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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAMUEL ZALMANOFF, Plaintiff Below/Appellant, v. JOHN A. HARDY, KENNETH I. DENOS, FRASER ATKINSON, ALESSANDRO BENEDETTI, RICHARD F. BERGNER, HENRY W. HANKINSON, ROBERT L. KNAUSS, BERTRAND DES PALLIERES, and EQUUS TOTAL RETURN, INC., Defendants Below/Appellees.	No. 609, 2018 COURT BELOW: Court of Chancery of the State of Delaware C.A. No. 12912-VCS

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NATURE OF PROCEEDINGS

Plaintiff Below/Appellant Samuel Zalmanoff ("Plaintiff") appeals the November 13, 2018 decision of the Court of Chancery granting summary judgment to Defendants on Plaintiff's single claim for breach of fiduciary duty of disclosure. Plaintiff alleges that the directors (collectively, the "Director Defendants") of Defendant Equus Total Return, Inc. ("Equus" or the "Company" and, together with the Director Defendants, "Defendants") breached their duty of disclosure by omitting material information from a proxy statement (the "2016 Proxy") Equus mailed to its stockholders in connection with seeking stockholder approval of a proposed equity incentive plan (the "EIP"). Based upon an undisputed factual record, the Court of Chancery properly granted summary judgment to Defendants and its decision should be affirmed.

First, it is undisputed that Equus' then-most-recent Form 10-K (the "2015 10-K") was included in the proxy mailing to stockholders with the 2016 Proxy, and that the 2015 10-K included the information that Plaintiff alleged in the Complaint was omitted from the 2016 Proxy. The Court of Chancery correctly held, based on a careful analysis of Delaware case law, that the disclosures in the 2015

10-K included in the proxy mailing were sufficient to satisfy Defendants' duty of disclosure. Opinion at 1, 14–15.[1]

Second, the Court of Chancery acted well within its discretion in holding that Plaintiff had waived any claim that the Director Defendants breached their fiduciary duties by purportedly failing to disclose the existence of a best efforts clause (the "Best Efforts Clause") in a separate Share Exchange Agreement. *Id.* at 8–9. As the Court of Chancery correctly found, Plaintiff's Complaint did not mention the Best Efforts Clause, and Plaintiff did not raise this new claim until his opposition to Defendants' motion for summary judgment. *Id*. Moreover, the Court of Chancery further held, correctly, that the Best Efforts Clause was not material information required to be disclosed in connection with the EIP. *See id.* at 9.

[1] The Memorandum Opinion of the Court of Chancery dated November 13, 2018 granting Defendants' motion for summary judgment is cited herein as "Opinion at __." Plaintiff's Corrected Opening Brief is cited herein as "Opening Br. at __." The Corrected Appendix filed by Plaintiff is cited herein as "A __." The Appendix in Support of Appellees' Answering Brief, filed herewith, is cited herein as "B __."

SUMMARY OF ARGUMENT

Response to Plaintiff's Summary of Argument

1. Denied. The Court of Chancery correctly held that the Director Defendants satisfied their duty of disclosure by including the allegedly omitted information in the 2015 10-K and mailing the 2015 10-K to stockholders together with the 2016 Proxy. Including the 2015 10-K in the proxy mailing made its contents part of the "total mix" of information reasonably available to stockholders.

2. Denied. The Court of Chancery correctly dismissed Plaintiff's theory of disclosure liability based on the purported omission of the Best Efforts Clause from both the 2015 10-K and the 2016 Proxy. Because Plaintiff did not include this theory in his Complaint and did not raise it until his opposition to summary judgment, the Court of Chancery acted within its discretion in determining that Plaintiff had waived the theory. Moreover, the Court of Chancery correctly held that the Best Efforts Clause was not material information required to be disclosed to stockholders in connection with obtaining their approval of the EIP.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. THE PLAN OF REORGANIZATION

Equus is a closed-end investment company that is classified as a business-development company ("BDC") under the relevant provisions of the Investment Company Act of 1940. A260–61, ¶ 1. On May 15, 2014, Equus filed a Form 8-K announcing Equus' intention "to pursue a merger or consolidation with MVC Capital, Inc. ('MVC') . . . or one or more of MVC's portfolio companies" (the "Plan of Reorganization"). A24. The Form 8-K also disclosed that, as part of the Plan of Reorganization, Equus and MVC had entered into a Share Exchange Agreement, under which Equus exchanged 2,112,000 Equus shares for 395,839 MVC shares (the "Exchange"), "calculated based on each company's respective net asset values per share, calculated as of May 12, 2014." *Id.*

On March 30, 2016, Equus filed the 2015 10-K, A129–206, which stated that Equus "expect[ed] to commence and/or consummate" the proposed merger or consolidation "during 2016." A132. The 2015 10-K also again disclosed the terms of the Exchange, including that the Exchange "was calculated based on [Equus'] and MVC's respective net asset value per share." A131. Immediately after the disclosures regarding the Plan of Reorganization, the 2015 10-K provided a list of Equus' portfolio dispositions and investments for 2015 and early 2016. A132.

