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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFERY J. SHELDON and ANDRAS KONYA, M.D., P.H.D., Plaintiffs Below-Appellants, v. PINTO TECHNOLOGY VENTURES, L.P., PINTO TV ANNEX FUND, L.P., PTV SCIENCES II, L.P., RIVERVEST VENTURE FUND I, L.P., RIVERVEST VENTURE FUND II, L.P., RIVERVEST VENTURE FUND II (OHIO), L.P., BAY CITY CAPITAL FUND IV, L.P., BAY CITY CAPITAL FUND IV CO-INVESTMENT FUND, L.P., REESE TERRY and CRAIG WALKER, M.D., Defendants Below-Appellees.	No.: 81,2019 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 2017-0838-MTZ

DEFENDANTS BELOW – APPELLEES INDEPENDENT DIRECTORS' CORRECTED ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

The gravamen of the Amended Complaint is equity dilution in connection with a July 2010 financing for IDEV Technologies, Inc. ("IDEV" or the "Company"). Plaintiffs allege certain stockholders acted as a control group and collectively controlled IDEV's board of directors, only two members of which are parties to this case. Appellees Reese Terry and Craig Walker, the two individual defendants below (collectively, the "Independent Directors"), moved to dismiss the Amended Complaint on multiple grounds.

In a well-reasoned Opinion, and with the benefit of oral argument, the Court of Chancery correctly determined that the Amended Complaint fails to sufficiently allege a control group, and thus did not fit within the narrow control-group exception under *Gentile v. Rossette*. On that basis, the Court of Chancery concluded that Plaintiffs' claims are solely derivative, and that Plaintiffs lacked standing to assert them. Having so concluded, the Court did not address the other bases independently supporting dismissal. Because Plaintiffs had already availed themselves of the opportunity to amend their complaint, the Court of Chancery dismissed all of Plaintiffs' claims against all Defendants with prejudice.

Plaintiffs raise one issue on appeal: whether the Amended Complaint sufficiently alleges the existence of a control group. The Court of Chancery's conclusion that Plaintiffs failed to adequately allege the existence of a control group

is well-reasoned and supported, and this Court should affirm on that basis. Yet, even if Plaintiffs had adequately alleged the existence of a control group (and they have not), the correct result would be to affirm the dismissal with respect to the Independent Directors because, among other things, the Amended Complaint fails to state a non-exculpated claim against them.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held the Amended Complaint fails to state a direct claim under *Gentile v. Rossette* because Plaintiffs failed to adequately plead the existence of a control group and Delaware law does not supply a pleadings-stage inference of disloyalty based on the mere fact that a director was nominated to the board by an interested stockholder. The conclusory allegations in the Amended Complaint do not come close to the well-pleaded facts that are required before a Delaware court will treat distinct entities as a unified control group. In the absence of well-pleaded allegations supporting an inference that a control group existed, Plaintiffs fail to state a direct claim and their derivative dilution claims must be dismissed for lack of standing.

2. Alternatively, there are multiple bases under Rule 12(b)(6) on which to affirm the Court of Chancery's dismissal of the Independent Directors, including the fact that the Amended Complaint fails to state a non-exculpated claim against them.

COUNTERSTATEMENT OF FACTS[1]

IDEV was "a developer and manufacturer of medical devices used in connection with interventional radiology, vascular surgery and interventional cardiology." A24. It was founded in 1999, completed multiple rounds of financing over the years, and was ultimately acquired by Abbott in August 2013 for approximately $310 million. A27, A34.

A. Parties and Relevant Non-Parties

Plaintiffs Below-Appellants Jeffery Sheldon ("Sheldon") and Andras Konya's ("Konya," and together with Sheldon, the "Plaintiffs") are former IDEV stockholders who complain that IDEV's July 2010 equity financing diluted their ownership interests in the Company. A24.

Plaintiffs did not complain about the July 2010 financing until years later when they learned (with the benefit of hindsight) that participating in the July 2010 financing would have yielded a significant return. After the August 2013 Abbott acquisition, and without first making a Rule 23.1 demand on IDEV's board of directors, Plaintiffs sued some, but not all, former IDEV directors and stockholders complaining about the alleged wrongful dilution, first in Texas and now in Delaware.

