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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN APPEL, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. DAVID J. BERKMAN, STEPHEN J. CLOOBECK, RICHARD M. DALEY, FRANKIE SUE DEL PAPA, JEFFREY W. JONES, DAVID PALMER, HOPE S. TAITZ, ZACHARY D. WARREN, AND ROBERT WOLF, Defendants-Appellees.	No. 316, 2017 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 12844-VCMR REDACTED VERSION-- FILED: November 9, 2017

ANSWERING BRIEF OF THE DIRECTOR DEFENDANTS, APPELLEES

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Dated: October 25, 2017

TABLE OF CONTENTS

TABLE OF CONTENTS *(continued)*

TABLE OF CITATIONS

Page(s)

Cases

TABLE OF CITATIONS *(continued)*

Page(s)

TABLE OF CITATIONS *(continued)*

Page(s)

NATURE OF PROCEEDINGS

This case concerns a decision by the former holders of 81% of the stock of Diamond Resorts International, Inc. ("Diamond Resorts" or the "Company") to tender their shares and accept a 58% premium offered by an affiliate of Apollo Global Management LLC ("Apollo") to take the Company private (the "Transaction"). Plaintiff-Appellant, a former stockholder of the Company, sued the former directors of the Company for breach of their fiduciary duties in connection with the Transaction, which closed before Plaintiff filed suit. In his Verified Class Action Complaint (the "Complaint"), Plaintiff challenged the adequacy of (1) certain disclosures made in connection with the Transaction; (2) the price paid to the Company's stockholders; and (3) the process followed by the directors in approving the Transaction.

On July 13, 2017, the Court of Chancery dismissed Plaintiff's claims in their entirety. First, the Court of Chancery found that the stockholder vote was fully informed and thus, Plaintiff failed to state a disclosure claim. Second, because the stockholder vote was fully informed, the Court of Chancery found that the business judgment rule applied to the directors' actions under this Court's decision in *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304, 309 (Del. 2015), and dismissed the case for failure to state a claim for breach of fiduciary duty.

Plaintiff now appeals only one aspect of the Court of Chancery's decision: whether the Transaction's solicitation statement adequately disclosed the reasons why the Company's former chairman, Stephen J. Cloobeck, abstained from the vote by the Company's board of directors approving the Transaction. Plaintiff does not challenge the fact that the solicitation statement accurately disclosed that Mr. Cloobeck abstained from the vote of the Company's board of directors to approve the Transaction and that Mr. Cloobeck was undecided about whether he would tender his own shares in the Transaction. Plaintiff also does not appeal the dismissal of his other disclosure claims or any other aspect of the Court of Chancery's decision.

This answering brief is submitted on behalf of Defendants-Appellees David J. Berkman, Richard M. Daley, Frankie Sue Del Papa, Jeffrey W. Jones, David Palmer, Hope S. Taitz, Zachary D. Warren, and Robert Wolf, who are former directors of the Company (collectively, the "Director Defendants").

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that the decision of the Company's former stockholders to tender their shares in the Transaction was fully informed. Plaintiff contends that the Director Defendants concealed the supposed "opposition" of Mr. Cloobeck, the Company's chairman, to the Transaction, but Mr. Cloobeck's abstention from the board vote approving the Transaction did not constitute "opposition" and was indisputably disclosed. As the Court of Chancery recognized, Plaintiff is attacking the failure of the Director Defendants to disclose the reasons for Mr. Cloobeck's abstention, and Delaware law does not require disclosure of the reasons for a director's vote.

2. Denied. The Court of Chancery did not disregard the standard of materiality in determining that the stockholders' decision to tender was fully informed. Plaintiff draws a false dichotomy between disclosure of the "existence" of Mr. Cloobeck's supposed objection to the Transaction and disclosure of the "reasoning" behind his votes. There is no distinction here. The statements by Mr. Cloobeck upon which Plaintiff relies to allege Mr. Cloobeck's "opposition" come from the Company's minutes, where they are explicitly noted to be his "reasons" for abstaining. The reasons for a director's vote are immaterial as a matter of law. The fact of Mr. Cloobeck's abstention was disclosed, and further disclosure of Mr.

Cloobeck's subjective view about the Transaction would not have materially altered the mix of information available to the Company's stockholders.

STATEMENT OF FACTS

A. The Director Defendants.

The Director Defendants are former members of the Company's board of directors (the "Board"). In the proceedings in the Court of Chancery and in his opening brief on appeal, Plaintiff relies heavily on a statement in the Company's 2016 proxy statement that describes why Mr. Cloobeck should continue to serve as a director, specifically that Mr. Cloobeck has "unique experience, knowledge and understanding of Diamond and its prospects." Appellant's Opening Brief ("AOB") at 18; A00269. Plaintiff would have the Court believe that the Company singled out Mr. Cloobeck for special accolades, but that is incorrect. As described below, the same proxy statement touts the qualifications of all members of the Board.

Mr. Berkman was the Company's lead director, chair of the Compensation Committee, and member of the Audit, Nominating and Corporate Governance, and Strategic Risk Committees. A00270. Mr. Berkman has served on the boards of a number of companies in the financial services industry. A00270. Mr. Berkman is also the CEO of a private equity firm that specializes in telecommunications and media investments. A00270. As a result, Mr. Berkman was noted by the Company to have "deep experience in private equity markets and . . . significant experience with mergers and acquisitions, corporate finance, financial reporting

and accounting and controls," in addition to "valuable expertise in matters relating to [the Company's] corporate governance and board responsibilities." A00270.

Mr. Jones joined the Board in 2015. A00271; A00019. Mr. Jones has been an officer or a director of multiple companies in the hospitality space, including serving as chief financial officer of Vail Resorts, Inc. A00271. Mr. Jones was a member of the Audit, Compensation, and Strategic Risk Committees. A00271. As a result, Mr. Jones was noted by the Company to have "significant management, financial and hospitality industry experience and expertise, which he has acquired through his 15 years as a chief financial officer, including 10 years as chief financial officer and four years as a director, as well as president of lodging, retail and real estate, of a publicly held resort management company." A00271.