The 2015 10-K also included additional extensive financial information about Equus as well as its investment activity.

B. THE EIP

On April 18, 2016, Equus filed the 2016 Proxy for its 2016 annual stockholders meeting. A207–59. The 2016 Proxy disclosed that one of the purposes of the meeting was to obtain stockholder approval of the EIP, which the Equus board of directors had adopted on April 16, 2016. The 2016 Proxy described the proposed EIP in comprehensive detail. It disclosed that, under the EIP, the board would be authorized to award up to 2,534,728 shares of common stock, in the form of stock options or restricted stock, to "full or part-time officers, employees, and non-employee directors of [Equus] and its subsidiaries." A233–35. The 2016 Proxy stated that "[t]he option exercise price of each option . . . may not be less than 100% of the fair market value of the common stock on the date of grant, or if required under the [1940 Act], not less than the net asset value of the common stock on the date of grant." A235. The 2016 Proxy disclosed that the "maximum aggregate market value of the common stock that could potentially be issued under the Plan [was] approximately $4.1 million." A233. The 2016 Proxy also stated that, if approved by stockholders, the EIP would become "effective as of June 13, 2016" and would "expire on June 13, 2026." *Id.* Finally, the 2016 Proxy disclosed the following purpose of the EIP:

> The [EIP] is intended to promote the interests of [Equus] by encouraging officers, employees, and directors of [Equus] and its affiliates to acquire or increase their equity interest in [Equus] and to provide a means whereby they may develop a proprietary interest in the development and financial success of [Equus], to encourage them to remain with and devote their best efforts to the business of [Equus], thereby advancing the interests of [Equus] and our stockholders. The [EIP] is also intended to enhance the ability of [Equus] and its affiliates to attract and retain the services of individuals who are essential for the growth and profitability of [Equus].

Id.

Ahead of the 2016 annual meeting, Equus' proxy agents, Broadridge and Computershare, mailed or emailed the 2016 Proxy to all Equus stockholders. Crucially, each of these proxy mailings also contained a copy of the 2015 10-K—a fact Plaintiff does not dispute. *See* Opinion at 7; Opening Br. at 1, 12, 13. At the meeting, held on June 13, 2016, with a quorum of Equus' stockholders present in person or by proxy, the stockholders voted to approve the EIP with 7,762,202 votes cast for the EIP, 1,526,169 votes cast against it, and 274,522 abstentions. B2 (Equus Total Return, Inc., Current Report (Form 8-K) (June 16, 2016)).

II. PROCEEDINGS BELOW

A. THE COMPLAINT

On November 16, 2016, Plaintiff, purportedly an Equus stockholder, filed his Verified Shareholder Class Action Complaint (the "Complaint"), asserting one count against the Director Defendants for breach of their fiduciary duties of

disclosure. A260–73. The Complaint premised Plaintiff's claim on the omission of the following allegedly material facts from the 2016 Proxy:

> (a) the reasons why Equus has not yet merged or consolidated with MVC and the current status of that transaction;
>
> (b) that Equus no longer engages in any meaningful new investment activities and holds over $32 million or 61% of its assets in cash or cash equivalents . . . ;
>
> (c) that Equus has previously sold shares to the MVC at prices reflecting [Equus' net asset value] while the EIP seeks to grant options based upon current market value . . . ; [and]
>
> (d) that Equus is in the process of being acquired by the MVC . . . .

A270–71, ¶ 38.[2]

Although Plaintiff purported in the Complaint to seek an order enjoining Equus from implementing the EIP, A272, Plaintiff never moved for such an order.

B. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff did not acknowledge in his Complaint that the 2015 10-K was mailed with the 2016 Proxy as part of one proxy mailing. Opinion at 11 n.21. Defendants moved for summary judgment based upon the presentation of undisputed

[2] The Court of Chancery dismissed a fifth omitted fact from the case on Defendants' motion to dismiss. Opinion at 4 n.3. Plaintiff does not challenge that ruling on appeal. Opening Br. at 10.

facts that the Director Defendants had satisfied their duty of disclosure by including the 2015 10-K in the proxy mailing with the 2016 Proxy. *Id.* at 5. Without conceding the materiality of the information that Plaintiff alleged was missing from the 2016 Proxy, *id.* at 6, Defendants' motion demonstrated that the alleged omissions that formed the basis of Plaintiff's claim were fully disclosed in the 2015 10-K.

With respect to the existence, status, and basic terms of the Plan of Reorganization (items (a) and (d) of the Complaint's list of omitted information), the 2015 10-K stated that "[o]n May 14, 2014, [Equus] [had] announced that [it] intended to effect a reorganization pursuant to Section 2(a)(33) of the 1940 Act." A131. It further stated that Equus "intend[ed] to finalize the reorganization by pursuing a merger or consolidation with MVC, a subsidiary of MVC, or one or more of MVC's portfolio companies." A132. It also stated that, "[a]bsent Equus merging or consolidating with/into MVC or a subsidiary thereof, [Equus'] current intention [wa]s for Equus to (i) consummate the Consolidation with a portfolio company of MVC, (ii) terminate its election to be classified as a BDC under the 1940 Act, and (iii) be restructured as a publicly-traded operating company focused on the energy and/or financial services sector." *Id.* Finally, it stated that "[Equus] management [wa]s currently evaluating these alternatives and expect[ed] to commence and/or consummate a Consolidation during 2016." *Id.*

With respect to Equus' investment activity (item (b) on the Complaint's list), the 2015 10-K included extensive disclosures concerning Equus' investment activity and its balance sheet as of December 31, 2015. A132, A167, A173. Under a section entitled "Portfolio Dispositions and Investments," the 2015 10-K detailed Equus' investments during the period covered by the 2015 10-K, including a $915,000 loan made to 5th Element Tracking, LLC in January 2015 and a $2,013,000 loan made to Biogenic Reagents, LLC in January 2016. A132, A173. As Plaintiff now acknowledges, *see* Opening Br. at 7, the 2015 10-K disclosed that Equus held 46% of its net assets in cash or cash equivalents. A167.

Finally, with respect to the Exchange (item (c) on the Complaint's list), the 2015 10-K expressly disclosed the following:

> On May 14, 2014, we announced that [Equus] intended to effect a reorganization pursuant to Section 2(a)(33) of the 1940 Act. As a first step to consummating the reorganization, we sold to [MVC] 2,112,000 newly-issued shares of [Equus'] common stock in exchange for 395,839 shares of MVC …. The Share Exchange was calculated based on [Equus'] and MVC's ***respective net asset value per share***.

A131 (emphasis added).

In his opposition to the motion, Plaintiff did not dispute the sufficiency of these disclosures to satisfy the Director Defendants' disclosure obligation, but instead asserted that the Director Defendants had breached their duty of disclosure by including them in the 2015 10-K rather than in the 2016 Proxy itself. A373–83.

Additionally, Plaintiff raised for the first time a new theory of disclosure liability: the 2016 Proxy's failure to disclose the existence of the Best Efforts Clause located in the Share Exchange Agreement between Equus and MVC. A384–86. The Best Efforts Clause provides that "Equus shall undertake its reasonable best efforts to effect the Events of Reorganization, including working expeditiously towards closing each of the Events of Reorganization and taking all reasonable steps to that end." A39.

C. THE COURT OF CHANCERY'S DECISION

On November 13, 2018, the Court of Chancery issued its Memorandum Opinion granting Defendants' motion for summary judgment. It began by noting that it was "undisputed" that "when Equus mailed the 2016 Proxy to its shareholders, a copy of the 2015 10-K was included in the mailing." Opinion at 7. The Court of Chancery also found that, other than the alleged omission of the Best Efforts Clause, Plaintiff acknowledged that all of the disclosures Plaintiff alleges are missing from the 2016 Proxy can be found in the 2015 10-K. *Id.* Plaintiff does not challenge these findings in this appeal.

The Court of Chancery then addressed Plaintiff's Best Efforts Clause claim. It held that the claim was "waived," because "the Best Efforts Clause is nowhere mentioned in the Complaint," and thus "Defendants received no notice in that pleading that Plaintiff intended to state a disclosure claim" on that basis. *Id.* at

8–9. It further held that the theory "fails on the merits." *Id.* at 9. Rejecting Plaintiff's assertion that the Best Efforts Clause required Equus to limit its investment operations, *see id.* at 8, the Court held that "the clause required nothing more than that [the] Board not 'actively and affirmatively torpedo' the Proposed Consolidation with MVC." *Id.* at 9 (quoting *Williams Cos. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *18 (Del. Ch. June 24, 2016)).

