IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

26 CAPITAL ACQUISITION CORP., and
26 CAPITAL HOLDINGS, LLC,

Plaintiffs and Counterclaim-Defendants,

v.

TIGER RESORT ASIA LTD, TIGER RESORT, LEISURE AND ENTERTAINMENT, INC., UE RESORTS INTERNATIONAL, INC., and PROJECT TIGER MERGER SUB, INC.,

Defendants and Counterclaim-Plaintiffs.

C.A. No. 2023-0128-JTL

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Plaintiffs and Counterclaim-Defendants 26 Capital Acquisition Corp. ("SPAC") and 26 Capital Holdings, LLC ("Sponsor" and collectively, "26 Capital" or "Plaintiffs") submit this pre-trial brief ahead of the July 10 trial in this action.

PRELIMINARY STATEMENT

In October 2021, SPAC entered into a merger agreement to bring a brand-new world-class casino and resort in the Philippines onto the Nasdaq exchange. The transaction was a sensational value, for both sides. SPAC shareholders would receive shares in a company valued at over $3.3 billion book value, at a $2.6 billion valuation. The casino's ultimate parent company, Universal Entertainment Corporation ("Parent" or "UEC"), would gain access to United States equity and debt financing markets and expected a massive reputational boost from the legitimacy and optionality associated with a Nasdaq listing. The casino's operating company ("Operating Company") would immediately be subject to improved corporate governance, the potential windfall from the international exposure of a publicly-listed U.S. company, and improved management by merging with Jason Ader, one of the world's leading figures in the casino-gaming sector. The deal was expected to close promptly.

As for the benefits of this transaction, to both sides, nothing has changed. Post-signing, the casino has only increased in value. And Parent company's leaders and Tokyo shareholders still see the value in the SPAC transaction. But all the

reasons favoring a transaction have also impeded it. Parent and the Operating Company are rife with corruption, infighting, and self-dealing. Each has interfered with this transaction; management entrenchment at the Operating Company has doomed it, absent court intervention.

Parent's ownership of the casino is subject to a family dispute between the founder and his son (previously resolved in Japan); during the course of this transaction, the father briefly regained control of the casino in the Philippines—and Defendants (the "UEC Parties") repeatedly breached the ordinary course covenant in the Merger Agreement. In the process of regaining control, the Operating Company management secured for themselves long-term guaranteed employment contracts and effective board control with autonomy from Parent (again, in breach of the ordinary course covenant, and never disclosed to Parent's stockholders, even to this day).

Defendants also appear to have engaged in suspicious activity to obtain government assistance to regain control of the casino: a senior Parent executive brought "heavy luggage" to meet with the Speaker of the House of the Philippines—Martin Romualdez (all in breach of the ordinary course covenants):

2022/07/27 20:47, Asano, Kenshi <asano.kenshi@hq.universal-777.com> wrote:

Director Tokuda,

I think that the reason why the president is irritated is that he finds it quite difficult to file a Hong Kong criminal case that he declared, and he is taking it out on someone because he can't sheathe the sword he has drawn.
Anyway, let's focus on the Supreme Court order for now.
To that end, Mr. Sato will be on a business trip to the Philippines tomorrow with heavy luggage.
Thank you.

Asano

* * *

2022/07/27 22:06, Tokuda, Hajime <Tokuda.hajime@hq.universal-777.com> wrote:

After the actual item arrives safely, I will set up an interview with Martin.

The Operating Company's CFO, Hans Van Der Sande, then received real-time updates using his top-secret Hotmail (which he shielded from proper collection in this case):

Date: Monday, August 1 2022 06:04 AM
Subject: Fwd: NO 2
From: Hans van der Sande <hansomvandersande@gmail.com>
To: hansvandersande@hotmail.com;

---------- Forwarded message ---------
From: tokuda-3383@i.softbank.jp <tokuda-3383@i.softbank.jp>
Date: Mon, Aug 1, 2022 at 10:50 AM
Subject: Fwd: NO.2
To: Hans van der Sande <hansomvandersande@gmail.com>

Please ensure that divulging the information is strictly prohibited to those members except for Hans.

The Supreme Court date has been changed to 4th from 3rd.

Sent from iPhone
Forwarded message

As soon as this "Philippine lobbying"—to use Defendants' phrase—succeeded, in August 2022, Van Der Sande's mission became quashing this deal which would bring management reform, potential investigations, and U.S. regulatory scrutiny. So too has Defendants' counsel, who just last Friday attempted to silence Plaintiffs from raising these issues at trial by threatening that it would "blow back" on Plaintiffs. After Plaintiffs declined that invitation and explained that all facts should be presented in open court, Defendants filed their offensive and false motion to shift burden, which will be addressed separately.

Although to this day Parent still recognizes that there would be great value from the SPAC transaction, the Operating Company refused to provide the

information needed to complete the PCAOB audit for closing. And then Operating Company succeeded in getting the PCAOB auditor to resign completely.

Since then, Operating Company's management claimed to be engaged in "reasonable best efforts" to find a replacement auditor and close the transaction. They were not. In fact, their attorneys advised them to create a pretextual record:

> I think it is important that we look like we are maximizing chances of actually getting an auditor.
>
> Dan Perry | Milbank | Partner
> 55 Hudson Yards | New York, NY 10001-2163
> T: +1 212.530.5083
> DPerry@milbank.com | milbank.com

The UEC Parties were hoping to run out the clock on SPAC's expiration date. Just *today* they sent a purported termination notice—confirming that their putative ongoing "efforts" were a total ruse.

Now, the UEC Parties have pivoted to sideshows, attempting to turn every "hot document" and "bad fact" into a transaction out, because none exists within the four corners of the agreement or at the core of the deal. No matter how sensational their allegations, the UEC Parties still cannot identify a single way the transaction would have been different, a single harm that flowed from the supposed "fraud" and "unclean hands." There is none.

In a war on deal certainty, the UEC Parties have latched onto supposed disloyalty by its non-fiduciary "SPAC advisor," a New York-based hedge fund

called Zama, to turn *any* merger agreement they would have chosen into an option contract. Merger agreements are not so easily broken.

What Parent seeks to weaponize are circumstances *entirely* of its own creation. In February 2021, Parent engaged Zama, without any fees, with express notice that Zama may trade on the other side of the transaction, and Parent created incentives and circumstances that aligned Zama with closing the transaction. As Parent's former executive officer in charge of the transaction testified, Zama acted as designed—facilitating closing.

Parent now believes it has claims against Zama; its recourse (if any) is in a suit against Zama—which is exactly what it has filed in the Southern District of New York. Having run out of excuses to escape closing, the UEC Parties want this case too to be about Zama. But the UEC Parties' claims as to Zama are irrelevant here; the question is whether the UEC Parties' have any valid outs as against SPAC. They do not.

The Merger Agreement is unambiguous; no conditions to closing will fail; there is no MAE even alleged. All inflammatory and sensational allegations accounted for, the UEC Parties still cannot identify a single way that the ***merger agreement*** would have been different. The transaction must close.

BACKGROUND

A. Parent Sought A Public Listing In The United States.

Parent is a Japanese gaming company publicly-traded on the Tokyo Stock Exchange founded by Kazuo Okada and majority-owned by Okada Holdings.[1]

Completed in 2021, Okada Manila is an integrated resort casino in the Philippines. The video tour is a must-see—golden towers connected by a skybridge, an indoor beach and night club, 3,000 gaming machines, 300 gaming tables, 993 guest rooms, and the world's largest dancing fountain.[2]

During the casino's development phase, Parent came under fire for allegedly bribing Philippine officials.[3] Wynn Resorts forcibly redeemed Parent's shares, settling in 2018 for a $2.5 billion payment to Parent.[4]

Parent indirectly owns the casino through Tiger Resort Asia Ltd. ("TRA"), of which Parent is the 100% owner.[5] TRA is a shell, operated only by two Parent-appointed board members.[6] TRA in turn owns 99.99% of the casino's operating

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[1] JX1593_(https://www.cnbc.com/quotes/6425.T-JP?tab=profile).

[2] JX1592_(https://universal-777.com/en/business/okada-manila).

[3] JX6_(https://www.reuters.com/article/us-wynn-resorts-litigation-universal-ent/wynn-resorts-to-pay-2-6-billion-to-settle-lawsuit-with-japans-universal-idUSKCN1GL0CW).

[4] *Id.*; JX1523_(Fujimoto)_159:15-161:16.

[5] D.I._233_(Second-Amended-Counterclaims)_¶32 ("SAC").

[6] JX1475_(Asano)_73:5-12.

company, Tiger Resorts Leisure & Entertainment, Inc. (the "Operating Company" or "TRLEI").[7] The board members of the Operating Company each hold one share, in accordance with Philippine law.[8] The Operating Company wholly owns two transaction entities, UE Resorts International ("New Parent" or "UERI") and Project Tiger Merger Sub ("Merger Sub" and together with TRA, the Operating Company, and New Parent, the "UEC Parties").[9]

Around 2018, Parent resolved to seek a public listing for the Operating Company[10] and began preparations to accomplish a reverse listing in the Philippines by purchasing an entity for this purpose, Asiabest Group.[11] (Parent Director Tokuda and Operating Company CFO Hans Van Der Sande prefer the Philippines listing using AsiaBest Group.[12])

In late 2019, Parent senior executive officer Toji Takeuchi proposed a SPAC transaction to the Parent board to position the casino as an independent publicly-traded company with access to U.S. debt and equity financing markets.[13] The Parent

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[7] SAC_¶32.

[8] JX18; JX1652_(TIGERDE_0119850)_at_9854.

[9] SAC_¶¶34-35.

[10] JX1564_(Eiseman)_96:9-19.

[11] JX17_(https://ssl4.eir-parts.net/doc/6425/tdnet/1668822/00.pdf).

[12] JX1650_(Fujimoto-30(b)(6))_10:22-11:7.

[13] JX1580_(Takeuchi)_28:11-31:22.

board backed this plan, especially given its superiority to a Philippines listing—for reputational, financing, and governance purposes.[14]

Executive officer Takeuchi was the head of Corporate Planning at Parent.[15] He was the only non-director that regularly attended UEC board meetings (with a subordinate to take notes) and was responsible for advising the board on major corporate direction.[16] Takeuchi was also Parent's most fluent (if not only) English-speaking executive and boasts an impressive resume—he is American-educated and held several high-level corporate compliance positions, including in New York.[17] He was appointed as head of investor relations and was responsible for implementing compliance at Parent (a nearly impossible task; Takeuchi testified UEC had abysmal compliance).[18]

Parent appointed Takeuchi to lead the search and implementation of the major corporate event at issue here, spinning off the casino in a merger with a U.S.-based SPAC partner.[19] Among other things, to effect Takeuchi's role as transaction lead,

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[14] JX1585_(Takeuchi)_97:9-98:8.

[15] JX1585_(Takeuchi)_17:19-18:24.

[16] JX1585_(Takeuchi)_20:21-22:13.

[17] JX1640_(Yip)_20:10-17; JX1585_(Takeuchi)_9:11-17:10.

[18] JX1585_(Takeuchi)_18:19-20, 109:19-23.

[19] JX0053_(TIGERDE_0252676)_at_2677.

Parent appointed Takeuchi as the "Project Leader" on the transaction.[20] And the TRA board executed a power of attorney for Takeuchi to take all steps necessary to effectuate the transaction.[21]

As chief of UEC's investor relations, Takeuchi was engaged in regular dialogue with Alex Eiseman of Zama Capital Advisors ("Zama"), a New York-based hedge fund and long-time stockholder of Parent.[22] Zama "look[s] to align themselves with key stakeholders who are likely to undertake a corporate action to unlock value the market is ignoring."[23]

Eiseman and Takeuchi discussed the idea of finding a U.S.-based SPAC to go public.[24]

B. Parent Prepared To Enter Into A SPAC Transaction To Accomplish A Public Listing At A Supportable Valuation.

On February 12, 2021, Parent's board approved seeking a SPAC-merger to list on a United States stock exchange to "realiz[e] the further expansion of that

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[20] *Id.*; JX1558_(Van-Der-Sande-30(b)(6))_200:7-11; JX1640_(Yip)_21:15-20; JX1585_(Takeuchi)_44:6-9.

[21] JX336_(TIGERDE_0174323)_at_4324; JX1475_(Asano)_121:9-126:9.

[22] JX1580_(Takeuchi)_31:4-10.

[23] JX1578_(https://www.stridecapital.com/investments/zama-capital).

[24] JX1580_(Takeuchi)_31:12-15.

[Philippines casino] business and greater corporate value."[25] Parent had found a SPAC partner to accomplish this: Leisure Acquisition Corp. (NASDAQ: LACQ).[26] The proposed LACQ terms included *no* minimum cash or PIPE conditions.[27]

Eiseman was warned by one of his limited partner investors (Andrew Rubenstein, who also spoke with Mr. Takeuchi) that the principal of LACQ may be a poor strategic fit.[28]

C. Parent Enters Into An Exclusivity Agreement With Zama To Find A More-Qualified SPAC Partner Offering Equal Or Better Terms.

Takeuchi and Eiseman discussed scrapping the LACQ deal, using it as a "floor" against which Zama would find a transaction with better terms—specifically, a higher valuation, which was UEC's primary consideration.[29]

On February 12, 2021, Parent entered into exclusivity with Zama.[30] Under that engagement (which was formally documented at Parent President Fujimoto's insistence), Zama was to identify potential SPAC partners for Parent and facilitate a

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[25] JX46_(https://ssl4.eir-parts.net/doc/6425/tdnet/1934741/00.pdf); JX53_(TIGERDE_0252676)_at_2677; JX1558 (Van-Der-Sande-30(b)(6))_38:6-9.