Ms. Taitz joined the Board in August 2013. A00271; A00019. She served as the chair of the Company's Audit Committee and Nominating and Corporate Governance Committee, and was a member of the Compensation and Strategic Risk Committees. A00272. Ms. Taitz has significant financial market experience, having spent a decade as an investment banker and later becoming managing partner of a money management firm. A00272. As a result, Ms. Taitz was noted by the Company to have "extensive investment and analytical expertise, which . . . provide[d] the Board with valuable insight when reviewing potential acquisitions,

joint ventures and other strategic transactions and in making other strategic and operational decisions." A00272.

Mr. Wolf began serving on the Board in July 2013. A00020. Mr. Wolf is the CEO of a global consulting firm and previously was a senior executive at UBS. A00269. Mr. Wolf has also served on various government advisory groups, including President Obama's Economic Recovery Advisory Board. A00269. Mr. Wolf was a member of the Compensation, Strategic Risk, and Nominating and Corporate Governance Committees. A00269. As a result, Mr. Wolf was noted by the Company to have "experience in the financial services and investment banking industries, as well as . . . experience offering economic advice and guidance to the President of the United States." A00629.

Mr. Berkman, Mr. Jones, Ms. Taitz, and Mr. Wolf served on the "Strategic Review Committee" (or "Committee") that reviewed the Transaction. A00209. Mr. Daley, Ms. Del Papa, Mr. Palmer, Mr. Warren, and Mr. Cloobeck were the remaining members of the Board. Mr. Daley is the former mayor of Chicago and is a prominent business leader and specialist in government affairs. A00270. Ms. Del Papa is an attorney in private practice and was formerly attorney general of Nevada. A00269. Mr. Palmer has served as CEO of the Company since 2013, prior to which he served in other officer roles. A00271; A00019. Mr. Warren is a senior executive in the financial services industry. A00272.

Mr. Cloobeck was the chairman of the board of Diamond LLC since he founded it in 2007 and until it became the Company in 2013, when he became the Company's chairman. A00268; A00018; A00021. He also served as Diamond LLC's CEO from 2007 until December 2012. A00268. Pursuant to an agreement, so long as Mr. Cloobeck was a director of the Company, he had the right to serve as Chairman. A00272.

B. The Board Holds Preliminary Strategic Discussions And Forms The Strategic Review Committee.

In the spring of 2015, as part of the Board's regular review of the Company's strategic options, the Board formed a transaction committee (the "Transaction Committee") to review the Company's strategic alternatives. A00208; A00022. Over the next several months, the Company contacted both acquisition targets and possible investors, but this did not result in a transaction. A00208; A00022. The Transaction Committee was disbanded in September 2015. A00208; A00022.

The Board continued to believe that it was important for the Company to consider strategic transactions, including a sale of the Company, in light of the Company's stock underperformance and the Company's financial results. A00209. On February 22, 2016, the Board formed the Strategic Review Committee, comprised solely of independent directors, to review the Company's strategic

alternatives. A00209; A00025–26. The Strategic Review Committee retained Centerview Partners LLC ("Centerview") as its financial advisor and Gibson, Dunn & Crutcher LLP as its legal advisor. A00209; A00028–29. The Company publicly announced the strategic review on February 24, 2016. A00209; A00028.

C. The Strategic Review Committee Implements A Robust, Public Sales Process.

In March 2016, the Committee and its advisors began to implement a public sales process. A00210. Centerview was in contact with 22 strategic and financial parties, fifteen of which entered non-disclosure agreements to receive non-public information from the Company. A00210; A00033.

During the week of April 25, 2016, the Company received written indications of interest to acquire the Company from five parties, ranging from a low of $23 per share to a high of $33 per share. A00210; A00034. Apollo submitted an indication of interest at $28–$30 per share, which represented a 47%–57% premium to the Company's $19.11 stock price on February 24, the trading day before the process was publicly announced. A00210; A00034. In light of the favorable bids received, the Board determined to proceed to a second round. A00211; A00034–35.

Throughout the rest of May and June, Centerview and the Company's management worked with potential bidders to conduct due diligence. A00212.

D. Apollo Emerges As The Superior Bid.

On June 23, 2016, Apollo submitted a final bid of $30.25 per share. A00213; A00037. Another bidder, "Sponsor B," also submitted a bid, of $27-$29 per share, but noted that it would need an additional 30-45 days to conduct diligence. A00213; A00037. Centerview had numerous discussions with other potential bidders, but none submitted a bid. A00213; A00038.

Over the next four days, the Committee and Board each met multiple times to discuss the bids from Apollo and Sponsor B, as well as Centerview's financial analysis of the bids. A00213-14; A00038-39; A00040; A00041. The Board authorized Centerview to seek best and final bids. A00213; A00039. In response to discussions with Centerview, Apollo agreed to improve its transactional financing but stated that it would not be able to increase its bid of $30.25 per share. A00214. Sponsor B stated that it would need additional diligence to submit a bid at the higher end of its $27-$29 per share range. A00214.

On June 25, 2016, the Board authorized Centerview and its legal advisor to negotiate a final merger agreement with Apollo at $30.25 per share. A00214; A00039. Centerview opined that the Transaction was fair to the Company's stockholders from a financial point of view. A00214; A00040. As disclosed in Diamond's July 14, 2016 Schedule 14D-9 Solicitation/Recommendation Statement

(the "Solicitation") (A00193-248), Mr. Cloobeck abstained from the Board vote approving the Transaction. A00214; A00054.

On June 29, 2016, the Company and Apollo executed the merger agreement and issued a joint press release announcing the Transaction. A00215; A00013.