Finally, the Court of Chancery turned to the question whether Defendants could "rely upon disclosures in the 2015 10-K to discharge their disclosure obligations to stockholders." *Id.* It stated, first, that an earlier Court of Chancery decision, *Wolf v. Assaf*, 1998 WL 326662 (Del. Ch. June 16, 1998) (Steele, V.C.), had already addressed this question, and had held that including the relevant information "in a Form 10-K made a part of the proxy mailing rather than in the proxy statement itself adequately informs the shareholder of the material information as a matter of law." Opinion at 10–11 (quoting *Wolf*, 1998 WL 326662, at *1). It noted that Plaintiff had failed to distinguish *Wolf*, *id.* at 11, and explained why two other cases on which Plaintiff relied (and on which Plaintiff relies again on appeal), *ODS Technologies, L.P. v. Marshall*, 832 A.2d 1254 (Del. Ch. 2003), and *Gilliland v. Motorola, Inc.*, 859 A.2d 80 (Del. Ch. 2004), were distinguishable. Opinion at 13–14.

The Court of Chancery rejected Plaintiff's argument that allowing the relevant disclosures to be made in the 2015 10-K would impermissibly "impose a duty on stockholders to rummage through a company's prior public filings" to find relevant information. *Id.* at 11. As the Court explained, because the material information was included in the proxy mailing, Equus stockholders were not required "to don their 'super-shareholder' capes in order to search for material information. That information was right at their fingertips." *Id.* at 14. The Court further added that it was "intuitive" that the purportedly omitted information would be found in the 2015 10-K, because that information related to the Plan of Reorganization and "not to the specifics of the EIP, the subject of [the] 2016 Proxy vote solicitation." *Id.*

Accordingly, the Court of Chancery granted Defendants' motion for summary judgment. This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT THE DIRECTOR DEFENDANTS SATISFIED THEIR DUTY OF DISCLOSURE BY INCLUDING THE 2015 10-K IN THE PROXY MAILING.

A. QUESTION PRESENTED

Did the Court of Chancery correctly hold on summary judgment that the Director Defendants satisfied their duty of disclosure by including the information the Complaint alleges was omitted from the 2016 Proxy in the 2015 10-K that was mailed to stockholders with the 2016 Proxy?

B. SCOPE OF REVIEW

This Court reviews the Court of Chancery's grant of summary judgment *de novo*. *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 819 (Del. 2013).

C. MERITS OF ARGUMENT

The Court of Chancery correctly held that the Director Defendants satisfied their duty of disclosure by including the allegedly omitted information in the 2015 10-K and including the 2015 10-K in the proxy mailing with the 2016 Proxy. That holding is both consistent with existing Delaware law and sensible as a matter of policy.

1. The Court of Chancery Correctly Identified *Wolf v. Assaf* as the Factually Controlling Precedent.

As noted above, the Court of Chancery recognized that the Court's prior decision in *Wolf* had already answered in the affirmative the question whether

directors can discharge their duty of disclosure by including the relevant information in a Form 10-K mailed with the proxy statement at issue. The Court of Chancery's reliance on *Wolf* was entirely proper given that there is no relevant factual distinction between *Wolf* and this case. The plaintiff in *Wolf* alleged that defendant directors breached their duty of disclosure by omitting certain information—a description of an ongoing securities class action—from a proxy statement seeking stockholder approval of an employee stock incentive plan. *Wolf*, 1998 WL 326662, at *2. The disclosure regarding the class action was contained in a Form 10-K that was included in the mailing that also contained the proxy statement. *Id.* at *3. As here, the plaintiff in *Wolf* argued that the failure to place the disclosure in the proxy statement itself, rather than in the Form 10-K, constituted a disclosure violation. The court disagreed, stating:

> Including the description of the federal class action in the 10-K and attaching it to the proxy statement creates a substantial likelihood that the reasonable shareholder would have been on notice to review and would have been likely to review its contents. Under no reasonable interpretation of the facts ple[]d could the placement of the disclosure about the federal action in the 10-K accompanying the proxy statement rather than in the statement itself serve as the basis for a disclosure violation.

