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Case No. 2021-0031-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEPHANIE GALINDO and DAVID WALSH, Individually and For All Others Similarly Situated,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2021-0031-SG
DAVID L. STOVER, JEFFREY L. BERENSON, JAMES E. CRADDOCK, BARBARA J. DUGANIER, THOMAS J. EDELMAN, HOLLI C. LADHANI, SCOTT D. URBAN, WILLIAM T. VAN KLEEF, and MARTHA B. WYRSCH,	)	
Defendants.	)	

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' VERIFIED CLASS ACTION COMPLAINT

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INTRODUCTION

Although you would not know it from reading the complaint, this case is about an overwhelmingly popular merger formed during a historically challenging period in the oil and gas market. The plaintiffs are two former shareholders of Noble Energy, Inc. At the time of the merger, Noble owned several companies involved in oil and gas operations around the world. The plaintiffs claim that the nine members of Noble's Board of Directors breached their fiduciary duties by approving a merger in 2020 with an unaffiliated third party, Chevron Inc. Noble's shareholders approved the merger with *90%* of voting shares in favor. But plaintiffs claim that the defendants breached their fiduciary duties because the merger was supposedly a worse deal than an initial *invitation to negotiate* that Noble received *years* earlier in a completely different economic climate. Plaintiffs also complain that several Noble executives received customary change-of-control payments as a result of the merger—payments that were disclosed to shareholders to the exact dollar well in advance of the vote, and that only one of the nine defendants was even eligible to receive. The merger was entirely lawful. The Court should dismiss the complaint.

In the spring of 2020, the global oil and gas industry was facing collapsing demand as a result of the COVID-19 pandemic and a price war between Saudi Arabia and Russia. Like many of its peer companies, Noble was in dire financial straits—it recorded a $4 billion net loss in just the first quarter of 2020. Over 100

oil and gas companies in the U.S. entered bankruptcy that year. But Noble was not one of them, because *unlike* many of its peer companies, Noble's directors found a solution by pivoting toward strategic alternatives that allowed the company to adapt to changing conditions while ensuring long-term value for its shareholders.

In July 2020, after spending months exploring the company's options—including asset sales, joint ventures, and acquisitions of other companies—Noble's directors and executives finally identified the transaction that best fit the company's needs: a stock-for-stock merger with Chevron that valued Noble's enterprise at $13 billion. Noble retained J.P. Morgan as a financial advisor, which issued a fairness opinion after an extensive review of the deal. The Board concluded that the merger was fair, and voted unanimously to approve it. After shareholders received a detailed proxy statement describing the transaction, more than 90% of Noble's voting shares were cast in favor of the merger. As most of those involved recognized at the time, the merger was a resounding victory for a company in a precarious position.

Plaintiffs nonetheless contend that everyone who approved the merger was dead wrong. They insist that Noble *could* have pursued asset sales that *might* have provided more value, but declined because several of its officers—only one of whom is a defendant—wanted the change-in-control payments that would come with a merger. This Court has held that similar allegations about these payments did not satisfy even the low bar to compel production of documents under Section 220 of

the Delaware General Corporation Law. So now, plaintiffs rely on a "confidential informant" who alleges that in mid-2018—two years before the merger—Cynergy Capital approached Noble with a proposal to pay $1 billion in cash in exchange for some of Noble's Eastern Mediterranean assets. According to plaintiffs, this proposal "may have" eventually yielded $6 billion of value for a portion of Noble's portfolio, $1 billion more than the equity value placed on Noble in the 2020 merger with Chevron (but still less than half Noble's total enterprise value in the merger).

The complaint describes Cynergy's initial proposal at length, but tellingly omits the most important detail of all: there is no reason to believe that this proposal was still on the table—or even indicative of what was possible in the market—two years after it was made and after Noble's stock had lost the lion's share of its value. Indeed, plaintiffs concede that Cynergy's proposal did not even lead to *negotiations*, much less negotiations that were ongoing in 2020. They simply assume that because this single, stale proposal allegedly existed in 2018, the directors' approval of the merger *must* have resulted from a breach of their duties, and the shareholders' approval *must* have been driven by ignorance of Cynergy's unrequited proposal.

Plaintiffs also contend that the shareholders were misled by omissions in the proxy issued in advance of the vote. These allegations are baffling, because the supposedly "omitted" information is actually in the proxy. Plaintiffs claim, for example, that Noble did not disclose the potential change-in-control payments, but

the proxy contains more than a dozen pages detailing the exact benefits executives and directors could receive following a merger. Everything material was disclosed.

Based on these allegations, plaintiffs assert three claims against Noble's directors: (1) that the merger process and price resulted from a breach of all of the defendants' fiduciary duties in their capacities as directors; (2) that the defendants breached their duty of disclosure to shareholders in their capacities as directors; and (3) that the merger was the result of a breach of the duty of care by David Stover in his capacity as Noble's CEO. Each claim fails for multiple, independent reasons.

Plaintiffs have not alleged a material omission. All three of plaintiffs' claims fail because they have not identified a material omission in the proxy sent to shareholders before the vote. Even a cursory review of the proxy reveals that shareholders were well-informed about the change-in-control payments for Noble's executives. Plaintiffs fault the proxy for not specifically describing the Cynergy proposal, but the complaint makes clear that it was never seriously pursued. It was a "preliminary" discussion that "need not be disclosed" under Delaware law. *State of Wisconsin Inv. Bd. v. Bartlett*, 2000 WL 238026, at *8 (Del. Ch. Feb. 24, 2000).

Plaintiffs' disclosure claim is therefore meritless. And plaintiffs' other two claims fall along with the disclosure claim: Where, as here, there is no allegation that a controlling shareholder was involved, a fully informed shareholder vote brings the transaction within the protections of the business judgment rule and cleanses any

other breach of fiduciary duty under *Corwin v. KKR Financial Holdings*, 125 A.3d 304 (Del. 2015). This means that the ultimate "decision to approve the Merger [is] insulated from all attacks other than on grounds of waste." *In re OM Grp., Inc. S'holders Litig.*, 2016 WL 5929951, at *10 (Del. Ch. Oct. 12, 2016) (quotation marks omitted). Plaintiffs have not attempted to state a waste claim, nor could they.

Defendants are exculpated from liability. Plaintiffs' first two claims should be dismissed for an additional reason: the defendants are protected in their capacities as directors by the exculpation provision in Noble's charter. When such a provision exists, a director can be liable in that capacity only if he or she (a) was interested in the merger, (b) was controlled by an interested party, or (c) acted in bad faith. *In re Cornerstone Therapeutics, Inc. S'holder Litig.*, 115 A.3d 1173, 1179-80 (Del. 2015).

Plaintiffs have not come close to meeting these requirements, so they have not stated a *Cornerstone* claim. "[T]he possibility of receiving change-in-control benefits . . . does not create a disqualifying interest." *In re Novell, Inc. S'holder Litig.*, 2013 WL 322560, at *11 (Del. Ch. Jan. 3, 2013). That is true even for benefits paid to the directors themselves, and it is certainly true of benefits paid to executives *other* than the directors. The complaint does not suggest that defendants were controlled by an interested party. Nor can plaintiffs' allegations establish the "very extreme set of facts" required to show bad faith. *In re Lear Corp. S'holder Litig.*,

967 A.2d 640, 654-55 (Del. Ch. 2008). The complaint itself reveals that the directors made the best decision for Noble under extraordinary financial circumstances.

Stover did not breach his duty of care. Plaintiffs' third count, brought solely against Stover in his capacity as CEO, fails because they have not adequately alleged that Stover breached his duty of care. Plaintiffs suggest that Stover was conflicted because he bought Noble stock "in significant and unusual quantities" during the negotiations with Chevron. But they do not explain why these purchases would make Stover's interests *adverse* to those of the shareholders. Plaintiffs also assert that Stover failed to disclose certain negotiations with Chevron to the rest of the Board. But the proxy statement makes clear that the Board was apprised of the merger negotiations with Chevron, and that months before voting to approval the final deal, the Board established an independent Advisory Group to work with management on possible strategic transactions. The Board was more than informed.

Finally, the complaint does not make clear whether plaintiffs' claims are inherently direct or derivative. To the extent these claims are premised on an alleged diversion of merger consideration toward change-in-control payments, they are derivative, and plaintiffs—as former shareholders—lack standing to pursue them.

