely absent.").

Although there is no competing bid here to invoke the concerns of *Revlon*, Globe's parallel negotiations with REDACTED provide a good illustration of the relative value of the FerroAtlántica deal. After negotiating aggressively for several months, the most favorable terms to which REDACTED would agree would require

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.[274] *See, e.g.*, *In re Smurfit-Stone Container Corp.*, 2011 WL 2028076, at *18-19 (noting fact that another company that had "made a significantly lower offer . . . and elected not to return to the negotiating table with a higher bid" was evidence in favor of the current deal being the best value reasonably available).

Perhaps most significantly, in the *six months* since the deal was publicly announced, no one has come forward to offer a better deal. Nor has REDACTED

[273] Ex. 12 at GLOBE_000000511.

[274] *Id.* at GLOBE_000000512.

renewed its interest.[275] A lack of competing bids is further evidence that the proposed transaction is the best reasonably available.[276] *See, e.g.*, *In re Plains Expl.*, 2013 WL 1909124, at *5.

b. The Business Combination Was Approved Following Board Authorization And The Assistance Of An Impartial Financial Advisor

Plaintiffs complain that it was improper for Mr. Kestenbaum to lead negotiations with FerroAtlántica.[277] Delaware courts have repeatedly acknowledged that it is a reasonable, and indeed value-maximizing choice to have an Executive Chairman CEO—the most knowledgeable executive whom the board trusts to lead the company—engage in merger negotiations. *Wayne Cty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *13 (Del. Ch. July 24, 2009) ("While a

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[275] Kestenbaum Aff. ¶ 10.

[276] This is particularly true where, as here, the deal protections are reasonable and allow for topping bids. Plaintiffs' Motion does not allege otherwise. Nor could they: Goldman's analysis demonstrated that the proposed termination fee, REDACTED

. Ex. 12 at GLOBE_000000516 REDACTED

Further, the fee falls well within the range upheld by this Court as being modest and reasonable. *See In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *4 n.52 (Del. Ch. Apr. 11, 2011) (finding 4.4 percent of equity value "is near the upper end of a 'conventionally accepted' range"); *In re Cogent, Inc.*, 7 A.3d 487, 503 (Del. Ch. 2010); *In re Dollar Thrifty*, 14 A.3d at 613-14 (finding 4.3 percent termination fee reasonable).

[277] Mot. at 58-59.

board cannot completely abdicate its role in a change of control transaction, Delaware law is clear that in certain circumstances it is appropriate for a board to enlist the efforts of management in negotiating a sale of control."), *aff'd*, 996 A.2d 795 (Del. 2010); *see also In re MONY Grp. Inc. S'holder Litig*., 852 A.2d 9, 20 (Del. Ch. 2004) (rejecting Plaintiffs' "lone wolf theory" and holding that a board of directors did not breach its fiduciary duties when a CEO who stood to gain extra payments under a change-in-control agreement led the negotiations in a single-bidder process: "A board appropriately can rely on its CEO to conduct negotiations[.]").

The Board had previously directed Mr. Kestenbaum to identify M&A opportunities, and to conduct preliminary diligence and negotiations, to determine whether the opportunity was worth bringing to the Board. Consistent with that charge, Mr. Kestenbaum had already been pursuing other potential deals for some time when the opportunity with FerroAtlántica arose. Wholly consistent with this Board direction, Mr. Kestenbaum had initial discussions with FerroAtlántica's management in April 2014, and updated the Board in May and August.[278] He had further preliminary discussions with FerroAtlántica's management in November 2014, when the two sides agreed to take a non-binding, preliminary term sheet for

[278] Ex. 1 at 66-67.

a potential transaction back to their respective boards.[279] On December 18, Mr. Kestenbaum presented the opportunity and term sheet to the Board, who authorized him to continue negotiations.[280] This process falls well within the range of reasonableness, which is all that *Revlon* requires. *See C & J Energy Servs., Inc*., 107 A.3d at 1067 (in assessing a board's decision to approve a change of control transaction under *Revlon*, courts focus on "whether the directors made a *reasonable* decision, not a *perfect* decision."); *see also In re Dollar Thrifty*, 14 A.3d at 608 ("[T]he question is not whether the Board could have reasonably decided to act differently than it did, [but] whether its decision to enter into the [agreement] when it did was reasonable.").