Id. The Court concluded that the fact that the defendants "mailed the Form 10-K to shareholders together with the proxy statement . . . preclude[d] any possibility of prevailing on the omission element of this claim." *Id.* So, too, here: the undisputed

fact that the 2015 10-K was mailed to Equus stockholders together with the 2016 Proxy defeats Plaintiff's claim.

The Court of Chancery recognized that "Plaintiff has little to offer by way of distinguishing *Wolf*," Opinion at 11, and that remains true on appeal. Plaintiff suggests that *Wolf* is distinguishable because the 2016 Proxy did not "cross-referenc[e] the particular disclosure" in the 2015 10-K. Opening Br. at 13. But the Court in *Wolf* made no mention of any requirement that the proxy statement must contain a cross-reference in order for the disclosures included in a 10-K mailed with the proxy statement to be considered. Rather, as the Court in *Wolf* correctly held, and the Court of Chancery correctly followed in this case, mailing the 10-K with the proxy statement "creates a substantial likelihood that [a] reasonable shareholder would have been on notice to review and would have been likely to review" the contents of the 10-K. *Wolf*, 1998 WL 326662, at *3.

Unlike *Wolf*, the cases cited by Plaintiff *are* distinguishable in one crucial respect: in none of those cases was the allegedly omitted information adequately disclosed in a document that was mailed to stockholders contemporaneously with the relevant proxy statement. Accordingly, those cases are inapposite and the Court of Chancery correctly held that they were not relevant to the legal issue in this case.

As he did below, Plaintiff relies on a misleading description of *ODS Technologies*, in which the Court held that the contents of a Form 10-K did not cure omissions in a proxy statement, 832 A.2d at 1262, to argue that *Wolf* is no longer good law. In *ODS*, similar to here, a Form 10-K was distributed to stockholders with the relevant proxy statement. *Id.* at 1258. However, as the Court of Chancery correctly recognized in distinguishing *ODS*, unlike *Wolf*, "where the allegedly omitted material information was actually *in* the Form 10-K, the director defendants in *ODS* argued that the material information could be found in materials referred to in the Form 10-K by reference but actually attached to an unrelated distribution provided to shareholders two years earlier." Opinion at 12. Accordingly, the Court of Chancery correctly held that, unlike *Wolf, ODS* is distinguishable from the facts here where the allegedly omitted information "was disclosed simultaneously in the 2015 10-K sent with the 2016 Proxy." *Id.* at 13.

As for *In re Trans World Airlines, Inc. Shareholders Litigation*, 1988 WL 111271 (Del. Ch. Oct. 21, 1988), the defendants in that case sought to rely on disclosures made in a Form 10-K and a Form 10-Q, but those documents were *not* mailed with the proxy materials. *See id.* at *11–12. Moreover, the court *denied* the plaintiffs' motion for a preliminary injunction, *id.* at *13, holding that the plaintiffs had not provided sufficient evidence to permit a determination whether the disclosures in the 10-K and 10-Q were sufficient, *id.* at *12. Thus, far from

supporting Plaintiff's argument, *Trans World* undercuts it, because the fact that the court even analyzed the contents of the 10-K and 10-Q indicates that directors can satisfy their duty of disclosure in some circumstances even if the relevant information was not included in the proxy mailing at all.

2. The Court of Chancery's Holding Is Consistent with the Case Law and Policy Underlying the Disclosure Requirement.

Plaintiff's insistence that Defendants were required to include the allegedly omitted information in the proxy statement itself is contrary to Delaware law. The question whether a director has satisfied his or her duty of disclosure is determined from the viewpoint of a reasonable investor, and takes into account the "total mix" of information available to that reasonable investor. *See, e.g.*, *Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001). Accordingly, the duty of disclosure does not require "that all material information that was previously disclosed be disclosed again with the specific correspondence requesting [stockholder] action." *Bren v. Capital Realty Grp. Senior Housing, Inc.*, 2004 WL 370214, at *9 (Del. Ch. Feb. 27, 2004). For example, in *Brinckerhoff v. Texas Eastern Products Pipeline Co.*, 2008 WL 4991281 (Del. Ch. Nov. 25, 2008), which the Court of Chancery cited, *see* Opinion at 12 n.24, the court dismissed a disclosure claim, holding that the "total mix" of reasonably available information included earlier proxy materials filed "weeks" before the allegedly deficient document. *Brinckerhoff*, 2008 WL 4991281, at *6. Here, the relevant information *was* disclosed with the 2016 Proxy. The fact

that it was disclosed in a separate document, the 2015 10-K, does not change the fact that it was "delivered to shareholders in a reasonable manner so that it would be a part of the total mix to be considered by them." Opinion at 12 (quoting *Wolf*, 1998 WL 326662, at *3).