The Court should dismiss the claims against the director defendants.

STATEMENT OF THE FACTS AND CASE

The plaintiffs in this case, David Walsh and Stephanie Galindo, are former shareholders of Noble Energy, Inc. Compl. ¶¶ 8-9. Noble (a non-party) is a Delaware corporation (*id.* ¶ 20) that "maintained a portfolio of assets engaged in upstream oil and gas operations onshore in the United States, off the west coast of Africa, and offshore in the Eastern Mediterranean" (*id.* ¶ 32). The defendants are nine Noble directors: David Stover (who was both Chairman of the Board and CEO), Jeffrey Berenson, James Craddock, Barbara Duganier, Thomas Edelman, Holli Ladhani, Scott Urban, William Van Kleef, and Martha Wyrsch. *Id.* ¶¶ 10-19.

The plaintiffs allege that beginning in 2018, Noble began considering a range of strategic transactions to increase the value of the company, culminating in the 2020 merger with Chevron that gave rise to this suit. The facts below are drawn from the complaint (to the extent it is not contradicted by documents subject to judicial notice) and the proxy statement Noble sent to shareholders in advance of the merger vote (the "Merger Proxy" (Ex. 1)).[1] The Merger Proxy is reviewable in support of this motion to dismiss but largely unaddressed in plaintiffs' complaint.[2]

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[1] All exhibits are attached to the Declaration of Kenneth J. Nachbar.

[2] This Court "properly consider[s] the entire contents of [a document] in determining whether the allegations in the Complaint state[] a claim that the document was materially misleading." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006). Where, as here, "a complaint alleges the omission of some material fact, a defendant is entitled to show that the disclosure was made

A. Noble Begins Considering A Broad Range Of Strategic Transactions In 2018.

Beginning in 2018, Noble began to notice "dramatic changes" in the oil and gas industry. Merger Proxy at 42. The Board therefore "engaged in a series of strategic reviews and strategy sessions in an effort to maximize stockholder value." *Id.* It "evaluated each of [Noble's business] components individually and as a whole, with a goal of achieving the maximum value of each component." *Id.*

Plaintiffs allege that, around the middle of 2018, Cynergy reached out to Noble about a potential acquisition of a portion of Noble's Eastern Mediterranean assets. Compl. ¶ 38. Plaintiffs claim that they learned from a "Confidential Informant" that the proposal would have allowed Noble "to realize approximately $1 billion in cash on the closing of a deal with Cynergy, while remaining [ ] a 15-20% stockholder of the Cynergy post-merger consolidation platform/structure." *Id.* ¶¶ 37-38. According to the informant, the proposal "was expected to have reaped five to six billion dollars of value for the [purchased] assets alone." *Id.* ¶ 41 (emphasis omitted). The complaint does not explain the basis for these figures,

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in the document," and the "Court of Chancery [is] not obligated to accept as true allegations that misstate[] or mischaracterize[]" the document. *Id.* The Court may also take judicial notice of the contents of documents filed publicly with the SEC, including the Merger Proxy. *See, e.g.*, *Solomon v. Armstrong*, 747 A.2d 1098, 1121 n.72 (Del. Ch. 1999) ("[I]t is well settled that where certain facts are not specifically alleged (or in dispute) a Court may take judicial notice of facts publicly available in filings with the SEC.").

whether they account for the market downturn in early 2020, or why an invitation to negotiate from two years prior would bear on a merger formed under different market conditions.

"Cynergy requested a formal process of engagement, whereby non-disclosure agreements . . . would be exchanged" and a "due diligence/negotiation" agreement would be reached "on a non-exclusive basis." *Id.* ¶ 39. Plaintiffs assert that "Noble Energy rejected the advances of Cynergy" and "failed to entertain [its] proposal." *Id.* ¶ 41. They provide no additional details about the communications between the two companies, nor do they allege that Noble failed to thoughtfully consider Cynergy's proposal, but they allege that the rejection was "unsurprising" because the proposal would not have come with "change-in control payments." *Id.* ¶¶ 40-41.

In the fall of 2019, Noble received multiple offers to purchase some or all of its subsidiary, Noble Midstream Partners LP ("Noble Midstream"). Merger Proxy at 43. Because none of these offers "was in a value range acceptable" to the Board, Noble's management "shifted focus" toward different transactional structures. *Id.* Notably, the Merger Proxy explains that Noble did not believe it was the right time to sell its Eastern Mediterranean assets: Noble "concluded that the optimal time to consider selling a portion of [this] interest would be after [a portion of its assets] in Israel commenced natural gas production, which was expected on or about December 31, 2019." *Id.* at 44. This decision was made after "several months" of

discussions with "several potential counterparties" "did not result in any offers [for Eastern Mediterranean assets] that were projected to increase value." *Id.*

B. Noble Begins Discussing A Possible Deal With Chevron In 2019 Involving Noble's Eastern Mediterranean Assets.

As detailed in the Merger Proxy, Noble began meeting with Chevron in 2019 to discuss potential strategic partnerships involving its Eastern Mediterranean assets, while continuing to explore all options.

In October 2019, Kevin Haggard, a member of Noble's senior management, met with Frank Mount, Chevron's General Manager for Mergers and Acquisitions, at an industry event. *Id.* at 44. Mount noted that Chevron was "monitoring" Noble's progress in the region and requested a meeting with Noble personnel. *Id.* In December of that year, Haggard and Mount met again and were joined by Amir Nebenzhal, another senior Noble executive. *Id.* They discussed Noble's Eastern Mediterranean operations, Chevron's potential entry into the upstream sector in Egypt, and the possibility of regional cooperation between the two. *Id.*

A few days later, Mount and Nebenzhal discussed "a potential path forward to determine if a transaction between Chevron and Noble Energy in the Eastern Mediterranean would be feasible." *Id.* Although "the exact nature of any potential transaction between the parties was unclear at this point," Mount and Nebenzhal agreed to revisit the topic in the new year, following the planned start-up of Noble's "Leviathan" gas field and once Chevron's plans in Egypt were "more firm." *Id.*

Haggard and Nebenzhal met with Mount and other Chevron representatives on February 2, 2020, and agreed to postpone discussions until a confidentiality agreement had been signed. *Id.* at 45. It was signed on March 4, 2020. *Id.*

C. Noble's Board And Management Respond To An Unprecedented Downturn In The Oil And Gas Industry.

Just as Noble was preparing to enter into more formal negotiations with Chevron relating to Noble's Eastern Mediterranean assets, the oil and gas market was devastated by the COVID-19 pandemic. *Id.* at 46. Saudi Arabia, spurred by Russia's refusal to cut oil production, "initiated a price war that led to a collapse in oil prices." *Id*. By March 18, Noble's share price had fallen 88% from the beginning of the year. *Id.*; Compl. ¶ 63.

These market conditions created a litany of troubles for Noble in addition to the decline in stock price. Most notably, from March to April 2020, multiple ratings services lowered their credit ratings for Noble, downgraded Noble's outlook, or both. Merger Proxy at 46. This, in turn, gave rise to several risks: a "higher cost of debt funding, a potential material reduction in available revolving credit . . . , potential dependence on the high yield bond market, with periods of limited to no access during downturns, [and] reduced ability to fund future capital budgets." *Id.*

Unlike many of its peer companies, over 100 of which entered bankruptcy in 2020,[3] Noble's directors took immediate action to secure the company's future against this dramatic reversal of market conditions. Noble's Board began special meetings to monitor Noble's performance. Merger Proxy at 46. Noble's management implemented voluntary 10-20% reductions of senior leadership salaries and reduced the cash retainer paid to directors for the remainder of 2020 by 25%. *Id.* at 47. The Board authorized numerous other measures to keep Noble's finances stable, including borrowing more money under its revolving credit agreement to address "market volatility and liquidity concerns"; reducing the company's quarterly dividend by 83%; and cutting its planned capital expenditures. *Id.* at 46-47.