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[1] Recognizing that Supreme Court Rule 14(b)(v) provides that the "Appellee's counterstatement of facts need not repeat facts recited by appellant," the Independent Directors nevertheless submit a comprehensive counterstatement because Plaintiffs' statement is incomplete or at odds with the record before the Court of Chancery.

See A26–27. In Delaware, Plaintiffs sued the Independent Directors and the following stockholders:

- Pinto Technology Ventures, L.P., Pinto TV Annex Fund, L.P., and PTV Sciences, II, L.P. (collectively, "PTV");
- RiverVest Venture Fund I, L.P., RiverVest Venture Fund II, L.P., and RiverVest Venture Fund II (Ohio), L.P. (collectively, "RiverVest"); and
- Bay City Capital Fund IV, L.P. and Bay City Capital Fund IV Co-Investment Fund, L.P. (collectively, "Bay City").

A24–25. Plaintiffs did not sue IDEV, Abbott, or most of the directors who were members of IDEV's board during the July 2010 financing. *See id.*

IDEV's certificate of incorporation contains a Section 102(b)(7) provision exculpating its directors to the maximum extent permitted by law.[2] A168. Under the terms of IDEV's Fourth Amended and Restated Shareholders Agreement, dated which governed during the relevant time period leading up to the challenged July 2010 financing (the "Shareholders Agreement"), IDEV's board was comprised of six directors.[3] *See* A29–30. A voting agreement in the Shareholders' Agreement

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[2] IDEV's certificate of incorporation provides: "A director of this Company shall not be liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except to the extent that exculpation from liability is not permitted under the General Corporation Law of the State of Delaware as in effect at the time such liability is determined." A168.

[3] The Court of Chancery noted a discrepancy in Plaintiffs' allegations with respect to the number of directors on IDEV's board of directors. *See* A1652 ("Plaintiffs allege the board consisted of six directors in their Complaint, but in their Answering Brief state there were seven directors. *Compare* Compl. ¶ 24 [A29-30]

gave each of PTV, RiverVest, and Bay City the right to designate one representative to serve on IDEV's board. *Id.* Two of the three remaining director posts were filled by the Independent Directors—whose appointment required a *majority vote* of PTV, RiverVest, and Bay City's appointees—and Plaintiffs allege the sixth director was IDEV's former Chief Executive Officer Chris Owens ("Owens").[4] A25, A29–30. The Amended Complaint refers to Owens and IDEV's former Chief Financial Officer Bill Burke ("Burke") as non-parties, but they remain defendants in the Texas action, which is discussed in more detail below. A25–26.

B. Alleged Unlawful Conduct During July 2010 Financing

Plaintiffs allege their respective shares of IDEV stock were "severely manipulated, diluted and devalued" because of the July 2010 financing and "Defendants' unlawful actions" in connection with it.[5] A35. According to Plaintiffs,

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with Pls.' Answering Br. 7–8 [A1073-74]. Defendants seem to agree there are seven directors, and so I assume there are seven."). IDEV's board consisted of six directors leading up to the July 2010 financing but was expanded to seven as of July 16, 2010. *Compare* A264–66 (voting agreement in Shareholders' Agreement) *with* A1111, A1131 ("Board of Directors" section in Series B-1 Preferred Stock Purchase Agreement). Regardless, as noted by Vice Chancellor Zurn, the change from six to seven directors does not impact the analysis.

[4] Owens did not become a director until July 16, 2010, meaning he was not a director at the time IDEV's board approved the challenged July 2010 transaction. *See* A1111, A1131 ("Board of Directors" section in Series B-1 Preferred Stock Purchase Agreement).

[5] The Court of Chancery pointed out: "Other investors participated in those rounds and received the same securities, but are not alleged to be part of the control group. For example, Covidien Group S.A.R.L. did not own IDEV stock before the

Defendants at some unspecified point in "early 2010" hatched "an unlawful scheme" to "dilute Sheldon's and Konya's combined holdings to less than 0.012% of the Company's outstanding shares."[6] A23, A31. The impact of the alleged scheme was not felt by Plaintiffs alone, as Plaintiffs repeatedly refer to the treatment and losses of "other common stockholders" throughout the Amended Complaint. *See, e.g.*, A31, A33.