The Court of Chancery's decision is also consistent with the policy concerns underlying the duty of disclosure. That duty "is a 'specific application of the general fiduciary duty owed by directors,' and accordingly, is concomitant with the duty of care, loyalty, or both." *In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *10 (Del. Ch. Feb. 29, 2012) (quoting *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998)). The Director Defendants' failure to include the allegedly omitted information in the 2016 Proxy itself is no basis for taxing them with carelessness or disloyalty, when they disclosed that information in another document provided *in the very same mailing*. The Director Defendants did not hide the information among Equus' "vast swath of prior disclosures," as Plaintiff suggests. *See* Opening Br. at 14. Instead, as the Court of Chancery recognized, the information "was right at [stockholders'] fingertips." Opinion at 14. While the Director Defendants may not have "organize[d] the documents to meet [P]laintiff's best case scenario," that "does not constitute the kind of omission or misleading half-truth" the duty of disclosure prohibits. *Id.* (quoting *Wolf*, 1998 WL 326662, at *3). To insist, as Plaintiff does,

that the relevant information was required to be disclosed in the 2016 Proxy itself is to engage in empty formalism serving no policy purpose.

That is especially true here, because, as the Court of Chancery noted, "Plaintiff's pled omissions relate not to the specifics of the EIP, the subject of 2016 Proxy vote solicitation, but to the Plan of Reorganization, which had been the subject of a previous Form 8-K and was updated in the 2015 10-K." Opinion at 14–15. The alleged omissions do not relate to the proposed beneficiaries of the EIP, the maximum number of shares and dollar amount that could be awarded under the EIP, the option exercise price of the options to be awarded, the EIP's purpose, or its effective date—all of which were disclosed in the 2016 Proxy. A233–35. Instead, the alleged omissions relate to the broader context in which the EIP was proposed. For that reason, the Court of Chancery correctly found that it was "intuitive" that this information "would be found in the 2015 10-K." Opinion at 14. In this context, there was no reason to require that the information be disclosed again in the 2016 Proxy.[3]

[3] Cherry-picking language from *Micromet*, Plaintiff argues that the Court of Chancery's holding creates the risk that fiduciaries will "obfuscate the disclosure of material facts by providing them within an avalanche of other immaterial information." Opening Br. at 19. But *Micromet* in fact held that the defendants were not *required* to disclose "highly technical" scientific information about the assumptions underlying a financial advisor's analysis. 2012 WL 681785, at *11. It does not support Plaintiff's apparent suggestion that providing *too much* information to shareholders can ever constitute a disclosure violation or otherwise say anything about which specific documents must contain the relevant disclosures.

In sum, the Court of Chancery correctly held that the Director Defendants satisfied their duty of disclosure, based on the undisputed facts that Equus included the information that forms the basis of Plaintiff's disclosure claim, as pled in the Complaint, in the 2015 10-K and mailed the 2015 10-K to stockholders with the 2016 Proxy. Accordingly, the Court should affirm that portion of the Court of Chancery's decision.

II. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFF'S UNPLED AND MERITLESS "BEST EFFORTS CLAUSE" THEORY OF LIABILITY.

A. QUESTION PRESENTED

Did the Court of Chancery correctly grant summary judgment to Defendants on Plaintiff's claim that the Director Defendants violated their duty of disclosure by failing to disclose the Best Efforts Clause in the 2016 Proxy, both because Plaintiff waived that theory by failing to plead it in his Complaint and because the Best Efforts Clause was not material to the stockholders' decision whether to approve the EIP?

B. SCOPE OF REVIEW

As noted above, this Court reviews the Court of Chancery's grant of summary judgment *de novo*. *Winshall*, 76 A.3d at 819. However, the Court of Chancery's determination that Plaintiff waived his Best Efforts Clause argument is reviewable for abuse of discretion. *See Realty Enters., LLC v. Patterson-Woods & Assocs., LLC*, 11 A.3d 228 (Table), 2010 WL 5093906, at *4 (Del. Dec. 13, 2010) (reviewing for abuse of discretion the trial court's finding that the defendant waived an affirmative defense by failing to raise it in its answer).