Plaintiffs' argument that there is a conflict because Goldman's fee is contingent on the closing of the transaction is also not supported by Delaware law. Rather, Delaware courts hold that a financial advisor's contingency fee does not support an inference that the financial advisor was improperly motivated. *In re Alloy, Inc.*, 2011 WL 4862716, at *11.[281] Moreover, Plaintiffs' allegation that Mr.

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[279] *Id*. at 68.

[280] *Id.* at 69-70.

[281] *See also, In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *23 ("[A] sales process is not unreasonable under Revlon merely because [a board] is advised by a financial advisor who might receive a large contingent success fee[.]"); *In re Toys "R" Us, Inc.*, 877 A.2d at 998 n. 26, 1005

Kestenbaum "committed to give Goldman a lead role in [a] secondary offering" is wrong and misleading. REDACTED

c. The Board And Globe Management Obtained Significant Minority Stockholder Protections

Plaintiffs argue that the independent and disinterested Board breached its *Revlon* duties by failing to obtain better minority stockholder protections than the BCA and Shareholder Agreements provide.[284] Plaintiffs cite no authority for the proposition that a failure to obtain minority stockholder protections demonstrates a breach of duty in a transaction that stockholders are free to accept or reject. In any event, the Board obtained protections, going both to process and value, that are substantially more protective of stockholders than Globe's existing governing documents and Delaware law.[285] The substantial protections established in Ferroglobe's articles of association and contractual arrangements fit within the

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(denying preliminary injunction where financial advisor would receive $27 million fee for a partial sale and $34 million for a total sale).

[282] Ex. 49 at GLOBE_000000154.

[283] Gordon Dep. Tr. at 38:11-24.

[284] Mot. at 62-63.

[285] *See infra* at p. 72.

established framework for equal treatment and protection of minority stockholders under UK corporate law.[286]

Globe proposed and negotiated hard for these minority protections to ensure that the minority stockholders (i) would have truly independent representatives on the Ferroglobe Board acting in the interest of the public stockholders and not beholden to Grupo VM[287], (ii) would have the opportunity to realize the substantial value represented by the transaction during and following an appropriate three year transition period[288], and (iii) perhaps most importantly, would be treated equally in any subsequent sale transaction to realize a future control premium.[289]

First, Grupo VM is only permitted to designate a number of directors to the Ferroglobe Board that is proportionate to Grupo VM's ownership, as opposed to the right to control the designation and election of <u>all</u> of the directors in the absence of the negotiated minority protections.[290] At least one of Grupo VM's designees is required to be independent under applicable NASDAQ rules and all of the directors designated by Grupo VM are required to have demonstrated good

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[286] *See infra* at pp. 74-75.

[287] Ex. 24 at § 1.11(a).

[288] Ex. 41 at § 34.3(c)(i)(iv).

[289] Ex. 40 at §§ 5.01(a); 5.01(b)(ix); 6.01(f).

[290] Ex. 24 at § 1.11(a); Ex. 40 at § 3.01(b); Ex. 41 at § 25.3.

judgment, character and integrity in his or her personal dealings and have relevant financial, management and/or global business experience.[291]

Second, Ferroglobe's board is required to have at least three independent Globe director designees at all times.[292] The process for designation of these independent director designees, and appointment of their independent director replacements, ensures they will not be beholden to Grupo VM and will act in the interest of Ferroglobe and its public stockholders.[293] Grupo VM has no ability to influence this process because only the Globe independent director designees are permitted to nominate independent director candidates for election to the Board, and Grupo VM is obligated to vote its shares in favor of these independent director candidates.[294]

Third, Mr. Kestenbaum may not be removed as Executive Chairman of the Ferroglobe Board for at least three years post-closing, except (i) for cause with the vote of a simple majority of the Ferroglobe Board or (ii) without cause by the two-

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[291] Ex. 24 at § 1.11(a); Ex. 40 at §§ 3.01(a); 3.01(e)(ii); Ex. 41 at § 25.8(b).