Around the same time, Noble's Compensation Committee (consisting of four independent directors) proposed a series of amendments to Noble's Long Term Incentive Plan ("LTIP"), which were approved by both the Board and shareholders. *See* Form 10-Q (Ex. 3) at Ex. 10.1. First, in March 2020, the Compensation Committee proposed a modification to the calculation of future equity awards (Annual Proxy (Ex. 4) at 23), which was approved at Noble's annual stockholders meeting (Form 8-K (Ex. 5) at 2). The amendment provided no new benefit to plan participants. But it clarified that early vesting of equity awards would occur in the

[3] *See* Paul Takahashi, *Over 100 oil and gas companies went bankrupt in 2020*, HOUSTON CHRON. (Jan. 20, 2021) (Ex. 2).

event of a "double-trigger": a plan participant had to be (a) employed at the time of a change of control and (b) terminated "without cause or for good reason . . . within the 12- to 24-month period following the change of control." Annual Proxy at 25.

Second, after Noble's directors and executives accepted voluntary salary and benefit reductions, the Compensation Committee proposed a series of amendments to Noble's compensation plans, all of which were disclosed to Noble's shareholders in its quarterly Form 10-Q filing with the SEC (the "COC Severance Plan" (Ex. 6)). The amendments were largely administrative (like modifying certain definitions to mirror those in the LTIP). But one change—which is the primary basis of plaintiffs' claimed conflict of interest—clarified that any Noble employees who accepted a temporary reduction of benefits would not be penalized by having their severance packages reduced to reflect the voluntary cuts. *Id.* at 2; *see* Compl. ¶ 55. Instead, severance would be based on compensation levels before any voluntary cuts. *Id.* This would include any severance following a change of company control. *Id.*[4]

[4] The amendments also provided that terminated executives would receive continuing healthcare benefits via payments equal to the cost of continuing coverage under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), rather than COBRA coverage itself, and that certain benefits would vest immediately with any plan participant who experienced a qualifying termination following a merger. COC Severance Plan at 7-8.

D. In Light Of Rapidly Deteriorating Market Conditions, Noble Begins Pursuing Alternatives To Asset Sales In April 2020.

On April 17, 2020, Chevron informed Noble that it "was potentially interested in creating a regional partnership with Noble Energy in the Eastern Mediterranean," but Chevron wanted to own at least 50% of the partnership or pursue a "full acquisition." Merger Proxy at 47. Noble's Board and management began considering this proposal, while also giving extensive consideration to other strategic transactions.

Noble's Board first discussed Chevron's proposal at regularly-scheduled meetings on April 27 and 28, 2020. It concluded that a sale of 50% to 100% of Noble's Eastern Mediterranean assets "would not be in the best interest of Noble Energy and its stockholders" in light of existing market conditions, including the pandemic and the ongoing oil price war. *Id.* The Board appointed three independent directors—defendants Berenson, Craddock, and Urban—to an independent Advisory Group that would "collaborate with management" on potential alternatives. *Id.* At that meeting, the Board gave the Advisory Group a broad mandate to explore a wide range of options; the Board determined that Noble "should be proactive in identifying and considering strategically impactful transactions" that would "improve the ability of the company to return capital to stockholders." *Id.*

The Advisory Group began meeting with Noble's management on May 1, 2020. At that meeting, the participants elected to retain J.P. Morgan as financial advisor, which had advised both the Board and management "on industry trends and mergers and acquisitions activity on several occasions over the prior months." *Id.*

One week later, on May 8, Noble announced its first-quarter earnings for 2020. It reported that, due "in large measure to the significant decrease in commodity prices," Noble had experienced a "$4 billion net loss" and was forced to write down $4.2 billion of the value of its assets. *Id.*

On May 12, 2020, Noble's President and COO Brent Smolik met with a representative from Chevron. *Id.* at 48. Smolik informed Chevron for the first time that, although Noble was no longer interested in the Eastern Mediterranean asset sale that the companies had explored previously, it was now willing to entertain a serious offer to acquire the company. *Id.* The next day, Smolik met with the Advisory Group; he advised the Group of the previous day's discussion with Chevron, and the participants considered additional counterparties "who might be interested in a strategically-meaningful transaction, such as an acquisition by Noble Energy, a merger-of-equals, or an acquisition of Noble Energy." *Id.* Working with J.P. Morgan, the Advisory Group identified a total of 10 potential counterparties, including Chevron, that might be candidates to acquire or combine with Noble. *Id.*

At a special meeting on May 14, 2020, Noble's management and the Advisory Group informed the other members of the Board about the ongoing conversations with Chevron and another potential counterparty. *Id.* The Board "authorized and encouraged Noble Energy management, in consultation with the Advisory Group, to continue its discussions with the list of identified potential counterparties." *Id.*

Over the next few weeks, Noble's management and advisors contacted each of the ten potential counterparties to discuss possible strategic transactions. *Id.* The Advisory Group was informed of these discussions, and relayed this information to the other directors at additional special meetings of the Board on May 28 and June 11, 2020. *Id.* at 48-50.

On May 28, Chevron told a Noble executive that Chevron's senior executives were in "full support" of exploring a deal to acquire Noble. *Id.* at 49. The Advisory Group received word of the call the following day, and "encouraged" Noble's executives "to continue to engage with Chevron and to also follow up with the other potential counterparties who had not given a final response to discussions with Noble Energy." *Id.* at 50. In a meeting on June 2, 2020, a Chevron executive reiterated to Noble executives that the company "was focused on Noble Energy," and "had the desire and ability to move quickly." *Id.*

On June 11, 2020, Noble's Board met to discuss the status of the company's meetings with potential counterparties, and Chevron's offer in particular. *Id.* at

50-51. The Board "determined that it would be in the best interests of Noble Energy's stockholders for Noble Energy to further explore a transaction with Chevron." *Id.* at 51. The Board authorized Noble's managers and advisors to enter into an NDA with Chevron to facilitate negotiation of a larger transaction, and it instructed them to commence initial due diligence. *Id*. The parties executed confidentiality agreements on June 20, 2020, but Noble continued discussions with other potential counterparties. *Id.*

At a special meeting on July 8, 2020, the Board, Noble's management, its outside counsel, and J.P. Morgan discussed the "potential counterparties" Noble had considered throughout the process, and "compar[ed] strategic alternatives, including remaining independent, a sale of the Eastern Mediterranean operations, a take-private of Noble Midstream, . . . a combination of [several] options, and a sale to Chevron." *Id.* at 52-53. Based on its review of the risks and benefits, the Board instructed management to pursue a transaction with Chevron. *Id.* at 53.

E. Noble Continues Negotiations With Chevron In July 2020.

On July 10, 2020, Chevron sent Noble its initial terms for an acquisition. *Id.* Chevron offered Noble stockholders 0.1123 shares of Chevron stock per share of their Noble stock—a 2% premium over Noble's 10-day average closing price, 1% over the three-month average closing price, and 11% over the average closing price for the period from March 6, 2020 through July 17, 2020. *Id.* Chevron "would not

agree" to more than that premium in light of "the current environment," but noted "the upside potential to Noble Energy stockholders from receiving Chevron's stock and Chevron's approximately 6% dividend yield." *Id.*[5]

Three days later, Noble's Board met with management, outside counsel, and J.P. Morgan to discuss Chevron's proposal. *Id.* at 54. The group examined "the specific risks and considerations relating to remaining a standalone entity," the two companies' relative financial positions, and the potential strategies for a response to Chevron's opening offer. *Id.* Noble's Board then "unanimously agreed that the best path for stockholder value" was to reject Chevron's opening offer, while indicating its continuing interest in a deal and persuading Chevron that Noble's "intrinsic value supported a higher exchange ratio." *Id.*

After a week of negotiations between Noble and Chevron, the parties reached an agreement to an exchange ratio of 0.1191 Chevron shares per share of Noble. *Id.* at 56. This figure represented a considerably higher premium than Chevron's opening offer: "a 12% premium to the ten day average closing price" (10% more than Chevron's initial offer); "a nearly 11% premium to the three month average closing price" (10% more than Chevron's initial offer); and "a nearly 23% premium

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[5] Chevron's stock was about 30% below its February 2020 trading prices at the time, so to the extent investors were expecting a rebound in oil and gas generally, receiving Chevron stock in a merger would allow them to participate in that rebound.

to the average closing price for the period from March 6, 2020 through July 17, 2020" (12% more than Chevron's initial offer). *Id.*

F. Noble's Board And Advisors Unanimously Approve The Merger With Chevron In July 2020.

On July 19, 2020, J.P. Morgan presented its fairness opinion for the merger. The opinion noted that J.P Morgan had weighed a broad range of evidence, including Chevron and Noble's relative financial performance, comparable historical mergers in the oil and gas industry, and its discussions with members of management from both companies. *Id.* at 64-65. J.P. Morgan concluded that the consideration to be paid Noble shareholders in the merger was fair. *Id.* at 47. The Board voted unanimously to approve the transaction, subject to shareholder approval, and the proposed merger was announced publicly on July 20. *Id.* at 57.