E. The Solicitation Makes Full And Accurate Disclosures.

In the Solicitation, dated July 14, 2016, the Board recommended that the Company's stockholders tender their shares. A00208; A00055. The Solicitation disclosed in at least four different places that Mr. Cloobeck abstained from the Board votes to approve and recommend the Transaction.[1] Further, when addressing the Company insiders' intent to tender, the Solicitation noted that "[t]o the Company's knowledge, the chairman of the board of directors has not yet

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[1] *See* A00208 ("All of the directors voted in favor of such resolutions [approving the Transaction] with the exception of the Company's chairman, who abstained."); A00214 ("On June 25, 2016, . . . the board of directors authorized Centerview and Gibson Dunn to negotiate a final merger agreement with Apollo at the $30.25 price per Share of Company Common Stock. The Company's chairman abstained from this vote."); A00214 ("[O]n June 26, 2016, . . . [t]he board of directors approved the entry into the merger agreement and the consummation of the transactions contemplated thereby. The Company's chairman abstained from this vote."); A00215 (On "June 28, 2016, . . . Each director reconfirmed his or her prior vote (with the chairman again abstaining)."). Plaintiff does not distinguish between these votes in his pleading or his argument. Accordingly, they will be referred to herein as a unitary vote.

determined whether to tender or cause to be tendered all of his Shares," although all of the other directors and officers intended to do so. A00220.

F. The Company's Stockholders Overwhelmingly Approve The Transaction With Apollo.

The Transaction provided significant benefits to the Company's stockholders. Principally, Apollo's bid of $30.25 per share represented a premium of 58% over the Company's share price on February 24, 2016, before the process was publicly announced, and a premium of 26% over the share price on June 28, 2016, the last trading day before public announcement of the merger agreement. A00215. Despite the publicly announced process involving up to 22 potential strategic and financial counterparties, no superior bids emerged. A00215; A00037-38.

The Company's stockholders overwhelmingly approved the Transaction. By the expiration of the tender offer on September 1, 2016, more than 81% of the Company's stock had been tendered. A00061. Moreover, despite his earlier abstention from the Board's vote to approve the Transaction, Mr. Cloobeck tendered all of his shares in the Company, representing over 15% of the Company's stock. A00018; A00060.

The merger was consummated on September 2, 2016. A00061.

G. The Company Provides Plaintiff With Documents Pursuant To Section 220 Of The Delaware General Corporation Law.

On August 6, 2016, Plaintiff sent a letter to the Company seeking production of certain materials pursuant to Section 220 of the Delaware General Corporation Law (the "220 Request"). B1. Referencing the Solicitation, Plaintiff stated in his 220 Request that the price offered in the Transaction was allegedly [redacted]

H. Plaintiff Files Suit, Which Is Dismissed By The Court Of Chancery, And Then Appeals.

On October 21, 2016, Plaintiff filed his Complaint in the Court of Chancery. A00009-67. Plaintiff brought claims for (1) breach of fiduciary duty against the Director Defendants for allegedly failing to disclose three topics: Cloobeck's "opposition" to the Transaction, a conflict involving Centerview, and a conflict involving another director; (2) breach of fiduciary duty against the Director Defendants for allegedly running an "ill-timed and conflict laden sales process"; (3) breach of fiduciary duty against the Director Defendants for allegedly "failing to secure fair value for Diamond's shares"; and (4) aiding and abetting breach of fiduciary duty against Centerview. A00063-65.

On December 13, 2016, the Director Defendants, Centerview, and Mr. Cloobeck separately moved to dismiss the Complaint. B12-68; A00607-13. The

Court of Chancery held multiple hours of oral argument on June 8, 2017. A00322-455.

On July 13, 2017, the Court of Chancery dismissed all of Plaintiff's claims. Op. at 13. Most relevant here, the Court of Chancery held that the stockholders' decision to tender was fully informed, and rejected Plaintiff's arguments concerning Mr. Cloobeck. The Court of Chancery found that the Solicitation "expressly states that Cloobeck abstained from the vote on the merger." Op. at 6. According to the Court of Chancery, "Cloobeck's reasoning for his abstention [was not] required under the significant weight of twenty-five years of Delaware authority on this point." Op. at 6-7. Thus, the Court of Chancery rejected the principal argument that Plaintiff presses on appeal—namely, that the Director Defendants failed to disclose Mr. Cloobeck's supposed "opposition" to the Transaction. *See* A00107.

This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT THE REASONS FOR MR. CLOOBECK'S ABSTENTION WERE IMMATERIAL.

A. Question Presented

Whether a director's stated reasons for abstaining from a vote of the board of directors to approve a tender offer are immaterial when the facts of the director's abstention and the director's indecision about whether to tender his own shares are expressly disclosed to stockholders?

B. Standard Of Review

This Court reviews *de novo* "the Vice Chancellor's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)." *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 100 (Del. 2013). However, while well-pleaded allegations must be accepted as true, the Court will not "credit conclusory allegations that are unsupported by specific facts or draw unreasonable inferences in the plaintiff's favor." *Id.*

C. Merits Of Argument

The Court of Chancery properly found that the decision of the Company's stockholders to tender their shares in overwhelming numbers in favor of the Transaction was "fully informed." Op. at 11. Plaintiff now challenges one aspect of that decision: whether the Solicitation disclosed all material facts about Mr.

Cloobeck's supposed "opposition" to the Transaction. In so doing, Plaintiff hopes to resuscitate (1) his disclosure claim concerning Mr. Cloobeck and (2) his price and process claims, which were dismissed under this Court's decision in *Corwin*.[2]

As discussed below, the Court of Chancery was correct. The Solicitation disclosed all material information about Mr. Cloobeck's abstention from the Board vote approving the Transaction. The Solicitation did not disclose the stated reasons for Mr. Cloobeck's abstention, but the reasons for a director's vote are immaterial as a matter of law. Plaintiff attempts to avoid the admittedly "undisputed" case law on this point, A00108, with a readily distinguishable, 25-year-old case, *Gilmartin v. Adobe Resources Corp.*, 1992 WL 71510 (Del. Ch. Apr. 6, 1992), but that effort fails here just as it failed before the Court of Chancery. Finally, Plaintiff's claims fail for the independent reason that Plaintiff has not come close to pleading bad faith on the part of the Director Defendants, which is required here. Accordingly, the Court of Chancery's dismissal of Plaintiff's claims should be affirmed.