[292] The number of independent directors increases if and to the extent Grupo VM reduces its ownership position. This ensures that the composition of the Ferroglobe board automatically adjusts to account for changes in relative ownership of Grupo VM. Ex. 24 at § 1.11(a); Ex. 40 at § 3.01(a)-(b); Ex. 41 at § 25.3.

[293] Ex. 24 at § 1.11(a); Ex. 40 at § 3.01(c).

[294] Ex. 40 at §§ 3.01(c); 3.01(g); Ex. 41 at § 25.4.

third's vote of the Ferroglobe Board.[295] The Globe Board believes it is in the best interest of the Globe stockholders to retain Mr. Kestenbaum following completion of the transaction,[296] because (i) as the founder and long-standing Globe chairman, Mr. Kestenbaum has the best knowledge of the business to ensure a seamless integration and realize the synergistic value resulting from the combined company,[297] and (ii) Mr. Kestenbaum has the single largest economic interest among the Globe stockholders to maximize the value of Ferroglobe.[298]

Fourth, the Board negotiated for express provisions in the BCA requiring that Ferroglobe form a special committee of the Ferroglobe Board, comprised of independent directors, with responsibility for "the exercise or waiver of [Ferroglobe's] rights, benefits or remedies under" the BCA.[299] This special committee's mandate is to "solely represent [Ferroglobe]," acting "on behalf of

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[295] Ex. 41 at §§ 32.4; 34.3(a); 34.3(b)(vii).

[296] Ex. 34 at GLOBE_000015092.

[297] *See C & J Energy Servs., Inc.*, 107 A.3d at 1065 (noting management of minority company has incentive against removal when deal premised "on the higher valuation its team could achieve in managing … underutilized assets").

[298] Ex. 1 at 249.

[299] Ex. 24 at § 10.6.

and in the best interests of [Ferroglobe] and its shareholders (but excluding Grupo VM)."[300]

Fifth, the provisions of Ferroglobe's articles of association expressly prohibit a director from voting on any matter in which he or she has a conflict of interest, subject only to certain limited exceptions.[301] This is more protective than Delaware law, which allows a director to vote on a matter in which he or she has a material conflict of interest, after appropriate disclosure.[302] This provision is meant to ensure that the Ferroglobe board will operate free of conflicts of interest with respect to matters as to which there is a conflict of interest with Grupo VM, or otherwise.

Sixth, material corporate actions as to which the Board believed Grupo VM's interests could diverge from the interests of the public stockholders expressly require the consensus two-thirds vote of the Ferroglobe Board.[303] These actions include, for example, any transaction that results in a change of control (except for a sale of 100 percent of the Ferroglobe stock in a transaction in which all stockholders receive the same per share consideration), extraordinary dividends or distributions, extraordinary share repurchases or redemptions, and amendment

[300] *Id.*

[301] Ex. 41 at § 33.12.

[302] *See* 8 *Del. C.* § 144.

[303] Ex. 41 at § 34(b)(i)-(xi).

of the Ferroglobe governance documents in a manner inconsistent with the negotiated minority protections.[304]

Seventh, the Board negotiated robust standstill protections and transfer restrictions in the stockholders agreement to be entered into by Grupo VM, which ensures that Ferroglobe's public stockholders are protected against actions by Grupo VM at the stockholder level that could deprive the public stockholders of the opportunity to realize the fundamental value of their investment in Ferroglobe, or a future control premium in connection with any subsequent sale of Ferroglobe.[305] Under the standstill provisions, Grupo VM is prohibited from purchasing additional shares above the 57 percent level acquired in the business combination.[306] In addition, Grupo VM is prohibited from commencing a tender offer or other proposal to take Ferroglobe private, except for an all cash, all shares takeover offer made after the third anniversary of closing and subject to a majority of the minority condition.[307] Grupo VM is also prohibited from selling its control position in Ferroglobe, whether in a block sale (more than 10 percent of the Ferroglobe shares) or to a third party in a takeover offer, except in a third party takeover offer that, among other things, is made for the same price per share and

[304] *Id.* at § 34.3 (b)(i)-(xi).

