

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GLOBE SPECIALTY METALS,) Consol. C.A. No. 10865-VCG
INC. STOCKHOLDERS LITIGATION) CONFIDENTIAL FILING
)
) **REDACTED PUBLIC VERSION**
) **FILED AUGUST 28, 2015**

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR
MOTION FOR PRELIMINARY INJUNCTION**

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ARGUMENT

I. THE SALE OF GLOBE CANNOT WITHSTAND *REVLON* SCRUTINY

Defendants do not dispute that the Transaction¹ is a change in control transaction which triggers enhanced scrutiny under *Revlon* and imposes “special obligations on the directors,” including “the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders.”² The Board was required to “act on an informed basis to independently ascertain how the merger consideration being offered . . . compare[s] to [the company’s] value as a going concern.”³ “[T]he *need for adequate information [is] central* to the enlightened evaluation of a transaction that a board must make.”⁴

The Globe Board approved the Transaction on February 22, 2015 based upon: (i) manipulated financial projections for Ferro that were admittedly wrong, (ii) synergy projections that were much higher than the synergies agreed upon by Globe management and Ferro, and (iii) partial information about only one of *five* separate criminal investigations implicating Javier López Madrid. Implicitly

¹ Capitalized terms herein have the same meaning identified in Plaintiffs’ Opening Brief in Support of Their Motion for Preliminary Injunction (Transaction ID 57688098) (“Plaintiffs’ Opening Brief” or “Plaintiffs’ Op. Br.”).

² *Paramount Comm’cns Inc. v. QVC Network Inc.*, 637 A.2d 34, 43 (Del. 1994).

³ *In re Rural Metro Corp. S’holders Litig.*, 88 A.3d 54, 90 (Del. Ch. 2014) (quoting *McMullin v. Beran*, 765 A.2d 910, 919 (Del. 2000)).

⁴ *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1287 (Del. 1989) (emphasis added).

conceding that the Board's February 22 approval could not withstand *Revlon* scrutiny, the Globe Defendants convened a Board meeting on August 7, 2015 in an attempt to cure its uninformed approval of the Business Combination Agreement ("BCA"). They failed.

A. The August 7 Board Meeting Does Not Cure the *Revlon* Violations

At its August 7 meeting, the Board discussed issues raised by this litigation concerning whether the Board's February 22, 2015 approval of the Transaction was informed, including: (i) the inaccurate and incomplete financial information and projections Kestenbaum presented to Goldman and the Board; (ii) the Board's lack of knowledge of numerous criminal investigations of López Madrid; and (iii) MorganFranklin's due diligence report ("MorganFranklin Report"). The meeting's purpose was to "allow the Board to be further informed for purposes of continuing to discharge the Board's duties in the context of its existing recommendation of the Transaction to the Company's shareholders."⁵ The August 12, 2015 Proxy Statement does not disclose this Board meeting, much less provide a fair and accurate summary of it.

The August 7 minutes and Board materials establish that Kestenbaum did not allow the Board to fairly reconsider its recommendation of the Transaction. Regardless, the Board was not free to withdraw its recommendation of the

⁵ Affidavit of Elizabeth A. DeFelice (Transaction ID 57727889) ("DeFelice Aff.") Ex. 42 at 1.

Transaction because Goldman was not present to consult at the meeting and the Board's failure to be fully informed when it approved the BCA was self-induced.⁶

1. The Board Could Not Change Its Recommendation at the August 7 Meeting

The BCA has a limited fiduciary out. Pursuant to Section 7.4 of the BCA, the Board may only make an adverse recommendation if there is a superior proposal from a competing bidder⁷ or "if the [Globe] Board determines in good faith, *after consultation with [Globe's] outside legal counsel and financial advisor*, that the failure to make a [Globe] Adverse Recommendation Change would be inconsistent with its fiduciary duties under applicable law."⁸ This, the Board contractually bound itself not to change its recommendation without consulting Goldman.

Goldman was conspicuously absent from the August 7 Board meeting. Thus, the Board could not consult with Goldman and change the Board's recommendation of the Transaction. Nor could the Board learn whether Goldman would still provide a fairness opinion after reviewing Ferro's 2015 projections (including the 2015 EBITDA estimate of € REDACTED), the lower synergies that Globe management agreed upon with Ferro on February 23, 2015 and Ferro's actual 2015 financial

⁶ *Smith v. Van Gorkom*, 488 A.2d 858, 888 (Del. 1985).

⁷ Transmittal Affidavit of Corinne Elise Amato in Support Plaintiffs' Reply Brief ("Reply Amato Aff.") Ex. 2, Annex B at § 7.4(d) (emphasis added).

⁸ *Id.* § 7.4(d)(ii).

results.⁹ Goldman's absence is not surprising, because any change of its fairness opinion based on the information presented at the August 7 meeting would have confirmed that Kestenbaum and management breached their fiduciary duty by misleading the Board through withholding material information.

2. Kestenbaum Continues to Provide Inaccurate and Incomplete Information

At the August 7 meeting, Globe management presented Ferro's actual performance for the first half of 2015 and compared the actual results with Globe's Forecasts for Ferro, Ferro's 2015 Budget and the Ferro Management Projections ("Ferro Forecast").¹⁰ Ferro's EBITDA performance during the first half of 2015 was largely consistent with Ferro's projections and much lower than Globe's:

Ferro Financials for 6 months ending June 30, 2015			
(In € millions)	Revenues	EBITDA	EBITDA Margin
Globe Forecast	607.9	141.3	23.2%
Ferro Budget	602.6	95.1	15.8%
Ferro Forecast Actual Results		REDACTED	

At his deposition, Kestenbaum explained his inflated estimate of Ferro's 2015 EBITDA by pointing to the perceived effect of translating Ferro's books from

⁹ See *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 802 (Del. Ch. 2011) (citing special committee's failure to have advisors update financial analyses as evidence of a tainted sales process).

¹⁰ DeFelice Aff. Ex. 42, Annex A, Transaction Update, August 7, 2015 at 15.

Euros into Dollars.¹¹ This made no sense because most of Ferro's revenues are generated, and REDACTED

REDACTED¹² At the August 7 Board meeting, Kestenbaum could no longer explain his inflation of Ferro's projected EBITDA based on exchange rates, so instead he claimed his REDACTED

REDACTED REDACTED¹³ This further after-the-fact excuse was patently false. Ferro earns REDACTED

REDACTED During 2011-2013 REDACTED REDACTED¹⁴ In 2014, REDACTED

REDACTED¹⁵ Ferro's projections correctly estimated that the same lack of REDACTED would occur in 2015.¹⁶

¹¹ Kestenbaum Dep. Tr. at 196-205, 273-74.

¹² *Id.* at 193-98. *See also* Transmittal Affidavit of Corinne Elise Amato in Support of Plaintiffs' Opening Brief (Transaction ID 57696361) ("Op. Amato Aff."), Corrected Ex. 21 at 17-20.

¹³ DeFelice Aff. Ex. 42.

¹⁴ Reply Amato Aff. Ex. 12 at 12.

¹⁵ Supplemental Transmittal Affidavit of Corinne Elise Amato in Support of Plaintiffs' Opening Brief ("Supp. Amato Aff."), Ex. 74 at GVM-FA_Sh00003161; Op. Amato Aff. Ex. 27 at GLOBE_000000065.

¹⁶ Op. Amato Aff. Ex. 41.

REDACT

The Board's belated consideration of the MorganFranklin Report, delay in learning of the other investigations, and the inaccuracy of Globe's projections cannot be blamed on Grupo VM or Ferro. Instead, they are due to (i) Globe management's failure to fully inform the Board of the MorganFranklin Report before the Board approved the BCA and (ii) Globe management's rejection of Ferro's own budget and projections and creation of unreliable projections for Ferro aimed at making the 57-43 exchange ratio look fair. Thus, the Globe Board's

failure to become fully informed was not a basis under BCA Section 7.4(d)(ii) for changing its recommendation or terminating the Transaction.¹⁷

It is no surprise that Kestenbaum and Ragen told the Board that the information they had previously withheld from the Board was not sufficient for the Board to change its recommendation.¹⁸ Had they said otherwise, they would have been admitting that they misled the Board at the time it approved the BCA.

In sum, the Board's August 7 decision not to change its recommendation based on additional information was a nullity because: (i) under the BCA, Goldman's absence prevented the Board from changing its recommendation; (ii) the Board's self-induced failure to become informed in February could not support a change in recommendation; and (iii) the Board was provided inaccurate and incomplete information.