The Court of Chancery succinctly described the series of actions leading up to and about which Plaintiffs complain as follows:

- "In 2009, IDEV 'hired a new executive management team, restructured its sales force, secured bridge funding from its current investor group and implemented a new strategic plan that was focused on leveraging and fully developing' its core technologies. IDEV also determined that it would need 'additional equity capital . . . in order to fund significant investments . . . critical to the Company's future growth prospects.'" A1629 (alterations in original) (footnotes omitted) (quoting 07/26/10 Confidential Information Statement at 3 (A1191)).

Financing, but invested more in the Financing than RiverVest." A1647 (citing 07/16/10 Series B-1 Preferred Stock Purchase Agreement, Schedule A (Schedule of Purchasers (A1149)). Plaintiffs never explain why these other investors are not part of the alleged control group.

[6] "Several of the amendments to the shareholders agreement coincided with financing required for IDEV's growth and solvency. Series A Financing in 2004 raised approximately $1.8 million; Series B in 2006 raised $24 million; and Series C in 2008 raised an additional $25 million. These transactions diluted the Shareholders' interests over time without any apparent dispute. However, dilution related to Series B-1 financing in 2010 and interconnected actions to amend the shareholders agreement precipitated Sheldon's and Konya's claims in the instant lawsuit." *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 434–35 (Tex. 2017).

- "In the first half of 2010, management 'met with more than fifteen venture capital and strategic investors,' and conducted follow-up meetings and site visits with interested investors. After extended discussions with [the] new investors and an evaluation of their proposed terms, the Company selected' a proposal, which included both new and current investors." A1629–30 (footnotes omitted) (quoting 07/26/10 Confidential Information Statement at 3).

- The July 2010 financing "consisted of several transactions that can be separated into two series. The first series related to IDEV's capital structure and stockholders, and set the stage for the second series, which raised new capital." A1630.

- "In the first series, the Venture Capital Defendants voted to convert all of IDEV's preferred stock to common stock. The Venture Capital Defendants then acted by written consent to amend IDEV's Certificate of Incorporation to accomplish two goals. The first was to effect a reverse stock split of common shares, reducing the number of outstanding shares by turning every 100 shares into a single share. The second was to authorize and issue a new class of shares, Series B-1 Preferred Stock. Finally, IDEV and the Venture Capital Defendants amended the Shareholders Agreement to eliminate certain preemptive rights held by Significant Shareholders, including Sheldon." A1630–31 (footnotes omitted).

- "IDEV raised $27 million in an initial closing by selling Series B-1 shares to new and existing investors (including each of the Venture Capital Defendants). There was also an exchange and purchase offering, in which previous holders of preferred stock could convert their common shares into Series A-2 Preferred Stock, provided they also purchased Series B-1 Preferred Stock. The Confidential Information Statement warned stockholders that '[t]he Transactions result in substantial dilution to Preferred Stockholders, and the dilution will be significantly increased as to Preferred Stockholders that do not participate in the Financing.'" A1631–32 (alteration in original) (footnotes omitted) (quoting 07/26/10 Confidential Information Statement at 2–4 (A1190-92).).

"Plaintiffs did not participate in the [July 2010] financing," A1632, and were diluted as a result of their own choosing.

Nevertheless, without attaching any agreement showing what rights they had that were violated, Plaintiffs allege that Defendants (1) did not give "prior notice" of the conversion of preferred stock to common stock, (2) amended IDEV's certificate of incorporation to conduct "a reverse stock split" and "authorize the issuance of new shares of IDEV preferred stock," (3) amended the Shareholders Agreement to eliminate the preemptive rights of "Sheldon (and other similarly situated shareholders) as 'Significant Shareholders' with preemptive rights," (4) did not offer "newly issued preferred stock to all of the common stockholders," and (5) did not timely disclose "underwater promissory note obligations." A31–34.

C. Three Years Later, Abbott Acquisition and Texas Action

On July 12, 2013—three years after IDEV's July 2010 financing and around the announcement of Abbott's acquisition of IDEV—Plaintiffs sued PTV, RiverVest, Bay City, Owens, Burke, and the Independent Directors in Texas. A26. On September 9, 2013, the Texas trial court dismissed Plaintiffs' claims against all defendants based on a mandatory Delaware forum-selection clause. *Sheldon v. Pinto Tech. Ventures, L.P.*, 2013 WL 12113789 (125th Dist. Ct., Harris Cty., Tex. Sept. 9, 2013), *rev'd*, 477 S.W.3d 411 (Tex. App.—Houston [14th Dist.] 2015), *rev'd*, 526 S.W.3d 428 (Tex. 2017).