[305] Ex. 40 at §§ 5.01; 5.02.

[306] *Id*. at § 5.01(a).

[307] *Id*. at § 5.01(b)(ix).

otherwise on the same terms and conditions for all stockholders, and is accepted by holders of a majority of the Ferroglobe shares not held by Grupo VM.[308]

If a sale of Ferroglobe is structured using a so-called "scheme of arrangement" under U.K. corporate law, which is a common structure for the acquisition of a U.K. listed company, U.K. corporate law provides additional heightened protections for the minority stockholders relative to Delaware law. Specifically, a scheme of arrangement requires approval both of (i) a majority of the number of stockholders voting at the shareholder meeting to consider the transaction and (ii) at least 75 percent of the shares voting at the shareholder meeting.[309] Lastly, the approval of a U.K. court is required for a scheme of arrangement to become effective and, in that context, each Ferroglobe shareholder could appear and be heard as to, among other things, the substantive fairness of the transaction to public stockholders.[310]

As Mr. Kestenbaum testified, these provisions were included, "to protect shareholders" and "to make sure that the independent directors, representatives of the shareholders, are able to … maintain their obligations and take advantage of any minority protections that are in there to make sure that the company continues,

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[308] *Id*. at § 6.01(f).

[309] Companies Act 2006, c. 46 (Eng.), http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf.

[310] Ex. 1 at 224; *supra* n. 303 at §§ 899; 903; 908; 909.

… with proper governance and the interest of all shareholders."[311] Delaware courts have found similar provisions to protect minority stockholder rights. *See Gilbert v. El Paso Co.*, 1988 WL 124325 (Del. Ch. Nov. 21, 1988), *aff'd*, 575 A.2d 1131 (Del. 1990) (granting defendants' motion for summary judgment on breach of fiduciary duty claims).

B. The F-4 Contains All Material Information

Plaintiffs' disclosure claims fail because all information that is material under the circumstances has been disclosed. In their Motion, Plaintiffs have merely shown that during six days of deposition and following the production of more than 180,000 pages of documents by Globe, Goldman, Nomura and FerroAtlántica, they "uncovered" certain details that were not disclosed. That is always the case, but it is not the basis for a viable claim. To demonstrate a breach of fiduciary duty based on allegedly deficient disclosures, Plaintiffs must show that there is a "substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder" when deciding whether to approve the transaction. *Next Level Commc'ns, Inc. v. Motorola, Inc.*, 834 A.2d 828, 851 (Del. Ch. 2003).

Delaware law requires only that directors disclose *material* information. An allegedly omitted fact is not deemed material "simply because [it] might be

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[311] Kestenbaum Dep. Tr. at 104:3-20.

helpful," *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000) , because financial advisors may have considered it, *In re General Motors (Hughes) Shareholder Litig.*, 2005 WL 1089021, at *16 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006), or even if it would be needed for stockholders to "make 'an independent determination of fair value.'" *In re OPENLANE, Inc. S'holders Litig*., 2011 WL 4599662, at *13 (Del. Ch. Sept. 30, 2011). Rather, the omitted fact must "significantly alter the total mix of information." *Skeen*, 750 A.2d at 1174. Plaintiffs bear the burden to "allege that facts are missing from the [information] statement, identify those facts, state why they meet the materiality standard and how the omission caused injury." *Id*. at 1173 (quoting *Loudon v. Archer-Daniels-Midland Co*., 700 A.2d 135, 140 (Del. 1997)).

As explained below, Globe's stockholders have all the material information they need to determine whether to vote in favor of the Business Combination, and none of Plaintiffs' arguments merit injunctive relief.

1. Globe Has Disclosed All Material Information Regarding The Criminal Investigations

First, Plaintiffs claim that Globe's extensive disclosures are deficient because they omit additional details regarding the criminal allegations relating to Mr. López Madrid and Mr. Villar Mir in Spain—allegations that have not been

adjudicated in a court of law.[312] Plaintiffs do not deny that the F-4 discloses details about the four matters relating to criminal investigations involving Mr. López Madrid and Mr. Villar Mir. Instead, Plaintiffs complain that, despite the five paragraphs of disclosures in the F-4, Globe should have disclosed more.[313] Plaintiffs are wrong.