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[2] *Corwin* mandates that "when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies." *Corwin*, 125 A.3d at 309. Plaintiff did not allege coercion, and the Court of Chancery found that the stockholder action here was fully informed. The Court of Chancery thus applied the business judgment rule to dismiss Plaintiff's price and process claims.

1. All Material Facts Concerning Mr. Cloobeck Were Disclosed In The Solicitation.

Plaintiff contends that the Solicitation omitted "any mention of Chairman Cloobeck's opposition" to the Transaction, and that instead the Solicitation should have disclosed that Mr. Cloobeck was "unequivocal[ly] oppos[ed]" to the Transaction, which was "approved and entered into over [his] opposition." AOB at 1-2. Plaintiff mischaracterizes the record.

As the Court of Chancery found, the Solicitation fully informed stockholders of all material facts about Mr. Cloobeck. Op. at 6-7. In particular, the Solicitation repeatedly disclosed that Mr. Cloobeck abstained from the Board's vote on the Transaction. A00208; A00214-15. The Solicitation separately disclosed that Mr. Cloobeck—alone among the Company's directors and officers—had not yet decided whether to tender his shares. A00220. Those are the *facts* about what happened. The Company was under no obligation to disclose Mr. Cloobeck's subjective state of mind. *See Newman v. Warren*, 684 A.2d 1239, 1246 (Del. Ch. 1996); *see also Huff Energy Fund, L.P. v. Gershen*, 2016 WL 5462958, at *15 (Del. Ch. Sept. 29, 2016).

Plaintiff nevertheless argues that the Solicitation should have disclosed more about Mr. Cloobeck's supposed "opposition" to the Transaction. Plaintiff's allegations on this point rest on the Board minutes that Plaintiff received in

response to his 220 Request. A00012, A00052-54. Those minutes provide the following:

A00180 (emphasis added). Plaintiff has distorted these words beyond what they will bear. While it is obvious that an abstention is not an approval, it is equally obvious that Mr. Cloobeck's abstention does not reflect an "unequivocal opposition" to the Transaction, *see* AOB at 1, and Plaintiff's editorializing does not change that fact.

Plaintiff also misconstrues the minutes by selectively omitting from his brief the last sentence highlighted above. *See, e.g.*, AOB at 10. That sentence is crucial because it demonstrates that Mr. Cloobeck's statements about the price and timing of the Transaction were [redacted] A00180; A00183 (emphasis added). As the Court of Chancery found, Delaware law "does not require 'that individual directors state (or the corporation state for them) the grounds of their judgment for or against a proposed shareholder action.'" Op. at 6 (quoting *Newman*, 684 A.2d at 1246). This principle applies equally to an abstention, *Huff*, 2016 WL 5462958, at *15, and has been followed repeatedly in

recent decisions.[3] Plaintiff provided the Court of Chancery with no reason to ignore "the significant weight of twenty-five years of Delaware authority on this point." Op. at 7. Indeed, Plaintiff acknowledged in briefing before the Court of Chancery that it is "undisputed" that "boards need not disclose in vivid detail the reasons for a director's decision." A00108.

To avoid this "undisputed" case law, Plaintiff attempts to transform Mr. Cloobeck's stated reasons for his abstention into something else. According to Plaintiff, "the Court of Chancery mischaracterized the omitted facts establishing the ***existence*** of Chairman Cloobeck's opposition to the Transaction as information concerning 'Cloobeck's ***reasoning*** for his abstention.'" AOB at 3 (emphasis in original). Plaintiff's attempt at transmutation fails for multiple reasons.

First, to be clear, it is Plaintiff who has consistently complained that the Solicitation failed to disclose the reasons for Mr. Cloobeck's abstention. Indeed, in a revealing statement in his brief before this Court, Plaintiff complained that

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[3] *See In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1130 (Del. Ch. 2011) ("Delaware law does not require that a fiduciary disclose its underlying reasons for acting"); *Dias v. Purches*, 2012 WL 4503174, at *9 (Del. Ch. Oct. 1, 2012) ("[I]ndividual directors need not state the grounds of their judgment for or against a proposed shareholder action.") (internal quotation marks and citation omitted); *In re Williams Cos. S'holder Litig.*, 2016 WL 197177, at *2 (Del. Ch. Jan. 13, 2016) (Where, as here, "a board has approved a transaction, the reasons for one board member's opposition to the transaction are not material[.]").

"Defendants cannot point to any indication within the 14D-9 of *why* Chairman Cloobeck abstained." AOB at 24 (emphasis in original). Plaintiff has only emphasized the supposed separate "existence" of Mr. Cloobeck's abstention because it is clear that "asking why a fiduciary took a certain action does not state a meritorious disclosure claim." *Dias*, 2012 WL 4503174, at *9. Plaintiff's decision to distance himself from his own pleading, where he repeatedly asks "why," is telling and exposes the deficiency of his argument.[4]

Second, as discussed above, there is no "opposition" to disclose. Mr. Cloobeck *abstained* from the Board vote, and when the time came to take stockholder action, he demonstrated his *support* for the Transaction by tendering his shares. A00060. Thus, it does not follow that any further disclosure in the Solicitation on Mr. Cloobeck's state of mind "would have assumed actual significance in the deliberations of the reasonable shareholder." *Arnold v. Soc'y for Sav. Bancorp, Inc*., 650 A.2d 1270, 1277 (Del. 1994) (quoting *TSC Indus., Inc. v. Northway, Inc*., 426 U.S. 438, 449 (1976)).

