IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JB AND MARGARET BLAUGRUND FOUNDATION,

Plaintiff,

v

GUGGENHEIM FUNDS INVESTMENT ADVISORS, LLC, TORTOISE CAPITAL ADVISORS, LLC, RANDALL C. BARNES, ANGELA BROCK-KYLE, DONALD A. CHUBB, JR., JERRY B. FARLEY, ROMAN FRIEDRICH III, THOMAS F. LYDON, JR., RONALD A. NYBERG, SANDRA G. SPONEM, RONALD E. TOUPIN, JR., and AMY J. LEE,

Defendants,

and

FIDUCIARY/CLAYMORE ENERGY INFRASTRUCTURE FUND,

Nominal Defendant.

C. A. No. 2021-1094-nac

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, February 22, 2023
1:30 p.m.

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BEFORE: HON. NATHAN A. COOK, Vice Chancellor

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TELEPHONIC RULINGS OF THE COURT ON DEFENDANTS' MOTIONS TO DISMISS

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

1 APPEARANCES:

2 GLENN R. McGILLIVRAY, ESQ.
Bernstein, Litowitz, Berger & Grossman LLP
3 -and-
AARON T. MORRIS, ESQ.
4 ANDREW W. ROBERTSON, ESQ.
of the New York Bar
5 Morris Kandinov LLP
for Plaintiff
6

7 TAMMY L. MERCER, ESQ.
MARTIN S. LESSNER, ESQ.
8 Young Conaway Stargatt & Taylor, LLP
-and-
9 DAVID A. KOTLER, ESQ.
CATHERINE V. WIGGLESWORTH, ESQ.
10 of the New York Bar
Dechert LLP
11 -and-
JOSHUA D.N. HESS, ESQ.
12 of the California Bar
Dechert LLP
13 for Defendants Guggenheim Funds Investment
Advisors LLC and Amy J. Lee
14

15 BROCK E. CZESCHIN, ESQ.
NICOLE M. HENRY, ESQ.
16 Richards, Layton & Finger, PA
for Defendant Tortoise Capital Advisors, LLC
17

18 M. DUNCAN GRANT, ESQ.
Troutman Pepper Hamilton Sanders LLP
19 -and-
RANDALL LENDING, ESQ.
20 of the Illinois Bar
Vedder Price P.C.
21 for Defendants Randall C. Barnes, Angela
Brock-Kyle, Donald A. Chubb, Jr., Jerry B.
22 Farley, Roman Friedrich III, Thomas F. Lydon,
Jr., Ronald A. Nyberg, Sandra G. Sponem, and
23 Ronald E. Toupin, Jr.

24

1 THE COURT: Good afternoon, this is
2 Vice Chancellor Cook. Who do I have on the line?
3 ATTORNEY McGILLIVRAY: Good afternoon,
4 Your Honor. This is Glenn McGillivray from Bernstein
5 Litowitz Berger & Grossmann on behalf of plaintiff, JD
6 and Margaret Blaugrund Foundation. And joining me
7 today I have co-counsel from Morris Kandinov LLP,
8 Aaron Morris and Andrew Robertson.
9 THE COURT: Good afternoon to you all.
10 ATTORNEY MERCER: Good afternoon, Your
11 Honor. This is Tammy Mercer from Young Conaway on
12 behalf of the Guggenheim entities and Amy Lee. I'm
13 joined on the phone today by my partner Marty Lessner
14 and our colleagues from Dechert LLP, David Kotler,
15 Joshua Hess, and Catherine Wigglesworth.
16 THE COURT: Thank you, Ms. Mercer.
17 Good afternoon.
18 ATTORNEY GRANT: Your Honor, this is
19 Duncan Grant with Troutman Pepper, representing the
20 independent trustees, and I'm joined by Randall
21 Lending of the Vedder Price firm.
22 THE COURT: Thank you, Mr. Grant.
23 Good afternoon as well.
24 ATTORNEY CZESCHIN: Good afternoon,

1 Your Honor. This is Brock Czeschin from Richards,
2 Layton & Finger on behalf of Tortoise Capital
3 Advisors, and I have with me Nicole Henry from my
4 office.
5 THE COURT: Good afternoon,
6 Mr. Czeschin.
7 Thank you to you all for hopping on
8 the line for me to deliver my ruling on the motions to
9 dismiss. If you'd like to put your phones on mute, I
10 will deliver my ruling now.
11 For the reasons I'll explain in a
12 moment, I am going to deny Guggenheim and the Trustee
13 Defendants' motion, except as to the Former Trustees,
14 which is granted as to them, and grant Tortoise's
15 motion.
16 At this stage, I must assume all
17 well-pleaded facts are true and draw all reasonable
18 inferences in favor of plaintiff. Plaintiff obtained
19 books and records before and during this action.
20 Those documents "necessarily shape the range" and
21 "outcomes" of pleading-stage inferences. Those are
22 quotes from our Supreme Court's 2022 *GGP* decision. I
23 also may consider public documents filed in connection
24 with stockholder votes to determine what was

1 disclosed.
2 Plaintiff is a former stockholder of
3 Fiduciary/Claymore Energy Infrastructure Fund, which
4 I'll refer to as the "Fund." The Fund was a Delaware
5 statutory trust governed by a board of trustees. The
6 Fund's governance documents specify that fiduciary
7 duties are governed by Delaware corporate law. The
8 Fund's governance documents do not exculpate breaches
9 of the fiduciary duty of care.
10 The individual trustees are named as
11 defendants in this action. When I refer to the
12 "Trustee Defendants," I mean all individual defendants
13 except Donald Chubb, Jerry Farley, and Roman
14 Friedrich. Where appropriate, I'll refer to those
15 three individuals collectively as the "Former
16 Trustees." Defendants do not argue that the Trustee
17 Defendants are independent or otherwise have defenses
18 under Rule 23.1.
19 The Fund was managed by defendants
20 Guggenheim and Tortoise. Guggenheim was the Fund's
21 principal advisor and Tortoise was the subadvisor.
22 The amended complaint portrays Guggenheim as the lead
23 decision-maker who operated the Fund, developed its
24 investment strategies, and accounted for its income.