Plaintiffs appealed—and although a divided appellate court reversed the trial court's decision—the trial court's dismissal was mostly upheld by the Texas

Supreme Court. *Pinto Tech.*, 526 S.W.3d at 447. The Texas Supreme Court upheld the dismissal of Plaintiffs' claims against PTV, RiverVest, Bay City, Terry, and Walker, but remanded Plaintiffs' claims against Owens and Burke to the Texas trial court because they did not sign IDEV's Shareholders Agreement, other than Owens in his capacity as CEO, and, thus, could not enforce the forum-selection clause. *Id.*

D. Seven Years Later, Delaware Action

On November 21, 2017, more than seven years after the July 2010 financing, Plaintiffs filed this action against PTV, RiverVest, Bay City, and the Independent Directors, alleging: (1) breaches of fiduciary duties, (2) aiding and abetting breaches of fiduciary duties, (3) Texas blue sky law violations, (4) civil conspiracy, and (5) unjust enrichment. *See* A20. PTV, RiverVest, Bay City, and the Independent Directors moved to dismiss and filed opening briefs supporting their motions. A18.

On May 30, 2018, Plaintiffs filed the Amended Complaint, asserting the following claims: (1) breach of fiduciary duty claims against all Defendants, (2) aiding and abetting breaches of fiduciary duty claims in the alternative against the "Venture Capital Defendants"—the label Plaintiffs use to refer collectively to PTV, RiverVest, and Bay City, and (3) unjust enrichment, presumably against all Defendants. A36–40. Plaintiffs dropped their claims of Texas Blue Sky Law violations and civil conspiracy. *See id.* PTV, RiverVest, Bay City, and the Independent Directors again moved to dismiss. A78, A170. In an attempt to cure

the pleading deficiencies in the Amended Complaint, Plaintiffs improperly injected a host of new allegations in their Answering Brief that are nowhere in the Amended Complaint. A1437–40. The Court of Chancery heard oral argument on November 1, 2018. A1475.

E. Court of Chancery Dismisses The Amended Complaint

On January 25, 2019, the Court of Chancery issued an opinion dismissing all of Plaintiffs' claims against all Defendants with prejudice. A1661. The Court of Chancery held Plaintiffs' claims are "solely derivative" and therefore Plaintiffs lack standing because they failed to comply with Court of Chancery Rule 23.1's pleading requirements for derivative claims. A1623-24. The Court of Chancery reasoned that Plaintiffs' allegations "fall short of those" in *In re Hansen Medical, Inc. Stockholders Litigation*, 2018 WL 3025525 (Del. Ch. 2018), "and are more akin to those in *van der Fluit v. Yates*, [2017 WL 5953514 (Del. Ch. 2017),] in which this Court found the complaint failed to adequately allege a control group." A1645.

In their Opening Brief in this Court, Plaintiffs challenge only the Court of Chancery's conclusion that Plaintiffs failed to plead the existence of a control group. Plaintiffs' Opening Brief does not challenge any of the various other issues

addressed in Vice Chancellor Zurn's opinion and, accordingly, those issues are waived and need not be addressed in this brief.[7]

[7] For example, Plaintiffs did not challenge the dismissal of their aiding and abetting claim or their disclosure claim. Nor do Plaintiffs contend the Court of Chancery erred in rejecting their argument regarding judicial estoppel. These claims and any others not expressly addressed in Plaintiffs' Opening Brief are waived. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

ARGUMENT

I. THE DISMISSAL SHOULD BE AFFIRMED BECAUSE THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT THE AMENDED COMPLAINT FAILS TO SUFFICIENTLY ALLEGE A CONTROL GROUP.

A. Question Presented

Whether the Court of Chancery correctly held that the allegations of the Amended Complaint do not sufficiently allege a control group? These issues were preserved for appellate review at: A99-109, A187-200, A1284-95, A1449-56.