G. Noble's Shareholders Approve The Merger By A 90% Vote In October 2020 After Receiving A Detailed Proxy Statement.

On August 26, 2020, Noble mailed the Merger Proxy to its shareholders and filed it with the SEC. As detailed above, the Merger Proxy explains the terms and negotiation process of the merger. And as detailed in the argument section (pp. 28-31, *infra*), the Merger Proxy also contains over a dozen pages detailing the existing and proposed change-of-control severance payments that directors and executives stood to receive in the merger, as well as the pool of funds from which "more than

400" employees, including executives, would be eligible to receive compensation payments following the merger. *Id.* at 76-88.

At a meeting on October 2, 2020, Noble's shareholders approved the merger by a massive margin: Over 90% of votes cast at the meeting were in favor of the transaction. Form 8-K at 2. In an advisory vote, the stockholders also approved the proposed compensation structure for change-of-control payments received by Noble's directors and executives. *Id.* The merger closed on October 5, 2020.

H. Plaintiffs Initiate This Litigation In January 2021.

On January 12, 2021, plaintiffs filed this litigation in the Court of Chancery alleging three causes of action based on the merger.

First, plaintiffs claim that all of the defendants breached their fiduciary duties as directors by "fail[ing] to obtain for the public stockholders of Noble Energy the highest value available for Noble Entergy in the marketplace," by "vest[ing] them[selves] with benefits that were not shared equally by Noble Energy's public stockholders," and by "fail[ing] to sufficiently inform themselves of Noble Energy's value . . . in an effort to benefit themselves." Compl. ¶¶ 90-91.

Second plaintiffs claim that all of the defendants breached their duty of disclosure as directors by "failing to reveal the proposal they received from Cynergy; information concerning the COC Severance Plan; and how executive severance was negotiated during the sales process." *Id.* ¶ 96.

Third, plaintiffs claim that Stover breached his duty of care as CEO by "fail[ing] to inform the Board of his communications with Chevron until after the COC Severance plan ha[d] been negotiated," and by "fail[ing] to communicate" the Cynergy proposal to the Board and the shareholders. *Id.* ¶ 101.

Plaintiffs claim that they "have suffered damages in that they did not receive the highest available value for their equity interest in Noble Energy." *Id.* ¶ 92. They demand "quasi-appraisal and/or damages" "in an amount to be determined at trial." *Id.* ¶ 98. Plaintiffs also seek to represent a class of all "holders of Noble Energy common stock who were harmed by Defendants' actions." *Id.* ¶ 30.

LEGAL STANDARD

Under Court of Chancery Rule 12(b)(6), a motion to dismiss is properly granted when a plaintiff cannot "recover under any reasonably conceivable set of circumstances susceptible of proof." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 536 (Del. 2011). Although "the Court must accept all well-pleaded factual allegations in the Complaint as true and draw all reasonable inferences in favor of the plaintiff," it "is not required to accept every strained interpretation of the allegations, credit conclusory allegations that are not supported by specific facts, or draw unreasonable inferences in the plaintiff's favor." *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020) (quotation marks, footnotes, and alterations omitted). Nor is the Court required to

"accept as true allegations that misstate[] or mischaracterize[]" a document referenced in the complaint. *Gen. Motors*, 897 A.2d at 169; *see* n.2 *supra*.

ARGUMENT

The Court should dismiss the complaint for multiple reasons. First, all three claims fail because plaintiffs have not alleged a material omission in the Merger Proxy, and the shareholders' approval therefore cleanses the merger under the *Corwin* rule. Second, plaintiffs' claims against the defendants as directors should be dismissed because the defendants are protected by an exculpation provision in Noble's charter, and plaintiffs have not alleged the facts necessary to overcome that protection. Third, plaintiffs have not adequately alleged that Stover breached his duty of care. Fourth, to the extent plaintiffs' claims are inherently derivative (which is not clear from the complaint), they should be dismissed for that reason as well. More broadly, plaintiffs' claims are based on fundamental assumptions that are either unsupported in the complaint or contradicted by the referenced documents.

I. ALL OF PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE NOT ALLEGED A MATERIAL OMISSION.

Plaintiffs' non-disclosure claim fails because plaintiffs have not identified a material omission in the Merger Proxy. And because the shareholder vote was fully informed, the other two claims fail as well, because that vote "cleansed" any other breach of fiduciary duty under the Delaware Supreme Court's *Corwin* doctrine.

A. Plaintiffs' Non-Disclosure Claim Fails Because The Noble Shareholder Vote On The Merger Was Fully Informed.

A "plaintiff challenging the decision to approve a transaction must first identify a deficiency in the operative disclosure document." *In re Solera Holdings, Inc. Stockholder Litig.*, 2017 WL 57839, at *8 (Del. Ch. Jan. 5, 2017). If the plaintiff does so, the burden "shifts . . . to the defendant to show that the alleged deficiency fails as a matter of law. *In re Merge Healthcare Inc.*, 2017 WL 395981, at *9 (Del. Ch. Jan. 30, 2017) (quotation marks omitted). "The essential inquiry is whether the alleged omission or misrepresentation is material." *Id.* "Information will be found material if from the perspective of a reasonable stockholder, there is a substantial likelihood that it significantly alters the total mix of information made available." *Id.* (quotation marks omitted). "Redundant facts, insignificant details, or reasonable assumptions need not be disclosed. Nor must information be disclosed simply because a plaintiff alleges it would be helpful, or interesting." *Id.*

Importantly, as noted above (at n.2), where "a complaint partially quotes or characterizes what a disclosure document says," and "alleges the omission of some material fact, a defendant is entitled to show that the disclosure was made in the document." *Gen. Motors*, 897 A.2d at 169. "[A] claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law." *Id.*

Plaintiffs allege that Noble's directors failed to make two types of disclosures in advance of the merger vote: (1) "the proposal they received from Cynergy"; and (2) "information concerning the changes to the COC Severance Plan" and "how executive severance was negotiated during the sales process." Compl. ¶ 96. The Merger Proxy makes clear, however, that Noble *did* disclose everything material about those matters. Plaintiffs have therefore failed to state a non-disclosure claim.

1. Noble's Directors Made No Material Omission Relating To The Cynergy Proposal.

Plaintiffs allege that the defendants "breached their disclosure duties by failing to reveal the proposal they received from Cynergy" (*id.*), because "the [merger] proxy fails to disclose Cynergy's Proposal, much less the Board's failure to follow-up on the Proposal or entertain discussions with Cynergy" (*id.* ¶ 83). This allegation fails as a matter of law for two independent reasons.

a. Noble's Preliminary Discussions With Cynergy Two Years Before The Vote Are Immaterial.

First, by plaintiffs' own account, the discussions between Noble and Cynergy were brief and quickly abandoned two years before the vote; they led to *no negotiations*. The complaint alleges that "in mid-2018," Cynergy "contacted Defendant Stover concerning a potential acquisition." *Id.* ¶ 37. As the complaint makes clear, at that stage, Cynergy was only interested in "exploring the *potential* of a deal for a *limited* initial time period on a *non-exclusive* basis." *Id.* ¶ 38

(emphases added). Cynergy then "requested a formal process of engagement, whereby [NDAs] would be exchanged." *Id.* ¶ 39. According to plaintiffs, the "NDA process was *necessary*" for negotiations because of "the sensitive geopolitical situation in the Eastern Mediterranean" and Cynergy's preference for confidentiality. *Id.* (emphasis added). But this "process of engagement" never began because Noble "rejected the advances of Cynergy"—it "never executed an NDA nor indicated [an] interest in doing so." *Id.* ¶¶ 39, 41.