1 The board retained responsibility for overseeing
2 Guggenheim's activities.
3 Guggenheim primarily used leverage to
4 increase the Fund's value. Although a common
5 strategy, Guggenheim's approach is alleged here to
6 have caused the Fund to take on more debt than nearly
7 all its peers.
8 The board allegedly had no risk
9 management systems or controls in place to check or
10 stress-test the Fund. Compounding the issue, the
11 board allegedly managed over 150 portfolios. Although
12 that number may not, by itself, be problematic, it is
13 alleged here to have contributed to the board's
14 inattentiveness. Indeed, plaintiff alleges that the
15 board's meetings were infrequent and superficial and
16 largely were conducted by deferring to Guggenheim's
17 reports and recommendations.
18 In November 2019, the energy market
19 experienced so-called "black swan" events that sharply
20 depreciated the value of oil commodities and financial
21 instruments tied to them. The Fund predominantly
22 invested in energy products. The Fund thus became
23 exposed to a liquidity crisis.
24 As the energy market worsened, so did

1 the Fund. In March 2020, Guggenheim and Tortoise sold
2 $45 million of the Fund's securities. This resulted
3 in an 81.7 percent loss to the Fund's net AUM, or all
4 its historical returns.
5 Once the board recognized the Fund's
6 declining financial health, it directed Guggenheim to
7 pursue strategic alternatives. In surveying potential
8 options, Guggenheim initially recommended a
9 liquidation. Guggenheim, at least in October 2020,
10 believed a liquidation would realize full NAV for the
11 Fund's stockholders. Guggenheim represented as much
12 in a memorandum to the board. The memorandum also
13 included a proposed liquidation plan. The plan
14 contemplated a trustee to wind up the Fund. The
15 allegations support a reasonable inference that the
16 plan would have empowered the trustee to create value
17 through litigation.
18 In February 2021, Guggenheim committed
19 a significant tax error. Guggenheim thought the
20 securities sales would generate losses. They did not.
21 The sales actually resulted in $29 million to $34
22 million in recapture gains. The Fund's recapture
23 liability, coupled with its thinning equity, led to a
24 $220 million net AUM loss. It also required

1 Guggenheim to write down the Fund's NAV by 42 percent.
2 Neither the board nor Guggenheim had installed any
3 systems to avoid these consequences.
4 In light of the tax event, Guggenheim
5 reversed course. Instead of a liquidation, Guggenheim
6 now recommended a merger.
7 During the sale process, Tortoise
8 proposed to acquire the Fund through a tender offer.
9 The offer was calculated to realize full NAV, but it
10 also contemplated that, if over 50 percent of
11 stockholders tendered, the Fund would be liquidated.
12 Guggenheim allegedly rejected
13 Tortoise's proposal without telling the board about
14 it. Guggenheim reasoned that, given the Fund's
15 performance, the tender offer would be oversubscribed,
16 leaving insufficient assets post-tender to justify a
17 merger. The amended complaint supports a reasonable
18 inference that Guggenheim understood that Tortoise's
19 offer would result in a liquidation, and thus,
20 potential fiduciary liability for Guggenheim and the
21 board.
22 After it rejected Tortoise's proposal,
23 Guggenheim pursued a stock-for-stock merger between
24 the Fund and Kayne Anderson or "KYN," which I'll refer

1 to as the "Merger." According to Guggenheim, the
2 Merger would absorb tax liability, offer potential
3 synergies, and install KYN as the Fund's manager.
4 The Merger differed from the
5 liquidation plan in at least two different ways.
6 First, the Merger did not contemplate a full NAV
7 realization. Second, the Merger would extinguish
8 claims brought by a liquidating trustee or a
9 stockholder against Guggenheim and the board.
10 The sell side priced derivative claims
11 at $0. This was so despite a $220 million valuation
12 presented by plaintiff's counsel to Guggenheim. On
13 top of this, KYN agreed to provide complete
14 post-closing indemnification to Guggenheim and the
15 board. As a result, KYN acquired the derivative
16 claims for no consideration.
17 The board approved the Merger and then
18 issued the Merger Proxy Statement, which I will refer
19 to as the "Proxy Statement." The Proxy Statement
20 initially failed to quantify the Merger's purported
21 tax benefits and expense savings. Guggenheim
22 corrected these figures in response to plaintiff's
23 inspection demands and an instruction from the SEC.
24 The Proxy Statement disclosed the

1 board's views on the benefits of the Merger, including
2 that the Merger would not be taxable at the
3 stockholder level and would create long-term value and
4 promote liquidity. The Proxy Statement explained that
5 if stockholders rejected the Merger, the board "would
6 consider other options, including a liquidation, which
7 would result in incremental taxes to [the Fund] and
8 would be taxable to [the Fund's stock]holders."
9 Having identified several alleged
10 deficiencies in the Proxy Statement, plaintiff filed
11 its original complaint. The original complaint
12 asserted four derivative claims as well as a direct
13 claim. The original complaint was filed in close
14 proximity to the Merger, which was scheduled for
15 February 4, 2022.
16 So plaintiff amended its complaint to
17 add Count VI. Count VI is styled under this Court's
18 2013 *Primedia* decision and its 2016 *Riverstone*
19 decision. Plaintiff also moved to expedite, which was
20 granted, and to preliminarily enjoin the Merger vote.
21 On January 24, 2022, approximately ten
22 days before the Merger vote, the board issued
23 Supplemental Disclosures. Relevant here, the
24 Supplemental Disclosures amended the second paragraph

1 on page 41 of the Proxy Statement's background section
2 to state: "Following a significant decrease in [the
3 Fund's] size and ... long-term underperformance, the
4 Board [] considered whether other alternatives may
5 better serve the interest of [the Fund) and its
6 shareholders, including ... strategic transactions ...
7 maintaining the status quo, and liquidation ....
8 "After considering multiple
9 alternatives, and taking into account management's
10 belief that, although [the Fund] remained viable as a
11 stand-alone fund at least in the short term, it could
12 potentially face challenges as a result of its smaller
13 asset size, the Board concluded that the most viable
14 alternatives were (1) to liquidate [the Fund] or (2)
15 to effect a merger ...."
16 Notably, the Supplemental Disclosures
17 did not amend identical language on page 7 of the
18 Proxy Statement. The disclosures on page 7 stated
19 that: "if the Merger is not approved ... the Board
20 will consider other options, including liquidation.
21 As explained in more detail below, an alternative of
22 liquidation would have adverse tax consequences."
23 The Supplemental Disclosures proceed
24 to explain those tax consequences as well as other

1 consequences of the liquidation. "A liquidation ...
2 would have complex tax consequences .... [T]axes
3 would be reflected in the Fund's NAV when the
4 liquidation is approved, and thus would decrease
5 liquidation proceeds ....
6 "It is likely that [the Fund] would
7 not be able to pay the entirety of the liquidation
8 proceeds in one payment, ... which could exceed one
9 year. [The Fund] thus would turn into a liquidating
10 vehicle, or would form a liquidating trust, and
11 shareholders would hold an interest in that vehicle
12 until tax matters are finally resolved. Although the
13 first payment of liquidation proceeds would likely
14 constitute a large portion of the proceeds, ... it is
15 difficult to estimate their timing and exact amount
16 .... In addition, a liquidation would also [sic] be a
17 taxable event for [the Fund's] shareholders ...."
18 In light of the amended complaint, the
19 Supplemental Disclosures also updated the Proxy
20 Statement's summary of Guggenheim's decision to
21 reverse its recommendation of the liquidation. The
22 Supplemental Disclosures explained that Guggenheim
23 reversed its liquidation recommendation due to
24 "depreciation recapture" caused by the Fund's

1 securities sales.

2 Further on, the Supplemental
3 Disclosures state that Guggenheim "considered the
4 timing and logistics of a potential liquidation of
5 [the Fund]" and concluded that a liquidation could
6 require "at least two payments of liquidation proceeds
7 to shareholders over a period of time that was
8 difficult to estimate, but which could be in excess of
9 a year" and that, during the liquidation process,
10 stockholders would own "illiquid interests in a
11 liquidating vehicle."