[26] JX1580_(Takeuchi)_82:13-17.

[27] JX31_(ZCSA00131569)_at_1571.

[28] JX40_(TIGERDE_252608)_at_2611; JX1564_(Eiseman)_362:18-364:2; JX47_(ZCSA00131363)_at_1363.

[29] JX34_(ZCSA00132023)_at_2023; JX1580_(Takeuchi)_80:23-81:2.

[30] JX228_(TIGERDE_0189560)_at_9566.

signing.[31] Recognizing that Zama was an activist hedge fund investor, Parent agreed that Zama was free to pursue, participate in, and profit from the transactions, was not bound by any fiduciary duties, and that Parent would be responsible for independently reviewing the transaction with independent advisors.[32]

Before the engagement letter—reviewed and approved by Parent's in-house counsel[33]—was signed, Executive Takeuchi asked "I don't see any advisory fee clause in the agreement…?"[34] Mr. Eiseman responded: "Yes, that is correct … ***we might want to participate in the SPAC deal***."[35] No one from the UEC Parties expressed any concern or raised any questions in response to this explanation.[36]

This no-fee non-fiduciary arrangement was unusual. At the same time that Parent engaged Zama, it was being advised by teams of Baker McKenzie lawyers across three countries—the U.S., Japan, and the Philippines—at significant cost.[37] (It was not, for instance, receiving its legal advice for the SPAC transaction from an activist investor familiar with American law and that disclaimed fiduciary duties and

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[31] JX51_(TIGERDE_0252642).

[32] JX1209_(TIGERDE_0189560)_at_9566.

[33] JX43_(ZCSA00131383)_at_1383.

[34] JX40_(TIGERDE0252608)_at_2608.

[35] JX40_(TIGERDE0252608)_at_2608.

[36] JX1558_(Van-Der-Sande-30(b)(6))_149:18-22.

[37] JX57_(B&M_00000001)_at_0016-0028.

declined any fee for the right to remain free to act for its own interests.) And Parent awarded Van Der Sande's company, Asian Structured Capital, a multi-million dollar consulting award in connection with brokering and negotiating ongoing U.S.-based financing.[38]

Zama's mandate, as discussed with Takeuchi, was to identify a SPAC partner offering equal or better terms to LACQ but with a principal who would add value to the casino business.[39]

Zama's first introduction was to Slam Corp. (NASDAQ: SLAM), run by former baseball star Alex Rodriguez.[40] Discussions dropped off after Slam's value-add was to bring celebrities to the casino.[41]

D. Zama Identified SPAC As A Better Fit Because Ader Was A Casino-Sector Specialist And SPAC Offered Better Terms Compared To LACQ.

Zama arranged a meeting with SPAC through a mutual connection to a SPAC director.[42] Before asked to meet with Zama, SPAC had no knowledge of Zama and had not focused on the Operating Company as a potential target. Nor, if they had,

[38] JX1107_(26CAPITAL_0049696)_at_9697-9702.

[39] JX1654_(ZCSA00132978).

[40] JX1580_(Takeuchi)_36:21-38:10.

[41] JX1580_(Takeuchi)_38:8-39:4.

[42] JX1520_(Ader)_95:7-14; JX56_(26CAPITAL_0152705)_at_2706.

could they have dealt with UEC Parties directly—Parent required any potential SPAC partner to go through Zama per the engagement letter.[43]

Ader is the CEO and Chairman of SPAC. He is the co-founder and CEO of SpringOwl Asset Management, which leads corporate turnarounds with a particular focus on the real estate, gaming, and lodging sectors. His deep experience includes acting as independent director of Las Vegas Sands Corp. from 2009-2017—where he was on the audit committee and chaired the corporate governance committee.

Mr. Ader diligenced Zama and learned from Ken Moelis, of Moelis & Company, that Ken was "an investor with Alex, and there had been times where Alex didn't have to do the right thing by his investors, but always did."[44]

Before making an introduction to the UEC Parties, Zama requested an investment in Sponsor.[45] Zama requested similar sponsor economics from other potential SPAC partners as well.[46] Contemporaneously, Zama retained Milbank—Defendants' counsel here—and Milbank advised that an investment in Sponsor, under the circumstances, was acceptable as long as Zama gained nothing more than

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[43] JX228_(TIGERDE_0189560)_at_9566-9568.

[44] JX1520_(Ader)_108:6-14.

[45] JX1655_(26CAPITAL_0159106)_at_9106.

[46] *E.g.*, JX39_(ZCSA00133556)_at_3559.

a passive economic interest.[47] After providing advice, Milbank terminated the engagement due to a conflict given their ongoing representation of Parent.[48]

Zama provided SPAC a copy of its engagement letter with Parent which gave Zama exclusivity and purported to give Zama freedom to trade for its own account and to not restrict its activities.[49] SPAC evaluated the proposed investment structure and involved counsel.[50]

The situation, as implemented by Parent, was that SPAC could discuss a merger only through Zama.[51] Still, Mr. Ader asked Zama's Eiseman whether Parent was okay with Zama's proposed investment in Sponsor; Eiseman assured Mr. Ader that Parent was aware and approved.[52]

On July 12, 2021, Zama paid $4.5 million for a 60% passive economic interest in Sponsor (which held shares and warrants in SPAC); SPAC is not a party to that agreement.[53] The subscription agreement was not tied to any specific SPAC deal,

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[47] JX1564_(Eiseman)_9:13-10:19; *id.*_366:4-18; JX72_(ZCSA00152935)_at_2935;_JX73_(ZCSA00152942)_at_2945.

[48] JX74_(ZCSA00152946)_at_2946.

[49] JX63_(26CAPITAL_0157706)_at_8133.

[50] JX1656_(26CAPITAL_0163924)_at_3925.

[51] JX63_(26CAPITAL_0157706)_at_8133.

[52] JX1520_(Ader)_213:11-20; JX1564_(Eiseman)_361:3-14.

[53] JX95_(26CAPITAL_0049317).

and Ader retained full control of Sponsor's holdings in shares and warrants.[54] Zama represented that the investment did not violate any agreement binding it.[55]

The same day, Zama introduced SPAC to UEC Parties.[56] Parent then considered the transaction and, within a few days, decided that Ader was an exciting and beneficial partner to unlock value for the Philippines casino. That belief did not wane. On September 22, 2022, after advocating that Parent Board should terminate the Merger Agreement, Parent's President Fujimoto concluded: "I would like … to continue some kind of cooperative relationship."[57] The same was communicated to Mr. Ader, on September 26, 2022: "Our company has great expectations for a …continued relationship with you, …because you're one of the few people who is an expert in both casino affairs and finance. Particularly with respect to finance, internationally, that is not our forte to begin with. Japanese, in general, are complete amateurs about casino affairs."[58]

Zama continued to actively promote the transaction *on both sides*. While Eiseman told Ader that the UEC Parties may agree to "pro-SPAC terms" and might

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54 JX95_(26CAPITAL_0049317)_at_9317(¶1)_9319(¶¶3(a),(e)).

55 JX95_(26CAPITAL_0049317)_at_9320(¶6(b)).

56 JX1657_(TIGERDE_0252760)_at_2760.

57 JX889_(TIGERDE_0258408)_at_8421.

58 JX907_(TIGERDE_0144865)_at_4866-4867.

not carefully scrutinize terms that were important to Sponsor, he simultaneously spoke to Parent and SPAC about *the key* concession important to Parent: the $2.6 billion valuation.[59] And in negotiations, he facilitated discussions on key concessions obtained by the UEC Parties, including rejecting a Parental guaranty that SPAC had demanded.[60]

SPAC did not particularly appreciate this setup, but Zama was the mandatory "intermediary" installed by Parent and the transaction was uniquely promising.[61]

E. Parent Prioritized A Quick And Sure Transaction With SPAC Over Negotiating For Terms That Were Unimportant To It Compared To A $2.6 Billion Valuation In A Nasdaq Listing And A Partnership With Jason Ader.

With a goal to list by year-end 2021, UEC Parties opted to move quickly toward signing.[62]

Consistent with his understanding that Zama was an intermediary, not a fiduciary financial advisor, Ader inquired at the outset whether Parent had "any bankers or advisors on their side? Like Nomura or Mizuho? Or Mitsubishi UFJ."[63]

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[59] *See, e.g.*, JX159_(ZCSA00145534)_at_5534; JX24_(ZCSA00131321); JX1585_(Takeuchi)_80:23-21:2; JX124_(26CAPITAL_0163939).

[60] JX160_(TIGERDE_0256537)_at_6540.

[61] JX861_(TIGERDE_0227301_EN)_at_7310.

[62] JX1564_(Eiseman)_88:6-23; JX46_(https://ssl4.eir-parts.net/doc/6425/tdnet/1934741/00.pdf).

[63] JX118_(ZCSA00122970)_at_2971.

During negotiation of the Merger Agreement, Parent's fiduciary advisors, Baker McKenzie and Van Der Sande, repeatedly advised Parent/UEC Parties to consider whether a minimum cash condition and/or PIPE financing was needed, if maximizing cash proceeds at closing was an important consideration.[64] It was not.[65]

Baker McKenzie was explicit: it advised that "the preferred approach" was "to place the PIPE prior to executing the Merger Agreement" and asked whether there should be "a minimum cash closing condition," absent a pre-signing PIPE.[66] Baker McKenzie advised, again, on September 26 "that because UEC was agreeing to no minimum cash condition … ***it could be forced to close into a cashless SPAC***."[67] Baker McKenzie even pushed "to control the terms of the PIPE (e.g., whether to issue a PIPE at a lower valuation than implied by the de-SPAC itself – something that is becoming more common in the market given the difficult PIPE market)."[68]

Defendants' Rule 30(b)(6) witness agreed that UEC Parties were aware pre-signing that (i) they could be "forced to close into a cashless SPAC"; (ii) the PIPE

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[64] JX1492_(Van-Der-Sande)_35:14-22; JX1558_(Van-Der-Sande-30(b)(6))_66:15-67:6; JX1558_(Van-Der-Sande-30(b)(6))_96:25-97:11.

[65] JX1585_(Takeuchi)_200:1-201:11.

[66] JX154_(ZCSA00144696)_at_4700.

[67] JX163_(ZCSA00145215)_at_5215.

[68] JX163_(ZCSA00145215)_at_5215.

market was "difficult"; (iii) PIPE investors were demanding "discounts"; and (iv) many SPAC deals included minimum cash provisions.[69] He further agreed that UEC Parties knew all these risks prior to signing and decided to move forward.[70] Parent's senior management, including CFO and Director Asano, were kept up-to-date regarding these issues.[71]

Ultimately, equity financing upon closing was not material to Parent,[72] was not part of Parent's business agreement with SPAC,[73] and the lack of a minimum cash condition *was* material to SPAC.[74] (The UEC Parties knew that. A November 16, 2021 draft of background facts for the Form F-4 noted that SPAC's board considered it a "material" "benefit" that closing was "not being subject to a minimum cash condition."[75] This language was included in every Form F-4 filed with the SEC,[76] and UEC Parties raised no concerns before litigation.[77])

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[69] JX1558_(Van-Der-Sande-30(b)(6))_190:17-193:11.

[70] JX1558_(Van-Der-Sande-30(b)(6))_194:2-10, 195:17-194:1.

[71] JX180_(TIGERDE_0254982).

[72] JX25_(ZCSA00131401)_at_1401.

[73] JX154_(ZCSA00144696)_at_4700.

[74] JX154_(ZCSA00144696)_at_4696; JX261_(ZCSA00090838)_at_0838.

[75] JX265_(TIGERDE_0017060)_at_7068.

[76] *See, e.g.*, JX458; JX562_(TIGERDE_0003103)_at_3210.

[77] JX1558_(Van-Der-Sande-30(b)(6))_208:13-212:9.

F. UEC Parties Approved The Transaction With Advice From Van Der Sande And Baker McKenzie (But Not Zama).

On October 14, 2021, the Operating Company board (including Van Der Sande) unanimously approved the merger agreement with SPAC.[78] The board of New Parent (also including Van Der Sande) did the same.[79]

On October 15, the Parent board met. The advisers brought to the meeting were Van Der Sande and two Baker McKenzie attorneys.[80] Not Zama.

Parent's board members asked many questions, including about several specific provisions of the merger agreement and about the closing timeline.[81] Not mentioned, even once: Zama. After extensive discussion with Van Der Sande and Baker McKenzie, the board unanimously approved.[82] After the board unanimously approved the merger agreement, Zama's role was "to provide . . . the advice necessary to get the deal closed."[83]

(Post-signing, Parent hired Zama under a new engagement with the same contractual disclaimers. JX228_(TIGERDE_0189560)_at_0561, 9571. Zama was

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78 JX187_(TIGERDE_0254403)_at_4404.

79 JX258_(TIGERDE_0170578)_at_0579-0580.

80 JX206_(TIGERDE_0254005)_at_4006.

81 JX206_(TIGERDE_0254005)_at_4007-4015.

82 JX208_(ZCSA00027500)_at_7500.

83 JX1580_(Takeuchi)_65:11-66:7; JX960_(TIGERDE_0155898)_at_5898.

tasked with, among other things, "[s]election of [a] financial prep statement preparation vendor" and "lias[ing] with UHY for completion of key audit milestones.")