3. The Board Incorrectly Assumes the Globe Rollover Directors Can Protect the Globe Stockholders from López Madrid

¹⁷ See *Van Gorkom*, 488 A.2d at 888 ("Clearly, the Board was not 'free' to withdraw from its agreement with Pritzker on January 26 by simply relying on its self-induced failure to have reached an informed business judgment at the time of its original agreement.").

¹⁸ See DeFelice Aff. Ex. 42 at 3 (Ragen stating his opinion that "
REDACTED
REDACTED"); *id.* at 5 (explaining away the
difference between Ferro's Q1 and Q2 financial results and Globe's projections for
Ferro because the Globe projections for Ferro were " REDACTED
REDACTED
REDACTED").

During the August 7 Board meeting, Latham informed the Board for the first time about several criminal investigations where López Madrid is *imputado* (i.e., a suspect), including the Bankia IPO Investigation, the Pinto Romero Investigation and the Infoglobal Investigation.¹⁹ The minutes establish that the Board was unaware of these serious investigations, even though the investigations were pending when the Board approved the deal in February.²⁰ The Board also learned of Villar Mir's involvement as *imputado* in the Punica Investigation.²¹ Following Latham's presentation, the Board concluded that it would not change its recommendation.²²

Because the BCA does not permit the Board to change its recommendation unless it would be a breach of fiduciary duty not to do so, the Board was not asked whether it *would have approved the Transaction* if it had known of all the serious allegations against López Madrid on February 22, 2015.²³ The Board was simply not free to change its recommendation based on the severity of the allegations against López Madrid alone. Moreover, the Board could not rely on its own failure to investigate publicly available information on López Madrid before approving the

¹⁹ *Id.* at 3-4.

²⁰ *Id.*

²¹ The August 7 Board minutes contain no discussion of López Madrid's involvement in the Punica Investigation. *Id.*

²² *Id.*

²³ *Id.*

Transaction in February, particularly when they were aware of one criminal investigation.²⁴

The Board purportedly decided not to consider a change in recommendation because it believed the Globe rollover directors could protect Globe stockholders by preventing López Madrid from serving as Executive Vice-Chairman if the situation worsens.²⁵ However, the Globe rollover directors cannot prevent López Madrid's appointment or force his removal so long as Ferroglobe's controlling stockholder (López Madrid's father-in-law) wants him to act as Executive Vice-Chairman.²⁶

After the Board raised concerns in February 2015 about López Madrid's appointment to the Ferroglobe board because of the Bankia Credit Card Investigation, the Board negotiated an extra board seat for another Globe rollover director, while agreeing that Globe would have “ **REDACTED** ” over the appointment of López Madrid to the Ferroglobe board.²⁷ Kestenbaum testified that once the Transaction closes, the rollover Globe directors cannot remove López

²⁴ See *Van Gorkom*, 438 A.2d at 888.

²⁵ Globe Defendants' Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction (Transaction ID 57727855) (“Def. Br.”) at 58-59; DeFelice Aff. Ex. 42.

²⁶ Kestenbaum Dep. Tr. at 234-35.

²⁷ See López Madrid Dep. Tr. at 160; Op. Amato Aff. Ex. 33. The strict limitations on removal of directors are generally described in the Definitive Proxy and set forth in the Ferroglobe Articles of Association. See Reply Amato Aff. Ex. 1 at 163, 229; Ex. 7 Annex F, §§ 31, 34.3. López Madrid is not subject to potential removal by Ferroglobe's Nominating and Corporate Governance Committee for character and integrity as he is not a “Qualified Director Nominee.” *Id.* at § 25.8(b).

Madrid from the Ferroglobe board.²⁸ Thus, the Board's belief that Globe rollover directors can protect Globe stockholders from the life-long appointment of López Madrid to the Ferroglobe board was ill-informed.²⁹

B. The Board's February 22 Approval Does Not Satisfy *Revlon*

1. Kestenbaum Was Motivated to Deceive the Board

“[W]hen a board is deceived by those who will gain from such misconduct, the protections girding the decision itself vanish. Decisions made on such a basis are voidable at the behest of innocent parties to whom a fiduciary duty was owed and breached, and whose interests were thereby materially and adversely affected.”³⁰

²⁸ Kestenbaum Dep. Tr. at 235 (“Q. And the Globe directors collectively could not remove him either, can they? A. It is my understanding from the documents that is correct.”).

²⁹ *Rural Metro*, 88 A.3d at 94 (finding *Revlon* violation because the board was unaware of financial advisor's “manipulation of its valuation metrics”); *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 444-45 (Del. Ch. 2012) (finding reasonable probability of success for *Revlon* claim when CEO kept material information from the board including his secret interest in a post-transaction leveraged buyout); *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 836 (Del. Ch. 2011) (enjoining merger because there was “fraud upon the board” when financial advisor “deceived” the board) (quoting *Mills Acq. Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1989)); *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 938 (Del. 2003) (“The directors of a Delaware corporation have a continuing obligation to discharge their fiduciary responsibilities, as future circumstances develop, after a merger agreement is announced.”); *see also Frontier Oil v. Holly Corp.*, 2005 WL 1039027, at *27 (Del. Ch. April 29, 2005) (noting directors' continuing obligation to evaluate the propriety of a proposed merger post-signing when they learned about previously undisclosed litigation risks for the merger partner).

³⁰ *Del Monte*, 25 A.3d at 836 (quoting *Mills*, 559 A.2d at 1283-84).

Here, Kestenbaum manipulated the Board to secure personal benefits, including a guaranteed three year term as Executive Chairman with virtually guaranteed bonuses exceeding \$42 million, the option to leave Ferroglobe in 2016 with a guaranteed payout of \$48.3 million and the right to sell his Ferroglobe stock in a secondary offering.³¹

Kestenbaum's registration and public offering rights are a valuable personal benefit not shared with other Globe shareholders. It is much easier for Kestenbaum to liquidate a 6% stake in the much larger Ferroglobe than a 12% stake in Globe because of so-called "blocking discounts."³² Defendants' argument that Kestenbaum would not "sacrifice between \$ REDACTED and \$ REDACTED in equity value to gain approximately \$ REDACTED in *potential* bonus"³³ underestimates the value of the benefits Kestenbaum will get in bonuses, termination payments and

³¹ Reply Amato Aff. Ex 1 at 75; Ex. 6, Annex E at E-5, 6; Ex. 7, Annex F, §§ 32.4, 34.3(a), 34.3(b)(vii); Kestenbaum Dep. Tr. at 74-79, 111; Plaintiffs' Op. Br. at 10 nn.21-23, 11; Barger Dep. Tr. at 149-151. Defendants' contention that Barger rejected Kestenbaum's request for a single trigger change-in-control payment (Def. Br. At 19) is not supported by the record. Indeed, one of the documents Defendants cite for this proposition is completely redacted.

³² See Def. Br. at 43-44; IRC, Sec. 2031-2(b)(1); 26 CFR 25.2512-2(e); Shannon P. Pratt, Blockage Discounts, Chapter 8 in *Business Valuation Discounts & Premiums*, 2009, at 118-127. Defendants fail to account for the fact that if Kestenbaum wanted to sell his large block of stock in the open market, he would suffer a discount to the prevailing stock price.

³³ Def. Br. at 43-44.

stock sale rights.³⁴ These private benefits are worth more than the potential reduction in the value of Kestenbaum's equity.

Kestenbaum's self-interest was also evident in his negotiations with redacted. Kestenbaum cancelled a November 18 meeting with Redacted when it became clear that he would not be Executive Chairman of a combined company.³⁵ Villar Mir promptly agreed to make him Executive Chairman of Ferroglobe, and Kestenbaum agreed to the 57/43 split favoring Grupo.³⁶

C. Kestenbaum Repeatedly Misled the Board

“[W]hen corporate directors rely in good faith upon opinions or reports of officers and other experts ‘selected with reasonable care,’ they necessarily do so on the presumption that the information provided is both accurate and complete.”³⁷

The evidentiary record and Defendants' August 7, 2015 attempt to “cure” the Board's uninformed approval of the BCA demonstrates that the information provided to the Board in February 2015 was neither accurate nor complete.

³⁴ The cases Defendants cite for the proposition that a stock-holding fiduciary's interests are necessarily aligned with public stockholders do not address situations where the fiduciary is using the transaction for the personal benefit of including his block of stock in a post-closing offering. Def. Br. at 43 n.20.