Plaintiffs allege that Globe should also have disclosed details from *media reports* suggesting an apparent relationship between Mr. López Madrid and two men who have been called as *imputado* in connection with a Spanish anticorruption investigation known as "Punica."[314] However, Mr. López Madrid's involvement with the Punica investigation is mere innuendo that does not warrant disclosure in an SEC filing. Mr. López Madrid has not been called as *imputado*, let alone been accused of any wrongdoing in the Punica matter. Any suggestion by Plaintiffs that the investigating court has made any conclusions regarding Mr. López Madrid is blatantly false.[315]

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[312] Mot. at 67-72.

[313] Id. at 69-70.

[314] Id. at 50, 67.

[315] While plaintiffs have stated that certain emails led "the judge who is leading the investigation to believe that the corruption was carried out in part through companies linked to Mr. López Madrid," Mot. at 30, their underlying source states only that the court sought those emails because they "could" link those companies to Punica. Plaintiffs' Ex. 3 at 8. In fact, as the very same source observes, Mr. López Madrid "seemed to be far from the web of conspiracy." *Id.*

This Court has long recognized that a proxy statement need not disclose an investigation when a director "has not been accused of any violation" and, to the contrary, "under Delaware law, directors are not required to admit wrongdoing before it [is] properly determined in a court of law." *Loudon v. Archer-Daniels-Midland Co.*, 1996 WL 74730, at *4-5 (Del. Ch. Feb. 20, 1996) *aff'd*, 700 A.2d 135 (Del. 1997); *see also Khanna v. McMinn*, 2006 WL 1388744, at *29 (Del. Ch. May 9, 2006) ("A long-standing principle of disclosure jurisprudence provides that a board need not engage in 'self-flagellation'").

Plaintiffs cite to no authority, nor can they, that requires Globe to disclose every rumor or innuendo reported by the media.

2. Goldman's Changes To The Assumptions Underlying The Globe Projections Are Immaterial

Next, Plaintiffs assert that Globe was required to disclose Globe management's and Goldman's changes to the preliminary projections.[316] Plaintiffs are again wrong. Delaware law only requires a "fair summary of a financial advisor's work, not the data to make an independent determination of fair value." *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *12 (Del. Ch. June 30, 2014); *see also In re 3Com S'holders Litig.*, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18,

[316] Mot. at 74.

2009) ("quibbles with a financial advisor's work simply cannot be the basis of a disclosure claim.").

Plaintiffs' nitpickings over the difference between the Board's request for Goldman to "update the projections" and management's agreement to "revise the assumptions"[317] is not material and does not give rise to a viable disclosure claim. *See In re MONY Grp., Inc.*, 852 A.2d at 28 n.52 ("[A] complaint about the accuracy or methodology of a financial advisor's report is not a disclosure claim."). Furthermore, Delaware does not require Globe to disclose specific details of the analysis underlying Goldman's opinion or explain Goldman's analysis to the level of detail that stockholders would be able to conduct the analysis themselves. *See In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *3 (Del. Ch. Nov. 1, 2007) (holding that a Proxy contained an "adequate and fair summary" of the financial advisor's work where it disclosed "the various sources upon which Goldman relied in coming to its conclusions," "some of the assumptions and calculations management made to come to its estimates," "comparable transactions and companies Goldman used," and certain management projections of earnings and EBITDA); s*ee also Gen. Motors (Hughes)*, 2005 WL 1089021, at *16 (granting motion to dismiss claim that disclosure of "raw data" underlying financial advisor's analyses was required, as

[317] *Id.*

there is no obligation to provide "all financial data needed to make an independent determination of fair value"); *In re Plains Expl.*, 2013 WL 1909124, at *8 ("The duty to disclose financial information that is material to [a stockholder's] decision does not include information that is merely helpful; it also does not require that stockholders have sufficient information to make an independent determination of fair value.").