G. Post-Signing, Parent Delays, Including Because It Planned To Terminate Van Der Sande And Yip.

Upon signing, the officers were protected from removal by the ordinary course covenant.[84] The Parties marketed Van Der Sande and Byron Yip (President and COO of the Operating Company) to investors.[85] But for Parent President Fujimoto, the long-term vision for the business included, even required, replacement of Operating Company management: Messrs. Van Der Sande and Yip.[86] He referred to them as, variously, incapable of effectively running the casino resort business, and untrustworthy[87] and planned to terminate Operating Company CFO Van Der Sande immediately post-closing.[88] SPAC objected, fearing that management and governance changes would concern investors, potentially eroding support and

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[84] JX192_(Merger_Agreement)_§6.1(j).

[85] *E.g.*, JX235_(TIGERDE_0069021)_at_9028; JX248_(26CAPITAL_0050566)_at_0578.

[86] *See* JX350_(TIGERDE_0120020)_at_0025-26; JX370_(TIGERDE_0219064).

[87] JX347_(TIGERDE_0139694); JX350_(TIGERDE_0120020)_at_0025-0026; JX362_(TIGERDE_0120076) at 0076; JX379_(TIGERDE_0120088)_at_0101-0102.

[88] JX532_(TIGERDE_0166755).

driving redemptions.[89] Fujimoto was steadfast in his desire to upgrade management.[90] As a result, the confidential F4 filed in December 2021 did not list New Parent's proposed board members or officers.[91]

Van Der Sande and Yip quickly learned of Fujimoto's plans and began defensive maneuvering.[92]

H. Post-Signing, Hans Van Der Sande And Byron Yip Leverage Their English-Language Skills And Pair With Milbank To Protect Their Positions And Extract Value For Themselves In Connection With The Transaction.

By January 24, 2022, Yip insisted that he would not facilitate the transaction until his future at the company was secured.[93] Van Der Sande attempted to thwart Fujimoto's plans by calling a sham board meeting.[94] Their efforts failed.

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[89] JX356_(ZCSA00043802).

[90] JX379_(TIGERDE_0120088)_at_0101-0102.

[91] JX326_(26CAPITAL_0003100)_at_3327.

[92] JX354_(TIGERDE_0166049)_at_6052; JX356_(ZCSA00043802)_at_3803; JX355_(ZCSA00043665)_at_3666; JX365_(TIGERDE_0165997)_at_5997-5998.

[93] JX365_(TIGERDE_0165997)_at_5997-5998; JX367_(26CAPITAL_0065993)_at_5993-5994.

[94] *See, e.g.*, JX473_(TIGERDE_0131926)_at_1926; JX1667 (26CAPITAL_0066897)_at_6898; JX1668_(TIGERDE_0167086)_at_7087-7088.

Meanwhile, the SEC returned the Form F-4 on April 15, 2022 with three readily-addressable comments.[95] The revised form was re-filed on April 22, 2022.[96]

Then, in a bizarre turn of events, fortuitous only for Van Der Sande and Yip, the transaction was thrown off the rails when UEC Parties temporarily lost control of the casino.

I. UEC Parties Fail To Protect Their Control Of The Casino.

The circumstances that allowed for UEC Parties to lose control of the casino are not clear. What is clear: UEC Parties blamed themselves, and specifically Operating Company co-chairman Michiaki Satate, for actions that led to the situation.[97]

On April 27, 2022, the Philippines Supreme Court issued a temporary order that seemed to require the UEC Parties to reinstate estranged founder Kazuo Okada as Chief Executive Officer and Chairman of the Board of Operating Company.[98]

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[95] JX487_(ZCSA00104100)_at_4100-01; JX485_(ZCSA00061598)_at_1568.

[96] SAC_¶83.

[97] JX1492_(Van-Der-Sande)_130:1-9; JX503_(TIGERDE_0167878)_at_7879; JX580_(TIGERDE_0167189)_at_7190; JX680_(TIGERDE_0144371)_at_4371.

[98] JX500_(TIGERDE_0176774).

This *status quo ante order*, often abbreviated as SQAO, was considered to be frivolous but a byproduct of Satate's management decisions.[99]

Still, the transaction proceeded apace. On Friday, May 20, 2022, UEC Parties' counsel Milbank received a no-comment notice from the SEC, which indicated that the Form F-4 would be declared effective as soon as it was resubmitted with a risk factor disclosing the SQAO.[100] The same day, the auditor, UHY, followed on this positive development by providing its consent for filing the Form F-4 on Monday, May 23.[101]

SEC approved the revised Form F-4 on Friday, May 27, 2022 and the transaction was thereby authorized to proceed.[102] UEC Parties' internal documents show that, despite the SQAO, Van Der Sande believed moving forward with the filings was "legall[y] required,"[103] and that UEC Parties received legal advice that it would not be a "strong argument" for them to claim the SQAO prevents closing.[104]

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[99] JX558_at_52/686; JX1492_(Van-Der-Sande)_130:19-21.

[100] JX537_(TIGERDE_0168276)_at_8276_002.

[101] JX538_(ZCSA00075943)_at_5943.

[102] JX571_(TIGERDE_0026449)_at_6449.

[103] JX570_(TIGERDE_0166782)_at_6783.

[104] JX595_(ZCSA00077310)_at_7315.

UEC Parties believed the "SPAC shareholder vote and the Closing [could] happen during the month of June"[105] and that "we actually have a very good chance of … closing the SPAC transaction … [in] June."[106]

J. UEC Labels The SQAO Frivolous And Does Not Consider It A Bar To The Transaction.

During the month after the SQAO was issued, the UEC Parties believed the SQAO was frivolous and not an impediment to the transaction.[107] Parent and the UEC Parties never publicly claimed the SQAO prevented the transaction from proceeding.[108]

On May 2, 2022, a group loyal to estranged founder Kazuo Okada, together with a local sheriff, visited the casino and demanded control.[109] Through Philippine connections, Hans Van Der Sande received advanced notice of this unannounced visit.[110] When the contingent loyal to Kazuo Okada showed up, they were diverted to a conference room and then sent home empty-handed.[111]

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[105] JX564_(TIGERDE_0168737)_at_8737.

[106] JX1681_(TIGERDE_0249213)_at_9214.

[107] JX1523_(Fujimoto)_125:8-22; JX511_(TIGERDE_0246750)_at_6750; JX602.

[108] JX1492_(Van-Der-Sande)_88:1-6; JX1558_(Van-Der-Sande-30(b)(6))_276:18-284:7, 289:3–290:23.

[109] JX1033_(TIGERDE_0113368)_at_3418.

[110] JX507_(TIGERDE_0167317)_at_7317_002.

[111] JX1033_(TIGERDE_0113368)_at_3418.

The UEC Parties made it a point to keep SPAC in the dark. In a May 9, 2022 email, ten days after the SQAO (which the UEC Parties had still not disclosed to SPAC) and a week after the first takeover attempt (which the UEC Parties *never* told SPAC about), Van Der Sande dictated that SPAC be told "the minimum information that we have to tell them."[112]

K. UEC Fails To Protect The Casino And Fails To Operate The Casino In The Ordinary Course Of Business After It Loses Control To Kazuo Okada.

On May 31, 2022, while Messrs. Van Der Sande and Yip were absent from the casino, the group loyal to Kazuo Okada, led by Dindo Espelata and Antonio "Tonyboy" Cojuangco together with a group of local police and private guards entered the Operating Company offices.[113] They succeeded in gaining control (the "Takeover").[114] The events were unusual and the consequences were serious—the UEC Parties lost management control of the casino and the group affiliated with Kazuo Okada took over day-to-day operating control.[115]

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[112] JX515_(TIGERDE_0211786)_at_1786.

[113] JX590_(https://ssl4.eir-parts.net/doc/6425/ir_material3/184963/00.pdf); JX580 (TIGERDE_0167189) at 7190; JX1558 (Van-Der-Sande-30(b)(6))_263:8-15; JX1561_(Yip)_120:24-121:1.

[114] JX1561_(Yip)_149:9-12; JX590.

[115] JX578_(TIGERDE_0166728); JX590; JX1561_(Yip)_149:9-12.

L. Van Der Sande And Yip Leverage The Takeover To Secure Their Economic Security And Control.

Post-Takeover, Van Der Sande—who is fluent in Japanese—became involved in discussing, with Parent, the means for resolving the Takeover.[116] These discussions apparently revolved around currying favor with a very powerful figure in the Philippine government, someone referred to variously as "No. 2," the "common friend," and "Martin," all apparent code words for Martin Romualdez, Speaker of the House for the Philippines.[117] The pathway to Mr. Romualdez was perceived to be through Operating Company Corporate Secretary Michelle Lazaro and Director James Lorenzana—both elites in the Philippines.[118]

Somehow though, as communicated to Parent and SPAC, the "key" to resolving the Takeover included providing guaranteed recurring three-year employment agreements (with lucrative compensation) for both Van Der Sande and Yip, seats for Van Der Sande and Yip and four close allies on the Operating

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[116] JX731_(TIGERDE_0141812_EN).

[117] JX1676_(TIGERDE_0167959); JX725_(TIGERDE_0152386_EN).

[118] JX841_(26CAPITAL_0050130); JX1677_(TIGERDE_0168110); JX605_(ZCSA00001123); JX1640_(Yip)_153:17-22; JX1664_(TIGERDE_0159755)_at_779.

Company board, and a requirement of a supermajority vote to modify Van Der Sande's or Yip's employment agreements.[119]

On June 13, 2022 a term sheet containing these terms (the "June 2022 Term Sheet") was signed by President Fujimoto.[120] On June 14, the term sheet was presented to SPAC as "the key" to regaining control of the casino—partnering with senior Philippine elites (i.e., Lazaro and Lorenzana) and tying their compensation to control of the casino.[121] The resulting consultancy agreements contained guaranteed $35,000 a month (net of taxes) payments to Lazaro and Lorenzana.[122]

The UEC Parties admit SPAC was not provided advanced written consent for this arrangement;[123] that it constituted a "major change;"[124] changed the organizational documents by empowering Lazaro and Lorenzana to appoint 6 of the 13 Operating Company board members;[125] that Van Der Sande now "can't be fired"

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[119] JX656_(26CAPITAL_0086722)_at_6722-6723, 6732-6733; JX1492_(Van-Der-Sande)_118:8-120:10.

[120] JX656_(26CAPITAL_0086722)_at_6732-6734. To this day it has not been publicly disclosed.

[121] JX656_(26CAPITAL_0086722)_at_6722–6723; JX647_(26CAPITAL_0066979)_at_6980.

[122] JX656_(26CAPITAL_0086722)_at_6732.

[123] JX1640_(Yip)_158:14-16.

[124] JX1492_(Van-Der-Sande)_132:3-133:5.

[125] *Id.*_124:11-18.

by Parent without Lazaro's consent;[126] and resulted in Van Der Sande's payment under his employment contract ballooning from $30,000 to $80,000 per/month with "definitely stronger protection."[127]

On June 17, the consultancy agreements were executed.[128] But UEC Parties remained locked out. Lazaro provided an update on June 23, 2022: using thinly-veiled code, she appears to have reported that estranged founder Kazuo Okada had used his control of the casino to develop the proof that President Fujimoto and others at Parent and the Operating Company were pilfering wealth from the casino.[129]

Nevertheless, on June 29, the merger parties entered into Amendment No. 3 to the Merger Agreement, extending the outside termination date from July 1 to October 1, 2022.[130] Parent issued a press release announcing an expected closing by September 30, 2022.[131]

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[126] *Id.*_148:3-9, 119:3-9.

[127] *Id.*_120:4-10, 119:16-23.

[128] JX1663_(TIGERDE_0144369)_at_4371-4380.

[129] JX678_(TIGERDE_0239760); JX1075_(ZCSA00119465); JX1006_(TIGERDE_0124284); JX784_(TIGERDE_0153071)_at_3160-3164.

[130] JX685_(26CAPITAL_0071784)_at_1785.

[131] JX687.

1. Schedule of the Merger

Execution of the Merger Agreement with 26 Capital	October 15, 2021
Agreement on extending the deadline of the Merger Agreement with 26 Capital	June 28, 2022 (US time)
General Shareholders' Meeting of 26 Capital for approving the Merger	TBD
General Shareholders' Meeting of UERI for approving the Merger	TBD
Implementation of the Merger	By September 30, 2022

Parent's press release did not mention the SQAO as a bar to closing.[132]

M. UEC Parties Arrange For Delivery Of "Heavy Luggage".

By July 27, the tactic for regaining control of the casino apparently evolved. Still out of control, Parent worked on a more-direct route to the top of the Philippine government (i.e., the Speaker of the House and the President). Parent's Sato Nobuki traveled to the Philippines "with heavy luggage" to deliver an "item" directly to "Martin."[133] These barely-disguised buzz words were used in top-secret internal emails and discussed only at the very top of UEC.[134] Within three days of the "item" being delivered, Parent and Operating Company Director Tokuda (who was also Mr. Van Der Sande's closest ally at Parent) met directly with Speaker of the House Martin Romualdez.[135] In after-meeting notes, Tokuda relayed how Speaker

[132] JX1523_(Fujimoto)_111:8-11.

[133] JX725_(TIGERDE_0152386)_at_2386.

[134] JX731_(TIGERDE_0141812)_at_1812.

[135] JX731_(TIGERDE_0141812)_at_1813; JX735_(ZCSA00069505)_at_9505.