³⁵ Op. Amato Aff. Ex. 49 at GLOBE_000003856-57. Indeed, when REDACTED proposed a transaction in January 2015 that would have provided Globe stockholders 49% of the combined company's equity, Kestenbaum again cut-off discussions knowing he would not be offered the Executive Chairman position. Reply Amato Aff. Ex. 13 at GS-00086860.

³⁶ Reply Amato Aff. Ex. 1 at 68.

³⁷ *Del Monte*, 25 A.3d at 836 (quoting *Mills*, 559 A.2d at 1283-84).

1. Kestenbaum Provided Inaccurate and Incomplete Financial Information

Kestenbaum misled the Board by: (i) using the erroneous Globe projections for Ferro; (ii) changing Ferro's best currently available 2015 EBITDA estimate of € Redacted (or \$ Redacted) to \$ Redacted ; (iii) withholding Ferro's projections from the Board and Goldman; (iv) using synergy numbers that Ferro said were unrealistic and Globe's management abandoned in the joint press release announcing the Transaction; (v) withholding the MorganFranklin Report; and (vi) not disclosing that Globe's own model showed Globe was worth much more than 43% of Ferroglobe.³⁸ Defendants attempt to rebut these facts by submitting four lawyer-prepared affidavits that contradict the record and were not subject to cross-examination. This Court discounts such one-sided attempts to rewrite the record.³⁹ Moreover, none of the affidavits contradict the following facts.

³⁸ Plaintiffs' Op. Br. at 14-15, 18-26, 36-47.

³⁹ See, e.g., *Del Monte*, 25 A.3d at 819 ("With their answering briefs, the defendants lobbed in four affidavits from witnesses who were deposed. Each of these lawyer-drafted submissions sought to replace the witnesses' sworn deposition testimony with a revised and frequently contradictory version. . . . I have discounted these 'non-adversarial proffers' and relied on the deposition testimony and contemporaneous documents) (citations omitted); *LeCroy Corp. v. Hallberg*, 2009 WL 3233149, at *2 n.16 (Del. Ch. Oct. 7, 2009) (affording limited weight to belatedly filed affidavit of someone not previously deposed); *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *3 n.26 (Del. Ch. Nov. 5, 2004) (giving "limited weight [to an affidavit submitted at the injunction stage] since the affiant was not deposed").

shipment volumes and commodity price assumptions⁴⁴ is hindsight nonsense.

Ferro's 2015 projections of revenue and cost-of-goods-sold include REDACTED

REDACTED

REDACTED

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Third, Kestenbaum admitted that the financial projections presented to the Board made no sense because they speculated that from 2014 to 2015 Ferro would experience declining gross profits, while dramatically increasing its EBITDA from \$ REDACTED to \$ REDACTED⁴⁶

Defendants argue that Kestenbaum merely conceded that the presentation to the Board provided incorrect information about Ferro's actual performance in 2014 rather than incorrect information about Ferro's estimated performance in 2015. Either way, the financial information was wrong. Although Ferro's actual performance in 2014 was easily verifiable, Kestenbaum's litigation affidavit makes no attempt to explain the error – strongly suggesting the error was not in the 2014

⁴⁴ Def. Br. at 28.

⁴⁵ See Op. Amato Aff. Ex. 41 (REDACTED); López Madrid Dep. Tr. at 30-32.

⁴⁶ Kestenbaum Dep. Tr. at 270.

numbers, but in Kestenbaum's unrealistic increase in Ferro's projected 2015 EBITDA.⁴⁷

2. Kestenbaum Withheld the Critical MorganFranklin Report

Defendants admit that Kestenbaum withheld MorganFranklin's critical due diligence report,⁴⁸ which raised concerns about REDACTED

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Based on an affidavit from Barger, Defendants claim that it was unimportant for the Board to receive the MorganFranklin Report before they approved the deal. Barger testified that the report raised several issues, but his affidavit claims that after discussion of the MorganFranklin Report at the August 7, 2015 Board meeting, he would not " REDACTED " in support of the deal.⁵⁰ However, by August 7, Barger and the other directors had already approved the limited fiduciary out in the BCA. The effect disclosure of the MorganFranklin Report at the February 22 Board meeting would have had on the Board's initial approval of the Transaction cannot be determined.

3. Kestenbaum Withheld Ferro's Lower Synergies

⁴⁷ Kestenbaum Aff. ¶¶ 7-9; Barger Dep. Tr. at 51-54. Goldman – whose February 22 presentation materials included the incorrect Ferro projections – relied on Kestenbaum for the financial projections and also did not inform the Board that they were wrong. Op. Amato Aff. Ex. 26; Gordon Dep. Tr. at 61-72.

⁴⁸ Def. Br. at 57-58; Ragen Aff. ¶¶ 11-12.

⁴⁹ Plaintiffs' Op. Br. at 25-26, 44-46.

⁵⁰ Compare Barger Dep. Tr. at 57-74, with Barger Aff. ¶ 9.

Globe management presented its synergy projections to the Board on February 22, but did not present Ferro's substantially lower synergy projections or reveal that Ferro disagreed with Globe's synergy projections. Moreover, the next day, in the joint press release announcing the Transaction, Globe management mutually agreed with Ferro on the Ferro Synergy Projections.⁵¹ Thus, the Board admittedly approved the Transaction based on projected synergies that Globe management knew were disputed by Ferro.⁵² The primary rationale for the deal was the supposed synergies by combining Globe with Ferro.⁵³ Consequently, the dispute between Globe and Ferro's significantly lower synergy projections were highly material to the Board's consideration of the Transaction.⁵⁴ Because management withheld highly material information from the Board, the Board was not adequately informed.

Relying on cases where there was no disagreement about achievable synergies, Defendants argue that the Board's approval was fully informed and

⁵¹ Supp. Amato. Aff. Ex. 59.

⁵² Def. Br. at 55-56.

⁵³ Kestenbaum Dep. Tr. at 37, 84-85; López Madrid Dep. Tr. at 95 (synergies "were crucial.").

⁵⁴ *El Paso Corp. S'holder Litig.*, 41 A.3d at 444-45; *Del Monte*, 25 A.3d at 836.

reasonable, so long as Globe management believed in their own disputed projections.⁵⁵ That is not Delaware law.⁵⁶

4. Goldman's Involvement Does Not Fix the Tainted Board Process

Defendants argue that the Board acted reasonably because it relied on an independent financial advisor.⁵⁷ However, Goldman was not informed that Ferro had prepared a 2015 budget in the ordinary course of business that projected 2015 EBITDA of €REDACTED,⁵⁸ ignored the Ferro Management Projections in favor of the unrealistic Globe Projections for Ferro and made numerous errors. Therefore, Goldman's fairness opinion is unreliable and does not support the reasonableness of the Board's approval process.⁵⁹

Moreover, Goldman was not an independent financial advisor to the Board. Kestenbaum brought Goldman into the process late, more than a month *after* he

⁵⁵ Def. Br. at 62.

⁵⁶ To satisfy *Revlon*, “directors have a duty to act *in a fully informed manner*.” *Koehler v. Netspend Holdings Inc.*, 2013 WL 2181518, at *10 (Del. Ch. May 21, 2013) (citation omitted) (emphasis added); *Barkan*, 567 A.2d 1279 at 1286; *see also Mills*, 559 A.2d at 1283 (officers may not use superior information or knowledge to mislead others in the performance of their own fiduciary obligations).

⁵⁷ Def. Br. at 65.

⁵⁸ Goldman's Gordon testified that Ferro's most recent projections were included in the September 4, 2014 Fitch presentation. Gordon Dep. Tr. at 72-73 (cited in Def. Br. at 51).

⁵⁹ *See Koehler*, 2013 WL 2181518, at *16-17, n.211 (a Board's reliance on a weak fairness opinion “pushes [its] decisions farther towards the limits of the range of reasonableness”).

agreed to the 57/43 equity split.⁶⁰ He agreed to pay a \$REDACTED contingent fee to Goldman with a \$REDACTED discretionary bonus and a lucrative “lead role” in the secondary offering of Ferroglobe stock.⁶¹ As Chief Justice Strine has explained, this scenario virtually ensured that the Board would not do right by Globe’s stockholders:

If independent directors get weak advisors, they will screw up. They will not do right by the stockholders, they will get sued, and they may lose or at the very least, get publicly embarrassed.⁶²

5. Kestenbaum Co-Opted the Board

Defendants argue that the Board acted independently when it approved the Transaction. Kestenbaum, however, used rollover seats on the Ferroglobe board to incentivize the other directors, who were frustrated with their director

⁶⁰ Gordon Dep. Tr. at 50-52.