Third, Plaintiff provides no logical way to distinguish the nearly metaphysical concept of the "existence" of Mr. Cloobeck's supposed objection

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[4] *See also* A00017 ("The 14D-9 failed to disclose . . . [Cloobeck's] reasons for abstaining from voting on whether to approve the Transaction"); A00054 ("The 14D-9 failed to disclose that the true reason for Cloobeck's abstention . . .").

from the "reasons" why he abstained. Plaintiff is simply engaging in word games. That is particularly true here because the Board minutes, which state that Mr. Cloobeck gave the reasons for his abstention, plainly refute Plaintiff's strained interpretation. In any event, Plaintiff does not—and cannot—explain how his proposed rule would operate. If Plaintiff is correct, a company and its directors would be forced to draw artificial and highly subjective lines between the "reasons" for directors' votes on a corporate transaction (which all agree are immaterial as a matter of law) and the "existence" of their views on that same transaction (which Plaintiff argues must be disclosed). That is an illogical and unworkable standard—and one that does not exist under Delaware law.

Fourth, even if one were to ignore the minutes and instead construe Mr. Cloobeck's statements to be part of the Board's general discussions about the Transaction, Mr. Cloobeck's statements still would be immaterial. It is clear that a company has no obligation to "disclose the details of the various discussions and deliberation of the various board members." *Newman*, 684 A.2d at 1246; *In re Tele-Commc'ns, Inc. S'holders Litig.*, 2005 WL 3642727, at *5 (Del. Ch. Dec. 21, 2005, *revised* Jan. 10, 2006) (same); *see also Matador Capital Mgmt. Corp. v. BRC Hldgs., Inc.*, 729 A.2d 280, 297 (Del. Ch. 1998) (rejecting proposition that a Schedule 14D-9 must "disclose the details of the board's discussions and deliberations"). Plaintiff does not contend otherwise.

At bottom, further disclosure of Mr. Cloobeck's subjective views about the Transaction simply would not be material in light of the disclosures already made in the Solicitation. The Solicitation disclosed that Mr. Cloobeck abstained and that he had not yet decided whether to tender his shares. The clear inference to be drawn from those disclosures is that Mr. Cloobeck had not yet decided whether the offered price was acceptable, which, of course, is the principal question to be decided by a stockholder, like Mr. Cloobeck, in a tender offer. *See In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1073 n.62 (Del. Ch. 2001) ("It is well established that reasonable shareholders can draw their own inferences from the facts disclosed."). Indeed, that inference is the identical one that Plaintiff reached in his 220 Request. B2 (stating [redacted]

Plaintiff suggests a host of contrary inferences to be drawn from the disclosures already made in the Solicitation, but none of them is reasonably conceivable. For example, Plaintiff asserts without any explanation that "the most logical inference" arising from Mr. Cloobeck's abstention is that there was some unspecified "conflict of interest." A00111. Plaintiff also concocts the far-fetched theory that Mr. Cloobeck's decision ultimately to tender his shares "further masks his concerns" regarding the Transaction due to imagined "boardroom conflict[s]"

or other rank speculation. AOB at 25. The Court should not "give any credence to . . . wildly speculative and unreasonable conjecture" like Plaintiff offers here. *In re Coca-Cola Enters., Inc. S'holders Litig.*, 2007 WL 3122370, at *3 (Del. Ch. Oct. 17, 2007), *aff'd sub nom. Int'l Bhd. Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Del. 2008) (TABLE). The only reasonable inferences to be drawn are that Mr. Cloobeck had initial concerns about the price offered in the Transaction, but ultimately resolved those concerns when he tendered his shares. Disclosing that Mr. Cloobeck stated at meetings of the Board that he was "disappointed" with price and timing of the Transaction would add nothing to a stockholder's consideration of Mr. Cloobeck's already evident doubts. *See In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *2 (Del. Ch. Nov. 1, 2007) (information is not material if it merely "might prove helpful").

2. Plaintiff's Interpretation Of Delaware Law Is Incorrect.

Plaintiff spends nearly a third of his argument analyzing a single, 25-year-old case from the Court of Chancery, *Gilmartin*, 1992 WL 71510. According to Plaintiff, *Gilmartin* "exemplifies the correct application of Delaware's materiality standard" to Mr. Cloobeck's statements. AOB at 19. Plaintiff drastically overstates *Gilmartin*'s importance and application here. By contrast, Plaintiff fails to give proper heed to "the significant weight of twenty-five years of Delaware authority" that the Court of Chancery relied upon in dismissing Plaintiff's claims.

Op. at 6-7. This Court should reject *Gilmartin*'s application here, and instead continue the clear line of case law that has emerged in the decades since *Gilmartin* was decided.

(i) *Gilmartin* Does Not Support Plaintiff's Case.

In the Court of Chancery and now before this Court, Plaintiff repeatedly touts a single, decades-old case—*Gilmartin*—as a panacea. However, *Gilmartin*'s assessment of the disclosure of directors' subjective points of view has never been followed in any case that the Director Defendants have located, nor has Plaintiff cited any. To the contrary, decades of precedent after *Gilmartin* have made clear that disclosure of the subjective reasons and rationales for directors' actions are immaterial as a matter of law. That *Gilmartin* reached an arguably inconsistent result years earlier should not impact this Court's decision.

Gilmartin also is readily distinguishable from this case. In *Gilmartin*, the proxy statement stated that the directors "*unanimously* recommend[ed] that shareholders vote for the merger and that the board believe[d] that the terms of the [m]erger [we]re fair." 1992 WL 71510, at *11 (internal quotation marks omitted) (emphasis added). The proxy statement thus gave the arguably misleading "impression that all of the directors believed that this was an appropriate time to sell the company," and that the "directors st[oo]d unified in their belief (and recommendation)." *Id.* at *11, *9. However, the proxy statement did not disclose

that "two directors . . . believed that this was a bad time to sell" and "that they communicated that belief to others on the . . . board." *Id.* at *9. Thus, in *Gilmartin*, the company failed to disclose statements and actions of directors that ran contrary to their votes and to the public disclosures of action by a "unanimous[]" board. Here, by contrast, the Solicitation accurately disclosed that "the board"—not all of the Company's directors—approved of the Transaction, while also specifically disclosing that Mr. Cloobeck abstained and had not yet decided whether to tender his shares. A00208, A00214-15, A00220. Unlike *Gilmartin*, there was no arguable conflict between the public disclosure in the Solicitation and the internal workings of the Company's Board.