12 Finally, the Supplemental Disclosures
13 described the amended complaint's allegations. The
14 Supplemental Disclosures also included a link to the
15 public version of the amended complaint so that
16 stockholders could review it. The Supplemental
17 Disclosures stated that the board and Guggenheim
18 believed that the amended complaint was "without
19 merit."

20 Based on the Supplemental Disclosures,
21 plaintiff dropped its PI motion in favor of pursuing
22 Count VI. So the Merger vote went forward as
23 scheduled.

24 Still, plaintiff challenged the public

1 version of the amended complaint. The public version
2 was heavily redacted, concealing portions of 119
3 paragraphs. The redactions were not random. The
4 redactions concealed the allegations that quoted or
5 paraphrased communications from defendants or KYN
6 regarding the Merger and the events leading to it.
7 These allegations were taken from plaintiff's
8 220 demands and expedited discovery in connection with
9 plaintiff's application for a preliminary injunction,
10 which yielded charts, testimony, emails, and other
11 internal corporate information.
12 On February 1, 2021, defendants moved
13 for continued confidential treatment of the amended
14 complaint so that they could maintain the redactions.
15 The Court did not consider the motion until February
16 7. Without a preliminary injunction, the stockholders
17 approved the Merger on February 4.
18 After the stockholder vote, defendants
19 unredacted all but three allegations in the amended
20 complaint. Notably, defendants never unredacted
21 paragraph 207. Paragraph 207 identifies tax damages
22 caused by Guggenheim's error. The damages were
23 calculated by Cornerstone, who advised the board. The
24 damages are not small.

1 Turning now to the pending motions.
2 Plaintiff concedes that the Merger vote and
3 Supplemental Disclosures extinguished and otherwise
4 mooted its original five claims. It also concedes
5 that the former trustees, at least at this time, are
6 not implicated in any wrongdoing.
7 Plaintiff made these concessions in
8 its opposition brief after Tortoise and the Former
9 Trustees already moved to dismiss. One effect of
10 these concessions is that Tortoise and the Former
11 Trustees must be dismissed. The question of whether
12 their dismissals should be with or without prejudice
13 is an issue I will address later in my ruling.
14 As to the merits, Guggenheim and the
15 Trustee Defendants -- whom I will now refer to
16 collectively as the "Moving Defendants" -- have moved
17 under Rule 12(b)(6) to dismiss Count VI, the only
18 remaining claim. The Moving Defendants principally
19 contend that Count VI must be dismissed under *Corwin*.
20 Alternatively, they contend that Count VI fails to
21 state a claim. They last argue that Count VI is
22 barred by laches "as a matter of equity" because
23 plaintiff "deferred bringing derivative claim[s]"
24 until the end of the Merger process.

1 In opposition, plaintiff argues that
2 *Corwin* does not apply to *Primedia*/*Riverstone* claims,
3 but even if it did, plaintiff contends that cleansing
4 is precluded on these facts because the stockholder
5 vote was coerced and not fully informed. Assuming
6 *Corwin* does not bar Count VI, plaintiff argues that it
7 has stated a *Primedia*/*Riverstone* claim because its
8 derivative claims were viable. Finally, plaintiff
9 argues that laches does not apply because Count VI did
10 not ripen until the Merger was approved. I heard
11 argument on the motion last November, and I am now
12 ready to issue my rulings.
13 I'll start with the standard of
14 review. In considering a Rule 12(b)(6) motion, I must
15 accept as true all well-pleaded allegations in the
16 complaint, credit vague allegations if they give the
17 opposing party notice of the claim, draw all
18 reasonable inferences in favor of the nonmovant, and
19 deny dismissal if recovery on the claim is reasonably
20 conceivable.
21 "[T]he threshold for the showing a
22 plaintiff must make to survive a motion to dismiss is
23 low." That's a quote from our Supreme Court's 2005
24 *Doe v. Cahill* decision. Dismissal is inappropriate

1 unless under no reasonable interpretation of the facts
2 alleged could the complaint state a claim for which
3 relief might be granted.
4 The parties have debated whether, as a
5 doctrinal matter, *Corwin* applies to a claim like Count
6 VI, but I need not decide that question, because even
7 if *Corwin* did apply to Count VI, cleansing would be
8 unavailable here. At the pleading stage, it is
9 reasonably conceivable that the Merger vote was
10 structurally coerced. Absent cleansing, it is
11 reasonably conceivable that entire fairness applies to
12 the Merger, and it is reasonably conceivable that the
13 Moving Defendants breached their fiduciary duties of
14 care and loyalty.
15 The Delaware Supreme Court held in
16 *Corwin* that "when a transaction not subject to the
17 entire fairness standard is approved by a fully
18 informed, uncoerced vote of disinterested
19 stockholders, the business judgment rule applies."
20 Stated negatively, *Corwin*'s version of the business
21 judgment rule does not apply if the vote was either
22 coerced or not fully informed. I find that plaintiff
23 has adequately alleged coercion, so I need not reach
24 the question of whether the vote was fully informed.

1 Under Delaware law, "stockholders are
2 presumed to vote in their economic interest." That's
3 a quote from our Supreme Court's *Daniel v. Hawkins*
4 decision, which was issued last month.
5 When stockholders vote in their
6 economic interest, they "express[] their collective
7 view as to whether a particular course of action
8 serves the corporate goal of ... wealth maximization."
9 That's a quote from our Supreme Court's 2010 *Crown*
10 *EMAK Partners v. Kurz* decision.
11 As a result, "the long-standing policy
12 of our law has been to avoid the uncertainties and
13 costs of judicial second-guessing when the
14 disinterested stockholders have had the free and
15 informed chance to decide on the economic merits of a
16 transaction for themselves." That's a quote from
17 *Corwin*. Where disinterested stockholders have had
18 that opportunity, they "can easily protect themselves
19 at the ballot box by simply voting no." That's also a
20 quote from *Corwin*.
21 Still, sometimes "voting no" is not
22 really an option due to the "structure or
23 circumstances of the vote." That's a quote from our
24 Supreme Court's 1996 *Williams v. Geier* decision.