Romualdez "then and there" called judges on the Philippines Supreme Court.[136] Defendants did not include Tokuda as a document custodian.

On August 10, 2022, the Philippines Supreme Court issued a clarification order: "disruption is never the intent of the SQAO … as it does not direct the doing or undoing of acts."[137]

During this time, SPAC remained engaged, asking questions about the UEC Parties' efforts while the SPAC itself lobbied through the U.S. embassy.[138] Though SPAC was informed (after the fact) about the June 2022 term sheet, SPAC was never told about the July 2022 top-secret "heavy luggage" mission.[139]

On September 1-2, 2022, the Philippine DOJ and the Philippine Gaming Corporation issued written opinions adverse to Kazuo Okada's illegal Takeover.[140] The national police and army promptly accompanied management and retook control of the casino.[141]

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[136] JX731_(TIGERDE_0141812)_at_1813.

[137] JX753_(TIGERDE_0203231)_at_3241.

[138] JX699_(ZCSA00102626)_at_2627-2628.

[139] JX656_(26CAPITAL_0086722)_at_6722-6723, 6732-6734.

[140] JX964_(TIGERDE_0149452)_at_9464-9465.

[141] JX778_(https://ssl4.eir-parts.net/doc/6425/tdnet/2179457/00.pdf); JX1671_(TIGERDE_0160410)_at_0412.

N. Van Der Sande And Yip Persuade The Parent Board That The Merger Is No Longer Economically Favorable.

Even before regaining control of the casino, Van Der Sande and Yip turned to scuttling the SPAC transaction. While it is still unclear exactly why, there are two notable explanations.

First, through the June 2022 Term Sheet, Van Der Sande and Yip secured the long-term, lucrative employment contracts they had been seeking. They no longer needed protection from President Fujimoto. *See supra* §L.

And *second*, Van Der Sande—a Harvard law grad and former big-law attorney—had been made aware of (if not involved in) the top-secret meetings with the Speaker of the House involving "heavy luggage." Van Der Sande may have feared regulatory and legal scrutiny the UEC Parties will face post-listing—particularly given the two board members who the SPAC would be appointing.[142]

On December 16, 2021, Ader introduced Raphaelson to Executive Takeuchi, Yip, and Van Der Sande as the second proposed board member (along with Mr. Ader): "Mr. Raphaelson was with Las Vegas Sands, … [and] the US Department of Justice and is a leading expert on gaming, AML, and FCPA regulations in both the

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[142] JX192_(Merger-Agreement)_§6.20(b).

USA and Asia."[143] Attached to the introductory email was Mr. Raphaelson's CLE regarding the Foreign Corrupt Practices Act.

On June 11, 2022, Lazaro—Van Der Sande's close ally—aired the consternation caused by Mr. Raphaelson's potential presence, texting Takeuchi "By the way. Is it true that UEC appointed a US independent director? That's the reason T is saying that F[ujimoto] cannot anymore be dictating or doing things that are questionable."[144]

Van Der Sande admitted that he and Yip, at some point between May and August 2022, turned against the transaction.[145] The turnaround was dramatic; on May 24, 2022, Mr. Van Der Sande explained that:[146]

> 3. Although in the beginning I was not believer in SPAC, I now believe Mr Fujimoto and Mr Takeuchi idea were correct
> - UE Group needs more access to financing
> -Listing in US does have positive impact on UE group reputation
> -Listing in US will give OMI access to more Capital than back door listing in the Philippines

On August 28, 2022 and again on September 6, 2022, Van Der Sande and Yip prepared economic analyses that they would use to convince the Parent board to

[143] JX1670_(26CAPITAL_0001396)_at_1396.

[144] JX641_(TIGERDE_0239767)_at_9767_004.

[145] JX1492_(Van-Der-Sande)_101:18–24.

[146] JX800_(26CAPITAL_0054685)_at_4687.

terminate the deal.[147] Van Der Sande sent an email with "Byron and my SPAC analysis" to CBRE with a request that they update it with negative information about the SPAC market: "information on … price declines post closing … struggling spacs … [and] difficulties that we will face."[148]

Van Der Sande had the analysis translated into Japanese and shared with UEC directors.[149] It was incorporated into a slide deck presented to the Parent Board at the September 22, 2022 meeting with the following cover slide:[150]

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[147] JX764_(TIGERDE_0154494)_at_4494–4496; JX785_(TIGERDE_0154742)_at_4742-4744.

[148] JX785_(TIGERDE_0154742)_at_4742.

[149] JX875_(TIGERDE_0112176)_at_2184-2191.

[150] JX1639_(ZCSA00085740)_at_5742.

Due to the deterioration of the SPAC market and problems with Okada Manila, the SPAC is no longer economically viable

Anticipated Profit
予想される収益

- The SPAC market has deteriorated significantly since last fall
- US$275 million is expected for 26 Capital, but investors have the right to redeem their investment at the time of the merger.
- Unlike in usual cases, 26 Capital did not commit to a PIPE prior to the merger agreement (participation guarantee).
- Cantor Fitzgerald and CBRE sold a PIPE after the merger and received zero orders.
- Average participation in SPACs in 2022 was 10%, down from 2021 when it was over 50%.
- Based on this and the ongoing Okada lawsuit, it is advised that the participation rate could be as low as 5%.
  - As a result, total revenues of US$13.75 million are expected.

SPAC Transaction Costs
SPAC取引の費用

- Expected to cost US$92 million at closing
  - US$69 million in shares issued to 26 Capital and Jason Ader
  - US$8 million in shares issued to Zama Capital and Alex Eiseman
  - US$5 million cash for 26 Capital's legal and transaction costs
  - US$10 million cash as an underwriting fee to Cantor Fitzgerald
  - This transaction could result in net cash proceeds of more than negative US$1 million and a loss of US$77 million in Okada Manila stock

Annual SPAC Fees
年間SPAC費用

- Future annual SPAC fees will reduce UEC net income and decrease TRLEI cash flow.
- Annual fees are expected to be US$10 million.
  - US$5 million for directors' and officers' insurance
  - $1 million for audit fees
  - $2-4 million for legal and consulting fees to comply with U.S. SOX Act
- Given the serious problems in the Philippines and the negative impact on its reputation, even if the SPAC were to be listed, the amount of capital it could raise in the U.S. stock market could be severely limited.

Okada Manila could lose the SPAC's U.S. listing within just six months if it fails to retain 400 investors.

Van Der Sande also enlisted Milbank to prepare analyses on the timeline to closing and the legal risk from voting to terminate the agreement. In a memo dated September 8, 2022, Milbank advised that the amended F-4, including all the necessary auditing work, could be completed by "***mid-November***" 2022.[151] The SQAO was not mentioned as a factor—only economic factors were discussed as

[151] JX797_(ZCSA00025709)_at_5716; JX1558_(Van-Der-Sande_30(b)(6))_302:5–22.

reasons to terminate.[152] The Milbank legal risks memo concluded that the primary risk to the UEC Parties was a suit for specific performance alleging failure to use reasonable best efforts, including based on "communications in which the UEC Parties' officers and agents may have expressed disinterest in the de-SPAC transaction due to economics or for other reasons."[153] The Milbank memo raised the Takeover as an impediment to close that had been resolved, leaving completion of the audit as the only bar to closing.[154] The SQAO was discussed only as something potentially affecting the "economic sense" of the transaction.[155]

Baker McKenzie also concluded the SQAO was *not* a bar to closing: "the claim of unsatisfactory fulfillment of preconditions under Article 7(a) may not be necessarily a strong claim" based on the SQAO, only a "future" judgment might impede closing.[156]

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[152] JX864_(ZCSA00025688)_at_5717–5718.

[153] JX864_(ZCSA00025688)_at 5704, 5706.

[154] JX864_(ZCSA00025688)_at_5705.

[155] JX864_(ZCSA00025688)_at_5707, 5715.

[156] JX832_(ZCSA00025738)_§4.2; JX909 (ZCSA00085716) at §4.2; JX891_(ZCSA00085728)_at_5735–5736.

At a September 22, 2022 videorecorded session of the Parent board, Parent's directors considered the economic aspects of the transaction and voted, on those bases, not to extend.[157]

O. Parent Extends The Merger Agreement Without Any Additional Conditions.

On September 26, Fujimoto, Asano, Takeuchi, and Eiseman met with Ader at Parent's offices in Japan.[158] Over the course of several hours, Ader explained that the merger was economically beneficial to the UEC Parties.[159] And that the UEC Parties were not entitled to terminate.[160] Fujimoto committed to bring the matter back to the board and seek a one-year extension of the Merger Agreement.[161] Fortunately, UEC secretly video-recorded the entirety of that meeting—which demonstrates Defendants made material misrepresentations in their pleadings. *See infra* Argument.§II.C.

On September 29, the Parent board convened an extraordinary meeting to reconsider whether to approve an extension of the Merger Agreement.[162] The

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[157] JX1644_(Video_Transcript)_at_00:14:39-00:20:10.

[158] JX907_(TIGERDE_0144865)_at_4865.

[159] JX907_(TIGERDE_0144865)_at_4893-4894.

[160] JX907_(TIGERDE_0144865)_at_4942.

[161] JX907_(TIGERDE_0144865)_at_4968.

[162] JX925_(TIGERDE_0219319)_at_9319.

directors asked copious questions, including about the ability to negotiate for PIPE financing or minimum cash.[163] The Board resolved to extend the Merger Agreement without requiring any formal conditions from SPAC.[164]

That same day, Fujimoto received assurances from Ader that SPAC would continue to use reasonable best efforts, consistent with the Merger Agreement, but would not agree to any additional terms, *including expressly declining to adopt commitments regarding the shareholder redemption rate or a minimum number of shareholders at closing*.[165] Parent proceeded anyway. The parties entered into a one-year extension to October 1, 2023.[166]

Absent further extension, the SPAC's expiration date is October 30, 2023.[167]

P. UEC Parties Engage In No Efforts To Advance Audit Work.

After the extension, the only real impediment to closing was completion of consent procedures for use of the prior PCAOB audit for the amended Form F-4, and review of the first-half 2022 financials.[168] To complete that work, the PCAOB auditors required information and financial statements from the Operating

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163 JX925_(TIGERDE_0219319)_at_9322-9323, 9325, 9327.

164 JX925_(TIGERDE_0219319)_at_9325.

165 JX928_(ZCSA00025799)_at_5799.

166 JX932_(26CAPITAL_0046382)_at_6382.

167 JX932_(26CAPITAL_0046382)_at_6384.

168 JX864_(ZCSA00025688)_at_5705.

Company.[169] Though *preparation* of statements is largely an exercise in formatting, it must be done independently of the auditors.[170] By December 15, 2022, the auditors were nearly complete with the consent procedures but could not proceed until the Operating Company provided financial statements.[171]

The Operating Company refused to devote even minimal resources to the filing-related audit work.[172] Yip testified that he never even requested a ***single member*** of the accounting staff to devote even "***four hours***" to assisting UHY's audit work between September 2022 and March 2023, "***did nothing to expedite***" the audit work, and made a "***business decision***" to "***allocate 100 per cent of the accounting resources*** to the ***audit work for UEC's reporting requirements***."[173] And the date on which they could devote resources was ever-shifting—first the UEC Parties needed to finish their Q2 numbers before they would be able to cooperate; then it was Q3; then the SPAC was told that no resources would be possible until March 24, 2023.[174] Besides the obvious, a moving target also created a very-real auditing problem: with the passing of the first quarter, another year would need to

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[169] JX1532_(Feye_Report)_¶55.

[170] JX1538_(De-La-Torre)_51:19-52:3; JX1537_(Jones)_44:8-13.

[171] JX1222_(TIGERDE_0089325); JX1532_(Feye_Report)_¶55.

[172] JX1557_(Nema)_49:22-51:10; JX1640_(Yip)_334:3-15.

[173] JX1640_(Yip)_359:22-360:20; 363:23-364:6; 334:11-15.

[174] JX1564_(Eiseman)_344:5-345:15; JX1259_(TIGERDE_0187397).

be audited, increasing the risk that the audit work could not be completed in time.[175] Yip and Van Der Sande acknowledged this in a January 5, 2023 email: "Will need full yr2022 audit financials if close/list after March 31."[176]

The solution, however, was simple—if the Operating Company was truly overwhelmed, outside resources were available.[177] For example, Calabrese Consulting was a financial statements vendor that had been engaged on the transaction to prepare the pro forma financial statements.[178] Stonewalled by the UEC Parties, SPAC retained the same team at Calabrese as consultants to compile New Parent financial statements for auditing.[179] No stranger to the UEC Parties and this transaction, Calabrese started working on the financial statements, including by corresponding with the UEC Parties and their counsel at Baker McKenzie.[180] Calabrese prepared as much of the financial statements as it could without assistance

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[175] JX1566_(Munter_Rebuttal_Report)_at_6-7.

[176] JX1258_(TIGERDE_0103560)_at_3560.

[177] JX1092_(TIGERDE_0025213).

[178] JX1138_(CALABRESE_0010937); JX297_(ZCSA00050678).

[179] JX1136_(26Capital_0105629); JX1138_(CALABRESE_0010937); JX1529_(Munter_Report)_at_25-26.