Defendants had no duty to disclose this fleeting interaction, because it is immaterial under Delaware law. Delaware courts have held that in the lead-up to a merger, "indications of interest from other potential suitors need not be disclosed" to shareholders if "those discussions were preliminary." *State of Wisconsin Inv. Bd. v. Bartlett*, 2000 WL 238026, at *8 (Del. Ch. Feb. 24, 2000). "The mere existence of unrequited attraction with other entities" does not support an "assertion of materiality" merely because, if the unpursued offer had been disclosed, "shareholders would then know other deals *might be possible* and that there *might be better options* than the [proposed] merger agreement." *Id.* (emphases in original). A court "cannot conclude that a failure to disclose the details of negotiations gone south would be either viably practical or material to shareholders in the meaningful way intended by [Delaware] case law." *Id*. Thus, "[e]arly contacts that do not lead to more formal negotiations or a transaction are not required to be disclosed." *In re*

PLX Tech. Inc. Stockholders Litig., 2018 WL 5018535, at *32 (Del. Ch. Oct. 16, 2018); *see also In re Columbia Pipeline Grp., Inc.*, 2017 WL 898382, at *5 (Del. Ch. Mar. 7, 2017) ("[A] board does not have a fiduciary obligation to disclose preliminary discussions, much less an analysis of preliminary discussions.").

There is a good reason for this rule: "requiring disclosure of every material event that occurred *and* every decision not to pursue another option would make proxy statements so voluminous that they would be practically useless." *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 736 (Del. Ch. 1999) (emphasis in original). That is particularly true where significant time passes after the event at issue. For example, Delaware courts have held that "it is not reasonably conceivable that preliminary conversations that occurred over eighteen months before [a] transaction . . . would significantly alter the total mix of information available to [ ] stockholders." *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *14 (Del. Ch. June 30, 2014). The lapse in time here was even longer, and the market for oil and gas assets changed markedly in the interim. *See* pp. 11-13 *supra*.

b. Defendants Disclosed Noble's Alternatives And The Reasons For Declining Them.

In any event, the Merger Proxy discloses Noble's exploration of potential transactions. The Proxy explained that, "at the end of 2018 and continuing through the first three quarters of 2019, Noble Energy engaged in a strategic review of its midstream business, including ways to potentially monetize the midstream business

and reduce Noble Energy's leverage." Merger Proxy at 42. Among other things, Noble was considering whether "to sell its general partner and limited partner interest in Noble Midstream," and as part of this analysis, Noble had "engaged with multiple potential counterparties." *Id.* at 42-43.

Importantly, the Merger Proxy then explained why Noble decided *not* to sell its Eastern Mediterranean assets at that time—which would include the sale proposed by Cynergy. Noble "concluded that the optimal time to consider selling a portion of its interest would be after [a portion of its assets] in Israel commenced natural gas production . . . on or about December 31, 2019." *Id.* at 44. Noble decided "that in order to increase scale, reduce volatility and better deliver stockholder returns, cost efficiencies and sustainability, Noble Energy would likely need to participate in consolidation in some form." *Id.* at 43.

In short, defendants had no duty to disclose Cynergy's proposal, but it went beyond what the law requires by telling shareholders that Noble had considered proposals to sell its Eastern Mediterranean assets, and determined, for strategic reasons, not to pursue those proposals. The shareholders were fully informed.

2. Noble's Directors Made No Material Omission Relating To Executive Compensation And Severance.

a. The Amendments To Noble's Severance Plan Were Extensively Detailed In The Merger Proxy.

Plaintiffs claim that, "effective April 27, 2020, the Board suddenly amended" the COC Severance Plan to "significantly increase" management's compensation in the event of a change of control. Compl. ¶ 55; *see also* pp. 12-13 *supra*. The complaint alleges that these changes were "not disclosed in the [Merger] Proxy or included as a proposal in the Company's 2020 Annual Proxy Statement for its annual stockholder meeting on April 28, 2020." Compl. ¶ 56.

As an initial matter, plaintiffs' reference to the Annual Proxy is misleading. This document was mailed to shareholders "on or about March 10, 2020." Annual Proxy at 1. It had nothing to do with the merger, so it is not an "operative disclosure document" under Delaware law. *Solera Holdings*, 2017 WL 57839, at *8. And it is obvious why the Annual Proxy does not discuss the COC Severance Plan: it was mailed to shareholders over a month before the Plan was amended and before the voluntary salary and bonus reductions occurred. Annual Proxy at 1; Compl. ¶ 56.

The Merger Proxy *extensively* details the COC Severance Plan—in part because the shareholders had a chance to *vote* on it. The Merger Proxy told shareholders that, in addition to voting on the merger itself, they could cast an advisory vote on whether to "approve the compensation that may be paid or become

payable to Noble Energy's named executive officers that is based on or otherwise related to the merger." Merger Proxy at 3. The document contains a dozen pages disclosing all relevant benefits the directors and executives may have stood to gain in the merger (*id.* 76-88), complete with multiple subsections titled, for example, the "Treatment of Noble Energy Equity-Based Awards in the Merger" (*id.* at 76), "Potential Severance Payments and Benefits in Connection with the Merger" (*id.* at 83), and "Quantification of Payments and Benefits to Noble Energy's Named Executive Officers" (*id.* at 86). The Merger Proxy has numerous tables and accompanying explanatory text detailing the change-in-control compensation *all* Noble executives would receive, including the immediate vesting of certain benefits if they were subject to a qualifying termination after the merger. *Id.* at 76-88.

To offer just one example, the Merger Proxy has a table detailing the precise dollar amount of "[g]olden [p]arachute" payments Noble's executives "could receive in connection with the merger," as well as the basis for calculating each payout (*id.* at 86):

Golden Parachute Compensation

Name	Cash(1)	Equity(2)	Pension/ NQDC(3)	Perquisites/ Benefits(4)	Other(5)	Total
David L. Stover	$ 10,333,865	$ 10,006,627	—	$ 70,327	$ 4,750,000	$ 25,160,819
Brent J. Smolik	$ 5,532,809	$ 5,648,781	$ 93,697	$ 61,106	$ 2,750,000	$ 14,086,393
Kenneth M. Fisher	$ 4,059,961	$ 2,934,149	—	$ 85,361	$ 1,500,000	$ 8,579,471
Rachel G. Clingman	$ 3,265,361	$ 1,838,189	$ 52,441	$ 52,221	$ 1,500,000	$ 6,708,212
John K. Elliott	$ 2,786,991	$ 1,845,763	—	$ 76,932	$ 2,000,000	$ 6,709,686

(1) Amounts shown reflect lump-sum cash severance payments under the Executive COC Plan, which consist of (i) the named executive officer's Annual Cash Compensation, multiplied by (x) 2.99 for Mr. Stover or (y) 2.5 for each of the other named executive officers, and (ii) the named executive officer's pro-rata target bonus under the STIP for the 2020 plan year through the assumed closing date of November 30, 2020. The cash severance payments are considered to be "double-trigger" payments, which means that both a change of control, such as the merger, and another event (*i.e.*, a Qualifying Termination) must occur prior to such payments being provided to the named executive officer (see the section entitled "—Change of Control Severance Plan for Executives"). The estimated amount of each such payment is set forth in the table below:

Named Executive Officer	Severance	Prorated Bonus
David L. Stover	$8,842,427	$ 1,491,438
Brent J. Smolik	$4,775,617	$ 757,192
Kenneth M. Fisher	$3,501,934	$ 558,027
Rachel G. Clingman	$2,868,868	$ 396,493
John K. Elliott	$2,442,813	$ 344,178

Plaintiffs do not mention these disclosures, much less identify any inaccuracies or deficiencies in the document. They *do* acknowledge that the details of the COC Severance Plan were included with Noble's Form 10-Q filed with the SEC on May 8, 2020—nearly five months before the shareholder vote on the Merger. Compl. ¶ 56. But they do *not* acknowledge that the Merger Proxy explicitly incorporated that Form 10-Q by reference (Merger Proxy at 145); urged shareholders to "carefully read . . . any documents incorporated by reference herein" (*id.* at 124); provided hyperlinks to the Form 10-Q (*id.* at 145); and informed shareholders that, upon request, Noble and Chevron would provide free *physical* copies of any requested materials incorporated by reference (*id.* at i). *See, e.g.*, *Solera*, 2017 WL 57839, at *11 (rejecting argument that information contained in an SEC filing was

not disclosed to shareholders where "the Proxy Statement expressly incorporated by reference the Form 10–K/A cited by plaintiff"). The notion that the COC Severance Plan was somehow hidden from shareholders is belied by its discussion in the very document on which plaintiffs primarily base their non-disclosure claim.

b. The Timing Of The Changes To Noble's Severance Plan And Their Role In The Merger Are Immaterial.