3. Additional Disclosure Of An Adjustment to FerroAtlántica's Terminal Year Cash Flow Estimate Is Immaterial

Plaintiffs argue that the F-4 fails to " REDACTED .".[318] Globe has already disclosed that Goldman calculated "the terminal year estimate of FerroAtlántica's cash flow using the Forecasts of $191 million."[319] Nothing more is material. *See In re Family Dollar Stores Inc. S'holder Litig.,* 2014 WL 7246436, at *21 (Del. Ch. Dec. 19, 2014) (holding that the "fair summary" standard only requires disclosure of "the actual metrics used . . . and not specific inputs used to determine those metrics").

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[318] *Id*. at 75.

[319] Ex. 1 at 89.

Just as "quibbles with a financial advisor's work simply cannot be the basis of a disclosure claim," the same must be true of management's work in evaluating countless factors in compiling projections. In *In re BioClinica, Inc. S'holders Litig*, the Court rejected plaintiffs' argument that the defendants "should have disclosed why they adjusted the capital expenditures upward [in their projections]." 2013 WL 5631233, at *9 (Del. Ch. Oct. 16, 2013). The Court explained that "stockholders are entitled to management's best estimates of future financials as of the time of the merger. The directors need not explain the basis for their estimates, nor why they have adjusted their estimates." *Id.*; *see also In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *11 (Del. Ch. Feb. 29, 2012) (concluding that because "investors received a summary that adequately described management's well-informed projections . . . the disclosure of [] additional information" was unlikely to "significantly alter the total mix of available information"); *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787, at *10 (Del. Ch. June 19, 2001) (noting where bare-bones projections were disclosed, there was no "substantial likelihood that the details and assumptions underlying the projections would significantly alter the total mix of information already provided to the stockholders") (internal quotation omitted).

As a general matter, disclosures of "why," "whether," or "how" something was or was not done is not required. *In re Delphi Fin. Grp. S'holder Litig.*, 2012

WL 729232, at *18 (Del. Ch. Mar. 6, 2012) (finding "little merit in the allegations of disclosure violations" because the information sought to be disclosed was "of the 'tell me more' variety, and given the quantity and quality of the disclosure provided in the Definitive . . . Proxy, I find that the Plaintiffs are unlikely to succeed on the merits of their claims alleging disclosure violations."); *In re Plains Expl.*, 2013 WL 1909124, at *9-10 (Del. Ch. May 21, 2013) (denying a motion for preliminary injunction and finding that the plaintiffs did not have a likelihood of success on the merits of their disclosure claims because simply "asking 'why' [the Board made certain decisions] does not state a meritorious disclosure claim"). Finally, Delaware courts have held, increased disclosure is not always preferable. *See also Zirn v. VLI Corp.*, 1995 WL 362616, at *4 (Del. Ch. June 12, 1995) *aff'd*, 681 A.2d 1050 (Del. 1996) ("[T]he law ought [to] guard against the fallacy that increasingly detailed disclosure is always material and beneficial disclosure. In some instances, the opposite will be true.").

Globe has already disclosed a "fair summary" of Goldman's analysis.

4. Disclosure Of Recent Market Prices Is Immaterial

Finally, Plaintiffs argue that Globe's extensive disclosures are deficient because the F-4 does not include a "quarterly range for April 2015 through June

30, 2015, a monthly range for July 2015, or any market prices in August 2015."[320] Globe's market prices are publicly available and therefore not required to be disclosed. *See, e.g.*, *In re Vertro, Inc. S'holders' Litig*., Consol. C.A. No. 7010-VCP, at 25 (Del. Ch. Dec. 21, 2011) (TRANSCRIPT) ("The change in stock price … is commonly available information that [the company] is not required to disclose."). In any case, though these disclosures are not required under applicable SEC rules or Delaware law, Globe has disclosed these market prices.[321]

II. PLAINTIFFS CANNOT DEMONSTRATE IRREPARABLE HARM

In support of their irreparable harm argument, Plaintiffs rely on purported *Revlon* and disclosure claims.[322] As explained above, both these claims are meritless. Plaintiffs cannot meet their burden of showing "harm of such a nature that no fair and reasonable redress may be had in a court of law and must show that to refuse the injunction would be a denial of justice." *In re Delphi Fin. Grp.*, 2012 WL 729232, at *18.