B. Standard of Review

"The decision of the Court of Chancery granting a motion to dismiss under Court of Chancery Rule 12(b)(6) is reviewed by this Court *de novo*." *Feldman v. Cutaia*, 951 A.2d 727, 730 (Del. 2008). Under Rule 12(b)(6), a claim must be dismissed where, accepting all well-pleaded factual allegations as true and drawing all reasonable inferences in favor of the plaintiff, the plaintiff "would not be entitled to recover under any reasonably conceivable set of circumstances." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011). Although this standard of review is "plaintiff-friendly," it is "not toothless." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC*, 2012 WL 3201139, at *13 (Del. Ch. Aug. 7, 2012). A plaintiff must "plead specific facts that make out a cause of action, rather than rely on conclusory allegations, in order to withstand a motion to dismiss." *Id.*; *see also Feldman*, 951 A.2d at 731 (stating "conclusory

allegations need not be treated as true, nor should inferences be drawn unless they truly are reasonable").

C. Merits of Argument

The Court of Chancery correctly concluded that the allegations in the Amended Complaint fall short of the well-pleaded facts required to invoke the narrow *Gentile v. Rossette* control-group exception to the general rule that dilution claims are derivative. 906 A.2d 91, 99 (Del. 2006).

"*Gentile* concerned a controlling shareholder and transactions that resulted in an improper transfer of both economic value *and* voting power from the minority stockholders to the controlling stockholder." *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1263–64 (Del. 2016) (emphasis in original). Under the "unique circumstances presented by" the facts in *Gentile*, this Court held the claims "constituted 'a species of corporate overpayment claim' that is 'both derivative and direct in character.'" *Id.* at 1263–64 (quoting *Gentile*, 906 A.2d at 99).

Under *Gentile*, a "breach of fiduciary duty claim having this dual character arises where: (1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling

stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." 906 A.2d at 99–100.

Recent opinions note *Gentile* has created confusion and go so far as to suggest it ought to be revisited by this Court. *See ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *26 n.206 (Del. Ch. July 21, 2017) ("Whether *Gentile* is still good law is debatable."), *aff'd*, 184 A.3d 1291 (Del. 2018) (TABLE). As explained in a recent concurring opinion authored by Chief Justice Strine, *Gentile* "is a confusing decision, which muddies the clarity of [Delaware] law in an important context"—"there is no gap in [Delaware] law for *Gentile* to fill" and "it ought to be overruled, to the extent that it allows for a direct claim in the dilution context when the issuance of stock does not involve subjecting an entity whose voting power was held by a diversified group of public equity holders to the control of a particular interest." *Brinckerhoff*, 152 A.3d at 1265–66.

Regardless, *Gentile* need not be overruled or even revisited here because the Amended Complaint plainly fails to sufficiently allege a control group and therefore fails to state a direct claim under the *Gentile* framework. Vice Chancellor Zurn's Opinion and the Answering Brief of PTV, RiverVest, and Bay City's both correctly explain the reasons the Amended Complaint cannot be found to have adequately alleged a control group. For the sake of efficiency and to avoid unnecessary duplication, the Independent Directors hereby join and incorporate by reference the

arguments and authorities in Section I.C. of the Answering Brief of Appellees PTV, RiverVest, and Bay City as if fully set forth herein.

II. ALTERNATIVELY, THERE ARE MULTIPLE OTHER BASES UNDER RULE 12(B)(6) ON WHICH TO AFFIRM THE COURT OF CHANCERY'S DISMISSAL OF THE INDEPENDENT DIRECTORS.

A. Question Presented

Whether the dismissal of the Independent Directors can be affirmed on alternate Rule 12(b)(6) grounds, including the fact that the Amended Complaint fails to state a non-exculpated claim against the Independent Directors? These issues were preserved for appellate review at: A112–21, A1440–45.

B. Standard of Review

This Court may affirm a judgment based "on any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court," and, accordingly, "may affirm the judgment of the Court of Chancery on the basis of a different rationale." *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012); *see also* Supr. Ct. R. 8.