1 Under Delaware law, "wrongful coercion may exist where
2 the board or some other party takes actions which have
3 the effect of causing the stockholders to vote in
4 favor of the proposed transaction for some reason
5 other than the [economic] merits of that transaction."
6 That's also a quote from *Williams*.
7 In those situations, the approving
8 vote may have been infected by "considerations
9 extraneous to the [economic merits of the]
10 transaction," such that the Court "cannot determine
11 that the vote represents a stockholder decision that
12 the challenged transaction is in the corporate
13 interest." Those are quotes from this Court's 2017
14 *Liberty Broadband* decision.
15 "If a plaintiff can identify a
16 reasonably conceivable basis to doubt that the
17 stockholders made that determination," then *Corwin*
18 does not apply. That's a quote from Vice Chancellor
19 Laster's 2020 *Dell Class V* decision.
20 Plaintiff argues that the Moving
21 Defendants presented the Merger as an "all or nothing
22 proposition" and, in doing so, invokes the concept of
23 structural coercion. Structural coercion has been
24 defined in the "traditional sense" as a "wrongful

1 threat that has the effect of forcing stockholders to
2 tender at the wrong price to avoid an even worse fate
3 later on." That's a quote from then-Vice Chancellor
4 Strine's 2002 *Pure Resources* decision.
5 Structural coercion thus focuses on
6 the transaction's mechanics and examines how its
7 operation affects the stockholders' ability to freely
8 choose whether or not to approve it. Vice Chancellor
9 Parsons explored this concept in his 2007 *Gradient v.*
10 *NBC* decision. In doing so, Vice Chancellor Parsons
11 discussed then-Vice Chancellor Strine's 1999 *GM*
12 decision:
13 "[The GM Board] was permitted to
14 structure the deal as they did so long as they did not
15 strong-arm the [] stockholders into voting for it ....
16 In making that determination, the court in *GM* focused
17 on the manner in which the board [structured the
18 transaction]. In particular, the court held that a
19 board's choices to formulate a business decision are
20 given deference by the courts unless [the structure]
21 impacts unfairly or strong-arms the vote so as to
22 force a [stock]holder, for reasons outside the
23 economic merit to [vote yes] ....
24 "A vote, by its nature, forces

shareholders to suspend artificially the present circumstances in a snapshot economic situation. It is not, however, the same as suggesting that the economic world itself does not move forward. Keeping the shareholders in the 'same' position, then, does not require an 'identical' position, economic or otherwise. Instead, a shareholder is [structurally] coerced when he is forced into a choice between a new position and a compromised position for reasons other than those related to the economic merits of the decision."

That's a quote from the *Gradient* decision. I note that *Liberty Broadband*, on which the parties relied, imported the term "strong-arming" from *Gradient* and *GM*.

Chancellor Allen reasoned similarly in his 1986 *AC Acquisitions* decision. There, Chancellor Allen considered a situation where stockholders were presented with two alternatives: an offer from a hostile bidder and one from the board. Chancellor Allen noted that "if all that [the board] defendants have done is to create an option for [stock]holders, then it can hardly be thought to have breached a duty."

1 The problem, however, was that the
2 board artificially manufactured circumstances
3 surrounding the options such that "no rational
4 [stock]holder could afford not to tender into the
5 company's [] offer[.]"
6 Chancellor Allen explained: "What is
7 clear ... is that a current [stock]holder who elects
8 not to tender into the [board offer] is very likely,
9 upon consummation of the company transaction, to
10 experience a substantial loss in market value of his
11 holdings. The only way, within the confines of the
12 company transaction, that a [stock]holder can protect
13 himself from such an immediate financial loss, is to
14 tender into the [board offer] so that he receives his
15 *pro rata* share of the cash distribution that will, in
16 part, cause the expected fall in the market price of
17 the company's stock."
18 Chancellor Allen found that the board
19 precluded stockholders from freely choosing the
20 hostile offer. Instead, the board's actions
21 effectively forced stockholders to take the board's
22 offer regardless of the economic merits of each
23 proposal. In short, the board's offer did not
24 "preserve the ability of the [stock]holders to choose

1 between the two options." So Chancellor Allen found
2 it coercive.
3 Based on this precedent and the very
4 unusual facts of this case, I conclude plaintiff has
5 pleaded a reasonably conceivable basis for inferring
6 that the stockholders were structurally coerced into
7 approving the Merger.
8 Page 41 of the Proxy Statement -- as
9 amended by the Supplemental Disclosures -- observed
10 that the Fund had a "significant decrease in asset
11 size" and "long-term underperformance." Given this,
12 the board determined to "consider strategic
13 alternatives." Among those alternatives, the
14 Supplemental Disclosures listed a liquidation, a
15 merger, and "maintaining the status quo."
16 The board and management, however,
17 recognized that the Fund's "short term" viability as a
18 stand-alone entity would be pitted against
19 "challenges" resulting from "its smaller asset size."
20 So the board concluded that the "most viable
21 alternatives" were a liquidation and a merger with a
22 strategic acquirer.
23 Read as a whole and in the light most
24 favorable to plaintiffs, as I must do at this stage,

1 the Proxy Statement and the Supplemental Disclosures
2 took the status quo off the table as a viable option
3 from the perspective of stockholders deciding how to
4 vote their shares. To the extent there's doubt, page
5 7 of the Proxy Statement confirms that "if the Merger
6 is not approved ... the Board will consider other
7 options, including liquidation." However, on page 7,
8 and ultimately, page 41, the board explained that a
9 liquidation and the Merger were the Fund's viable
10 options, not the status quo.
11 Read together, the Proxy Statement and
12 Supplemental Disclosures framed the vote as a choice
13 between the Merger and a liquidation. It did not
14 frame the vote as a choice between the Merger and a
15 continuation of the Fund's existence.
16 The Moving Defendants accomplished
17 this structure using a straightforward set of logical
18 propositions. First, the Fund was financially
19 imperiled. Second, the board considered alternatives
20 to remedy the situation. Third, management recognized
21 that the fund was not very likely to last beyond the
22 short term. Fourth, the board consequently determined
23 that the only viable options were a merger or a
24 liquidation. And, fifth, if the Merger were rejected,

1 the board would propose "other options, including
2 liquidation" — which, as the Supplemental Disclosures
3 confirmed, was the only other viable option to address
4 the Fund's "difficulties."
5 Also, I note that although the
6 Supplemental Disclosures arguably tried to soften the
7 page 7 language found again later on page 41, they
8 still left page 7 intact. Indeed, the Supplemental
9 Disclosures go further than the "adverse tax
10 consequences" cautioned on page 7.
11 For purposes of this motion to dismiss
12 stage, the Proxy Statement and Supplemental
13 Disclosures presented a liquidation as a proverbial
14 worst-case scenario that would expose stockholders to
15 uncertain tax liability, lock them into an illiquid
16 trust, and delay their returns for a year or more.
17 In sharp contrast, the Merger was
18 presented as a tax-free transaction that would close
19 quickly and provide liquidity and a similar investment
20 profile to what stockholders previously owned. Given
21 the timing of the Supplemental Disclosures,
22 stockholders had just over a week to process all this.
23 Moreover, the premise of the
24 Supplemental Disclosures was the amended complaint,

1 yet the amended complaint, as disclosed to
2 stockholders via a link in the Supplemental
3 Disclosures, was redacted at the demand of the Moving
4 Defendants to conceal the Moving Defendants' actual
5 communications, analyses, and thought processes
6 regarding the Merger and the liquidation. This
7 created the impression that plaintiff had no
8 significant factual basis for pressing a contrary
9 valuation of the liquidation.
10 The identity of the speaker matters in
11 both a complaint and in disclosures. Here, in
12 reality, the redactions to the version of the amended
13 complaint that the Moving Defendants disclosed to
14 stockholders concealed information that came from
15 plaintiff's Section 220 investigation and expedited
16 preliminary injunction discovery.
17 The redactions prevented stockholders
18 from learning what plaintiff purported to know about
19 the rationale driving the Moving Defendants' decision
20 to push the Merger instead of a liquidation. And,
21 again, I note that the Moving Defendants filed a Rule
22 5.1 motion to keep that information under seal three
23 days before the stockholder vote and then dropped
24 nearly all the redactions soon after the vote.