First, monetary damages would adequately remedy any supposed harm to Plaintiffs resulting from the transaction. *See, e.g.*, *In re K-Sea Transp. P'rs L.P.*, 2011 WL 2410395, at *9 (Del. Ch. June 10, 2011) ("This Court is reluctant to

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[320] Mot. at 75-76.

[321] Ex. 11 at 21, 64-65.

[322] Mot. at 77-79.

enjoin a premium transaction where there is no superior bid on the table and … money damages are sufficient to remedy a claim that a transaction price is inadequate."). A "harm that can be remedied by money damages is not irreparable."[323] *In re TIBCO Software Inc. S'holders Litig*., 2014 WL 6674444, at *21 (Del. Ch. Nov. 25, 2014). Plaintiffs' assertion that monetary damages are "imprecise"[324] is contradicted by their *two* expert reports that purport to quantify the alleged harm.[325]

Furthermore, there is no irreparable harm where stockholders have the opportunity to make a fully informed decision. *See McMillan v. Intercargo Corp.*, 1999 WL 288128, at *4 (Del. Ch. May 3, 1999) ("The shareholders are not threatened with irreparable harm, because it is they who in the end will decide whether or not the company will be sold now."). There is also no evidence that an

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[323] Plaintiffs' argument that irreparable harm will occur because Globe's directors may be exculpated from liability has no merit. Mot. at 78-79. Even if Globe directors are ultimately able to demonstrate that they are exculpated from monetary liability, this does not change the fact that the damages alleged by Plaintiffs are quantifiable and recoverable if plaintiffs can prove an unexculpated claim. *In re TIBCO Software Inc.*, 2014 WL 6674444, at *22; *In re Delphi Fin. Grp. S'holder Litig*., 2012 WL 729232, at *20 (Del. Ch. Mar. 6, 2012) (denying a preliminary injunction even though some of the alleged injuries appeared irreparable).

[324] Mot. at 77.

[325] *See* Ex. 48 at Schedule 4, REDACTED

injunction will enable a higher bid to materialize, particularly as none have emerged in the *six months* since the announcement. The "theoretical possibility . . . that an unknown potential offeror might submit a higher offer if an injunction is granted does not constitute irreparable injury." *Yanow v. Sci. Leasing, Inc.*, 1988 WL 8772, at *6 (Del. Ch. Feb. 8, 1988).

Finally, Plaintiffs' argument that Globe's stockholders will suffer irreparable harm because they have no right to appraisal is without merit.[326] Under Delaware law, a lack of appraisal rights does not constitute irreparable harm. *See, e.g., Wand Equity Portfolio II L.P. v. AMFM Internet Hldg. Inc.*, 2001 WL 167720, at *2 (Del. Ch. Feb. 7, 2001) (denying motion to expedite proceedings when plaintiffs' lacked appraisal rights); *Nebenzahl v. Miller*, 1993 WL 488284, at *2, 5 (Del. Ch. Nov. 8, 1993) (denying motion for preliminary injunction seeking to enjoin consummation of a merger even though stockholders were not entitled to, nor given, appraisal rights following the merger).

III. PLAINTIFFS CANNOT PREVAIL ON THE EQUITIES

Plaintiffs must also prove that the balance of hardships favors injunctive relief. *In re Cogent, Inc.*, 7 A.3d at 517. Plaintiffs must establish that a preliminary injunction "will result in comparatively less harm [to Globe and its other stockholders] and that, in the end, it is unlikely to be shown to have been

[326] Mot. at 81.

issued improvidently." *In re Delphi Fin. Grp.*, 2012 WL 729232, at *18. Plaintiffs cannot meet this burden.