Plaintiff's attempts to align *Gilmartin* with the allegations here miss the target. That the directors in *Gilmartin* and Mr. Cloobeck both addressed the price to be paid in their respective transactions is of no moment—all directors evaluating such a transaction consider the adequacy of the price. Plaintiff presses a theory that Mr. Cloobeck's views carried special weight due to his supposed "unique" status within the Company, AOB 23, presumably on the theory that stockholders would listen to Mr. Cloobeck alone over the votes of the other *eight* directors, who were also disclosed to have "extensive," "significant," and "valuable" knowledge and skills. *See supra* 5-7. Once again, Plaintiff asks the Court to draw an unreasonable inference. Indeed, even after considering *Gilmartin*, the Court of

Chancery rejected a similar theory in *In re Williams*, just last year. *See infra* 31-32.

(ii) Plaintiff's Attempts To Distinguish Clear Case Law Fail.

In rejecting *Gilmartin*, the Court of Chancery found that Plaintiff had failed to rebut "the significant weight of twenty-five years of Delaware authority" that held the reasons for a director's vote are immaterial as a matter of law. Op. at 6-7. Plaintiff has previously called the case law on this point "undisputed," A00108, but nevertheless attempts on appeal to distinguish the five cases relied upon by the Court of Chancery in reaching its decision. Plaintiff's efforts fail. Indeed, none of the five decisions, reached by five different judges, so much as cite *Gilmartin*, let alone adopt its reasoning.

Newman. Chancellor Allen decided *Newman* in 1996. In that decision, the Court of Chancery engaged in "thoughtful consideration" of the "logical as well as practical" problems that would emerge from requiring directors to provide the reasons for their votes. 684 A.2d at 1245. Chancellor Allen noted that "[e]ach member [of a board] may have a complex set of reasons that lead to his or her vote" and "they may . . . differ radically while leading to the same vote." *Id.* Disclosure of those differing reasons runs into problems ranging from the practical difficulties of drafting a set of accurate, agreed "reasons" to determining how far

the disclosure must go into detail. *Id.* at 1245-46. These concerns are obviated by the rule requiring disclosure of "*all material facts*"—such as the outcome of board votes—instead of the subjective "grounds of [directors'] judgment for or against a proposed shareholder action." *Id.* at 1246 (emphasis in original). Notably, although *Newman* was issued after *Gilmartin*, neither the *Newman* plaintiff nor the Court of Chancery identified a case in which a disclosure was found defective because it failed to disclose the grounds for a director's dissent. *Id.*

Plaintiff attempts to distinguish *Newman* by again drawing a distinction between the supposed existence of Mr. Cloobeck's "opposition" and the stated grounds for his abstention. As discussed above, there is no difference between the two. In any event, the logic of *Newman* applies equally to whatever label Plaintiff applies to Mr. Cloobeck's statements. Disclosure of every board member's subjective views in a solicitation or a proxy statement is simply not practical, nor would consideration of the directors' complex, individualized, and subjective mental processes add anything to a stockholder's consideration of a transaction. *Accord id.* at 1246 n.5. Indeed, under *Newman*, it makes no difference to materiality if the subjective views are expressed as reasons for a vote or as part of "various discussions and deliberation of the various board members." *Id.* at 1246. Neither needs to be disclosed. What does need to be disclosed are *facts*, and that is

just what was disclosed here: Mr. Cloobeck abstained from the vote and had not decided whether to tender his shares at the time of the Solicitation.

In re Sauer-Danfoss. Vice Chancellor Laster decided *In re Sauer-Danfoss* in 2011. The decision concerned a fee award sought by the plaintiff for purportedly forcing the defendants to make a dozen disclosures in connection with a tender offer that ultimately was withdrawn. The Court of Chancery found only one of the disclosures—concerning an errant description of the trading price of the company's stock—to be material. Among the immaterial disclosures was a disclosure of the reasons that the company's special committee attempted to eliminate certain conditions from the transaction at issue. The Court of Chancery found that "Delaware law does not require that a fiduciary disclose its underlying reasons for acting." *In re Sauer-Danfoss*, 65 A.3d at 1130. All that is required is disclosure of material facts—in this case, that the special committee took the action that it did—and there is no "benefit to stockholders" from having information about the reasons for those actions. *Id.* at 1127.

In re Sauer-Danfoss is, like *Newman*, directly applicable here. The Solicitation disclosed that Mr. Cloobeck abstained, which is a fact. The reasons "why" Mr. Cloobeck did so are immaterial as a matter of law. *See id.* at 1131 (citing *Loudon v. Archer-Daniels-Midland Co.,* 700 A.2d 135, 145 (Del. 1997) (dismissing disclosure claim because it merely "pose[d] a question" rather than

"stat[ing] the omission of a material fact.")). Plaintiff's only response is to argue that Plaintiff is not asking "why," but that is exactly what Plaintiff is doing in his own pleading. A00016-17, A00054.

Dias. Vice Chancellor Glasscock decided *Dias* in 2012. *Dias*, like *In re Sauer-Danfoss*, involved a fee application following certain "corrective" disclosures made by a company as part of a corporate transaction. The Court of Chancery found that the only material corrective disclosure concerned management cash flow projections. 2012 WL 4503174, at *8. By contrast, the Court of Chancery found that disclosures concerning "the Board['s] justification for certain actions" was not required because "asking why a fiduciary took a certain action does not state a meritorious disclosure claim." *Id.* at *9.

Plaintiff makes little effort to distinguish *Dias*, arguing only that Vice Chancellor Glasscock did not engage in "any meaningful analysis or application" of the law. AOB at 31. The reason *Dias* did not do so is simple: by the time *Dias* was decided, it had been clear for 18 years that the reasons behind directors' actions are immaterial as a matter of law. *See Newman*, 684 A.2d at 1246. When a plaintiff seeks disclosure of that information—as Plaintiff does here—no in-depth "analysis" is required.