⁶¹ Op. Amato. Aff. Ex. 29 at GLOBE_000000152-53.

⁶² Leo E. Strine, Jr., Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone (*The Business Lawyer*, Volume 70, May 2015) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514520. Defendants’ reliance on *In re Smurfit-Stone Container Corp.*, 2011 WL 2028076 (Del. Ch. May 24, 2011) and *In re Alloy, Inc., S’holder Litig.*, 2011 WL 4863716 (Del. Ch. Oct. 13, 2011) is misplaced. In neither case did the court find that the board’s reliance on a financial advisor who provided a fairness opinion and presentation that contained mathematical errors, inadequate, incomplete and misleading information supported a finding of reasonableness.

compensation, to support the Transaction.⁶³ Because the roll-over directors have still not been announced, each Globe director has a reasonable expectation of appointment to an unassailable seat on the Ferroglobe board for the indefinite future and the opportunity to earn more income.⁶⁴

Defendants characterize these lucrative board seats as “minority stockholder protections” for Globe stockholders.⁶⁵ However, these board positions are really just protections for Kestenbaum and the rollover board members.⁶⁶ No Ferroglobe board member, including the rollover board members, can be removed by the Globe stockholders.⁶⁷

⁶³ Barger Dep. Tr. at 172-73; Op. Amato Aff. Ex. 30. The Board’s desire to earn more compensation disables Defendants’ reliance on *In re KKR Fin. Hldgs. LLC S’holder Litig.*, 101 A.3d 980, 996 (Del. Ch. 2014). The record establishes a personal financial interest in the transaction for the Board rather than the mere prospect of being nominated to the Ferroglobe board. Each director’s expectation to rollover and desire to receive higher compensation go “to the interest and lack of independence of the *individual members* of the board.” *In re TriQuint Semiconductor, Inc. S’holders Litig.*, 2014 WL 2700964, at *3 (Del. Ch. June 13, 2014) (emphasis supplied).

⁶⁴ Barger Dep. Tr. at 181-82.

⁶⁵ Def. Br. at 17, 68-74.

⁶⁶ Defendants’ contention that the Board will select the Rollover Directors is false. The BCA specifically states that the “independent GSM Designees shall be designated **by GSM** from the current members of the GSM Board **after consultation with Grupo VM.**” Reply Amato Aff. Ex. 2, Annex A at § 1.11(a) (emphasis added). Thus, Kestenbaum and Grupo VM will have the authority to select the Rollover Board Members.

⁶⁷ Kestenbaum Dep. Tr. at 118 (conceding Globe stockholders cannot remove any directors).

D. The Manipulated Process Results in a Negative Premium Deal

When evaluating a merger, this Court examines whether the consideration represents a “premium over the Company’s unaffected stock price.”⁶⁸ The unaffected stock price of Globe was **\$15.37** per share on February 20, 2015 (the last trading day before the Merger was announced).⁶⁹ The value of the merger consideration was and is less than \$15.37 per share.⁷⁰

Indeed, even Defendants’ expert, Professor Jarrell, calculated the discounted cash flow value of the merger consideration as only \$^{REDACTED} per share, representing a **REDACTED** per share compared to Globe’s unaffected stock price.⁷¹

Defendants and their expert attempt to reframe the issue by claiming the merger

⁶⁸ *SEPTA v. Volgenau*, 2013 WL 4009193, at *22 (Del. Ch. Aug. 5, 2013); *see also*, e.g., *In re BJ's Wholesale Club, Inc.*, 2013 WL 396202 at *13 (Del. Ch. Jan. 31, 2013) (same); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1140 (Del. Ch. 1994) (same); *In re S. Peru*, 52 A.3d at 819 (“healthy, solvent public companies are usually sold at a premium to the unaffected trading price of everyday sales of the company's stock”). Even when a merger price is at a premium to the unaffected stock price, it may still be unfair. *See, e.g., Harris v. Rapid-American Corp.*, 1992 WL 69614, at *1, 4 (Del. Ch. Apr. 6, 1992) (\$28 merger price, representing a 28% premium over unaffected trading price, was only a third of the adjudicated fair value of \$73.29); *In re Shell Oil Co.*, 1990 WL 201390, at *14-15, 38 (Del. Ch. Dec. 11, 1990), *aff'd*, 607 A.2d 1213 (Del. 1992) (market price \$44, adjudicated fair value \$71.20). Here, the Merger price provides a negative premium to Globe’s unaffected stock price.

⁶⁹ Op. Amato Aff. Ex. 27 at GLOBE000000071.

⁷⁰ *Id.*, Corrected Ex. 21, Op. Amato Aff. Ex. 23; Plaintiffs’ Op. Br. 51-58. Neither Defendants nor their expert disagree with, or have taken any issue with, Mr. Jeffers’ corrections to Goldman’s WACC, cash flow and capital expenditures errors.

⁷¹ Op. Amato Aff. Ex. 22 at 13.

consideration is a premium to their own, lower DCF value for Globe. However, there is no premium to the unaffected stock price, indicating the market is not buying Defendants' speculation that the combination will generate enormous synergies.

E. The Board Failed to Protect the Globe Stockholders

Defendants' discussion of supposed protections for the Globe stockholders⁷² ignores that the Transaction will eliminate their most fundamental stockholder protections: the ability to elect directors and determine the outcome of fundamental transactions and other matters requiring stockholder approval.⁷³ The Globe stockholders "are entitled to a control premium and/or protective devices of significant value."⁷⁴

All directors of Ferroglobe will be elected by Grupo VM, which is required to vote for its designees and the designees of the Nominating Committee.⁷⁵ The public stockholders of Ferroglobe (*i.e.*, the former Globe stockholders) will have no say in electing or nominating even a single director. The former Globe stockholders will

⁷² Def. Br. at 68-75.

⁷³ *QVC Network Inc.*, 637 A.2d at 42-43 (Absent effective minority stockholder protections, where a merger will transfer control to a majority stockholder, "the minority stockholders have lost the power to influence corporate direction through the ballot.").

⁷⁴ *Id.* at 43.

⁷⁵ Plaintiffs' Op. Br. at 12.

not have any “truly independent representatives on the Ferroglobe Board”⁷⁶ because the still-unidentified Globe Board rollovers will not be elected by or accountable to those stockholders. Instead, they will be able to designate themselves to the Ferroglobe board indefinitely.⁷⁷ Moreover, the Globe Defendants do not dispute that the Ferroglobe directors and Grupo VM will not be accountable to the former Globe stockholders through litigation.⁷⁸

Defendants’ claim that Globe stockholders will be more protected than under Delaware law and Globe’s organizational documents⁷⁹ is disproven by Grupo VM’s control of Ferroglobe at the stockholder, board and management levels. Grupo VM will have majority stockholder voting power, will designate a majority of the Ferroglobe board, and has designated Ferroglobe’s Executive Vice-Chairman, CEO and other members of management.⁸⁰

English law is *less* protective of stockholders because, as the Proxy Statement admits, there are (i) no regulatory regime for proxy solicitation, (ii) no appraisal rights, (iii) no equivalent to 8 *Del. C.* § 203 and (iv) no stockholder actions.⁸¹ The English “scheme of arrangement” provisions are not applicable to tender offers, and

⁷⁶ Def. Br. at 69.

⁷⁷ Plaintiffs’ Op. Br. at 12.

⁷⁸ *Id.* at 66; Reply Amato Aff. Ex. 1 at 256-58.

⁷⁹ Def. Br. at 68.

⁸⁰ Plaintiffs’ Op. Br. at 61-63.

⁸¹ Reply Amato Aff. Ex. 1 at 231, 233-34, 243-44, 246.

English law would permit an irrevocable undertaking by Grupo VM to tender its majority position, effectively locking up a public deal.⁸² Because the scheme can be approved by 75% of those voting, not 75% of the shares outstanding,⁸³ Grupo VM likely can satisfy the voting requirements by itself and certainly with Kestenbaum's support.