Plaintiffs claim that the Merger Proxy was deficient because it did not disclose whether the amendments to the COC Severance Plan were "in due course or . . . had been in the works for some time." Compl. ¶ 84. But plaintiffs do not explain why the timing of the amendments—as distinct from their *content*, which was fully disclosed and overwhelmingly similar to prior versions of the plan—would have been material to shareholders. It was not. The amendments were proposed and enacted *before* Chevron and Noble began discussing a possible whole-company merger in May 2021, and were driven by the desire to preserve managers' change of control benefits despite their voluntary reductions in salary.

Plaintiffs also claim that the merger vote was not fully informed because the Merger Proxy did not discuss "what role the COC Severance Plan had in negotiations during the sale of the Company." Compl. ¶ 84. In other words, plaintiffs believe that the Proxy should have said that the COC Severance Plan was a *reason* for the merger. That is circular: it assumes plaintiffs' core allegation that

the merger was driven by the compensation incentives. And defendants certainly had no duty to list every aspect of Noble's business that did *not* influence the merger.

To the contrary, "Delaware law does not require that a fiduciary disclose" *any* of "its underlying reasons for acting." *In re Sauer-Danfoss, Inc. S'holder Litig.*, 65 A.3d 1116, 1130 (Del. Ch. 2011). In *In re Columbia Pipeline Group*, 2017 WL 898382 (Del. Ch. Mar. 7, 2017), Vice Chancellor Laster applied that rule in a strikingly analogous case, holding that the defendants had not made a material omission by failing to inform stockholders that a merger was "engineered . . . as part of a plan to generate change-in-control benefits." *Id.* at *3. The court explained that the "basic terms of Defendants' compensation packages were publicly available," the proxy statement disclosed the total value of the change-in-control benefits received by the directors, and therefore the company's "stockholders had access to the same information as the plaintiffs." *Id.* So long as "a proxy statement describes the facts that create differing incentives for fiduciaries, it need not explain how those differing incentives could produce a self-interested outcome." *Id.*

For these reasons, plaintiffs have failed to carry their burden to "first identify a deficiency in the operative disclosure document," and even if they had, defendants have carried their burden to "establish that the alleged deficiency fails as a matter of law." *Solera Holdings*, 2017 WL 57839, at *8. Plaintiffs have failed to state a

non-disclosure claim. And as discussed next, because the shareholder vote was fully informed, plaintiffs' first and third counts fall along with their second.

B. Plaintiffs' First And Third Claims Fail Because The Fully Informed Shareholder Vote "Cleansed" Any Breach Of Fiduciary Duty Under The *Corwin* Doctrine.

Delaware has a "long-standing policy . . . to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves." *In re Tangoe, Inc. Stockholders Litig.*, 2018 WL 6074435, at *9 (Del. Ch. Nov. 20, 2018). Thus, in *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), the Delaware Supreme Court held that when a merger does not involve a controlling shareholder, and when the transaction "is approved by a fully informed, uncoerced vote of the disinterested stockholders," Delaware's deferential "business judgment rule applies." *Id.* at 309; *see also In re Cyan, Inc. Stockholders Litig.*, 2017 WL 1956955, at *11 (Del. Ch. May 11, 2017). This means that the transaction is "insulated from all attacks other than on grounds of waste." *In re OM Grp., Inc. Stockholders Litig.*, 2016 WL 5929951, at *10 (Del. Ch. Oct. 12, 2016) (alterations omitted); *see also Larkin v. Shah*, 2016 WL 4485447, at *13 (Del. Ch. Aug. 25, 2016) ("[T]he business judgment rule irrebuttably applies if a majority of disinterested, uncoerced stockholders approve a transaction absent a looming conflicted controller." (emphasis omitted)).

This doctrine, known as "*Corwin* cleansing," creates a virtually insurmountable bar for claims of breach of fiduciary duty based on third-party mergers approved by a fully informed shareholder vote. As this Court has observed, even if the directors accepted a "hypothetical bribe [that was] fully disclosed to the stockholders in way of a non-coercive vote," and "the stockholders nonetheless approved the transaction, [this] theoretically would result in dismissal under *Corwin* despite adequate pleading of a clear breach of loyalty." *In re USG Corp. Stockholder Litig.*, 2020 WL 5126671, at *2 (Del. Ch. Aug. 31, 2020).

The *Corwin* doctrine applies here. Plaintiffs do not (and cannot) allege that Noble had a controlling shareholder, that the merger was with a related party, or that the shareholder vote was coerced. And as discussed in Part I.A above, Noble's shareholders overwhelmingly approved the merger after being fully informed of all material details. The Board's decision to approve the merger is therefore insulated from all attacks other than waste.

Plaintiffs have not attempted to make out a waste claim, nor could they. They needed to allege facts that, if true, would establish that "no person of ordinary sound business judgment could view the benefits received in the transaction as a fair exchange." *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 656 (Del. Ch. 2008). Put differently, a "claim of waste will arise only in the rare, unconscionable case where directors irrationally squander or give away corporate assets." *In re Walt*

Disney Co. Derivative Litig., 906 A.2d 27, 74 (Del. 2006) (quotation marks omitted). If "any reasonable person might conclude that the deal made sense, then the judicial inquiry ends," and the claims must be dismissed. *Lear*, 967 A.2d at 656.

Indeed, where "the business judgment rule standard of review is invoked because of a [stockholder] vote, dismissal is typically the result"; "the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful." *Singh v. Attenborough*, 137 A.3d 151, 151-52 (Del. 2016); *see, e.g.*, *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 901 (Del. Ch. 1999) ("it is difficult to see the utility of allowing litigation to proceed in which the plaintiffs are permitted discovery and a possible trial" where a plaintiff must show "that the transaction was so devoid of merit that each and every one of the voters comprising the majority must be disregarded as too hopelessly misguided to be considered a person of ordinary sound business judgment" (quotation marks omitted)); *OM Grp.*, 2016 WL 5929951, at *17 (dismissal appropriate under *Corwin* where plaintiffs alleged breach of fiduciary duty from a merger, but had "not alleged or argued that the merger amounted to waste" following shareholder vote); *Solera*, 2017 WL 57839, at *13 (dismissing claim subject to *Corwin* cleansing because "plaintiff [did] not assert that the board's decision to approve the Merger amounted to waste").

Because plaintiffs' complaint "contains no allegations that would allow the Court to infer that the [transaction] was an irrational business decision or a transaction that amounted to waste," the Court should dismiss the complaint. *Gen. Motors*, 2005 WL 1089021, at *19.

II. PLAINTIFFS' FIRST AND SECOND CLAIMS FAIL BECAUSE THE DEFENDANTS ARE EXCULPATED FROM LIABILITY IN THEIR CAPACITIES AS DIRECTORS.

Plaintiffs' first and second claims—those against the defendants in their capacities as directors—fail for a separate reason: Noble's Board is protected by an exculpatory provision, and plaintiffs have failed to state a non-exculpated claim.

This Court may "take judicial notice of an exculpatory charter provision in resolving a motion addressed to the pleadings." *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 n.40 (Del. Ch. 2000). Noble's certificate of incorporation contains such a provision. Certificate of Incorporation (Ex. 7) at 6. Thus, under the Supreme Court's decision in *In re Cornerstone Therapeutics Inc., Shareholder Litigation*, 115 A.3d 1173 (Del. 2015), "plaintiffs must plead a non-exculpated claim for breach of fiduciary duty," or the "director[s] will be entitled to be dismissed." *Id.* at 1179.

Specifically, *Cornerstone* requires plaintiffs to plead "facts supporting a rational inference that the director[s] [1] harbored self-interest adverse to the stockholders' interests, [2] acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or [3] acted in bad

faith." *Id.* at 1179-80. A "plaintiff must adequately plead a loyalty breach against each individual director; so-called 'group pleading' will not suffice." *USG*, 2020 WL 5126671 at *23 (brackets omitted). Plaintiffs have not invoked the second prong, and they have not come close satisfying either the first or the third prongs.