C. Merits of Argument

Because it dismissed under Rule 23.1 for lack of standing, the Court of Chancery did not reach three other meritorious bases for dismissal under Rule 12(b)(6) asserted by the Independent Directors below. The simplest of these is that the Section 102(b)(7) provision in IDEV's certificate of incorporation exculpates the Independent Directors from monetary liability.[8] Accordingly, even if the Amended

[8] In addition to their Section 102(b)(7) exculpation defense, the Independent Directors' motion to dismiss raised, as Rule 12(b)(6) bases for dismissal, the

Complaint sufficiently alleged a control group and entire fairness review applied, the Independent Director are shielded from liability by IDEV's exculpatory provision and entitled to dismissal.

Section 102(b)(7) of the Delaware General Corporation Law permits a corporation to adopt a charter provision that eliminates personal, monetary liability to the corporation and its stockholders for breaches of fiduciary duty that do not involve bad faith, disloyalty, or improper personal benefit. *See* 8 *Del. C.* § 102(b)(7); *see also McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 (Del. Ch. 2000). "The purpose of [Section 102(b)(7) is] to permit stockholders to adopt a provision in the certificate of incorporation to free directors of personal liability in damages for due care violations, but not duty of loyalty violations, bad faith claims and certain other conduct." *Malpiede v. Townson*, 780 A.2d 1075, 1079, 1095–96 (Del. 2001) (affirming dismissal of residual due care claim where Section 102(b)(7) provision "bar[red] any claim for money damages against the director defendants"). The "effect of the exculpatory charter provision is to guarantee that the defendant directors do not suffer discovery or a trial simply because the plaintiffs have stated

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business-judgement rule and the Amended Complaint's failure to state a waste claim. For the sake of brevity, the Independent Directors hereby incorporate by reference their motion to dismiss briefing on these issues as if fully set forth herein. A112–21.

a non-cognizable damages claim for a breach of the duty of care." *McMillan*, 768 A.2d at 501–02.

The presence of a Section 102(b)(7) provision requires a plaintiff to "plead a non-exculpated claim for breach of fiduciary duty against an independent director protected by an exculpatory charter provision, or that director will be entitled to be dismissed from the suit." *In re Cornerstone Therapeutics Inc, Stockholder Litig.*, 115 A.3d 1173, 1179 (Del. 2015). To do so, a plaintiff "must sufficiently allege conduct implicating bad faith or a breach of the duty of loyalty to survive [an independent director's] motion to dismiss." *Hamilton Partners, L.P. v. Highland Capital Mgmt., L.P.*, 2014 WL 1813340, at *15 (Del. Ch. May 7, 2014); *see, e.g.*, *Wayne Cty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *19 (Del. Ch. July 24, 2009) (granting motion to dismiss breach of fiduciary duty claim against directors shielded by a Section 102(b)(7) provision where plaintiffs failed to plead sufficient allegations showing bad faith or "a breach of the duty of loyalty"), *aff'd*, 996 A.2d 795 (Del. 2010) (TABLE).

Here, Plaintiffs allege that the Independent Directors breached their "fiduciary duties of loyalty, care and candor." A37. Because the Independent Directors are exculpated from liability by a Section 102(b)(7) exculpatory provision, Plaintiffs' breach of fiduciary duty claim must be dismissed to the extent it is based on an alleged breach of the duty of care. *See Hamilton Partners*, 2014 WL 1813340, at

*15; *see also* A119 n.12. The elimination of any claims based on the duty of care leaves the duty of loyalty as the only viable ground for Plaintiffs' breach of fiduciary duty claims against the Independent Directors. Yet, the Amended Complaint lacks specific allegations that, if true, would show either of the Independent Directors acted in bad faith or were disloyal.

Plaintiffs were required to plead "the loyalty breach or other non-exculpated claim against each individual director; group pleading will not suffice in the face of an exculpatory provision." *In re Saba Software, Inc. Stockholder Litig.*, 2017 WL 1201108, at *19 (Del. Ch. Mar. 31, 2017). Where, as here, a plaintiff pleads "no facts to support an inference that any of the independent directors breached their duty of loyalty, fidelity to the purpose of Section 102(b)(7) requires dismissal of the complaint against those directors." *In re Cornerstone*, 115 A.3d at 1187. This holds true regardless of what standard of review applies and regardless of whether there is a controlling stockholder or control group. *See, e.g.*, *Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co.*, 2017 WL 3172722, at *6–7 (Del. Ch. July 24, 2017) (dismissing independent directors protected by exculpatory provision even where entire fairness standard of review applied to the underlying transaction and plaintiffs adequately pleaded a control group); *see also Hamilton Partners*, 2014 WL 1813340, at *15, *19 (dismissing director protected by exculpatory provision where complaint failed to "sufficiently allege conduct implicating bad faith or a breach of

the duty of loyalty" against that director for agreeing to merger involving controlling stockholder and therefore subject to entire fairness standard of review).