While the Globe Defendants mention the supposed protections provided by the BCA, Articles of Association and Grupo VM Shareholder Agreement,⁸⁴ they fail to address the lack of stockholder voting protections, the ineffectiveness of the supposed board protections and the huge holes in the standstill provisions.⁸⁵

The Globe Defendants also fail to address the nine exclusions from Grupo VM's standstill, the inapplicability of the standstill to matters that do not require a two-thirds board vote, and the ability to evade the standstill by a two-thirds board

⁸² Kobi Kastiel, To-may-to To-mah-to: 10 Surprises for a US Bidder on a UK Takeover, at 1, 5-6 <http://corpgov.law.harvard.edu/2014/04/04/to-may-to-to-mah-to-10-surprises-for-a-us-bidder-on-a-uk-takeover/>; Scott Davies and Kate Ball-Dowd, Deal Protection Mechanisms in the US and the UK, Mergers and Acquisitions 2008/9, at 17,

https://www.mayerbrown.com/files/Publication/24d6f9fe-ff4e-44aa-b91f-6556860864d8/Presentation/PublicationAttachment/f7ca1a5f-3014-490f-bdfe-dc2aee5e8686/ART_DEALPROTECTION_MAY08.PDF.

⁸³ Def. Br. at 74.

⁸⁴ Def. Br. at 69-74.

⁸⁵ Plaintiffs' Op. Br. at 63-66.

vote by Kestenbaum and Grupo VM's designees.⁸⁶ Similarly, Article 33.12's limitation on a director's voting on matters where he has an interest (other than an interest in Ferroglobe securities): (i) does not say who determines whether the director has an interest that "can be reasonably regarded as likely to give rise to a conflict with interests of the Company; (ii) has seven broad exceptions; and (iii) does not provide the same protections of 8 *Del. C.* § 144 and Delaware fiduciary duty law.⁸⁷ The "Special Committee" under § 10.6 of the BCA has only three limited functions and cannot protect any stockholder rights under the BCA because, under § 11.8 of the same agreement, the Globe stockholders have no such rights.

The Globe Defendants try to excuse the Globe Board's failure to protect Globe's stockholders by arguing that the stockholders can vote down the Transaction—in other words, the stockholders are left to protect themselves. But under Delaware law, the Board had an affirmative fiduciary duty to protect the stockholders and could not abdicate that fiduciary obligation by leaving it to the stockholders to decide.⁸⁸ Defendants' argument also illustrates how unprotected the

⁸⁶ *Id.* at 65.

⁸⁷ Reply Amato Aff. Ex. 7, Annex F.

⁸⁸ *Van Gorkom*, 488 A.2d at 872-73; *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 755 n.460 (Del. 2005). *See also* Lawrence A. Hamermesh, "A Kinder, Gentler Critique of *Van Gorkom* and Its Less Celebrated Legacies," 96 Nw. U. L. Rev. 595, 596-97 (2002).

former Globe stockholders will be as stockholders of Ferroglobe, where their votes will not matter.

The lame provisions that the Globe Defendants assert as protections stand in stark contrast to the protections in *C&J Energy Services, Inc. v. Miami Gen. Emps. and Sanitation Emps. Ret. Trust*, 107 A.3d 1049 (Del. 2014). The C&J board insisted on protections that made C&J the acquiror, neutralized Nabors' nominal majority stock ownership, retained board and management control, provided business combination protection similar to 8 *Del. C.* § 203, included a poison pill rights plan applicable to Nabors and required stockholder approval of bye-law amendments, often by supermajority vote.⁸⁹ Moreover, in *C&J*, unlike here, the two-thirds director vote for waiving standstill restrictions and on other matters could not be satisfied by the votes of the majority stockholders' designees and the Chairman.⁹⁰ Finally, *C&J* included a broad and iron-clad same-consideration bye-law that could only be changed or repealed by a unanimous stockholder vote.⁹¹ The numerous meaningful protections in *C&J*, absent here, demonstrate how the Globe Board failed miserably to protect the Globe stockholders.

F. The Board Was Not Adequately Informed about the Numerous Criminal Investigations into López Madrid

⁸⁹ *C&J*, 107 A.3d at 1061-63, 1069-70; Reply Amato Aff. Ex. 11 at 237.

⁹⁰ *C&J*, 107 A.3d at 1062.

⁹¹ *Id.* at 1062-63.

Defendants concede that the Board was only aware of one of five criminal investigations implicating López Madrid when it approved the Transaction.⁹² Defendants argue that the one-day investigation of the Bankia Credit Card Investigation somehow rendered the Board's February 22, 2015 decision approving the deal fully informed.⁹³ Not so. If the Board had instructed Goldman and Latham to conduct a thorough investigation, the Board would have learned in February 2015 about the Bankia Investigation, the Pinto Romero Investigation and the Infoglobal Investigation.⁹⁴

II. THE GLOBE DIRECTORS BREACHED THEIR DUTY OF DISCLOSURE

A. The Proxy Statement Does Not Disclose the August 7, 2015 Board Meeting

Under 8 *Del. C.* § 251 and Delaware law, a board has an ongoing obligation to review and update its recommendation.⁹⁵ The board's recommendation is material information that must be communicated to stockholders to inform their

⁹² Def. Br. at 32-35; DeFelice Aff. Ex. 42.

⁹³ Def. Br. at 58-59.

⁹⁴ Defendants do not address that López Madrid failed to identify the criminal investigations other than the Bankia Credit Card Investigation and Pinto Romero Investigation when asked under oath at his deposition to identify other criminal investigations. López Madrid Dep. Tr. at 166.

⁹⁵ *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 491 (Del. Ch. 2013); *Frontier Oil Corp.*, 2005 WL 1039027, at *28.

vote on a merger.⁹⁶ The obligation to provide a current recommendation can be viewed as a duty to update prior material statements.⁹⁷

The Board met on the morning of August 7, 2015 to “ REDACTED
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meeting covered important subjects: REDACTED

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August 7 meeting, each director determined, “ REDACTED

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REDACTED ”¹⁰⁰

Globe filed revised preliminary proxy materials later on August 7 and issued the definitive Proxy Statement on August 12, 2015. The Proxy Statement describes various Globe Board meetings, but does not even acknowledge that the August 7 meeting occurred, much less describe the matters discussed and actions taken at that meeting. Under Delaware law, the directors’ obligation to provide a current

⁹⁶ *Primedia*, 67 A.3d at 491.

⁹⁷ *Id.*

⁹⁸ DeFelice Aff. Ex. 42 at 1. *See also* Def. Br. at 38-39, 52-53, 58; Barger Aff. ¶ 9; Ragen Aff. ¶¶ 9, 17.

⁹⁹ DeFelice Aff. Ex. 42 at 1-6; Def. Br. at 38-39, 52-53, 58; Ragen Aff. ¶¶ 9, 17.

¹⁰⁰ DeFelice Aff. Ex. 42 at 6; Def. Br. at 39.

recommendation includes disclosing their meeting to consider additional information and evaluate whether to reconsider the Board's recommendation of the Transaction. A reasonable stockholder would want to know that: (i) a Board meeting had been very recently held; (ii) the Globe Board reviewed the MorganFranklin Report, was briefed on all five of the investigations and was provided with a comparison that showed Ferro's actual results for the first half of 2015 were close to Ferro's projections but far less than Globe's projections; and (iii) with that information, the directors determined to continue to recommend the Transaction. Stockholders would consider this information important in evaluating the Board's performance and recommendation, whether as a positive reconfirmation of the Board's approval or as a negative indication that the Board continued with the Transaction despite these serious questions.¹⁰¹

B. The Proxy Statement Does Not Disclose Ferro's First Half Results or the Comparison to the Globe and Ferro Projections

The Proxy Statement discloses Ferro's actual results through December 31, 2014, Ferro's projections provided to Fitch in September 2014, Ferro's budget numbers for 2015 and Globe's projections for Ferro for 2015.¹⁰² The Proxy

¹⁰¹ *Matador Capital Mgt. Corp. v. BRC Holdings Inc.*, 729 A.2d 280, 295 (Del. Ch. 1998) ("Delaware law requires directors who disclose such a recommendation also disclose such information about . . . their reason for approving the transaction so as to be materially accurate and complete.").

¹⁰² Reply Amato Aff. Ex. 1 at 23-25, 82-85.