C. MERITS OF ARGUMENT

The Court of Chancery correctly granted Defendants summary judgment on Plaintiff's theory of disclosure liability based on the omission of the Best Efforts Clause from the 2016 Proxy. First, Plaintiff waived that claim by

omitting it from his Complaint and waiting until the eleventh hour to raise it in his opposition to Defendants' motion for summary judgment. Second, the claim has no merit, because the Best Efforts Clause was not material to stockholders' decision whether to approve the EIP.

1. Plaintiff Waived Any Claim Based Upon the Best Efforts Clause by Failing to Raise It until His Opposition to Summary Judgment.

A plaintiff's complaint is required to give a defendant "fair notice" of the claims asserted against him. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003). Consistent with this requirement, where a plaintiff omits a theory of liability from the complaint and raises it for the first time in a brief, trial courts regularly hold that the plaintiff has waived that claim. *See Morgan v. Cash*, 2010 WL 2803746, at *8 n.64 (Del. Ch. July 16, 2010); *McGowan v. Ferro*, 2002 WL 77712, at *4 n.27 (Del. Ch. Jan. 11, 2002); *Hintzke v. Town of Felton*, 1994 WL 45423, at *3 (Del. Super. Jan. 6, 1994).

The Court of Chancery here acted well within its discretion in ruling that Plaintiff had waived any claim based upon the Best Efforts Clause. Opinion at 8–9. The Best Efforts Clause is not included in the Complaint's express list of alleged disclosure failures or misstatements forming the basis of Plaintiff's disclosure claim. *See* A270–71, ¶ 38. Indeed, the Complaint does not mention the Best Efforts Clause at all. Thus, as the Court of Chancery explained, "Defendants

received no notice in that pleading that Plaintiff intended to state a disclosure claim based on a failure to explain [the Best Efforts] [C]lause to stockholders." Opinion at 8–9.

Plaintiff barely acknowledges this part of the Court of Chancery's ruling. His only response is an apparent suggestion that the Complaint gave Defendants adequate notice of the Best Efforts Clause theory by alleging the 2016 Proxy's failure to disclose information about "Equus's investment activity and business operations (or lack thereof)." *See* Opening Br. at 20. That argument is meritless. Plaintiff does not dispute that the 2015 10-K sufficiently disclosed Equus' investment activity and business operations. He cannot circumvent this concession by claiming that the Complaint, by discussing Equus' "investment activities," *see* A271, ¶ 38(b), was actually making a veiled reference to the Best Efforts Clause. Moreover, as more fully discussed below, the link Plaintiff attempts to draw between the Best Efforts Clause and Equus' investment activities simply does not exist.

The Court of Chancery's waiver ruling finds further support in the fact that Plaintiff never attempted to amend his Complaint and waited until discovery had closed on the merits of the summary judgment motion to raise his Best Efforts Clause theory. *See Hintzke*, 1994 WL 45423, at *3 (declining to consider new theory of liability on summary judgment where it was not set forth in complaint and plaintiff did not attempt to amend the complaint). Given that the entirety of the Share

Exchange Agreement—including the Best Efforts Clause—was publicly disclosed in Equus' filings over two years before this action was commenced, Plaintiff could easily have sought to amend his complaint to include the Best Efforts Clause theory at any point after filing this action. Instead, Plaintiff chose to wait until his opposition to Defendants' motion for summary judgment. The Court of Chancery's holding that the claim was waived was well within the discretion of the Court.

2. Defendants Were Not Required to Disclose the Best Efforts Clause in Connection with Obtaining Stockholder Approval of the EIP.

The Court of Chancery also correctly held that the Best Efforts Clause theory failed on the merits, Opinion at 9, because Plaintiff did not put forward any evidence that the Best Efforts Clause "would have assumed *actual significance* in the deliberations of [an Equus] shareholder" voting on the EIP. *In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232, at *18 (Del. Ch. Mar. 6, 2012) (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)).

Most importantly, as the Court of Chancery recognized, Plaintiff's claim is based on a mischaracterization of the meaning of the Best Efforts Clause. Opinion at 9. Plaintiff's claim is premised on Plaintiff's suggestion that the Best Efforts Clause "impaired" Equus' ability to "operate [its] traditional line of business," Opening Br. at 15, and caused Equus to stop "engaging in any meaningful investment activity," *id.* at 16. But that premise is false. In the context of a merger

agreement, "reasonable best efforts" simply means "good faith." *Williams Cos. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *16 (Del. Ch. June 24, 2016) (citing *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 755–56 (Del. Ch. 2008)). Accordingly, as the Court of Chancery explained, "the clause required nothing more than that [the] Board not 'actively and affirmatively torpedo' the Proposed Consolidation with MVC." Opinion at 9 (quoting *Williams*, 2016 WL 3576682, at *18). Plaintiff offers no legal or factual support for his assertion that the Best Efforts Clause further restricted the Board's discretion in operating Equus.