A. Plaintiffs Have Not Adequately Pleaded That The Defendants Had Self-Interests Adverse To Noble Stockholders.

The first *Cornerstone* prong requires a showing that the directors "had divided loyalties or received a financial benefit not available to stockholders equally." *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *12 (Del. Ch. Aug. 18, 2006); *see also Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993). Plaintiffs have failed to allege that defendants had any financial interest that was adverse to the shareholders'. To the contrary, the complaint makes clear that they had no "rational motive . . . to do anything other than attempt to maximize the [merger] value." *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 662 (Del. Ch. 2013).

1. Eight Of The Nine Defendants Received No Independent Benefits From The Merger.

Plaintiffs do not attempt to allege a meaningful conflict for eight of the nine defendants. They claim that the merger "undervalued the Company and vested [defendants] with benefits that were not shared equally by . . . stockholders." Compl. ¶ 91. But they do not explain what exactly those "benefits" were. Although they claim that the amendments to the COC Severance Plan gave rise to a conflict, they

admit that the plan only "increase[d] the compensation that Noble's *management* would receive in the event of a change in control." *Id.* ¶ 64 (emphasis added).

That is important, because no defendant other than Stover was part of Noble's management or otherwise entitled to benefit from the amendments to the plan. Nor is there an "allegation that the Director Defendants revised their own compensation structures such that they would benefit in the short term from a change in control transaction." *Rudd v. Brown*, 2020 WL 5494526, at *10 (Del. Ch. Sept. 11, 2020) (dismissing complaint). By focusing on benefits allegedly received by Noble's *executives*, plaintiffs have pleaded eight defendants out of court. *See, e.g.*, *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993) ("This Court has never held that one director's colorable interest in a challenged transaction is sufficient . . . to deprive a *board* of the . . . presumption of loyalty."); *Globis Partners, L.P.* v. *Plumtree Software, Inc.,* 2007 WL 4292024, at *9 (Del. Ch. Nov. 30, 2007) (allegations against "only one member of a six person Board" were insufficient).

2. David Stover's Allegedly Independent Benefits Do Not Give Rise To An Actionable Conflict.

Plaintiffs claim that Stover was conflicted by three benefits he supposedly received from the merger. As a matter of law, none gives rise to a conflict.

Stock purchases. Plaintiffs assert that "members of [Noble's] management began buying Company stock on the open market in significant and unusual quantities" during the negotiations with Chevron. Compl. ¶ 54. They do not explain,

however, how any such purchases would give Stover an interest *adverse* to those of the shareholders. They would not: a "fiduciary's financial interest in a transaction as a stockholder (such as receiving liquidity value for her shares) does not establish a disabling conflict of interest when the transaction treats all stockholders equally." *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1035 (Del. Ch. 2012); *see also Morton's*, 74 A.3d at 662; *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989). And plaintiffs do not allege that these purchases, which were made in Stover's personal capacity, were in any way concealed from the Board or investors; in fact, all of them were publicly disclosed in the required SEC Form 4 filings, which are judicially cognizable. *See* Stover Form 4 (Ex. 8).

COC Severance Plan. As discussed above (at pp. 12-13 *supra*), plaintiffs allege that Noble's executives were motivated to pursue a merger—rather than the asset sale allegedly offered by Cynergy—because the merger would give them change-in-control benefits. Compl. ¶¶ 40, 55. These alleged benefits, too, do not give rise to a conflict: It is well established that "the possibility of receiving change-in-control benefits pursuant to pre-existing employment agreements does not create a disqualifying interest." *In re Novell, Inc. S'holder Litig.*, 2013 WL 322560, at *11 (Del. Ch. Jan. 3, 2013); *see also In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *12 (Del. Ch. May 22, 2000) ("[A] $4.5 million cash severance payment coupled with accelerated vesting of certain options to an executive

chairman of a large corporation does not . . . give rise to an improper motive to accomplish a merger."); *Krim v. ProNet, Inc.*, 744 A.2d 523, 528 n.16 (Del. Ch. 1999) (the "vesting of options does not create a conflict" because "a high exchange ratio for [the company's] shares benefits the option-holding directors as much as, if not more than, the regular stockholders"); *Nebenzahl v. Miller*, 1993 WL 488284, at *3 (Del. Ch. Nov. 8, 1993) (no conflict created by "the mere inclusion in [a] merger agreement of [a] provision guaranteeing the payment of the special benefits package for four of the directors" totaling $11.5 million).

Here, moreover, the benefits resulted in *no windfall*. The COC Severance Plan simply ensured Noble's management would not be penalized for *voluntarily* reducing their compensation in response to a collapsing market. Those benefits cannot possibly have motivated Stover to pursue a bad deal. *See, e.g.*, *Wayne Cty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *12 (Del. Ch. July 24, 2009) (dismissing claim that defendants receiving change-of-control benefits were interested in merger because, "even according to the allegations in the Complaint, . . . [the directors] waived some benefits to which they would otherwise be entitled, and [one director] agreed to a salary reduction of over $400,000"); *In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013) ("Plaintiffs' contention that the vesting of stock options in a change of control transaction implicates the duty of loyalty is frivolous.").

In the separate suit seeking access to Noble's corporate records under Section 220, this Court concluded that very similar allegations failed to meet even that Section's low bar to warrant production of related documents. *See* Trial Tr. at 73:11-74:22, *Yancey v. Noble Energy Inc.*, No. 2020-0845-SG (Ex. 9). The Court should apply the same rationale and reject plaintiffs' allegations here.

Integration pool. Plaintiffs allege without elaboration that Noble "agreed to a $40,000,000 'integration pool' to 'award' executives," from which Stover "receive[d] $4.75 million." Compl. ¶ 64. But as the complaint acknowledges, *all* shareholders received compensation for the merger in a total amount equal to Noble's equity value: "$5 ***billion***." *Id.* ¶ 60 (emphasis added). More than 400 other Noble employees—the vast majority of whom were not named executives—also received benefits from the pool, and Stover's compensation amounted to less than 0.1 percent of the total consideration. Merger Proxy at 82. Delaware courts have consistently held that compensation awards representing such a small fraction of the total merger value are immaterial. *See, e.g.*, *Brokerage Jamie Goldenberg v. Breyer*, 2020 WL 3484956, at *12 (Del. Ch. June 26, 2020) (executive award of over $82 million from a $71 billion merger "was immaterial to that transaction"); *Golaine v. Edwards*, 1999 WL 1271882, at *8 (Del. Ch. Dec. 21, 1999) ("[L]et me express my doubt that the $20 million fee wagged the $8.3 *billion* merger dog.").

Plaintiffs have failed to allege that the defendants had self-interests adverse to those of Noble's shareholders. They cannot rely on the first *Cornerstone* prong.

B. Defendants Did Not Act In Bad Faith.

To invoke the third *Cornerstone* prong, plaintiffs had to "overcome the general presumption of good faith" by alleging facts that, if true, would show that the "board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests." *White v. Panic*, 783 A.2d 543, 554 n.36 (Del. 2001). That is the case only when plaintiffs allege "a very extreme set of facts." *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 654-55 (Del. Ch. 2008). They must allege that the defendant's conduct was "motivated by an actual intent to do harm," or that there was "an intentional dereliction of duty, a conscious disregard for one's responsibilities." *McElrath v. Kalanick*, 224 A.3d 982, 991 (Del. 2020) (quotation marks omitted). Even "[g]ross negligence, without more, is insufficient"; it is necessary that the director "*knew* he was" violating his duties. *Id.* at 991-92 (emphasis in original).

Plaintiffs have not alleged any facts that would satisfy this standard. They do not claim that the defendants were motivated by an actual intent to harm Noble or its shareholders. Nor have plaintiffs pleaded "an intentional dereliction of duty" or "a conscious disregard for [the directors'] responsibilities." *Id.* at 991. Much of the complaint is devoted to attacking the consideration that shareholders received for

the merger, but plaintiffs do not explain why the price Chevron paid for Noble was unreasonable, let alone "egregious or irrational." *White*, 783 A.2d at 554 n.36. The opposite is true: The complaint demonstrates that the terms of the merger were entirely reasonable, especially in light of the state of the market.

As discussed above (at pp. 8-9 *supra*), plaintiffs contend that the merger was a bad deal because Noble supposedly could have made at least $1 billion more through Cynergy's proposal while still retaining a substantial portion of its assets. Plaintiffs offer nothing to support that figure beyond the bare assertions of their confidential informant. And inexplicably, plaintiffs compare this figure with the $5 billion *equity* value placed on Noble in the merger, rather than the $13 billion *enterprise* value that Chevron actually paid, which reflected nearly $8 billion of Noble's debt. Merger Proxy at 58, 91. That is not a fair comparison.