Statement says that the projections were included because they were provided to the Globe Board by Globe management, that the projections are inherently uncertain and that actual results may differ materially from the projections.¹⁰³

On August 7, 2015, Globe management provided the Board with Ferro's actual results for the first half of 2015 and a comparison that showed these actual results differed materially from Globe's projections, but were close to Ferro's budget and projections.¹⁰⁴ For example, Ferro's actual EBITDA for the first half of 2015 was € REDACTED , compared to Globe's projection of €141.3 million. Ferro's actual EBITDA approximated Ferro's 2015 Budget projections of € REDACTED and the Fitch presentation (i.e. the Ferro Management Projections) number of €90.8 million.¹⁰⁵

The Proxy Statement does not disclose either the Ferro 2015 first half actual results or the comparison to the various projections. This information was important enough that it was provided to the Globe Board at a special meeting where the directors were asked whether their favorable recommendation should be reconsidered. The actual results and comparison to projections would also be information a reasonable Globe stockholder would want. Hard numbers on Ferro's

¹⁰³ *Id.* at 81.

¹⁰⁴ DeFelice Aff. Ex. 42 at 5 and attached Board of Directors Meeting Transaction Update August 7, 2015 at 13-15 ("August 7 Update").

¹⁰⁵ August 7 Update at 15.

recent performance are at least as significant as inherently uncertain projections in evaluating what Ferro's future performance might be. The comparison of the actual results to the different projections contained in the Proxy Statement is also material to the stockholders' evaluation whether Globe's or Ferro's projections may be more reliable.

C. The Disclosure of the Investigations Remains Materially Misleading and Incomplete

Globe says that the Proxy Statement discloses "details regarding the criminal investigations" of López Madrid and Villar Mir, such that further "details" need not be disclosed.¹⁰⁶ Globe ignores Delaware's doctrine of partial disclosure, which requires disclosure of additional facts necessary to make Globe's disclosure complete and not misleading.¹⁰⁷ Once information about investigations is disclosed, a full description is required.¹⁰⁸

The Proxy Statement's partial disclosures fail to provide facts that are material to (i) the credibility and fitness for association with Ferroglobe of López Madrid and Villar Mir and (ii) whether the Globe Board was diligent and informed and acted reasonably in entering into, amending, continuing to pursue and recommending the Transaction.

¹⁰⁶ Def. Br. at 76-78.

¹⁰⁷ *Arnold v. Society for Savings*, 650 A.2d 1270, 1280 (Del. 1994).

¹⁰⁸ *In re Immucor Inc., Secs. Litig.*, 2006 WL 3000133, at *13 (N.D. Ga. Oct. 4, 2006).

1. No Disclosure of the Timing of the Board's Knowledge of and the Denials Concerning the Investigations

The Proxy Statement repeatedly says that López Madrid and Villar Mir “advised” Globe that each of them “vehemently denies” the allegations in the various investigations.¹⁰⁹ It does not say when López Madrid and Villar Mir so advised Globe.

The Proxy Statement does not inform the stockholders of what the Globe directors knew about the investigations and when they knew it, including what the Board knew on February 22, 2015 when it approved the BCA. This basic information is necessary for an evaluation of the directors’ conduct regarding the investigations. The August 7 minutes demonstrate that, except for the Bankia Credit Card Investigation, the Board was not aware of the other investigations until the August 7 meeting and just accepted the denials by López Madrid and Villar Mir.

2. The Punica Investigation of López Madrid and Villar Mir

Having made disclosure concerning (i) several criminal investigations involving López Madrid and (ii) Villar Mir being *imputado* in the Punica Investigation as to contract fixing by Obrascón Huarte Lain (“OHL”), further disclosure that López Madrid is a director of OHL and has been called before the same court in the same investigation regarding contract fixing allegations is

¹⁰⁹ Reply Amato Aff. Ex. 1 at 193-94. Significantly, as to the Bankia Credit Card Investigation, the Proxy Statement does not say that López Madrid has advised Globe that he denies the charges.

necessary to make the Proxy Statement's account a full and fair summary. Simply because López Madrid was not called as *imputado* in the Punica Investigation¹¹⁰ does not excuse the failure to disclose that he has been called as a witness to respond to these allegations. The risk to Globe stockholders of becoming stockholders in a company where López Madrid is a director, Executive Vice-Chairman and the son-in-law of the majority stockholder does not begin only when López Madrid becomes *imputado*. Globe's attempt to dismiss López Madrid's involvement in the Punica Investigation as based on *media reports*¹¹¹ ignores that the Proxy Statement¹¹² discloses Villar Mir's involvement in that investigation based on what "news media ... reported" on July 29, 2015, and that the Board received other information that was based on "media coverage."¹¹³

The Proxy Statement also provides the misleading partial disclosure that OHL is "a company partially owned by Grupo Villa Mir and of which Villar Mir is the Chairman...."¹¹⁴ In fact, OHL is controlled and majority owned by Grupo VM, which holds 58.45% of OHL's stock and OHL is the largest of the constituent companies of Grupo VM, produces most of its earnings and cash flow, and

¹¹⁰ Def. Br. at 77.

¹¹¹ *Id.*

¹¹² Reply Amato Aff. Ex. 1 at 194.

¹¹³ DeFelice Aff. Ex. 42 at 3-4.

¹¹⁴ Reply Amato Aff. Ex. 1 at 194.

constitutes most of its assets.¹¹⁵ At the August 7 Board meeting, the Globe directors were informed that OHL is “a construction company owned by the Villar Mir family.”¹¹⁶ López Madrid is a director of OHL, as are his wife and several other members of the Villar Mir family.¹¹⁷

3. The Bankia Bailout

The Bankia Bailout, including that the bank’s collapse caused López Madrid to resign, is a material matter, particularly given the disclosures that López Madrid is *imputado* in two Bankia-related investigations. The Globe Board was told at its August 7 meeting that:

Following the IPO, Bankia failed and was taken over by the Spanish government in 2012.¹¹⁸

Having made partial disclosures regarding the two Bankia investigations, the directors are required to disclose what led to those investigations – *i.e.*, the collapse of the bank within ten months of its IPO, the loss in the value of its stock and the bailout by the Spanish government. These events are material to (i) the fitness of López Madrid as a director, officer and control person of Ferroglobe and (ii) the decision of Globe stockholders whether they want shares in a public company where López Madrid is a director.

¹¹⁵ Reply Amato Aff. Ex. 9 at 5, 7-8, 10, 36 (Annex 1 – OHL 2014 Results).

¹¹⁶ DeFelice Aff. Ex. 42 at 4.

¹¹⁷ Reply Amato Aff. Ex. 10 at 6-8; Op. Amato Aff. Exs. 2, 3.

¹¹⁸ DeFelice Aff. Ex. 42 at 3.

4. The Infoglobal Investigation

The Proxy Statement conveys the misleading impression that only Grupo Urbina is alleged to have failed to disclose negative information on Infoglobal before selling Infoglobal shares, and that López Madrid is not implicated because he is merely a passive investor in Grupo Urbina.¹¹⁹ The August 7 Board minutes, however, reveal that “Mr. López Madrid was a significant minority investor in Grupo Urbina and had introduced the investors to the investment opportunity.”¹²⁰ Thus, López Madrid is personally accused of misleading investors to sell them shares of Infoglobal.¹²¹

D. Materiality

Globe does not contest the numerous reasons why full and accurate disclosure of the investigations is material.¹²² The Globe Board’s August 7 discussion acknowledges that the investigations are material to López Madrid’s fitness to be Executive Vice-Chairman and a director of Ferroglobe.¹²³ The minutes of the August 7 meeting state:

¹¹⁹ Reply Amato Aff. Ex. 1 at 194. *See In re Staples, Inc. S’holders Litig.*, 792 A.2d 934, 954 (Del. Ch. 2001) (directors must “avoid partial disclosures that create a materially misleading impression”) (citation omitted).

¹²⁰ DeFelice Aff. Ex. 42 at 4.

¹²¹ Op. Amato Aff. Ex. 7.

¹²² Plaintiffs’ Op. Br. at 70-71.

¹²³ DeFelice Aff. Ex. 42 at 3-4, 6.

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Thus, the Globe Board has determined that what is known to the Board is material to the stockholders in voting on the Transaction. Yet the Proxy Statement does not include information on the Bankia Bailout, the Punica Investigation of OHL and Villar Mir and the Infoglobal Investigation that was told to the Board on August 7. Moreover, the Proxy Statement does not disclose that the Globe directors received a report on the investigations at the August 7 meeting that the Globe directors “REDACTED” and that they

“REDACTED

REDACTED,” but decided to continue to recommend the Transaction anyway.¹²⁵

Loudon,¹²⁶ which was decided before Enron, other corporate scandals and the financial meltdown of 2008-2009, does not hold, as Defendants suggest, that investigations need not be disclosed when a director has not been formally charged. The Court only held that the disclosure of the investigation did not need to include

¹²⁴ *Id.* at 6.