[180] JX1561_(Yip_30(b)(6))_26:14-29:13; JX1214_(CALABRESE_0011345); JX1641_(TIGERDE_0067455).

from management, presented the drafts to management (who internally confirmed the numbers "look okay"), and awaited assistance that never came.[181]

Q. Van Der Sande And Yip Capitalize On The Proper Retention Of Calabrese As A Reason To Further Imperil The Transaction.

After Calabrese was forced to stop work because the Operating Company would devote no time or resources to supporting the audit, Van Der Sande and Yip seized on the retention of Calabrese as a breach of the Merger Agreement.[182] This was baseless—as Dan Jones, the lead at UHY, repeatedly informed Mr. Yip:[183]

- I hope this will be the last time I am explaining this, but it is common for a SPAC and its target Company undergoing a de-SPAC transaction/merger to utilize third-party consultants to assist in drafting the financial statements and pro-forma information.
- The consultant involved currently, Calabrese and Co. have worked alongside UHY on several transactions and I can assure you that they are of the upmost competence and very qualified. They are currently in process drafting the June 30, 2022 financial statements which will need to be included in the registration statement. You and the TRLEI team have a listing of their required open items – sent via email on Tuesday 12/13 11am est.
- To be clear, once the financials are drafted and complete, it will be management's responsibility to review them and sign-off on their inclusion in the prospectus.

But they were loud and relentless, insisting that the retention of Calabrese posed substantial risk to the Operating Company.[184] This hook succeeded.

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181 JX1198_(TIGERDE_0067671); JX1223_(TIGERDE_0148424).

182 SAC_¶¶_146-149; JX_(TIGERDE_0089331)_at_9331-9334.

183 JX1222_(TIGERDE_0089325)_at_9325.

184 JX1286_(TIGERDE_0066645)_at_6662-6668.

On January 25, 2023, President Fujimoto approved of a letter to the PCAOB auditor inquiring about the retention of Calabrese.[185] When Van Der Sande learned of this, he and Yip celebrated:[186]

#	Byron - HK <85293307722@s.whatsapp.net> Kentaro told me f agreed to send the two letters	1/25/2023, 3:30 AM
#	Hans <639176240771@s.whatsapp.net>	1/25/2023, 4:29 AM
#	Hans <639176240771@s.whatsapp.net> Good	1/25/2023, 4:29 AM

Milbank drafted the letters and, on January 31, 2023, they were sent.[187] But the UEC Parties *already knew* the answers to the questions posed in the letter to the PCAOB auditor—with the subject line "Unauthorized Sharing of … Confidential Information" and demanding a response within 10 days.[188] The letters were not part of any legitimate investigation—they were to cause the PCAOB auditors to resign. Van Der Sande admitted that, as a CFO, he knew that sending a threatening letter to

[185] JX1492_(Van-Der-Sande)_185:1-13.

[186] JX1308_(TIGERDE_0167184)_at_7185.

[187] JX1492_(Van-Der-Sande)_185:19-22.

[188] JX1492_(Van-Der-Sande)_202:18-203:4.

a PCAOB auditor would push it to resign.[189] Mr. Takeuchi felt that the letter quashed the last hope of getting to a closing.[190]

R. 26 Capital Files Suit.

On February 2, 2023, SPAC filed suit, seeking specific performance ordering the UEC Parties engage in best efforts and close the merger.[191]

S. UEC Fails To Use Best Efforts To Hire A PCAOB Auditor.

On February 6, UHY resigned.[192] The UEC Parties claim that they have used best efforts since that date to find a replacement auditor.[193] This defies belief. There are over 1,600 PCAOB-registered auditors.[194] In four-plus months, the UEC Parties have reached out to no more than 30 firms.[195] They subsequently rejected nearly every firm that agreed to conduct the audit, and have somehow failed to engage the one firm they believed was qualified to conduct the audit and expressed interest in doing so—RSM, the United States affiliate of its current auditor, RT & Co.[196]

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[189] JX1492_(Van-Der-Sande)_197:19-23.

[190] JX1585_(Takeuchi)_202:22-203:2.

[191] D.I._1_(Complaint).

[192] JX1340_(TIGERDE_0065088)_at_5090.

[193] JX1561_(Yip-30(b)(6))_34:5-6.

[194] JX1529_(Munter_Report)_at_15_n.41.

[195] JX1559_(TIGERDE_0258495).

[196] JX1559_(Munter_Report)_at_17-23; JX1478_(Defs' Amended_Rog_Responses)_at_No.20.

Instead, as Defendants' counsel recommended to Yip and Van Der Sande:[197]

> I think it is important that we look like we are maximizing chances of actually getting an auditor.
>
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ARGUMENT

I. THE UEC PARTIES CANNOT TERMINATE.

Under Section 8.1 of the Merger Agreement, TRA (and *not* the Operating Company) may unilaterally terminate only if (i) a condition to closing under Merger Agreement sections 7.3(a) or 7.3(b) cannot be met at closing (unless a breach by the UEC Parties caused the failure);[198] or (ii) after the outside termination date, provided that the failure to close had not been primarily the result of the UEC Parties' breach.[199] The UEC Parties may also terminate due to a final, non-appealable order blocking the transaction.[200]

Because the conditions precedent *can* be satisfied at closing and because the UEC Parties are in breach, the Merger Agreement cannot be terminated.

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197 JX1352_(TIGER_0186166)_at_6167.

198 JX192_(Merger Agreement)_§8.1(c).

199 *Id.*_§8.1(d).

200 *Id.*_§8.1(e).

A. No Failure Of Conditions Precedent.

UEC Parties cannot prove that any Article 7 condition would fail at closing. And because the UEC Parties cannot prove any material adverse effect nor any material breach of any material covenant, there are no obstacles to closing (other than those created by UEC).

1. Section 7.1(a): The SQAO Does Not Prevent Closing.

Under Section 7.1(a) of the Merger Agreement, "[t]he obligations of the Parties to consummate the Transactions are subject to the satisfaction" of the condition that "no Order (including a Temporary restraining Order or preliminary injunction) issued by a Governmental Authority of competent jurisdiction preventing the consummation of the Transactions shall be in effect."[201] The UEC Parties argue this condition fails based on the SQAO. That argument misunderstands both the nature of a SQAO under Philippine law and the terms of the SQAO as elucidated by the Supreme Court's Clarificatory Resolution.

Under Philippine law, a status quo ante order "must be implemented strictly based on the language of the order and in the context of the nature of a SQAO."[202] A status quo ante order is a provisional remedy "intended to maintain the last, actual,

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[201] *Id.*_§7.1(a).

[202] JX753_(TIGERDE_0203231)_at_3241.

peaceable and uncontested state of things which preceded [a] controversy."[203] Unlike a TRO or preliminary injunction, which are subject to a more stringent standard, a status quo ante order "does not direct the doing or undoing of acts,"[204] and "disruption is never the intent."[205] Thus, by its nature, a status quo ante order cannot reasonably be understood to preclude the consummation of the Merger. Such outcome, as the UEC Parties' own Philippine law expert testified, would be "an example of disruption."[206] That same expert further acknowledged that status quo ante orders "do not change the legal status of parties in a contractual relationship nor … change any of the terms of the reciprocal obligations,"[207] which is precisely the result if the UEC Parties' interpretation of the SQAO is adopted.

As Philippine Supreme Court precedent makes clear, the appropriate provisional remedy for stopping another party from "continuing the implementation" of a signed merger agreement is a *preliminary injunction*, not a status quo order.[208] Consistent with that precedent, Okada sought preliminary

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[203] *Id.*_3236-3237.

[204] *Id.*_3242.

[205] *Id.*_3241.

[206] JX1672_(Jardeleza)_122:10-21.

[207] JX1672_(Jardeleza)_117:24-118:16.

[208] JX3_(*GMA Network v. National Telecommunications*)_at_7 (Feb. 3, 2016).

injunctive relief from the Supreme Court that would have expressly enjoined the Operating Company from consummating the Transactions and performing any further acts requiring the approval of Operating Company's shareholders or board of directors.[209] The Supreme Court denied that relief, and instead issued the SQAO.[210] The SQAO cannot reasonably be understood to provide *implicitly* the same relief that Okada sought explicitly, and which the Supreme Court denied.

Nor is there anything in the language of the SQAO or Clarificatory Resolution that would prevent the consummation of the Merger. By its terms, the SQAO requires the Operating Company (but no other parties to the Merger Agreement) to maintain the status quo "prevailing prior to [Okada's] removal as stockholder, director, chairman, and CEO of [Operating Company] in 2017."[211] As explained in the Clarificatory Resolution, "[t]he grant of the SQAO was based on equity in recognition of the right of [Okada] to protect his interest as an indirect beneficial owner of [the Operating Company]" through his undisputed 46.4% interest in Okada Holdings Ltd., owner of 67.9% of UEC's shares.[212] What the SQAO protects is merely Okada's ability to exercise rights attendant to his indirect interest in the

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[209] JX467_(TIGERDE_0145110)_at_5140.

[210] JX500_(TIGERDE_0176774)_at_6778.

[211] *Id.*

[212] JX753_(TIGERDE_0203231)_at_3232,_3241.

Operating Company—rights that do not include a voting right in the Operating Company or the right to block any transactions.[213]

Even before the Clarificatory Resolution was issued, the UEC Parties' own counsel at Baker McKenzie advised that there was "low risk" that consummation of the Merger would violate the SQAO because: "(i) Such transaction will not result in a change in the beneficial owner because, even after the Closing, a majority of shares of [New Parent] stock will continue to be held by TRA, and [New Parent], TRA, and UEC will retain control of [the Operating Company] even after the Closing; (ii) [New Parent] is not a party to the motions that Mr. Okada has filed with the Supreme Court of the Philippines and thus is not bound by the Status Quo Order; (iii) Mr. Okada's motions also do not claim that the Reorganization is invalid."[214] And based on their course of conduct, the UEC Parties appear to see little risk associated with the SQAO. The Operating Company's Executive Committee adopted a resolution in September 2022 "suspend[ing] the authority" of Okada as CEO "effective immediately."[215] In May 2023, Okada filed a Petition to Cite for Indirect Contempt in the Supreme Court against the Operating Company and certain of its officers and directors alleging that the Executive Committee resolution

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[213] JX1527_(Paraiso_Report)_¶32.2.6.

[214] JX848_(26CAPITAL_0086041)_at_6044.

[215] JX837_(TIGERDE_0068203)_at_8266.

violated the SQAO.[216] Nowhere in Okada's Petition did he mention the Merger, much less argue that consummation of the Merger would violate the SQAO.[217] Notwithstanding the risk of contempt, the Operating Company has not rescinded the Executive Committee resolution.[218]

To the extent the UEC Parties had legitimate concerns regarding the SQAO and its impact on the Merger, the Operating Company could have filed a motion for clarification in the Supreme Court on the question of whether consummating the Merger would violate the SQAO.[219] The Operating Company has not done so, which not only reveals the disingenuousness of the UEC Parties' argument, but also exhibits a failure to use best efforts to consummate the Transactions.

2. Section 7.1(c): A Replacement Auditor Is Available And Can Complete The Audit.

There are over 1,600 firms registered with the PCAOB.[220] UEC Parties should not have any issue finding *just one.* UEC Parties' audit expert cannot name a *single company* that failed to be listed for failure to find an auditor.[221] Numerous top

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[216] JX1535.

[217] JX1535.

[218] JX1561_(Yip-30(b)(6))_24:15-17.

[219] JX1567_(Paraiso_Rebuttal)_¶19; JX1672_(Jardeleza)_142:9-143:15.

[220] JX1529_(Munter_Report)_at_15_n.41; JX1588_(Munter)_50:14-19.

[221] JX1587_(Feye)_231:8-13.

auditing firms, including highly-reputable firms in the Philippines, are qualified, regularly accept new clients, and have not been approached by the UEC Parties.[222] Indeed, the UEC Parties do not need to look far: the Operating Company's statutory auditor, RT & Co., which has essentially already done this audit, *is PCAOB-registered*, and notwithstanding the UEC Parties' contentions, should be qualified to do the required audit.[223]

In all events, RT & Co. audited Operating Company's 2022 financial statements.[224] That audit is in many respects the same as a PCAOB audit; it provides a significant head-start on completing a PCAOB audit, whoever ultimately does that work.[225]

With the use of reasonable best efforts—the type of efforts that the UEC Parties did use when Parent was at risk of being delisted, for instance[226]—Section 7.1(c) is simply not an obstacle to closing.

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[222] JX1588_(Munter)_55:15-19; *id.*_97:21-24.

[223] JX1588_(Munter)_61:19-20 (June 22, 2023); JX1529_(Munter_Report)_at_15_n.42.

[224] JX1251_(TIGERDE_0258496); JX1587_(Feye)_71:9-15.

[225] JX1566_(Munter_Rebuttal)_at_ 24-26; JX1587_(Feye)_166:17-167:6, 238:11-239:2; JX1588_(Munter)_61:19-20.

[226] JX1662_(TIGERDE_0027098).

3. Section 7.3(a): There Are No Misrepresentations Arising To A Material Adverse Effect.

Under Section 7.3(a), a breach of a representation or warranty is only a bar to closing "to the extent … the failure of such representations and warranties" has "a SPAC Material Adverse Effect[.]" The UEC Parties bear the burden of proving an MAE. *Hexion Specialty v. Huntsman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008).

The UEC Parties cannot prove, indeed they have not even *alleged*, any SPAC MAE.

(a) SPAC Did Not Breach Any Representations Or Warranties

The UEC Parties allege that SPAC breached §§5.3(a)(i) and 5.5 in allegedly violating securities laws by: (i) making public statements "relating to the Transactions [that] were false and misleading to the investing public" and (ii) "not disclosing the existence and effect of the Zama Subscription Agreement and the Rimu Subscription Agreement."[227] The UEC Parties have not pled any material false statements or omissions. *In re Philip Morris*, 437 F. Supp. 3d 329, 348-49 (S.D.N.Y. 2020) ("For a statement of fact to be actionable … the statement must be false, and the statement must be material.").