Plaintiffs do not, and cannot, cite any authority to support their contention that blocking a $3.1 billion transaction will inflict *de minimis* harm. Rather, the potential harm to Globe and its stockholders from an injunction is significant and outweighs any benefit an injunction could speculatively provide. If the transaction is enjoined, Globe's stockholders could lose the singular opportunity to become stockholders in a larger more valuable global company. This harm would be particularly great here —although the proposed transaction has been public for nearly six months, no other bidder has come forward.[327] This risk far outweighs any purported harm that would arise if the preliminary injunction is denied. *C & J Energy Servs., Inc.*, 107 A.3d. at 1072-73 ("[W]here no rival bidder has emerged to complain that it was not given a fair opportunity to bid, and where there is no reason to believe that stockholders are not adequately informed or will be coerced into accepting the transaction if they do not find it favorable, the Court of Chancery should be reluctant to take the decision out of their hands."); *In re Micromet, Inc*, 2012 WL 681785, at *13-14 (refusing to enjoin stockholder vote on premium sale with no other bidder); *In re Delphi Fin. Grp.*, 2012 WL 729232, at * 19 ("[I]n the context of a single-bidder merger, the Court when balancing the

[327] Kestenbaum Aff. ¶ 10.

equities must be cognizant that if the merger is enjoined, the deal may be lost forever"); *In re Cogent, Inc.*, 7 A.3d at 515 ("[I]n the absence of another viable bid, this Court often finds injunctive relief to be inappropriate[.]"); *Wayne Cty. Emps.' Ret. Sys. v. Corti*, 954 A.2d 319, 331 (Del. Ch. 2008) (refusing to "enjoin the vote for anything other than a particularly strong showing" of materially deficient disclosures, particularly where "no other bidder has emerged").

Finally, this Court has long been reluctant to issue an injunction that would jeopardize the opportunity for stockholders to decide for themselves whether to accept a premium deal. *See In re El Paso Corp. S'holder Litig.*, 41 A.3d at 439-40; *see also C&J Energy Servs., Inc.*, 107 A.3d. at 1072 (reversing the lower court's grant of a preliminary injunction and finding that preliminary injunctions are disfavored where stockholders are "capable of addressing [the] harm themselves by the simple act of casting a 'no' vote"); *In re Dollar Thrifty*, 14 A.3d at 618 (finding that the balance of harms tilted against an injunction because stockholders could decide for themselves to vote the deal down and take the chance of receiving an actionable higher bid).

IV. PLAINTIFFS SHOULD BE REQUIRED TO POST A REASONABLE INJUNCTION BOND

Plaintiffs claim they should be required to post only "[a] nominal bond."[328] In fact, the opposite should be true. Plaintiffs seek to enjoin a $3.1 billion transaction approved by an independent Board which offers a premium compared to Globe as a standalone company. While Plaintiffs blithely assert that the balance of equities favors them, they ignore that they are placing at risk a multi-billion dollar transaction—despite the fact that no rival bidder has emerged in the six months since the transaction was publicly announced. *See, e.g., ACE Ltd. v. Capital Re Corp*, 747 A.2d 95, 110 (Del. Ch. 1999) ("[L]oss of a 'unique acquisition opportunity' may constitute an irreparable injury."); *True N. Commc'ns, Inc. v. Publicis S.A*., 711 A.2d 34, 45 (Del. Ch. 1997).

Against this backdrop, Plaintiffs seek to be excused from posting a reasonable injunction bond. *See In re Netsmart Techs., Inc. S'holders Litig*., 924 A.2d 171, 209 (Del. Ch. 2007) ("It would be hubristic for [the Court] to take a risk of that kind for the . . . stockholders, [when] the [P]laintiffs have not volunteered to back up their demand with a full bond."); *see also Mercier v. Inter-Tel (Del.), Inc*., 929 A.2d 786, 821 n.90 (Del. Ch. 2007) ("it is certainly relevant to a judge deciding whether to issue an injunction that the plaintiff offers no protection to

[328] Mot. at 82.

other investors if the powerful remedy he seeks was wrongly granted and caused them harm.”). If the Court determines to enter a preliminary injunction (which, to reiterate, Globe does not believe is justified), Globe respectfully urges the Court to require Plaintiffs to post an injunction bond in an amount no less than $1,000,000 based upon the risk to the transaction. *See, e.g., In re Del Monte Foods Co. S'holder Litig.*, 25 A.3d 813, 844 (Del. Ch. 2011) (setting a bond at $1.2 million for a delay-based injunction).

CONCLUSION

For the foregoing reasons, the Globe Defendants respectfully request that Plaintiffs' Motion for Preliminary Injunction be denied in its entirety.

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