¹²⁵ DeFelice Aff. Ex. 42 at 6.

¹²⁶ *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).

the *question*, which was not a *fact*, that plaintiff posed concerning *whether* an FBI recording existed of a corporate officer committing a violation of anti-trust law.¹²⁷ Here, Plaintiffs seek disclosure of facts about the investigations, the timing and extent of López Madrid's disclosure of the investigations, the Board's knowledge of the investigations, and the Board's consideration of and response to that information.

E. False Disclosure Regarding Ferro's Terminal Year Cash Flow

Defendants' contention that the Proxy Statement's disclosure as to the terminal year estimate of Ferro's cash flows was not misleading is, like the disclosure itself, contrary to the facts. The Proxy Statement represents that in calculating the DCF value of Globe, Goldman used "the terminal year estimate of Globe's cash flow using the Forecasts, using perpetuity growth rates of 1.0% to 3.0%."¹²⁸ It represents that in calculating Ferro's enterprise value, Goldman used "the terminal year estimate of FerroAtlántica's cash flow using the Forecasts of \$191 million, using a range of perpetuity growth rates of 1.0% to 3.0%."¹²⁹ Thus, the Proxy Statement conveys the misleading impression that Goldman merely applied 1% to 3% growth rates to Globe management's projections of terminal year

¹²⁷ *Id.*

¹²⁸ Reply Amato Aff. Ex. 1 at 89.

¹²⁹ *Id.* The Proxy Statement defines "Forecasts" to include "forecasts for Globe" and "forecasts for FerroAtlántica...as prepared by Globe's management." *Id.* at 86.

cash flows for Globe and Ferro.¹³⁰ It misleadingly suggests that Globe management's projection of Ferro's terminal year cash flow was \$191 million, when Globe management projected only \$ REDACTED for Ferro's terminal year.¹³¹ The disclosure of false information particularly calls for correction.¹³²

The Proxy Statement also fails to disclose the adjustment Goldman made to Globe management's \$ REDACTED terminal year projection for Ferro which resulted in Goldman using \$191 million as Ferro's terminal year cash flow. In projecting \$ REDACTED in Ferro cash flow for the terminal year of 2019, Globe management deducted \$ REDACTED for increased working capital.¹³³ Goldman increased that terminal year cash flow estimate to \$191 million (a REDACTED increase) by eliminating the \$ REDACTED deduction for working capital.¹³⁴ The Proxy Statement does not merely fail to disclose "why" Goldman made the adjustment.¹³⁵ It fails to disclose that Goldman made *any* adjustment and instead misrepresents that Globe management's estimate of Ferro's cash flow in the final year was \$191 million.

¹³⁰ *Staples*, 792 A.2d at 957.

¹³¹ Reply Amato Aff. Ex. 1 at 82.

¹³² *Staples*, 792 A.2d at 957.

¹³³ Op. Amato Aff. Ex. 27 at GLOBE_000000072.

¹³⁴ *Id.* Goldman also excluded increased working capital from the projection of Globe's terminal year cash flow, but because Globe management had only projected a \$2 million increase, the adjustment was only 2%. *Id.* at GLOBE_000000071.

¹³⁵ *Cf. In re BioClinica, Inc. S'holders Litig.*, 2013 WL 5631233, at *9 (Del. Ch. Oct. 16, 2013).

Goldman's adjustments increased the DCF value of Ferro by 10% to 20% while increasing the DCF value of Globe by only 1% to 2% based on the assumed perpetuity growth range of 1% to 3%. This is material.¹³⁶

F. Misleading Partial Disclosure Regarding Changes to Globe Management's Projections

The Proxy Statement discloses projections for Globe that Globe management provided to Goldman and the Globe Board relied on.¹³⁷ It twice notes that the assumptions underlying Globe management's projections are inherently uncertain and include assumptions concerning selling general and administrative expenses ("SG&A"), capital expenditures ("CAPEX") and income attributable to Globe's non-controlling interest in joint ventures with Dow Corning.¹³⁸

The Proxy Statement describes a discussion at the February 2, 2015 Board meeting concerning projections prepared by Globe management. It says there was review of "the underlying assumptions used to build the financial projections" but does not mention what assumptions were discussed.¹³⁹ In contrast, the February 2 Board minutes indicate that assumptions concerning silicon prices, SG&A and

¹³⁶ *Staples*, 792 A.2d at 955-956 (adjustment of valuations through subtraction of items can change the results significantly and are material because they "can radically alter a reasonable investor's perception of the valuation information contained in the proxy statement"). Moreover, the adjustment was wrong as a matter of finance and Delaware law. Plaintiffs' Op. Br. 56-57.

¹³⁷ Reply Amato Aff. Ex. 1 at 81-82.

¹³⁸ *Id.* at 82, 84.

¹³⁹ *Id.* at 73.

CAPEX were discussed.¹⁴⁰ The Proxy Statement says “[t]he Globe Board requested that management update the financial projections to reflect input from the directors in the meeting.”¹⁴¹ It does not say the updated financial projections were to be presented at the next Board meeting, which was held the next day. The February 2 minutes reveal that the “ REDACTED ” related to assumptions as to silicon prices, SG&A and CAPEX and that management was directed to “ REDACTED REDACTED ,” not “update the financial projections” and to present projections based on those revised assumptions “ REDACTED .”¹⁴²

The difference between “update the projections” and “REDACTED REDACTED ” is not “nitpicking”¹⁴³ – it is material. “Update the projections” gives the misleading impression that management was just asked to bring the projections up to date with more recent information.¹⁴⁴ “ REDACTED ” indicates the Board directed management to change the inherently uncertain assumptions

¹⁴⁰ Compare Reply Amato Aff. Ex. 1 at 73, with Op. Amato Aff. Ex. 37 at GLOBE_000000474.

¹⁴¹ Reply Amato Aff. Ex. 1 at 73.

¹⁴² Compare Op. Amato Aff. Ex. 37 at GLOBE_000000474, with Reply Amato Aff. Ex. 1 at 73.

¹⁴³ Def. Br. at 79.

¹⁴⁴ *In re Professional Video Ass’n, Inc.*, 2007 WL 2429453, at *6 (Bankr. D. Del. Aug. 24, 2007); *Dow v. New Haven Sav. Bank*, 1998 WL 405058, at *6 (Sup. Ct. Conn. July 6, 1998); *Strohm v. Clearone Commc’ns, Inc.*, 308 P.3d 424, 441-42 (Utah 2013).

underlying the projections.¹⁴⁵ Both the Proxy Statement and the minutes recognize that the assumptions are different from the projections.

The Proxy Statement's misleading disclosure concerning management's change in assumptions continues in the description of the February 3 Board meeting. In describing the February 3, 2015 Board meeting, the Proxy Statement only says that Goldman reviewed a preliminary analysis it prepared "based on the financial projections prepared by management."¹⁴⁶ It does not indicate whether the projections were different from the projections discussed on February 2 or whether the projections reflected different assumptions than the projections discussed on February 2. In contrast, the February 3 minutes plainly show that management's projections had been changed, that the altered numbers resulted from changed assumptions as to SG&A, CAPEX and other subjects and that the resulting projections were used to justify the 43/57 equity split.¹⁴⁷ Globe's brief does not even address the disclosures concerning the February 3 meeting.

¹⁴⁵ *Dow*, 1998 WL 405058, at *6.

¹⁴⁶ Reply Amato Aff. Ex. 1 at 73.

¹⁴⁷ Op. Amato Aff. Ex. 35 at GLOBE_000000875. As the Jeffers Report demonstrates, the overnight changes in the Globe management projections reduced the DCF value of Globe by \$196 million or 15%. Op. Amato Aff. Corrected Ex. 21 at 38-40.

These disclosure deficiencies do not concern raw data necessary for stockholders to make an independent adjustment to the projections.¹⁴⁸ Rather, the issue is partial disclosure. Having made partial disclosure regarding the discussion of management's projections and assumptions and the Board's direction to management to make changes, the Globe directors were required to give a complete and accurate account. The Proxy Statement gives the misleading impression that management was directed merely to get up-to-date numbers, fails to disclose that management was directed to (at the February 2 meeting) and did (prior to the February 3 meeting) revise specific assumptions and does not describe the effect those changed assumptions had on the projections and the valuation of Globe and Ferro.