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[227] SAC_¶¶173-178, 180-187.

First, the press statements that the UEC Parties identify were all true statements.[228]

- Statements in the fall of 2022 that the deal was "close to the end," that it was "possible" to "do it this year," that the parties "should be able to consummate the deal well within the deadline," and that "[SPAC] was 'planning to move full-steam ahead'" are the sort of "[r]osy predictions … and corporate optimism [that] do not give rise to securities violations."[229] *In re Magnum Hunter*, 26 F. Supp. 3d 278, 291 (S.D.N.Y. 2014), *aff'd*, 616 F. App'x 442 (2d Cir. 2015). Courts specifically decline to attach liability to predictive statements surrounding private companies going public because "[t]he fulfillment of plans for any IPO is never a certainty." *Dooner v. Keefe*, 157 F. Supp. 2d 265, 278 (S.D.N.Y. 2001); *accord Metro Commc'n v. Advanced Mobilecomm*, 854 A.2d 121, 148 (Del. Ch. 2004) (statements "emphasizing IPO plans," "do not involve the sort of actionable misrepresentations of fact that can support a fraud claim"). Regardless, Mr. Ader was truthfully optimistic. *See supra* §A(2).

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[228] SAC_¶¶153–154; JX1651 (Defendants'_Supp._Responses_to_Interrogatories)_No.32.

[229] SAC_¶¶153-154.

- The statement that Mr. Ader had "'gotten to know quite a few' employees at the resort," was admittedly true—*he had*.[230]
- Mr. Ader did not "falsely state[] he had 'read all the reports' regarding money Okada stole from the Resort during his illegal occupation."[231] There *were* "public reports about Okada stealing money" issued prior to Mr. Ader's statements, which is what Mr. Ader reviewed and referenced in his interview.[232]
- The UEC Parties claim that Mr. Ader "falsely described the SQAO and Violent Takeover as 'something that's in our rear view mirror now[.]'"[233] But Mr. Ader was discussing *only the Takeover*.[234] This was true. In any event, Mr. Ader's expression of his opinion ("I view") is not actionable.[235] *Omnicare, Inc. v. Laborers Dist.*, 575 U.S. 175, 186 (2015).

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230 JX1492_(Van-Der-Sande)_310:19-311:7.

231 SAC_¶153.

232 JX1492_(Van-Der-Sande)_307:5-20.

233 SAC_¶153.

234 JX789; JX1492_(Van-Der-Sande)_297:2-19.

235 JX789.

Finally, "the existence and effect of the Zama Subscription Agreement and the Rimu Subscription Agreement" were simply not subject to any disclosure obligation.[236]

It is well-known that the securities laws "do[] not create an affirmative duty to disclose any and all material information." *Arkansas Pub. v. Bristol-Myers Squibb*, 28 F.4th 343, 352 (2d Cir. 2022). "Disclosure is necessary only if there is a duty to disclose or when necessary to make statements made, in the light of the circumstances under which they were made, not misleading." *Id.* at 353. SPAC's SEC filings correctly disclosed that Mr. Ader "has voting and investment discretion with respect to the common stock[.]"[237] This was, and still is, true.[238] Pecuniary ownership interests, with no control rights, are thus unnecessary to disclose.

(On March 30, 2023, the SEC proposed a *new* regulation, contributing to the following April 17, 2023 disclosure: "Zama's pecuniary interest is disclosed here because of our litigation against UEC filed on February 2, 2023, … and proposed (non-final) S.E.C. rules."[239])

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[236] SAC_¶¶176, 180–185.

[237] JX1642_(10-K).

[238] JX1643_(Sponsor_LLC_Agreement).

[239] JX1450_(10-K).

Nor were any of these statements material. Whether or not Mr. Ader had met casino employees or read "all the reports" about Kazuo Okada's theft, are blips on the screen in this multi-billion dollar merger with a world-class casino resort.[240] And even if it was not "possible" for the deal to be finished by year-end 2022, that's seemingly an immaterial difference to the UEC Parties' internal prediction that the deal would close in Q1 2023.[241] With respect to each, there is not "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to act." *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988). SPAC's stock moved no more than a penny around any of these immaterial statements. *See* Appendix A. *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) ("[W]hen a stock is traded in an efficient market, the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's stock.").

These true and immaterial statements certainly do not rise to a material adverse effect which requires "material[ity] when viewed from the longer-term perspective of a reasonable [counterparty]" and cannot be merely "[a] short-term

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[240] JX1492_(Van-Der-Sande)_307:5-20, 313:4-18.

[241] JX797_(ZCSA00025709)_at_5717.

hiccup in earnings[.]" *In re IBP*, 789 A.2d 14, 68 (Del. Ch. 2001). The UEC Parties do not even allege an MAE.[242]

4. Section 7.3(b): There Are No Breaches Of Any Material Covenants And No Material Breaches Of Any Covenants.

Nor did SPAC "***materially breach***[] [any] ***material*** covenants." (JX192_(Merger-Agreement)_§7.3(b).) This two-fold test in Section 7.3(b) of the Merger Agreement requires determining not only whether a purported breach was "material[]" but also whether the purportedly breached provision was a "***material*** covenant." *Id.* Not every covenant is a "material covenant." *See In re Cellular*, 2021 WL 4438046, at *75 (Del. Ch. Sept. 28, 2021) (distinguishing "material breach" from "material covenant"). A covenant is material if it goes to the "root of the agreement between the parties;" covenants tangential to the essence of the agreement may be materially breached but not material covenants. *Qualcomm Inc. v. Texas Instruments*, 875 A.2d 626, 628-29 (Del. 2005).

(a) Section 6.3: Access to Information.

Although the UEC Parties pound the table about SPAC sharing information with Calabrese (SAC ¶147), this was *not* a breach of the Merger Agreement. Section 6.3 provides that confidential information may be disclosed to SPAC's consultants "in connection with the parties' efforts to consummate the Transactions." *See*

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[242] SAC_¶¶173–178, 180–187.

JX192_(Merger-Agreement)_§6.3 (permitting disclosure "to its Representatives") and pg. 8 ("Representative" includes "consultants").

There is no dispute Calabrese was a "consultant."[243] And Calabrese was certainly engaged as part of SPAC's efforts to consummate the merger.[244] *See supra* Background.§Q. In fact, Calabrese had already been engaged by the UEC Parties to prepare the *pro forma* financials—with access to essentially the same information needed to prepare the financial statements.[245] Nor was the work done by Calabrese secret, unusual, or even potentially harmful.[246] *See supra* Background.§Q.

Even if breached (and it was not), Section 6.3—governing confidentiality—was not a "material covenant" in the context of a multi-billion dollar Merger Agreement, as explained *infra* §(B). And it was not *materially* breached when information was shared with a consultant, that was under an NDA, that had previously been given access to the same information to perform materially similar tasks.[247]

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[243] JX1538_(De-La-Torre)_13:20-25, 15:23-16:8.

[244] JX1538_(De-La-Torre)_54:10–56:15; JX1550_(Borgers)_95:11–98:7; *see also* JX1529_(Munter_Report)_at_27 and n.77.

[245] JX1538_(De-La-Torre)_17:16-21:22, *id.*_24:14-27:11, *id.*_51:8-18, *id.*_52:8-15; JX1529_(Munter_Report)_at_25 n.69; JX1537_(Jones)_90:17-19.

[246] JX1537_(Jones)_82:24-83:5.

[247] *See* JX1538_(De-La-Torre)_57:15-59:20; JX1222_(TIGERDE_0089325).

(b) Section 6.5: Public Announcements.

The "Public Announcements" covenant (Merger Agreement § 6.5) was not a "material covenant" and it was not "materially breached" (Merger Agreement § 7.3). As will be established at trial, post-signing the parties reached an understanding that they could not literally comply with the advanced written consent requirement before making any press statements—with mismatched time zones, investor support would be imperiled if neither side took press opportunities while waiting a full day for approval. SPAC implemented this understanding by circulating approved press talking points.[248]

After the Takeover, the parties embarked on a press tour, with the UEC Parties encouraging and thanking Mr. Ader for his positive and helpful press statements.[249] In the one instance that the UEC Parties raised an isolated concern, SPAC immediately cured by having an incorrectly attributed statement removed from the press coverage.[250] The UEC Parties made their own statements on June 10, 2022, June 29, 2022, September 30, 2022, and April 1, 2023; they never sought consent.[251]

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[248] JX1673_(26CAPITAL_0043815).

[249] JX1492_(Van-Der-Sande)_290:14-291:4.

[250] JX1678_(CAPITAL_0077640)_at_7640-7643.

[251] JX1561_(Yip-30(b)(6))_65:17-69:4.

As in *Qualcomm Inc. v. Texas Instruments*, 875 A.2d 626, 629 (Del. 2005), this "provision was not material" to "the 'root of the agreement' or the 'essence of the contract,'" which here is not about press statements but rather about a complex business merger to list a casino on the Nasdaq. The statements in this case certainly do not rise to the level of a material breach of a material covenant under the Merger Agreement. *See also supra* §3.

(c) Section 6.16: PIPE Subscriptions.

UEC Parties' litigation-made theory that SPAC violated Merger Agreement Section 6.16 (PIPE Subscriptions) is meritless. PIPE is a method of raising funds concurrently with closing by selling shares, often at a discount, to a large or several large investors.[252] Although PIPE financing brings in immediate cash at closing, it also takes equity from the listed entity, and often does so at a discount.[253] Where, as here, an entity is expected to see a price increase immediately post-closing, PIPE is an unattractive financing option. *See* JX418_(TIGERDE_0166125) (Van Der Sande writing that "Selling equity is always possible. Currently the world agrees in the US2.7bb valuation. If [New Parent] sells shares at a 15% discount, then investors will view [New Parent] as worth USxbb, which will be negative for UEC stock

[252] JX1659_(https://www.investopedia.com/terms/p/pipe.asp).

[253] *Id.*

price."). (Van Der Sande prepared this email for Eiseman, who then sent it to Takeuchi. JX423_(TIGERDE_0131919)_at_1919 (Mar. 18, 2022). ***Remarkably, Van Der Sande testified that this statement was "fraud," before being reminded he was the author***. JX1558_(Van-Der-Sande_30(b)(6))_242:13-244:15).

Section 6.16 is not a material covenant. The covenant calls for "SPAC and Parent" to jointly pitch a PIPE investment to a set of "investors mutually selected by SPAC and Parent."[254] Akin to an agreement to agree, the terms are that the parties shall use reasonable best efforts to secure PIPE subscriptions "in a form, mutually agreed by both SPAC and Parent, from investors mutually selected by SPAC and Parent … in an amount to be mutually agreed by the Parties."[255] The UEC Parties were advised of their options, including to negotiate for the right to secure a PIPE or for a minimum cash condition (*supra* Background.§F); they proceeded with an agreement-to-agree.

Nor was this covenant breached (and certainly not materially breached). The Parties went on a roadshow together and the UEC Parties declined the PIPE offers that were received.[256] Rimu did not fall into the scope of "PIPE Investors," i.e., "as

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[254] JX192_(Merger-Agreement)_§6.16; JX1492_(Van-Der-Sande)_272:1-16.

[255] JX192_(Merger-Agreement)_§6.16.

[256] JX1644_(Video_Transcript)_at_0:14:39,_0:30:47; JX1492_(Van-Der-Sande)_284:24-285:4.

"mutually selected by SPAC and Parent," as defined in Section 6.16. And as explained *infra* Argument.§II.A*,* Rimu was ultimately not interested in a PIPE transaction on the UEC Parties' desired terms—as was the case with every other investor approached.[257]

(d) Section 6.12(a): SPAC Listing

SPAC is currently listed on the Nasdaq Capital Market (NASDAQ:ADER). Section 6.12(a) requires SPAC to "use reasonable best efforts to ensure SPAC remains listed."[258] It has. Mr. Ader has taken every opportunity to speak positively and truthfully about the transaction to industry press. *See* supra §4(b). SPAC urged Parent to timely file an amended Form F-4 ahead of the shareholder vote on extension.[259] And to induce shareholders to stay invested and not redeem, the Sponsor committed to pay $275,000 per month, paid out as dividends to SPAC shareholders.[260]

However, as with many SPACs and especially due to the UEC Parties' breaches, it is possible that the parties here will require investment banking support to remain listed post-closing. SPAC is prepared to engage a leading investment bank

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[257] JX1520_(Ader)_56:13-57:20.

[258] JX192_(Merger-Agreement)_§6.12.

[259] JX1176_(TIGERDE_0144328); JX1162_(ZCSA00045769).

[260] *See* JX1511_(SPAC's._Interrogatory_Resp)_No._46.

(IB Capital)—recommended by transfer agent D.F. King and vouched for by Cantor Fitzgerald—if a roadshow is needed to increase investor interest post-closing.[261]

SPAC has also obtained an offer from Cantor Fitzgerald: a $400 million credit equity facility, which would dramatically boost the number of shareholders, for purposes of Nasdaq listing requirements.[262]

(e) Section 6.2: Ordinary Course.

SPAC's incurrence of debt in connection with legal expenses for this litigation—required to accomplish the merger contemplated by the Merger Agreement—does not breach Section 6.2 of the Merger Agreement because that provision expressly carves out actions "***contemplated by th[e] Agreement***."[263] Sections 9.13 and 9.14 expressly contemplate seeking specific performance in Delaware court to enforce the Merger Agreement.