In re Williams. Vice Chancellor Noble decided *In re Williams* in 2016. The case involved allegations that a company's CEO, who also was a director,

"publicly supported [a] merger" with another company "even though he . . . opposed it when the question was put to a board vote," and that this allegedly left stockholders "without a full understanding of the transaction." 2016 WL 197177, at *1. In denying the motion to expedite, the Court of Chancery found, while the CEO was "perhaps individually more important than the other directors," the complaint only supported an allegation that the stockholders were "not fully informed about what [the CEO] did during" the negotiation of the transaction. *Id.* at *2. The Court of Chancery then concluded that "where a board has approved a transaction, the reasons for one board member's opposition to the transaction are not material." *Id.* Notably, the plaintiff in *In re Williams* cited *Gilmartin* to Vice Chancellor Noble, but the Court of Chancery instead relied upon *Newman* and its progeny. B85.

Plaintiff has no answer for *In re Williams*. Just as here, the plaintiff in *In re Williams* argued that the director in question was arguably "unique," and his "opposition" to the transaction was allegedly not fully explained. Unsurprisingly, Plaintiff tries to minimize the import of Vice Chancellor Noble's decision due to, for example, its short length or the faultiness of the other disclosure allegations. But it does not require extensive explanation or complicated analysis to reach the conclusion that disclosure of the rationale underlying a director's voting decision

on a transaction is immaterial as a matter of law, and has been for decades. The same result should obtain here.

Huff. Vice Chancellor Slights decided *Huff* in 2016. In *Huff*, the plaintiff challenged a company's dissolution on several grounds, including the lack of a fully informed stockholder decision. According to the plaintiff, the dissolution required unanimous board approval, but one director abstained, which allegedly breached a unanimity requirement that was later found to be ineffective. 2016 WL 5462958 at *15. In cleansing the transaction under *Corwin*, the Court of Chancery found that the stockholder action was fully informed even though the disclosure in question not only did not disclose the reasons for the director's abstention *but also failed to disclose the abstention itself*. *Id.* The Court of Chancery determined that these matters were not material facts. *Id.*

Plaintiff cannot sidestep *Huff*. Indeed, the omissions at issue in *Huff* are more serious than are alleged here. In *Huff*, not only were the abstaining director's subjective views not provided, but his vote was not disclosed either. By contrast, the Solicitation disclosed in multiple places that Mr. Cloobeck abstained, and that he had not decided whether to support the Transaction by tendering his shares. Plaintiff attempts to distinguish *Huff* as not involving disclosure of the "existence" of a director's "opposition," but that is wrong because the director's abstention in *Huff* was not disclosed at all. Plaintiff also tries to avoid *Huff* with the argument

that the abstention in *Huff* "was by the lone designee of . . . an investment fund that was differently situated from all other stockholders." AOB at 33. Plaintiff does not even attempt to explain why that matters here.

In sum, the Court of Chancery's decision in this case follows the decisions rendered by the Court of Chancery for decades.

3. There Are No Misrepresentations In The Solicitation Related To Mr. Cloobeck's Abstentions.

Plaintiff contends that the failure to disclose in the Solicitation Mr. Cloobeck's supposed dissatisfaction with the price and timing of the Transaction renders certain other statements in the Solicitation "materially false or misleading." AOB at 26-27. Plaintiff's argument is unfounded and based solely on selective quoting and misreading of the Solicitation.

Plaintiff focuses on two categories of statements. First, Plaintiff points to three effectively identical statements where the Solicitation disclosed that the Company's "board of directors," A00199; A00208, and the Strategic Review Committee, A00215, determined that the Transaction was "fair to" and "in the best interests of" the Company's stockholders. Second, Plaintiff points to a single disclosure that the Company's "board of directors" determined that alternatives to the Transaction were less favorable to the Company's stockholders. A00215.

There is nothing incorrect or misleading about those statements because the Board and the Strategic Review Committee indisputably *did* make those determinations. That should end the matter.[5] Indeed, it is telling that Plaintiff cites no legal support whatsoever in support of his strained theory. Plaintiff nevertheless contends that these statements gave the misleading impression that "*all* directors" made these determinations, even though Mr. Cloobeck supposedly "objected," but that is simply not plausible. AOB at 27. Board votes are not required to be unanimous. Thus, a statement that "the board" took an action does not imply that "the board unanimously" took an action. There is no misleading disclosure here. *Huff*, 2016 WL 5462958, at *15 ("Neither party cited a case, and I am aware of none, that stands for the proposition that a proxy statement's omission of the fact that a board's approval of a transaction was other than unanimous, much less that the only dissent was one director's abstention, is a material omission."). To the contrary, no stockholder could have been misled into thinking that Mr.

[5] *See, e.g.*, *MacLane Gas Co., Ltd. P'ship v. Enserch Corp.*, 1992 WL 368614, at *8 (Del. Ch. Dec. 11, 1992), *aff'd,* 633 A.2d 369 (Del. 1993) (TABLE) (rejecting disclosure claim because the statement "was not false or misleading" and noting that the statement that "management recommended rejection of the proposal does not imply that no person disagreed with the recommendation or that no person had ever changed their mind regarding the proper recommendation to be made.").

Cloobeck affirmatively approved the determinations at issue because his abstentions were repeatedly disclosed.