In sum, stockholders were told that the Fund would disappear, it was just a matter of how: by liquidation or through the Merger. Yet the Moving Defendants seem to have curated the vote in a way that presented the Merger as the only real choice between the two. As a result, it is reasonably conceivable that stockholders chose the Merger not for its merit, but because the liquidation, as framed, was no option at all.

On these facts, then, I cannot be sure that stockholders approved the Merger because it was in their economic interest or because they were strong-armed by Moving Defendants' conduct and presentation of the two options. Accordingly, *Corwin* does not cleanse the Merger vote.

To reach the opposite result, defendants try to portray the stockholder vote as a choice between the Merger and "the status quo." This formulation comes from *Liberty Broadband*, which stated that "if a transaction is negotiated and structured in a particular way, and presented to the stockholders such that they may ratify it, or reject it and retain the status quo, such a vote is not structurally coercive."

But that was not the choice presented here. As discussed, the Fund would have been sold or liquidated. It was not going to have a "status quo." Instead, the stockholders were required to choose between a new position — the Merger — and, as framed, a compromised position — the liquidation. At least at this pleadings stage, that looks like structural coercion.

It also looks like the situation in then-Vice Chancellor Jacobs' 1987 *Eisenberg* decision. There, Vice Chancellor Jacobs found structural coercion where stockholders had to vote for the board's offer or else the board would have arranged to delist the company's securities.

From a liquidity standpoint, the liquidation was presented similarly. If stockholders rejected the Merger, they would be left with the very likely -- indeed, almost certain -- prospect of the imposition of a liquidating trust, whereby stockholders could expect to be frozen into their equity interests for an indefinite time period with an uncertain and, according to the disclosures, disadvantageous outcome. If stockholders approved the Merger, they would at least still have liquidity. The

1 risk of structural coercion presented is therefore, at
2 bottom, very much in line with the concern in
3 *Eisenberg*.
4 The Moving Defendants alternatively
5 contend that the Merger vote was not structurally
6 coercive because the vote did not require the
7 stockholders to approve the separate, unfavorable
8 "transaction." Again, this language comes from
9 *Liberty Broadband*, which stated that "breaches of duty
10 inherent in that transaction ... are not themselves
11 separate 'transactions' embedded in the vote that
12 render it coercive." *Liberty Broadband* involved a
13 specific type of potential structural coercion
14 involving cross-conditioned votes. In that context,
15 it makes sense that the Court focused on the existence
16 of separate "transactions."
17 But *Liberty Broadband* did not purport
18 to redefine structural coercion or to jettison 40
19 years of precedent examining it. To the contrary,
20 *Liberty Broadband* relied on precedent like *Gradient*
21 and *GM*. So the mere fact that the Moving Defendants
22 did not package separate transactions within the
23 Merger vote does not mean the vote could not be
24 structurally coercive.

1 That said, I do note that there has
2 been some discussion of whether the indemnification
3 afforded the Moving Defendants qualifies as a separate
4 "transaction" within the meaning of *Liberty Broadband*.
5 In some sense, it should. This was a benefit that
6 stockholders did not share, and yet the stockholders
7 effectively were required to approve it as part of the
8 Merger, for no consideration.
9 Even so, I need not delve into this
10 further. Plaintiff cited *Liberty Broadband* to invoke
11 structural coercion, and *Liberty Broadband* relied on
12 traditional coercion principles to reach its result.
13 I do the same here.
14 To be clear, my coercion analysis
15 should not be mistaken for a pleading-stage finding on
16 whether the Moving Defendants breached their fiduciary
17 duties. As Vice Chancellor Laster explained in *Dell*
18 *Class V*, a finding of pleading-stage coercion does not
19 "support a claim for fiduciary breach," but rather,
20 "is limited to raising a sufficient question about the
21 meaning of the stockholder vote to prevent it from
22 having cleansing effect."
23 Discovery may, for example, reveal
24 that Moving Defendants were simply presenting the

1 objective realities of the two transactions. But
2 today, the question is whether the Merger, as
3 presented to stockholders, is the kind of transaction
4 that *Corwin* was designed to cleanse. On these unusual
5 facts, I conclude that it is not.
6 *Corwin* does not apply, so I now turn
7 to the merits.
8 Plaintiff argues that Count VI states
9 a claim under "*Primedia/Riverstone*." This creates
10 some confusion as to the proper framework for
11 analyzing Count VI. Both cases addressed a claim
12 challenging a merger as unfair due to the fiduciaries'
13 failure to obtain value for the stockholder's
14 derivative claims. The key differences appear to lie
15 in timing and the nature of the claims.
16 By way of background, Delaware law
17 follows the continuous ownership rule. Under the
18 continuous ownership rule, "a derivative [stock]holder
19 must not only be a stockholder at the time of the
20 alleged wrong and at [the] time of commencement of
21 suit but that he must also maintain shareholder status
22 throughout the litigation." That's a quote from our
23 Supreme Court's 1984 *Lewis v. Anderson* decision.
24 Where, as here, the target is acquired

1 in a stock-for-stock merger, litigation assets become
2 assets of the acquirer. Under those circumstances,
3 the merger extinguishes the former derivative
4 plaintiffs' standing to sue.
5 Still, Delaware law "recognizes that
6 the extinguishment of derivative standing can confer a
7 unique benefit on the fiduciaries that approve the
8 merger[.]" That's a quote from Vice Chancellor
9 Laster's *Harris* decision, which was issued last month.
10 As a result, this Court will recognize
11 stockholder standing to bring extinguished derivative
12 claims as direct claims under certain conditions. And
13 if those conditions are met, pre-closing derivative
14 claims "will not be evaluated as derivative claims but
15 rather, indirectly, as evidence relevant to the
16 fairness of the [merger] price." That's a quote from
17 Chancellor Allen's 1986 *Colonial Foods* decision.
18 In *Primedia*, a derivative suit existed
19 before the merger closed. The derivative claims that
20 were the subject of the *Primedia* case were the very
21 litigation assets that the *Primedia* board deemed
22 valueless. By operation of the merger, the *Primedia*
23 stockholders lost standing to maintain those claims.
24 Instead, those claims passed to the buyer, who was not

1 likely to pursue them. The *Primedia* court thus
2 crafted a three-part test for determining whether the
3 stockholders had standing to continue their derivative
4 litigation as if it were a direct litigation.
5 By contrast, *Riverstone* did not
6 involve an existing, pre-merger derivative suit.
7 Instead, the *Riverstone* stockholders sued for the
8 first time post-merger claiming that a "possible
9 derivative action" existed pre-merger and the
10 *Riverstone* board pursued the merger for purposes of
11 extinguishing it. The *Riverstone* court thus treated
12 the stockholders' claim as a pure direct claim
13 challenging the fairness of the merger itself.
14 Riverstone thus expressly
15 distinguished *Primedia*, explaining, "The Defendants
16 first tried to characterize the Plaintiffs' Complaint
17 as a disguised pursuit of the Usurpation Claims, which
18 were derivative in nature and thus extinguished by the
19 Merger. The plaintiffs hotly contest that
20 characterization, arguing that they have standing
21 under this Court's analysis in *Primedia*. I need not
22 consider that issue further here .... Here ... the
23 ex-stockholders bring a direct claim: that the merger
24 was unfair. They undoubtedly have standing to do