Even though not obligated, SPAC sought UEC Parties' advance consent and then cured the UEC Parties' only (baseless) objection—removing any discount upon

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[261] JX1605_(http://ibsgroup.net/about.php); JX0461_(TIGERDE_0145389)_at_5390; JX1520_(Ader)_150:20–152:17; JX484_(26CAPITAL_0143998)_at_3999.

[262] JX1285_(26CAPITAL_0071140)_at_1142; JX1589_(Ader-30(b)(6))_153:17–154:21.

[263] JX192_(Merger_Agreement)_§6.2(j); JX688_(TIGERDE_0165600)_at_5603-5604.

conversion from the terms of the convertible notes.[264] The UEC Parties *still* declined.[265] If consent *was* required, it was unreasonably withheld. *See Cypress Assocs. v. Sunnyside Cogeneration*, 2007 WL 148754, at *17 n.21 (Del. Ch. Jan. 17, 2007) ("[A] party may properly withhold consent to a transaction only when the decision is made for a legitimate business purpose.").

B. TRA Cannot Terminate Because The UEC Parties' Breaches Contribute To Any Failure Of Conditions.

1. Section 6.2: UEC Parties Breached The Ordinary Course Covenant.

Section 6.1 of the Merger Agreement provides that "the UEC Parties shall …except as consented to in writing by SPAC (which consent shall not be unreasonably withheld, conditioned or delayed), (a) ***conduct its business in all material respects in the ordinary course of business, consistent with past practice***."[266] The UEC Parties engaged in extraordinary departures from past practice.

Takeover. The Takeover and its aftermath were a material breach of the unconditional ordinary course covenant. Not only was SPAC's consent not sought,

[264] JX1483_(April_26_Letter_from_Ader_to_Yip); JX1591_(June_27_Letter_from_Ader_to_Yip).

[265] JX1488_(April_27_Letter_from_Yip_to_Ader); JX1675_(June_30_letter_from_Yip_to_Ader).

[266] JX192_(Merger-Agreement)_§6.1.

the UEC Parties deliberately kept SPAC in the dark. *See, e.g.*, JX515_(TIGERDE_0211786)_at_786 (May 9, 2022) ("…let [26 Capital] know the minimum information that we have to tell them"). The admittedly "unprecedented" events around the Takeover include events before[267] and resulting from the Takeover.[268]

June 2022 Term Sheet. Section 6.2(e) and (m) of the Merger Agreement provides that each of the UEC Parties shall not "enter into any binding agreement committing it to" or "make any change to its Organizational Documents." The June 2022 Term Sheet reflected a "major change," and was a "binding" agreement to change the Operating Company's "organizational documents."[269]

The UEC Parties did not request or receive SPAC's advanced consent.[270]

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Finally, if the Court concludes that UEC Parties bribed Philippine officials in an attempt to end the Takeover, that too constitutes a material breach. *See AB Stable v. Maps Hotels*, 2020 WL 7024929, at *68 n. 242 (Del. Ch. Nov. 30, 2020) ("some

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[267] JX1640_(Yip)_95:3-96:6; JX1558_(Van-Der-Sande)_95:21-96:6.

[268] JX1640_(Yip)_121:2-122:6, 125:3-18; JX1558_(Van-Der-Sande-30(b)(6))_260:2-6.

[269] JX1492_(Van-Der-Sande)_124:11-18, 132:9-133:5.

[270] JX658_(TIGERDE_0159927)_at_9927; JX1640_(Yip)_173:11-18; JX1640_(Yip)_176:11-22.

categories of conduct are so extreme as to fall outside the ordinary course," including "fail[ing] to comply with law, or engag[ing] in fraud.").

2. Section 6.13: UEC Parties Breached The Reasonable Best Efforts Requirement.

The UEC Parties' failed to use "reasonable best efforts to prepare or cause to be prepared" the audited financials required for the Form F-4 under Section 6.13 of the Merger Agreement.

In September 2022, a "business decision" was made at the Operating Company to devote no resources to the PCAOB audit.[271] Operating Company President Yip admitted he could have assigned accountants to assist with the minimal work necessary for the PCAOB audit, but he did not.[272] The UEC Parties waited *a month* before they would *even sign* the UHY re-engagement letter.[273]

At the same time, the UEC Parties prepared audited financials for Parent to comply with its reporting requirements to the Tokyo Stock Exchange and remain listed.[274] The UEC Parties were also required to use reasonable best efforts to prepare the audited financials needed for the Form F-4. The UEC Parties promptly and diligently did the former; they flatly refused to do the latter.

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[271] JX1640_(Yip)_334:3-15; JX1557_(Nema)_45:16-24, 50:5-51:10.

[272] JX1640(Yip)_359:22-361:21.

[273] JX1640_(Yip)_191:21-192:1.

[274] JX1532_(Feye_Report)_¶9(1)(a); JX1566_(Munter_Rebuttal)_at_9.

By December 2022, the UEC Parties had financial statements audited in accordance with Philippines standards.[275] The PCAOB audit was within reach.[276] If the PCAOB auditors were given the information they needed, the PCAOB audits could have been completed in a matter of weeks.[277] The UEC Parties continued to devote zero resources to the PCAOB audit, through February 2023.[278] No effort was even made to hire or retain additional professional staff, despite the ability to do so.[279]

Following the resignation of UHY (*see supra* Background.§S), the UEC Parties have failed to use reasonable best efforts to hire a replacement auditor.[280] Instead, they have engaged in a pretext to "look like" they are using reasonable best efforts.[281] The UEC Parties' reached out to a seemingly-random assortment of 28 PCAOB-qualified firms.[282] Their pitch for the auditing firms to take the work was

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[275] JX1587_(Feye)_82:24-83:8.

[276] JX1640_(Yip)_361:13-21; JX1588_(Munter)_167:3-9.

[277] JX983_(UHY_00000304); JX1031_(ZCSA00003264).

[278] JX1640_(Yip)_357:21-362:6.

[279] JX1557_(Nema)_30:17-31:4, 31:16-33:12, 86:5-10; *see also* JX1566_(Munter_Rebuttal)_at_10_n.21 (citing JX1092_(TIGERDE_0025213)).

[280] JX1561_(Yip-30(b)(6))_34:8-16.

[281] JX1352_(TIGERDE_0186166).

[282] JX1529_(Munter_Report)_at_17; JX1566_(Munter_Rebuttal)_at 21-23.

hardly persuasive.[283] They subsequently dinged nearly every firm that expressed any potential interest.[284]

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Further violating their obligation to use reasonable best efforts to close the transaction, the UEC Parties have used "economic reasons" (though they were instructed not to disclose those reasons publicly) as a reason to not vigorously pursue closing.[285] *See Channel Medsystems v. Boston Sci.*, 2019 WL 6896462, at *38 (Del. Ch. Dec. 18, 2019) (economic motivations "adds credence to and corroborates other robust facts demonstrating that [a party] did not fulfill [their] obligations").

II. The UEC Parties' extra-contractual defenses fail.

Because they have no valid contractual defenses, UEC Parties resort to the standard deal-avoidance playbook—alleging fraud, fraudulent inducement, and unclean hands.

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283 *See* JX1561_(Yip-30(b)(6))_50:6-55:13, 82:12-17; JX1588_(Munter)_229:20-230:15.

284 JX1478_(Defs' Amended_Rog_Responses)_at_No.20; JX1529_(Munter-Report)_at_19-20_n.55.

285 JX889_(TIGERDE_0258408)_at_8411, 8413, 8416, 8418; JX1492 (Van-Der-Sande) 155:12–22; JX1640 (Yip) 215:7–16, 216:41–14; JX806_(TIGERDE_0142922)_at_4923-4924.

A. **SPAC Did Not Engage In Any Misconduct.**

The UEC Parties cannot establish an unclean hands defense predicated on the alleged undisclosed investment by Zama in Sponsor or any impropriety with Rimu. Although this Court does not absolutely require the showing of an injury to invoke unclean hands, *see Am. Healthcare v. Aizen*, 285 A.3d 461, 494 (Del. Ch. 2022), where "unclean hands is the sole reason for refusing relief and the opposing party has not been harmed by the inequitable conduct, the Court of Chancery ordinarily will not apply the doctrine," *Universal Enter. v. Duncan Petroleum*, 2014 WL 1760023, at *8 (Del. Ch. Apr. 29, 2014) (citing Wolfe & Pittenger, § 11.07[b], at 11-91 (collecting cases)). UEC Parties' 30(b)(6) witness testified that he could not identify a single way in which the UEC Parties have been harmed as a result of the UEC Parties' unclean hands (i.e., the alleged undisclosed investment by Zama in Sponsor).[286] And with respect to Rimu, those too get the UEC Parties nowhere because, as courts have noted, "the inequitable behavior attributable to the unclean litigant must be directed at, or be the concern of, an interested party (as opposed to a third party)." *O'Marrow v. Roles*, 2013 WL 3752995, at *7 (Del. Ch. July 15, 2013).

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[286] JX1492_(Van-Der-Sande)_181:21-182:13, 190:17-195:23.

(Many courts have refused to apply unclean hands where the party invoking the doctrine was not harmed. *See, e.g.*, *Park v. Escalera Ranch,* 457 S.W.3d 571, 597 (Tex. App. 2015) ("doctrine should not be applied unless the defendant has been seriously harmed and the wrong complained of cannot be corrected without applying the doctrine" (citation omitted)); *Brown v. Lee*, 859 N.W.2d 836, 844-45 (Minn. Ct. App. 2015); *Cook v. Cook*, 249 P.3d 1070, 1082 (Alaska 2011) (same); *In re Bridge Info.*, 314 B.R. 421, 430 (Bankr. E.D. Mo. 2004).)

Delaware has a long-held, strong public policy of enforcing contracts as a "contractarian state." *See S'holder Rep. v. Albertsons Cos.*, 2021 WL 2311455, at *13 (Del. Ch. June 7, 2021). Indeed, "[w]hen parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public-policy interests even stronger than freedom of contract." *Universal Enter.*, 2014 WL 1760023, at *8. As noted *infra* Argument.§§ B-C, Defendants expressly agreed that any alleged extracontractual misrepresentations or omissions are barred by virtue of the anti-reliance and integration provisions—and such provisions are fully enforceable in Delaware.

As *Abry Partners* recognizes, enforcing such provisions enhances deal certainty, avoids the "double liar" problem, and is consistent with Delaware's contractarian nature—all of which reflect important Delaware public policy

considerations. *Abry Partners v. F & W Acquisition*, 891 A.2d 1032, 1057-58 (Del. Ch. 2006). There is no basis to displace these strong public policy concerns under the circumstances here, where there is no assertion that the alleged unclean hands had anything to do with the anti-reliance and integration provisions, and the UEC Parties were advised by teams of sophisticated business and legal personnel pre-signing. *See Nakahara v. NS 1991*, 718 A.2d 518, 523 (Del. Ch. Sept. 28, 1998) ("[S]ince [the unclean hands doctrine] is ultimately based on public policy, countervailing public policy which points in the direction of reaching the case on the merits can preclude its operation.").

Moreover, Delaware law provides that a party seeking to invoke equitable defenses (including unclean hands) cannot have unclean hands themselves. *See Whittington v. Dragon Grp.*, 2009 WL 1743640, at *10 n.54 (Del. Ch. June 11, 2009) (assessing whether equitable defense was barred by unclean hands). UEC Parties cannot invoke unclean hands doctrine here given their inequitable and improper conduct through the course of this transaction, including (1) sham auditor outreach efforts to give the appearance they are engaged in efforts to retain a successor auditor, and (2) potential bribery of governmental officials followed by efforts to run the deal clock out before such activity comes to light.

Finally, the evidence adduced at trial will show that the UEC Parties' allegations regarding Zama and Rimu are false. The UEC Parties cannot meet their

burden of establishing that SPAC did anything improper or wrong that would support the application of unclean hands.

First, as to Zama, the UEC Parties cannot undo a Merger Agreement due to participation in the process by the advisor that Parent itself *engaged exclusively* to find a SPAC partner. Parent is a multi-billion dollar Japanese company with access to the world's best advisors including a sprawling international engagement with Baker McKenzie, engagements of Union Gaming (the foremost casino-sector business advisor), and a multi-million dollar multi-year engagement with Asian Structured Capital (Van Der Sande's financial consulting company). UEC chose to engage Zama to identify and help enter into a SPAC transaction. UEC agreed Zama owed no fiduciary duties and was free to engage in any activities, including participating on the other side of the SPAC transaction. SPAC had *nothing* to do with this unusual arrangement. And without that arrangement, SPAC might never have found the UEC Parties as potential SPAC partners: Parent's exclusive engagement with Zama actually precluded SPAC from directly engaging with the UEC Parties.

The record shows that Parent always treated advice from Zama with caution, mindful of Zama's role as focused on closing. For instance, at a September 29 board meeting, Director Tokuda stated: "I think we need an objective opinion. … Zama

Capital are naturally eager to proceed because they will receive incentives [upon closing].”[287]

Parent believes it has claims against Zama and has brought them in SDNY. New York. But Parent’s regrets regarding the Zama engagement do not transform its Merger Agreement with SPAC into an option.