The most Plaintiff can muster is a dictum from *Williams* noting that the term "commercially reasonable efforts" "is not addressed with particular coherence in [Delaware] case law." *Williams*, 2016 WL 3576682, at *16 (inaccurately quoted in Opening Br. at 19). But Plaintiff ignores *Williams*'s actual holding, which was that the "commercially reasonable efforts" clause at issue simply required behavior that was "objectively reasonable to produce" the relevant goal. *Id.* Even assuming that there is any uncertainty on the meaning of the Best Efforts Clause here (and there is none), *Williams* does not suggest that it has the meaning Plaintiff advances.

Plaintiff also fails to draw any link between the Best Efforts Clause and the EIP, or more specifically, to explain how disclosing the Best Efforts Clause in the Proxy Statement or the 2015 10-K would have "significantly altered the 'total mix' of information made available" to stockholders voting on the EIP. *Gantler v.*

Stephens, 965 A.2d 695, 710 (Del. 2009) (quoting *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994)); *see also Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998) ("Materiality is determined with respect to the shareholder action being sought."). Equus' stockholders were already made aware that Equus intended to pursue a consolidation with MVC. *See* A131. Given that the Best Efforts Clause simply required Equus to work in good faith towards that goal, it would not have significantly added to the information available to stockholders about Equus' likely future. Plaintiff does not cite any case in which a court has held that the failure to disclose an obligation to use "reasonable best efforts" or to act in good faith to further a disclosed corporate goal was a material omission.

Plaintiff further argues that the omission of the Best Efforts Clause was misleading due to the impression created by Equus' prior disclosures. Specifically, Plaintiff faults Equus for not including in the 2015 10-K two sentences that appeared in Equus' Form 10-K for the previous year. Opening Br. at 16 n.18. Those two sentences, however, have nothing to do with the Best Efforts Clause, and instead relate to the possibility that MVC might rescind the Share Exchange Agreement. Plaintiff fails to explain why the prior disclosure of that possibility required Equus to disclose the Best Efforts Clause in the Proxy Statement or in the 2015 10-K.[4]

[4] In making this argument, Plaintiff also mischaracterizes Equus's prior disclosures in its 2014 10-K. Plaintiff suggests, as he did before the Court of Chancery, that the 2014 10-K disclosed that "Equus would be restricted to certain limited business

Ultimately, Plaintiff's Best Efforts Clause theory fails because the clause played no independent role in any decision of the Equus Board that would have been relevant to stockholders voting on the EIP. Plaintiff provides no explanation why Equus' alleged reduction of its investment activity would have constituted "best efforts" furthering the goal of consummating the consolidation with MVC, and generally offers no factual support for his argument. Indeed, Plaintiff's decision not to raise this theory until his opposition brief suggests that Plaintiff devised the theory as a desperate, last-gasp attempt to avoid summary judgment at all cost. The omission of the Best Efforts Clause from the Proxy Statement simply was not material, and this Court should also affirm the portion of the Court of Chancery's decision relating to the Best Efforts Clause theory that so held.

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operations" during the time before the Plan of Reorganization was completed. Opening Br. at 16 (citing A75). In fact, the cited portion of the 2014 10-K says nothing of the sort. Rather, it lays out risks related to consequences of consummating the Proposed Consolidation, namely, that Equus might become subject to corporate income tax and greater regulatory requirements, and might not be able to utilize its capital losses. It further states that Equus might be required to repurchase MVC's Equus shares if the Proposed Consolidation was not consummated. *See* A75. Defendants pointed out this mischaracterization in their briefing before the Court of Chancery, but Plaintiff has simply reasserted it on appeal without modification.

CONCLUSION

Plaintiff does not dispute that all of the disclosure omissions alleged in the Complaint were adequately disclosed in Equus' 2015 10-K. Nor does he dispute that the 2015 10-K was included in the proxy mailing sent to Equus' stockholders. The Court of Chancery correctly applied Delaware precedents regarding the duty of disclosure to these undisputed facts and held that they defeated Plaintiff's disclosure claims. Further, the Court of Chancery acted well within its discretion when it ruled that Plaintiff waived his unpled Best Efforts Clause theory, and correctly held that the theory lacks merit in any event. Accordingly, the Court of Chancery's grant of summary judgment to Defendants should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2019, the foregoing was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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