1 so .... The Complaint alleges ... that by
2 orchestrating a merger that extinguished a possible
3 derivative action, the Director Defendants obtained a
4 special benefit for themes, and were thus interested
5 in the transaction."
6 So far, so good. But then *Riverstone*
7 applied *Primedia*'s test anyway. The reason for this
8 appears to stem from the Court's concern that a claim
9 like the one in *Riverstone* could provide fertile
10 grounds "for strike suits and other mischief." A more
11 stringent test, like *Primedia*'s test, would serve to
12 filter such claims.
13 I am inclined to think that there is a
14 doctrinal way to determine when a standing analysis is
15 necessary in this context without requiring a
16 plaintiff to plead a "*Primedia*/*Riverstone*" claim.
17 Some subsequent case law has provided guidance.
18 For example, the Delaware Supreme
19 Court's 2021 *Morris v. Spectra Energy* decision adopted
20 *Primedia* as the appropriate test for evaluating "a
21 post-merger claim challenging the fairness of a merger
22 based on the defendant's failure to secure value for
23 the derivative claims[.]" *Morris* involved derivative
24 claims that were actually being litigated before the

1 closing of the transaction divested the plaintiff of
2 stockholder standing.
3 As another example, Vice Chancellor
4 Glasscock's *Orbit* decision, which was issued last
5 month, declined to engage in a standing analysis
6 because "there was no pending derivative action, or
7 even a substantial threat of litigation, as of the
8 time of the merger." Vice Chancellor Glasscock
9 explained that "to the extent the existence of a
10 pre-merger litigation asset, held by Orbit,
11 contributes to a finding of the unfairness of the
12 merger, that unfairness is not extinguished via the
13 merger; it is created by the merger." Having reached
14 this conclusion, *Orbit*, unlike *Riverstone*, did not
15 walk through *Primedia*'s test.
16 Count VI is unusual in the sense that
17 it has aspects of both *Primedia* and *Riverstone*. Read
18 charitably, this was the product of plaintiff's
19 counsel's foresight — Count VI was alleged
20 prophylactically, in anticipation of the Merger, not
21 after the Merger closed. On the one hand, paragraph
22 405 alleges that the Moving Defendants "negotiat[ed]
23 and approv[ed] a self-interested Merger on unfair
24 terms in an effort to avoid liability" for derivative

1 claims. This allegation fits the *Riverstone* paradigm
2 because it suggests that the Merger itself is a
3 breach.
4 On the other hand, paragraph 406
5 alleges that "the Fund's derivative claims, as set
6 forth in this action, are worth in excess of $220
7 million, but [the Moving Defendants] assigned no value
8 to them and secured no value for them in connection
9 with the Merger." This allegation fits the *Primedia*
10 paradigm because it was pleaded before the merger
11 closed, refers to pre-merger derivative claims that
12 actually were being litigated, and seeks to reassert
13 them in the form of a direct action. Indeed,
14 paragraphs 407 through 409 go on to allege the three
15 elements of *Primedia*'s test.
16 Although plaintiff's simultaneous
17 invocation of *Primedia* and *Riverstone* raises
18 potentially interesting questions, I need not explore
19 it further here. The parties have treated these cases
20 as interchangeable, and both use the three-part test.
21 Unlike those cases, however, the Moving Defendants
22 concede that only one part of the test is relevant
23 here: viability.
24 Given that concession, and the hybrid

1 nature of Count VI, I will streamline the analysis by
2 evaluating the sufficiency of plaintiff's underlying
3 fiduciary duty claims under the rubric of viability.
4 On these facts, the viability element
5 overlaps the sufficiency analysis that will govern the
6 underlying duty of loyalty and care claims. So if
7 these underlying claims are viable -- in other words,
8 reasonably conceivable -- then plaintiff also has
9 standing to assert the claims that are embedded in
10 Count VI.
11 The starting point for analyzing
12 fiduciary action is to determine the correct standard
13 of review. Delaware corporate law has three tiers of
14 review: the business judgment rule, enhanced scrutiny,
15 and entire fairness. The choice here is between the
16 business judgment rule and entire fairness.
17 Delaware's default standard of review
18 is the business judgment rule, a principle of
19 non-review that reflects and promotes the role of the
20 board of directors as the proper body to manage the
21 business and affairs of the corporation. Unless one
22 of its elements is rebutted, the Court merely looks to
23 see whether the business decision made was rational in
24 the sense of being one logical approach to advancing

1 the corporation's objectives.
2 Entire fairness is Delaware's most
3 onerous standard and applies when the board labors
4 under actual conflicts of interest. Once entire
5 fairness applies, the defendants must establish to the
6 Court's satisfaction that the transaction was the
7 product of both fair dealing and fair price. Not even
8 an honest belief that the transaction was entirely
9 fair will be sufficient to establish entire fairness.
10 Rather, the transaction must be objectively fair
11 independent of the board's beliefs.
12 In *Riverstone*, this Court articulated
13 the standards for determining whether the business
14 judgment rule or entire fairness applies in the
15 context of a post-closing direct claim challenging the
16 value ascribed to pre-merger derivative claims.
17 "[I]n the merger context, ... where
18 ... ex-stockholders challenge the fairness of a merger
19 and seek damages from the directors, the stockholders
20 must plead facts that, if true, rebut [the] business
21 judgment [rule] and demonstrate a non-exculpated
22 breach of fiduciary duty ....
23 "Where the stockholders do plead
24 particularized facts in connection with a board action

1 which, if true, demonstrate that the directors acted
2 in a way that strips them of the protections of the
3 business judgment rule — as where their loyalty is
4 divided between corporate interest and material
5 self-interest — then the standard of review is entire
6 fairness, and the directors must demonstrate that the
7 merger developed a fair price from a fair process ....
8 "A director may be interested in a
9 transaction where she ... expects to derive a personal
10 financial benefit separate from the benefits bestowed
11 to stockholders generally. Similarly, a director may
12 lack independence if, rather than basing a decision on
13 the merits to the corporation, she grounds a decision
14 on extraneous considerations or influences."
15 As in *Riverstone*, it is reasonably
16 conceivable that entire fairness applies. The Moving
17 Defendants knew about plaintiff's derivative claims
18 when they negotiated and approved the Merger and
19 before they submitted it for a stockholder vote.
20 Liability for the claims was realistic for the Moving
21 Defendants. The Fund's governance documents did not
22 contain a Section 102(b)(7) provision, and it is
23 reasonably conceivable that the Moving Defendants
24 recommended the Merger to avoid that liability.