G. Misleading and Incomplete Disclosures Concerning Synergies and Goldman's Fairness Opinion

Plaintiffs' Opening Brief discussed the following misleading and contradictory disclosures in the Proxy Statement: (i) the Globe Synergy Projections presented on February 22, 2015, including \$85 million per year of run-rate ("R-R") synergies and \$200 million in working capital release ("WCR") over four years; (ii) the Ferro Synergy Projections (\$65 million R-R synergies and \$100 million WCR in three years), which Globe and Ferro on February 23 mutually agreed to after discussion of achievable synergies and jointly announced; (iii) statements that as of

¹⁴⁸ *Cf.* Def. Br. at 78-80.

May 5, 2015 the Globe Synergy Projections were unchanged except for a \$16 million reduction in financial synergies; (iv) a representation that, except for the \$16 million revision, the Globe Synergy Projections remained the best estimates and judgments of Globe's management on February 23, 2015; and (v) statements that Goldman confirmed its fairness opinion on May 5, 2015 based on the assumption that the expected synergies were unchanged except for the \$16 million decline in financial synergies.¹⁴⁹

In response, Globe asserts the untenable position that the Globe Synergy Projections remained Globe management's best estimates of synergies on and after February 23, 2015, even though Globe's management publicly *agreed* to the far lower Ferro Synergy Projections in the February 23, 2015 joint press release announcing the Transaction.¹⁵⁰ The press release did not, as Globe suggests, merely reflect synergy estimates "approved by Ferro." It is a joint press release issued on behalf of, and approved by Globe, that recites the Ferro Synergy Projections – twice. The Proxy Statement acknowledges that the joint press release announced these synergies and represented that they "were mutually agreed to by Globe and

¹⁴⁹ Plaintiffs' Op. Br. at 40-43.

¹⁵⁰ Def. Br. at 26, 55-56. The synergies Globe management and Ferro "mutually agreed" were achievable were not simply "slightly more conservative" but were, as Kestenbaum conceded, "far lower." *Id.* at 26; Reply Amato Aff. Ex. 1 at 76.

FerroAtlántica.”¹⁵¹ Having publicly announced the synergies and represented to the stockholders that it had agreed to these synergies, Globe cannot now say it had its fingers crossed and really still believed some other set of synergies were the best estimate.

III. THE IRREPARABLE HARM AND BALANCE OF HARMS ELEMENTS ARE MET

A. Plaintiffs’ Strong Showing of Irreparable Harm

The closing of the merger and disclosure violations will cause irreparable harm to stockholders, as numerous cases hold.¹⁵² Defendants have not shown that this case is somehow different. They have failed to address the unique factors that make irreparable harm and lack of an adequate remedy particularly acute in this case.¹⁵³

Globe does not dispute that the closing of the Transaction will preclude rescission or other equitable relief.¹⁵⁴ Globe will become a wholly owned subsidiary of Ferroglobe, so the Globe directors will no longer be directors, or control the management of that company. Thus, any equitable relief directed to those directors will be ineffective. English and Spanish law would make it difficult

¹⁵¹ Reply Amato Aff. Ex. 1 at 76.

¹⁵² See cases cited at Plaintiffs’ Op. Br. at 77 & n.240-241, 79 & n.247-248. Globe’s only response to the irreparable harm from disclosure violations is to assume there is no violation. Def. Br. at 84.

¹⁵³ Plaintiffs’ Op. Br. at 78.

¹⁵⁴ See *Id.* at 77-78.

if not impossible to enforce any equitable relief against Ferroglobe or Grupo VM.¹⁵⁵ Moreover, once the Transaction occurs, the (former) Globe stockholders will not be able to remove López Madrid, whether he is charged with, or even convicted of, one or more crimes.¹⁵⁶

The difficulty of quantifying and proving damages (even in a cash merger) is often enough to establish irreparable harm.¹⁵⁷ The claim here is not for a definite sum¹⁵⁸ or for the difference between fair value and a cash merger price. The merger consideration is not money. The Transaction involves becoming a majority owned division of a privately held Spanish company and receiving shares of a new English company. Plaintiffs' expert reports do not quantify monetary damages, but critique the attempts of Goldman and Globe's expert to project the values of Globe, Ferro and Ferroglobe.¹⁵⁹

Neither Grupo VM nor Ferroglobe is Globe's majority stockholder, so they owe no fiduciary duties to the Globe stockholders. Thus, obtaining a monetary judgment against them will require proving a claim for aiding and abetting the

¹⁵⁵ *Id.* at 78.

¹⁵⁶ *Id.*

¹⁵⁷ *E.g., Del Monte*, 25 A.3d at 838; *In re Netsmart Tech. Inc. S'holders Litig.*, 924 A.2d 171, 207 (Del. Ch. 2007).

¹⁵⁸ *Cf. In re TIBCO Software Inc., S'holders Litig.*, 2014 WL 6674444, at *22 (Del. Ch. Nov. 25, 2014) (fiduciary duty claim for \$100 million based on incorrect share count).

¹⁵⁹ *Cf. Def. Br.* at 84.

directors' breach of fiduciary duty. There a serious doubt as to whether any damage award would be collectible from Grupo VM, a Spanish company, or Ferroglobe, an English company. The Proxy Statement acknowledges that the United States has no treaty with England or Spain for enforcement of judgments and any U.S. judgment would not be recognized unless numerous stringent criteria were proven in a proceeding in an English or Spanish court.¹⁶⁰

The mere existence of a stockholder vote, which occurs in most mergers, does not eliminate irreparable harm. The stockholder vote will not be informed. Moreover, Kestenbaum has agreed to vote 12% of Globe's shares for the Transaction and there is no separate vote of the public stockholders.

Monetary relief against the directors will present the usual problems: 8 *Del. C.* § 102(b)(7), 8 *Del. C.* § 141(e) and lack of sufficient resources to satisfy a large judgment. Kestenbaum will likely be living in England, and his primary asset will likely be shares of an English company (which he may liquidate in the planned secondary offering), so enforceability of a judgment against him may be difficult.

B. Very Favorable Balance of Harms for Plaintiffs

The irreparable harm from a merger and disclosure violations is frequently enough to tip the balance of harms in the stockholders' favor.¹⁶¹ However, under

¹⁶⁰ Reply Amato Aff. Ex. 1 at 256-58.

¹⁶¹ See Plaintiffs' Op. Br. at 80 & nn.250-251.

the particular circumstances of this case, the equities analysis tips decidedly the stockholders' way. There is a particularly strong showing of irreparable harm to, and lack of an alternative remedy for, the Globe stockholders. Furthermore, an injunction will not deprive the stockholders of a large premium or immediate cash — there is no premium in this unfair stock-for-stock merger. Globe's brief does not assert a risk that the market price of Globe stock will fall to pre-announcement levels if the deal is enjoined. Indeed, Globe never mentions the market price of Globe's stock. That is because recent market prices are well *below* the unaffected trading price of Globe's stock before the announcement of the Transaction.

Defendants are unable to show that a preliminary injunction will cause significant harm to them. In this stock-for-stock transaction, there are no expensive financing commitments that might expire because of an injunction. There is (i) no imminent closing, (ii) a termination date that is three months off and extendable, and (iii) a pending application for regulatory clearance with a timing agreement which will not expire for at least two months. Entry of a preliminary injunction is not grounds for termination of the Transaction,¹⁶² and some or all grounds for the injunction could be cured by the Defendants. Finally, there is time for a trial.

¹⁶² Reply Amato Aff. Ex. 1 at 114-15. *Cf. McMillan v. Intercargo Corp.*, 1999 WL 288128, at *4 (Del. Ch. May 3, 1999) (preliminary injunction would permit termination of merger agreement).

The lack of harm to Defendants from a preliminary injunction reinforces the appropriateness of a nominal bond in this case. Defendants provide no evidence that they will suffer \$1 million in costs and damages if they are wrongly enjoined – they simply plucked the number out of the air.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant the motion for preliminary injunction.

Dated: August 21, 2015

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CERTIFICATE OF SERVICE

I, Corinne Elise Amato, do hereby certify that on this 28th day of August 2015, I caused a copy of the foregoing Redacted Public Version of Plaintiffs' Reply Brief in Support of Their Motion for Preliminary Injunction to be served via File & Serve*Xpress* upon the following counsel:

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