4. Plaintiff's Claims Independently Fail For Lack Of Bad Faith.

The Court of Chancery did not reach the Director Defendants' argument that Plaintiff's claims independently fail because Plaintiff did not adequately allege that the Director Defendants acted in bad faith. *See* AOB at 41-47. This Court likewise need not reach that issue in affirming the Court of Chancery's decision to dismiss Plaintiff's claims. *Dambro v. Meyer*, 974 A.2d 121, 129 (Del. 2009) (declining to address arguments not addressed by lower court because there were sufficient grounds to decide appeal without them). However, if this Court addresses this issue, it is clear that Plaintiff has not come close to alleging the "extreme set of facts" required. *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009) (citation omitted).[6]

As an initial matter, Plaintiff does not dispute that the Director Defendants are exculpated from monetary liability for breaches of the duty of care because the Company's certificate of incorporation protects the Defendant Directors to the full

[6] In this Court, Plaintiff disputes whether the Director Defendants engaged in the bad faith non-disclosure of Mr. Cloobeck's supposed "opposition." AOB at 34-37. Plaintiff does not contend that any other aspect of the Director Defendants' conduct in the Transaction was in bad faith.

extent permitted by 8 *Del. C.* § 102(b)(7). B58-59. Accordingly, Plaintiff must state a claim for breach of the duty of loyalty—and only bad faith will do in this case—to prevail on any of his claims.[7] "Bad faith is not a light pleading standard." *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *23 (Del. Ch. Oct. 24, 2014). To plead bad faith, Plaintiff must allege that the "Board consciously disregarded its duties by 'intentionally fail[ing] to act in the face of a known duty to act.' 'Conscious disregard' involves an 'intentional dereliction of duty which is more culpable than simple inattention or failure to be informed of all facts material to the decision.'" *Melbourne Mun. Firefighters' Pension Tr. Fund ex rel. Qualcomm, Inc. v. Jacobs*, 2016 WL 4076369, at *9 (Del. Ch. Aug. 1, 2016) (alteration in original) (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67, 66 (Del. 2006)), *aff'd*, 158 A.3d 449 (Del. 2017) (TABLE).

Plaintiff has not come close to pleading adequately that the Director Defendants acted in bad faith. As discussed above, Mr. Cloobeck's statements are

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[7] Plaintiff does not challenge the independence of the majority of the Board, which makes bad faith the relevant inquiry. *See Nguyen v. Barrett*, 2016 WL 5404095, at *3 (Del. Ch. Sept. 28, 2016) ("[P]laintiff must demonstrate that a majority of the board was not . . . independent, or that the board was otherwise disloyal because it failed to act in good faith."). The Board's conceded independence also renders any allegations of "bad faith" suspect. *McMillan v. Intercargo Corp.*, 768 A.2d 492, 503 (Del. Ch. 2000) ("The presence of an unconflicted board majority undercuts any inference that the decisions of the . . . board can be attributed to disloyalty.").

immaterial as a matter of law, and the omission of immaterial information, even if intentional, cannot constitute bad faith. Otherwise, every disclosure—all of which intentionally exclude immaterial information—would be suspect. At best, Plaintiff has called into question whether the Director Defendants' decision about the materiality of Mr. Cloobeck's statements was correct in light of the supposed conflict between *Gilmartin* and the decades of authority accepted by the Court of Chancery. Making an incorrect decision under those circumstances is not bad faith because "even if the complaint states a claim that there were material omissions from the [Solicitation], it does not allege facts from which one can reasonably infer that any such omission resulted from more than a mistake about what should have been disclosed." *McMillan*, 768 A.2d at 507.

Plaintiff's argument confuses a breach of the duty of care with the duty of loyalty. According to Plaintiff, the Director Defendants engaged in bad faith because the directors were aware of Mr. Cloobeck's statements yet chose not to include them in the Solicitation. AOB at 35-36. Accepting Plaintiff's view would effectively collapse the inquiry of whether bad faith exists to whether or not there was a disclosure violation, but it is clear that "not every breach of the duty of disclosure implicates bad faith or disloyalty." *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 362–63 (Del. Ch. 2008). What Plaintiff needed to allege are facts showing that the Director Defendants "knowingly and completely failed to

undertake their responsibilities," *Lyondell*, 970 A.2d at 243-44, but the Complaint nowhere alleges facts that suggest that the Director Defendants knowingly concealed *material* information from stockholders, as opposed to Mr. Cloobeck's immaterial reasons for his vote. Indeed, the Board was overwhelmingly comprised of independent directors and holders of the Company stock, A00261—it does not follow that they would deliberately choose to mislead fellow stockholders into accepting an inferior transaction. "[W]ithout a story of why the directors would [do so], there is no basis to conclude that they acted in bad faith—if the Board acted with a purpose other than advancing the best interests of the corporation, [Plaintiff has] not explained what that purpose was." *In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *6 (Del. Ch. Oct. 16, 2013).

Plaintiff nevertheless contends there is a "reasonably conceivable inference of bad faith" whenever a "director knowingly elects not to disclose material information." AOB at 35. As support, Plaintiff relies on *In re PLX Technology Inc. Stockholders Litigation*, C.A. No. 9880-VCL (Del. Ch. Sept. 3, 2015) (TRANSCRIPT), and *Chen v. Howard-Anderson*, 87 A.3d 648 (Del. Ch. 2014). Plaintiff featured these cases in the Court of Chancery but has relegated them to a footnote in this appeal. That is for good reason: they are inapposite. In *Chen*, there was both an affirmative misrepresentation and an attempt to cover it up through discovery misconduct. 87 A.3d at 664, 692-93. Yet the Court still did not

declare bad faith, finding it "not clear at this stage whether the disclosure violations in the Proxy Statement resulted from a breach of the duty of loyalty or the duty of care." *Id.* at 692. That *Chen*—on its extreme facts—did not find disloyalty shows just how short Plaintiff is of the mark here.

In *PLX*, the plaintiff alleged that the merger process was riddled with actions in service of ulterior motives, including the directors' knowingly providing their financial advisor with an artificially low set of projections in order to favor a certain purchaser "at the expense of generating greater value through a competitive bidding process." C.A. No. 9880-VCL at 33:13–15. Moreover, the board member responsible for handing over those projections "used the sale process to further his own career interests." *Id.* at 31:20–21. Plaintiff has alleged no such acts here. In short, Plaintiff has not adequately alleged a disclosure violation, let alone bad faith.

CONCLUSION

The order and judgment of the Court of Chancery should be affirmed.

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Dated: October 25, 2017

CERTIFICATE OF SERVICE

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