1 They rejected the liquidation shortly
2 after realizing Guggenheim's tax error, suggesting
3 that they wanted to eliminate stockholder or
4 liquidating trustee litigation. The Moving Defendants
5 successfully extinguished any pursuit of those claims
6 by selecting a counterparty who was willing to provide
7 them with full indemnification, for no consideration,
8 on those claims.
9 Plaintiff has adequately alleged that
10 the Moving Defendants derived a personal benefit from
11 the Merger that was not shared by the Fund's
12 stockholders. Accordingly, it is reasonably
13 conceivable that entire fairness applies to the
14 Merger.
15 The Moving Defendants do not
16 meaningfully dispute these allegations, instead
17 devoting nearly all their energy to *Corwin*. As
18 explained, however, cleansing is unavailable. I
19 recognize that Moving Defendants may have
20 counterarguments, but at this stage, plaintiff has
21 well-pleaded facts that disable the business judgment
22 rule.
23 "The applicability of the entire
24 fairness standard normally will preclude [] dismissal

1 of a complaint on a Rule 12(b)(6) motion to dismiss."
2 That's a quote from *Riverstone*. With that in mind, I
3 turn to the last step in the analysis: determining
4 whether Count VI states a breach of the underlying
5 standards of conduct. I conclude that it does.
6 As observed, the Fund's governance
7 documents do not exculpate the fiduciary duty of care.
8 "The duty of care requires the [fiduciaries] of a
9 company to act on an informed basis. It also requires
10 a [fiduciary] to take an active and direct role in the
11 context of a sale of a company from beginning to end."
12 That's a quote from this Court's 2021 *Pattern Energy*
13 decision.
14 "A plaintiff can recover monetary
15 damages for a breach of the duty of care only by
16 establishing that the fiduciary was grossly
17 negligent." That's a quote from Vice Chancellor
18 Laster's 2021 *Presidio* decision.
19 "Gross negligence ... is akin to
20 recklessness." That's a quote from this Court's 2022
21 *Metro Storage* decision. It has been defined to
22 include "reckless indifference to or a deliberate
23 disregard for the whole body of stockholders" and
24 "actions which are without the bounds of reason."

1 That's a quote from then-Vice Chancellor Hartnett's
2 1990 *Tomczak* decision.
3 "[T]he inquiry of whether the claims
4 amount to gross negligence is necessarily
5 fact-specific." That's a quote from this Court's 2020
6 *Baker Hughes* decision.
7 Here, it is reasonably conceivable
8 that the Moving Defendants were grossly negligent. As
9 to Guggenheim, the amended complaint supports a
10 reasonable inference that Guggenheim recklessly
11 mismanaged the Fund. For example, Guggenheim sold $45
12 million in the Fund's securities on the theory that
13 the sales would generate tax losses and infuse
14 liquidity. That did not happen. Instead, the sales
15 resulted in up to $30 million in recapture gains and
16 eradicated all the Fund's historical returns.
17 For an investment advisor to undertake
18 a sale of that magnitude and with those consequences
19 in the middle of a liquidity crisis, and yet overlook
20 the possibility of a multi-million-dollar tax event,
21 it is at least reasonably conceivable at this stage
22 that that was reckless. My conclusion here is likely
23 colored by the fact that one of the only allegations
24 that was not unredacted after the stockholder vote was

1 that Guggenheim faced damages for its tax error. As
2 mentioned, that figure was not small.
3 Plaintiff also has well-pleaded facts
4 suggesting that Guggenheim took the Fund's leverage
5 too far. There are allegations, for example, that
6 Guggenheim caused the Fund to take on more debt than
7 nearly all its peers. Absent internal controls, or
8 any form of portfolio stress-testing, in other words,
9 taking plaintiff's allegations as true at this stage,
10 as I must, it is reasonably conceivable that
11 Guggenheim's conduct was reckless in inflating the
12 debt ratio beyond industry norms.
13 Indeed, given the fact-specific nature
14 of the duty of care, I cannot say at the pleading
15 stage that it is not possible that Guggenheim was not
16 grossly negligent. To be clear, Guggenheim is free to
17 argue -- and I anticipate that it will argue -- that
18 its investment decisions were made with due care. But
19 at this stage, Count VI states a duty of care against
20 Guggenheim.
21 As to the board, it is reasonably
22 conceivable that the Trustee Defendants were
23 uninformed throughout the sale process and the events
24 leading to it. The amended complaint supports a

1 reasonable inference that the board barely
2 participated in the Fund's management. This may be
3 because, as observed earlier, the Trustee Defendants
4 oversaw at least 150 funds. Again, I recognize that
5 the number may not be problematic, but it does seem
6 overwhelming. For example, there is deposition
7 testimony from one of the Trustee Defendants, obtained
8 during expedited preliminary injunction discovery, in
9 which he suggested that the board barely parsed the
10 thousands of documents presented for review at each
11 meeting.
12 This is consistent with the allegation
13 that the Trustee Defendants conducted their meetings
14 without any meaningful preparation. Indeed, the
15 Trustee Defendants allegedly did not learn of any
16 issues with the Fund until things were too far gone.
17 I reiterate here that Guggenheim's
18 liability for tax-based damages was not a small sum.
19 The damages evaluation was provided by Cornerstone, an
20 advisor retained by the board. Even at its lowest,
21 the figure represented a lucrative litigation asset.
22 Yet it is alleged that the board did not try to obtain
23 any consideration at all for it from KYN. At this
24 stage, it is reasonably conceivable that the failure

1 to do so was a decision made with a conscious
2 disregard for the Fund's stockholders.
3 As with Guggenheim, I understand the
4 Trustee Defendants may have defenses and
5 counterarguments, but those will have to wait for
6 another day. For now, it is possible that the Trustee
7 Defendants were grossly negligent. Count VI states a
8 duty of care claim against them.
9 The amended complaint also pleads a
10 reasonably conceivable breach of the duty of loyalty.
11 "[T]he duty of loyalty mandates that the best interest
12 of the corporation and its [stock]holders take[]
13 precedence over any interest possessed by a director,
14 officer or controlling [stock]holder and not shared by
15 the stockholders generally." That's a quote from our
16 Supreme Court's 1993 *Technicolor* decision.
17 Fiduciaries "are not permitted to use
18 their position of trust and confidence to further
19 their private interests." That's a quote from our
20 Supreme Court's 1939 *Guth v. Loft* decision.
21 Accordingly, a plaintiff may plead a
22 duty of loyalty violation by alleging facts supporting
23 a reasonable inference that the fiduciary "was
24 interested in the transaction under consideration or

1 not independent of someone who was." That's a quote
2 from Vice Chancellor Laster's 2014 *Orchard Enterprises*
3 decision.
4 The amended complaint supports a
5 reasonable inference that the Moving Defendants were
6 interested in the Merger. A liquidation would have
7 been stewarded by a trustee. It is alleged that the
8 trustee would have been empowered to pursue litigation
9 value on behalf of the Fund. Based on the
10 well-pleaded facts, it is reasonably conceivable the
11 Moving Defendants would have been on the hook for some
12 of that liability.
13 The Merger, by contrast, afforded the
14 Moving Defendants indemnification for and eliminated
15 corporate claims. This was a benefit not shared by
16 the stockholders generally. The timing of
17 Guggenheim's 180-degree reversal suggests that the
18 Moving Defendants were willing to sacrifice an
19 allegedly better transaction in favor of a transaction
20 that absolved the Moving Defendants from liability for
21 cratering the Fund.
22 And again, I recognize that the Moving
23 Defendants may have their defenses and
24 counterarguments. But at this stage, it is reasonably