More importantly, there is no reason to believe that the Cynergy proposal—floated in mid-2018—was available at the time of the merger in 2020, after a global collapse in the oil and gas industry. Nor is there any reason to believe that if Cynergy *had* been interested, the proposed consideration would have been the same despite Noble's declining stock price. The complaint does not even allege that Cynergy was still interested in acquiring Noble's Eastern Mediterranean assets *at any price*.

Indeed, plaintiffs do not allege that, at the time of the Merger, there were *any offers at all* available to Noble that would have yielded superior value. *See, e.g.*,

Agostino v. Hicks, 845 A.2d 1110, 1123 (Del. Ch. 2004) ("The first problem with [plaintiff's] purported injury is that there is no allegation that a value-maximizing transaction was on the horizon."). Nor have plaintiffs alleged that, during the 77-day period between the announcement of the Chevron transaction and its closing, any other acquirer came forward to make a higher bid, which would have been expected if (as plaintiffs allege) the Chevron transaction undervalued Noble by at least a billion dollars. *See e.g.*, *In re Plains Expl. & Prod. Co. S'holder Litig.*, 2013 WL 1909124, at *6 (Del. Ch. May 9, 2013) (finding that a board of directors obtained the best transaction reasonably attainable because no bidders emerged in the five-month period after the announcement of the transaction at issue); *In re Pennaco Energy, Inc.*, 787 A.2d 691, 707 (Del. Ch. 2001).

Based on the complaint and the referenced documents, no such offer was forthcoming from Cynergy or anyone else: Noble's stock had recently fallen 88% in less than three months, amid what plaintiffs characterize as a "rout in oil prices" arising out of the COVID-19 pandemic. Compl. ¶ 76. The Merger Proxy further explains that factors like the "pandemic," the "Saudi/Russia [oil] price war," and broader "commodity price uncertainty" forced the Board to explore "strategic alternatives" that it had *not* previously considered. Merger Proxy at 47.

It is therefore no understatement to say that the Chevron deal was a *boon* to Noble shareholders. Chevron paid a *premium* over the share price at which Noble

was trading (Compl. ¶ 76), and Delaware "jurisprudence recognizes that" that share price is the "measure of fair value superior to any estimate." *Applebaum v. Avaya, Inc.*, 812 A.2d 880, 889-90 (Del. 2002); *see also DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 369-70 (Del. 2017). That premium, moreover, was substantially higher than Chevron's initial offer—it was won through hard-fought negotiations following extensive internal discussions. *See* pp. 17-19 *supra*.

At bottom, plaintiffs' claim is that that they are better able to assess Noble's fair value at the time of the merger than Chevron, J.P. Morgan, Noble's Board, its management, the vast majority of its shareholders, and the stock market. Plaintiffs' general dissatisfaction with the merger price—based primarily on an indication of interest for certain assets two years prior in a very different market—comes far from a showing of bad faith.

III. PLAINTIFFS THIRD CLAIM FAILS BECAUSE THEY HAVE NOT ADEQUATELY PLEADED A BREACH OF THE DUTY OF CARE BY DAVID STOVER IN HIS CAPACITY AS CEO.

Plaintiffs claim that "Stover breached his duty of care in his capacity as [CEO]" by "fail[ing] to inform the Board of his communications with Chevron until after the COC Severance Plan ha[d] been negotiated"; by "engag[ing] in stock purchases shoring up his equity in the Company prior [to] the Merger"; and by "fail[ing] to communicate" Cynergy's proposal "to the Board" and "stockholders." Compl. ¶ 101. The bulk of these allegations—those about Stover's stock purchases (*see* pp.

38-39 *supra*), and the communications to shareholders about the Cynergy deal (*see* pp. 22-26 *supra*), which are brought against him in his capacity as a director—are addressed above. The remaining allegations—about what Stover allegedly failed to disclose to the *Board* in his capacity as CEO—are meritless.

Simply put, we have found no authority so much as suggesting that Stover was required to inform the Board that there had been tentative discussions with Chevron about a transaction involving Eastern Mediterranean assets before the Compensation Committee recommended the COC Severance Plan to the Board—or that the timing of that recommendation is relevant at all to Stover's duty of care. Delaware law is clear on this point: "Due care in the decision making context . . . [turns on] whether the board was reasonably informed of all material information reasonably available *at the time it made its decision*." *Ash v. McCall*, 2000 WL 1370341, at *8 (Del. Ch. Sept. 15, 2000) (emphasis added). Noble's Board did not make its "decision" until its meeting on July 19, 2020, when it approved the Chevron merger. Merger Proxy at 56. As the complaint recognizes, that was at least *three months* after Stover informed the Board about his meetings with Chevron. Compl. ¶¶ 56-57; *see also Morrison v. Berry*, 2019 WL 7369431, at *23 n.286 (Del. Ch. Dec. 31, 2019) (executive had no duty to communicate information "immediately to the Board," and complaint did not allege that he "withheld any facts or otherwise failed to inform the Board as it reacted to [an offer] over the following weeks").

Plaintiffs' allegation that Stover failed to communicate *Cynergy's* proposal to the Board (Compl. ¶ 101) is at odds with the Merger Proxy's description of potential strategic transactions involving Noble Midstream that were evaluated at the Board's direction (Merger Proxy at 42-43). But again, Delaware law does not require either directors or executives to disclose preliminary, ephemeral matters like the existence of an invitation to negotiate that never led even to negotiations. *See* pp. 24-26 *supra*. Plaintiffs have built their case around that proposal, and it is a remarkably thin reed.

IV. THE COMPLAINT DOES NOT MAKE CLEAR WHETHER PLAINTIFFS' CLAIMS ARE DIRECT OR DERIVATIVE.

Plaintiffs' complaint appears to raise claims that are inherently derivative, but their allegations are not specific enough to resolve this issue with certainty. Unless plaintiffs are able to establish in their opposition brief that their claims are not derivative, the Court should dismiss the complaint for this reason as well.

In *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), the Supreme Court held that "determining whether a stockholder's claim is derivative or direct . . . must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* at 1033. A claim is direct only if the stockholder "can prevail without showing an injury to the corporation." *Id.* at 1039.

This question depends on "the nature of the wrong alleged, not [on] the form of words used in the complaint." *In re Syncor Int'l Corp. S'holders Litig.*, 857 A.2d 994, 997 (Del. Ch. 2004). A court must therefore "look[] to the body of the complaint, not the plaintiff's designation or stated intention," and dismiss any claims that a plaintiff lacks standing to assert derivatively. *Agostino*, 845 A.2d at 1121 (quotation marks omitted); *see also, e.g.*, *Culverhouse v. Paulson & Co.*, 133 A.3d 195, 199 (Del. 2016) (affirming dismissal where the "alleged harm flowing from the Investment Fund's losses would not in the first instance be suffered by" the plaintiff).

To the extent plaintiffs' claims are premised on the supposed diversion of merger consideration toward severance payments and the integration pool, their claims are derivative and must be dismissed for lack of standing. As discussed above, plaintiffs allege that defendants "fail[ed] to act in the best interests of the common stockholders" by amending the COC Severance Plan to adjust severance payments and establishing a $40 million integration pool from which certain senior executives received benefits in the merger. Compl. ¶¶ 63-64. But in *Kramer v. West Pacific Industries, Inc.*, 546 A.2d 348 (Del. 1988), the Supreme Court affirmed the dismissal of a directly-pled claim that plaintiffs had been "wrongfully deprived of a portion of the Merger Sale proceeds" because a $29 million were "unnecessarily spent by management" on bonuses, stock options, and fees—a sum that "could only come out of the Sale Proceeds." *Id.* at 352 (quotation marks omitted). The court held that

these allegations failed to "state a claim of special or direct injury to the common shareholders rather than a derivative claim for waste." *Id.* at 353. Because the plaintiffs "lost standing to pursue the derivative claims" following the merger, those claims were dismissed. *Id.* at 355; *see also In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *10-11 (Del. Ch. Sept. 30, 2009). Plaintiffs—who are former, not current, Noble shareholders—have likewise lost standing to pursue such claims.

CONCLUSION

The Court should dismiss the complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, the foregoing was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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