The Amended Complaint also fails to adequately allege a material benefit that either Independent Director received in connection with the July 2010 financing. "Delaware courts apply a subjective 'actual person' standard to determine whether a 'given' director was likely to be affected in the same or similar circumstances." *McMullin v. Beran*, 765 A.2d 910, 923 (Del. 2000) (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167 (Del. 1995)). "Materiality means that the alleged benefit was significant enough '*in the context of the director's economic circumstances*, as to have made it improbable that the director could perform [his or her] fiduciary duties . . . without being influenced by [his or her own] overriding personal interest." *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002) (emphasis in original) (quoting *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999)) (collecting cases). Accordingly, "it is well established that when a party challenges a director's action based on a claim of the director's debilitating pecuniary self-interest, that party must allege that the director's interest is material to *that director*." *Solomon v. Armstrong*, 747 A.2d 1098, 1118 (Del. Ch. 1999) (emphasis added), *aff'd*, 746 A.2d 277 (Del. 2000) (TABLE).

Here, in the absence of a single allegation that any benefit received by either Independent Director was material to him, there is no basis for inferring a lack of

independence. *See Cinerama*, 663 A.2d at 1167; *see, e.g.*, *Carr v. New Enter. Assocs., Inc.*, 2018 WL 1472336, at *23 (Del. Ch. Mar. 26, 2018) (dismissing two independent directors where plaintiff failed to allege a non-exculpated claim against them in part because plaintiff failed to plead "facts such that it would be reasonable to infer that" one director's compensation and the other director's stock options "were material to them so as to taint their decision-making").

Instead of pointing to well-pleaded facts regarding a loyalty breach in the Amended Complaint—there are none—Plaintiffs suggested below that the Court of Chancery indulge them with a "pleadings-stage inference of disloyalty." A1100. This Court, however, has rejected an "automatic inference" of disloyalty because such an inference "would be inconsistent with Delaware law and would also increase costs for disinterested directors, corporations, and stockholders, without providing a corresponding benefit." *In re Cornerstone Therapeutics*, 115 A.3d at 1182. Plaintiffs are not entitled to any *reasonable* inference here with respect to the Independent Directors because the Amended Complaint fails to sufficiently allege that the Independent Directors were not independent. *See* A1442–45. Nor should this Court supply an inference that the Independent Directors received a material benefit in connection with the July 2010 financing. *Id.*

For these reasons, even if this Court chose not to adopt the rationale upon which the Court of Chancery dismissed the Amended Complaint, this Court should

still affirm the dismissal of the Independent Directors based on IDEV's exculpatory provision and Plaintiffs' failure to allege well-pleaded facts to support a claim against the Independent Directors for breach of the duty of loyalty.[9]

[9] In the event this Court rules the Court of Chancery's decision should be reversed and the Court determines not to exercise its authority to address the additional Rule 12(b)(6) bases advanced below in support of dismissal, *see Cent. Laborers Pension Fund*, 45 A.3d at 141 (recognizing "this Court may rest its appellate decision on any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court"), the Court should remand the case to the Court of Chancery for it to decide the additional Rule 12(b)(6) issues before any further proceedings. *See McMillan*, 768 A.2d at 501–02 ("The effect of the exculpatory charter provision is to guarantee that the defendant directors do not suffer discovery or a trial simply because the plaintiffs have stated a non-cognizable damages claim for a breach of the duty of care. To give the exculpatory charter provision any less substantial effect would be to strip away a large measure of the protection the General Assembly has accorded directors through its enactment of 8 Del. C. § 102(b)(7).").

CONCLUSION

For the foregoing reasons, and those set forth in the well-reasoned Opinion of the Court of Chancery, Defendants Below – Appellees Reese Terry and Craig Walker respectfully request that this Court AFFIRM the decision of the Court of Chancery.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2019, a copy of the foregoing document was served electronically by *File & Serve Xpress* on the following counsel of record:

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