1 conceivable that the Moving Defendants breached their
2 duty of loyalty.
3 In sum, Count VI states a claim. To
4 the extent standing is relevant, plaintiff also has
5 standing.
6 Finally, I consider the Moving
7 Defendants' laches argument. "[A]ffirmative defenses,
8 such as laches, are not ordinarily well-suited for
9 treatment on" a motion to dismiss. That's a quote
10 from our Supreme Court's 2020 *Reid v. Spazio* decision.
11 Accordingly, I cannot dismiss Count VI on laches
12 grounds unless it is not possible that Count VI could
13 be timely on any set of facts. That's a paraphrase of
14 *Reid*.
15 The Moving Defendants do not make a
16 traditional laches argument, which would have to
17 contend with the fact that plaintiff filed its claims
18 well within the three-year analogous limitations
19 period. Instead, the Moving Defendants effectively
20 press an unclean hands theory, contending that
21 plaintiff should not be permitted "as a matter of
22 equity" to arbitrage a sale process claim after the
23 Merger closed. This logic is not entirely clear to
24 me.

1 Indeed, at least based on the
2 briefing, plaintiff says that it was going to assert a
3 derivative claim following its initial Section 220
4 investigation. Then the Merger was announced.
5 Plaintiff, accordingly, served a further books and
6 records demand and, in connection with that
7 investigation, was apparently told by defense counsel
8 to wait to commence litigation until after the
9 preliminary Proxy Statement was filed.
10 Plaintiff did so and sought expedited
11 treatment. Expedition was granted, but only as to the
12 disclosure claims. As the Merger vote approached,
13 plaintiff filed its amended complaint with Count VI,
14 which is the subject of defendants' present motion.
15 Of course, plaintiff had already
16 asserted in its original complaint derivative claims
17 for breach of fiduciary duty. And this is to say
18 nothing of plaintiff's argument that defendants
19 themselves stated in their opposition to expedition
20 that "under *Primedia*, Plaintiff may seek relief via a
21 direct claim following the close of the Merger ....
22 That avenue potentially provides adequate redress for
23 Plaintiff's purported harm, although it would remain
24 subject to the ultimate lack of a viable claim."

1 Plaintiff alleged derivative claims
2 before the vote. The Merger vote extinguished the
3 derivative claims. Count VI is a *Primedia*-style claim
4 that was designed to reassert the claims. So I am not
5 sure when Count VI could have been pursued, if not
6 after the claims were extinguished. In any event, it
7 is not "clear on the face of the [amended] complaint
8 that ... plaintiff can prove no set of facts to avoid
9 [laches]." That's a quote from *Reid*. So laches does
10 not provide a basis for dismissal at this stage.
11 In sum, the Moving Defendants' motion
12 to dismiss is denied.
13 All right. We've come a long way.
14 I'll end by revisiting the dispute among plaintiff and
15 Tortoise and the Former Trustees. Plaintiff concedes
16 that these defendants must be dismissed but requests
17 that the dismissal be without prejudice.
18 Plaintiff does not dispute that
19 Rule 15(aaa) governs. The upshot of Rule 15(aaa) is
20 that "when a court dismisses a complaint after full
21 briefing in the absence of a timely motion to amend,
22 the dismissal shall be with prejudice unless the
23 plaintiff can show good cause why dismissal with
24 prejudice would not be just under all of the

1 circumstances." That's a quote from this Court's 2013
2 *Sussex Associates* decision.
3 Put another way, Rule 15(aaa) requires
4 plaintiffs faced with a motion to dismiss to either
5 "amend their complaint instead of opposing the motion,
6 or else stand firm and face a dismissal with prejudice
7 if they lose." That's a quote from Vice Chancellor
8 Zurn's 2019 *Otto Candies v. KPMG* decision.
9 Here, Tortoise and the Former Trustees
10 moved to dismiss the amended complaint. Plaintiff did
11 not further amend the complaint. Instead, it opposed
12 their motions. Only then did it concede that they
13 should be dismissed. Given this progression, their
14 dismissal is with prejudice.
15 Plaintiff has not argued any good
16 cause for dismissal without prejudice other than that
17 there's not been any discovery yet. But that position
18 cannot amount to good cause here. Otherwise, every
19 pleading-stage dismissal would be without prejudice.
20 That outcome would defeat the purpose of Rule 15(aaa).
21 That being said, the dismissal of
22 these defendants is a prejudgment ruling. "Subject to
23 the law of the case doctrine, [prejudgment rulings]
24 can be revisited should future developments, including

1 evidence generated by the discovery process, provide a
2 compelling reason for doing so." That's a quote from
3 Vice Chancellor Laster's 2014 *Quadrant* decision, which
4 in turn cited Chancellor Allen's 1993 *Zirn v. VLI*
5 decision.
6 To recap, I denied Guggenheim's and
7 the Trustee Defendants' motion and granted Tortoise
8 and the Former Trustees' motion. Tortoise and the
9 Former Trustees are dismissed with prejudice.
10 I'm not looking for reargument at this
11 time, but are there any questions?
12 I'll start with plaintiff's counsel.
13 ATTORNEY McGILLIVRAY: No questions,
14 Your Honor.
15 THE COURT: Defense counsel?
16 ATTORNEY GRANT: No questions from the
17 independent trustees, Your Honor.
18 ATTORNEY MERCER: No questions here,
19 Your Honor, unless Mr. Hess has a question.
20 ATTORNEY HESS: No. No questions,
21 Your Honor.
22 ATTORNEY CZESCHIN: No questions on
23 behalf of Tortoise, Your Honor.
24 THE COURT: Thank you all for bearing

1 with me for a long reading of that bench ruling.
2 And with that, we're adjourned.
3 (Hearing concluded at 2:26 p.m.)
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1 CERTIFICATE
2
3 I, JULIANNE LABADIA, Official Court Reporter for the
4 Court of Chancery for the State of Delaware, Registered
5 Diplomate Reporter, Certified Realtime Reporter, and
6 Delaware Notary Public, do hereby certify that the
7 foregoing pages numbered 3 through 52 contain a true
8 and correct transcription of the rulings as
9 stenographically reported by me at the hearing in the
10 above cause before the Vice Chancellor of the State of
11 Delaware, on the date therein indicated, except as
12 revised by the Vice Chancellor.
13 IN WITNESS WHEREOF I hereunto set my hand at
14 Wilmington, this 23rd day of February, 2023.
15
16
17
18 /s/ Julianne LaBadia
----
19 Julianne LaBadia
Official Court Reporter
20 Registered Diplomate Reporter
Certified Realtime Reporter
21 Delaware Notary Public
22
23
24