Second, as to Rimu, the evidence adduced at trial will show that there was no cannibalization of a PIPE opportunity, nor any fraud. McPike Global Family Office (the “Family Office”) is a longtime investor in SpringOwl. In October 2022, after the Family Office received a substantial return on an investment in Playtech LLC through SpringOwl, Mr. Ader presented it with an opportunity to invest in this transaction.[288]

On October 22, 2021, the Family Office received an NDA for potential PIPE investors, and it executed the NDA on November 4.[289] The Family Office was not immediately interested, however, in a $10/share common equity PIPE; it was looking for a better deal.[290] Accordingly, Ader presented an opportunity to pursue an investment in the Sponsor, which carries a much higher risk but allows for a much

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[287] JX927_(TIGERDE_02584442)_at_8449.

[288] JX1647_(26CAPITAL_0153116)_at_3117.

[289] JX242_(26CAPITAL_0043165)_at_3167-3168.

[290] JX1520_(Ader)_57:3-12.

higher upside. In a November 6 email to the Family Office, Ader laid out such a proposal: "an immediate investment of up to $25,000,000 of common/warrant units @ $10 per unit," subject to lock-up provisions.[291] Ader left open the opportunity to pursue a PIPE, stating: "[t]here is additional capacity of up to $50,000,000 of common only @ $10 per share."[292] On November 8, still pitching PIPE, Ader had PIPE investor materials given to the Family Office.[293] Given his understanding of the Family Office's investment parameters, Ader privately stated: "I am not sure they are a PIPE player ***but let[']s see***."[294]

A few weeks later, the Family Office decided upon the riskier investment and paid $25 million for 2.5 million "Founder Shares" and 2.5 million "Private Placement Warrants" at a price of $10/unit (i.e., one share and one warrant).[295] The agreement made it abundantly clear that the Family Office was purchasing founder shares from the Sponsor (not public shares through SPAC, where the money paid is kept in trust), and explicitly emphasized the "high degree of risk" involved.[296] Given the sophistication of the parties and explicit language therein, there is no credible

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[291] JX242 (26CAPITAL_0043165) at 3166.

[292] *Id.*

[293] JX246 (26CAPITAL_0062660) at 2661.

[294] *Id.* 2661 (emphasis added).

[295] JX1646 (26CAPITAL_0086949) at 6953-6962.

[296] *Id.* 6962.

basis for fraud. Nor did Ader have an obligation to disclose the Family Office's interest to UEC Parties.

(Rimu filed a frivolous complaint against Ader and Sponsor in SDNY. Ader and Sponsor look forward to vigorously defending the baseless claims.)

Ader also did not de-risk himself from the SPAC. Rather, he invested almost one million dollars in this transaction by "rolling over" SpringOwl's management fees from the Playtech PLC investment, into the Family Office's SPAC investment.[297] And following the Family Office subscription, from February to March 2022, Ader purchased 1.5 million warrants on the secondary market.[298]

B. There Was No Pre-Signing Fraud.

The UEC Parties claim they were defrauded into the Merger Agreement. Yet, they can identify precisely *zero* pre-signing statements with any specificity.[299] JX1558_(Van-Der-Sande-30(b)(6))_119:10-20 ("I can't think of anything specifically."). They vaguely reference two categories of purported omissions: (a) "Mr. Ader never disclosed that Alex Eiseman and Zama had an investment in the SPAC's sponsor" and (b) "Mr. Ader never disclosed that he had sold a large portion

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[297] *Id.*_6954.

[298] JX1583_(SPAC's_Resp._To_Third_Interrogatory)_at_No.1.

[299] JX1651_(Defs'_Third_Amended_Interrogatory_Resp.)_at_No.32.

of his investment in the SPAC's sponsor to Harald McPike"—*after the deal was signed*.[300]

These omission theories first require a duty to speak. *Stephenson v. Capano Dev.*, 462 A.2d 1069, 1074 (Del. 1983). As a counterparty to a prospective agreement, SPAC had no "fiduciary or other similar relation of trust and confidence" with the UEC Parties, and thus no "duty to speak." *Prairie Cap. v. Double E*, 132 A.3d 35, 52 (Del. Ch. 2015). Nor was any affirmative statement by Mr. Ader false or misleading. *Airborne Health v. Squid Soap*, 2010 WL 2836391, at *9 (Del. Ch. July 20, 2010) ("actionably misleading partial disclosure" is one "that would tend to create a false impression"). In fact, the UEC Parties never asked Mr. Ader whether Zama had invested, despite Zama's disclosure to Mr. Takeuchi that Zama "*might want to participate in the SPAC deal*."[301]

Defendants presented no pre-signing statement regarding Rimu, nor is there any evidence that, while the parties negotiated the Merger Agreement, "a fixed and secret plan existed" to breach Section 6.1, which is necessary to prove fraud regarding Rimu. *Sanders v. Devine*, 1997 WL 599539, at *9 (Del. Ch. Sept. 24, 1997).

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[300] JX1651_(Defs'_Third_Amended_Interrogatory_Resp.)_at_No.32.

[301] JX41_(ZCSA00069412) (emphasis-added).

C. There Was No Post-Signing Fraud.

The UEC Parties assert that SPAC fraudulently induced them at a September 26, 2022 meeting into extending the agreement on September 29, 2022.[302] Each of their alleged misstatements fail.

Redemptions. The UEC Parties' three verified complaints alleged that Mr. Ader "claim[ed] that he believed that more than 90% of the SPAC's public shareholders would … ***not redeem their shares.***"[303] A recording of the September 26 meeting puts this claim to rest: he did not.[304] The UEC Parties now admit that and instead claim that Mr. Ader said something different than they previously *swore* (at least three times, in verified pleadings and in verified interrogatories: Mr. Ader said 50% (not 90%) at a post-meeting dinner (not at the recorded meeting).[305]) An email three days after this supposed statement puts this new claim too to rest: when President Fujimoto asked Mr. Ader to commit to "strive" to maintain redemptions

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302 SAC_¶¶25, 135-37, 195-202.

303 SAC_¶¶25, 135, 195, 197.

304 JX907_(TIGERDE_0144865)_at_4875-4877.

305 SAC_¶¶12, 76, 118–119; D.I._25_(First_Amended_Counterclaims)_¶¶12, 76, 118-19; SAC_¶¶_25, 135, 195, 197; JX1651_(Defendants'_Supp._Responses_to_Interrogatories)_No.32; JX1558_(Van-Der-Sande-30(b)(6))_319:3-22; JX1580_(Takeuchi)_114:18-24; JX907_(TIGERDE_0144865)_at_4875-4877.

below 50%, Mr. Ader said he refused to commit.[306] Tellingly, on January 20, 2023, after the board was informed that 88% of shareholders had redeemed, nobody on the Parent board even expressed surprise.[307]

Even crediting this allegation, the expression of confidence constitutes an "opinion[] about probable future events" that "cannot be deemed fraud." *Liberto v. Bensinger*, 1999 WL 1313662, at *8 (Del. Ch. Dec. 28, 1999) (cleaned up). Moreover, the UEC Parties have no evidence that Mr. Ader's optimism about any "50% redemption rate" was not honestly believed. *See BAE Sys. v. Lockheed Martin*, 2004 WL 1739522, at *7 (Del. Ch. Aug. 3, 2004).

Auditing. Mr. Ader did not lie when he "claimed that the Operating Company's U.S. auditors had told him that their work would be complete within weeks[.]"[308] They did.[309]

Liability. Mr. Ader did not falsely represent that "he currently held the opinion that members of the Parent Company Board could be exposed to personal liability if they did not agree to an extension."[310] Mr. Ader's statement was based

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[306] JX928_(ZCSA00025799)_at 5799.

[307] JX1292_(TIGERDE_0219309_EN)_at_9316.

[308] SAC_¶¶ 25,_195,_198.

[309] JX907_(TIGERDE_0144865)_at_4871; JX1520 (Ader)_275:14-276:6; JX870_(26CAPITAL_0143740)_at_3741.

[310] SAC_¶¶ 25,_135,_195,_199-200.

on the same statement in his counsel, Schulte's, letter to the UEC Parties.[311] Moreover, "a misrepresentation as to a matter of law is a statement of opinion only and cannot afford a basis for a charge of fraud." *Wal-Mart Stores v. AIG Life*, 2005 WL 5757652, at *12 (Del. Ch. Apr. 1, 2005).

Interests. Mr. Ader did not "omit[] to disclose that he had sold substantially all of his economic interest in the SPAC by December 2021."[312] He did have interests in SPAC but, regardless, the UEC Parties do not even allege that any statement regarding Mr. Ader's interests in SPAC were made or relayed to Parent ahead of Parent's September 29 vote to extend.

A. The UEC Parties Cannot Establish Justifiable Reliance.

"[A]ctual and justifiable reliance" is necessary to prove fraud. *Anglo Am. v. S.R. Glob.*, 829 A.2d 143, 158 (Del. Ch. 2003). The UEC Parties can demonstrate neither. As explained,

- Zama informed Parent of Zama's intention to invest in the SPAC and then Parent signed an engagement letter permitting the investment. (*supra* Background.§C);

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[311] JX828_(26CAPITAL_0097517)_at_7519.

[312] JX1416_(Defendants'_Supp._Responses_to_Interrogatories)_Nos.39-41.

- the Rimu facts were not even contemplated at signing, nor are they, or Mr. Ader's interest in the Sponsor, justifiably relevant to signing or extension decisions (*supra* §A) and Parent did not even know about the statement supposedly giving rise to Mr. Ader's duty to disclose his interests—they could not have relied upon it (*supra* §B), *see Zhou v. Deng*, 2022 WL 1024809, at *11 n.109 (Del. Ch. Apr. 6, 2022) ("Defendants could not have relied on statements they did not know about.");
- Mr. Ader refused, in writing, to commit to any level of redemptions (*supra* Background.§O);
- the UEC Parties were in an equal position to Mr. Ader to ascertain an expected level of redemptions, and the supposed redemption representation would have been contradicted by Ader's later email (*supra* Background.§O), *see Ogus v. SportTechie, Inc.*, 2020 WL 502996, at *7 (Del. Ch. Jan. 31, 2020) ("[I]t is unreasonable to rely on oral representations when they are expressly contradicted by the parties' written agreement");
- the UEC Parties had access to their own auditor to determine what their auditor said and their own legal counsel to determine their potential personal liability (supra Background.§C), *see Universal Enter. v.*

> *Duncan Petroleum*, 2013 WL 3353743, at *14 (Del. Ch. July 1, 2013) ("A party dealing on equal terms with another is not justified in relying on representations where the means of knowledge are readily within his or her reach.").

Finally, Section 4.27 of the Merger Agreement is an Exclusive Representations and Warranties Clause that, together with Section 9.1's integration clause, "forecloses claims of fraud based on extra-contractual misrepresentations"—i.e., the UEC Parties' fraud claims.[313] *Prairie Cap. v. Double E*, 132 A.3d 35, 50 (Del. Ch. 2015); *Abry Partners v. F&W Acquisition*, 891 A.2d 1032, 1057 (Del. Ch. 2006). These same provisions apply to the Extension Agreement. *See* JX1679_(26CAPITAL_0088818)_at_8962-8964 ("The provisions of Article 9 of the Agreement shall apply to this letter agreement . . . taken together as a single agreement, reflecting the terms as modified hereby."); *Yatra Online. v. Ebix, Inc.*, 2021 WL 3855514, at *11 (Del. Ch. Aug. 30, 2021) ("[L]imitations the parties may have agreed to in other contracts" are incorporated), *aff'd*, 276 A.3d 476 (Del. 2022).

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[313] JX1558_(Van-Der-Sande-30(b)(6))_214:2-16.

The UEC Parties' claims against the Sponsor are also barred by Section 9.15 of the Merger Agreement—the non-resource provision—which the UEC Parties' 30(b)(6) witness testified was fully enforceable.[314]

The defects in the UEC Parties' fraud theories also undermine any suggestion that Mr. Ader *intended* to defraud anyone. He did not.

III. SPECIFIC PERFORMANCE OF CLOSING IS THE ONLY APPROPRIATE REMEDY.

Section 9.14 of the Merger Agreement authorizes "specific performance," which should be awarded here because the balance of equities tips in SPAC's favor. *See Snow Phipps*, 2021 WL 1714202, at *51. SPAC has engaged in all reasonable efforts to achieve a closing, the UEC Parties have done the opposite—cycling through a panoply of reasons, excuses, delays, and impediments to closing. Not a single one affects the core of this merger: the transaction remains beneficial, it would benefit Parent's stockholders and the Operating Company's corporate governance, and the UEC Parties even claim to continue to engage in "reasonable best efforts" to accomplish closing.[315] Closing here would be "…a victory for deal certainty…" *Snow Phipps*, 2021 WL 1714202, at *2.

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[314] JX1558_(Van-Der-Sande-30(b)(6))_353:18-22; 355:10-14.

[315] JX194_at_1-2; JX1475_(Asano)_7:11-14, 48:12-49:4, 53:4-15; JX1580_(Takeuchi)_97:9-98:17; JX1416_(Defs'_Interrogatory_Responses)_No.1.

Specific performance of closing is also the *only* adequate remedy: "a monetary remedy … is something that is going to be significantly more difficult[.]"[316]

CONCLUSION

UEC Parties should be ordered to close and Plaintiffs should be awarded their fees and costs per the Merger Agreement.

[316] JX1680_(Hr'g_on_Exp._Mot.)_42:17-44:2.

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2023, my firm caused true and correct copies of the *Revised Public Version of Plaintiffs' Corrected Pre-Trial Brief* on the following counsel of record via File & Serve*Xpress*:

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