EFiled: Jun 09 2020 04:54PM EDT
Filing ID 65685646
Case Number 156,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALEX BÄCKER and RICARDO BÄCKER,	§	
Defendants Below, Appellants,	§	No. 156, 2020
v.	§	Court Below–Court of Chancery of the State of Delaware
PALISADES GROWTH CAPITAL II, L.P.,	§	C.A. No. 2019-0931-JRS
Plaintiff Below, Appellee.	§	

APPELLANTS' OPENING BRIEF

Thomas A. Uebler (#5074)
Joseph L. Christensen (#5146)
Hayley M. Lenahan (#6174)
MCCOLLOM D'EMILIO SMITH UEBLER LLC
2751 Centerville Road, Suite 401
Wilmington, DE 19808
(302) 468-5960

Attorneys for Alex and Ricardo Bäcker

June 9, 2020

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

NATURE OF PROCEEDINGS

During a regular meeting of the board of directors (the "Board") of QLess, Inc. ("QLess") on November 15, 2019 (the "November 15 Meeting"), defendants Alex Bäcker ("Alex") and Ricardo Bäcker ("Ricardo"), voted to, among other things, terminate QLess's CEO, Kevin Grauman ("Grauman"), because of unfitness and poor performance.

Plaintiff Palisades Growth Capital II, L.P. ("Palisades"), a QLess preferred stockholder, sought to invalidate Grauman's termination under 8 *Del. C.* § 225 ("Section 225"). Palisades claimed that Alex and Ricardo did not compose a Board majority as of the vote because Palisades partner Paul D'Addario ("D'Addario") had been elected to the Board, which would have made the vote to terminate Grauman a 2-2 tie. Alternatively, Palisades argued that equity should invalidate Alex and Ricardo's votes because they had interfered with D'Addario's election.

For weeks before the November 15 Meeting, Palisades had secretly plotted with Grauman, QLess's outside corporate counsel, and QLess preferred stockholder Altos Hybrid 2, L.P. ("Altos") to take control of the Board by convincing Altos to elect D'Addario to its designated Board seat.

In Count I, Palisades sought a declaration that D'Addario had been elected to the Altos Board seat and the Board was composed of Alex,

Ricardo, D'Addario, and Palisades partner Jeff Anderson ("Anderson"). In Count II, Palisades sought a declaration that Alex and Ricardo "did not constitute a majority of the Board" and their "attempt to unilaterally terminate Mr. Grauman was therefore ineffective." In Count III, Palisades requested specific performance requiring Alex and Ricardo, as stockholders, to appoint Grauman to a Board seat designated for QLess's CEO.

Palisades did not prevail on these theories at trial. The Court of Chancery held that D'Addario was not elected as a director, Alex and Ricardo did not interfere with the (non)election of D'Addario, Alex and Ricardo did not affirmatively deceive Palisades regarding the (non)election of D'Addario, and Palisades was not entitled to specific performance.

Despite having its legal and equitable theories rejected, Palisades nevertheless obtained the outcome it sought: a ruling that Grauman was not terminated as CEO during the November 15 Meeting.

After a half-day trial on the papers, the Court of Chancery ruled that Alex and Ricardo affirmatively deceived Anderson

> into attending the November 15 meeting on the belief that the Bäckers would honor the Voting Agreement by appointing Grauman to the vacant CEO director seat. As Grauman should have been appointed to the Board as of, or at, the November 15 meeting, the actions taken at that meeting lacked approval by a majority of the Board and

> are, therefore, voided, regardless of whether *vel non* Bäcker breached the Voting Agreement.

Ex. 1 (Mem. Op. dated March 26, 2020 ("Opinion" or "Op.")) at 5.

The Court of Chancery's invalidation of Grauman's termination and other actions at the November 15 Meeting under an affirmative-deception theory not advanced by Palisades must be reversed because it is based on clearly erroneous factual findings and a misapplication of Delaware law.

SUMMARY OF ARGUMENT

1. The Court of Chancery's finding of affirmative deception was based on a clearly erroneous rewriting and interpretation of a trial exhibit, JX 224, that even Palisades did not proffer. The evidence, properly interpreted, does not meet the standard for affirmative deception. Alex and Ricardo's communications cited by the Court of Chancery were not deceitful and did not deceive Anderson into attending the November 15 Meeting. Equity, therefore, cannot invalidate Alex and Ricardo's votes at the meeting.

2. The Court of Chancery's finding of affirmative deception imposed an equitable advance-notice requirement for regular, as opposed to special, Board meetings that this Court held in *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035 (Del. 2014), is not cognizable.

3. The Court of Chancery misapplied the rule of *Koch v. Stearn*, 1992 WL 181717 (Del. Ch. July 28, 1992), that if a director's presence at a special board meeting is obtained by false pretenses, the deceived director can seek to void the actions at the special meeting. First, the Court of Chancery did not find that the November 15 Meeting was a special meeting, and thus *Koch* is inapplicable. Second, even if *Koch* applied, Alex and Ricardo's votes cannot be invalidated because Anderson participated throughout the November 15 Meeting and was not disadvantaged.

4. The Court of Chancery held that Alex and Ricardo did not breach a stockholder voting agreement by refusing to recognize Grauman as a member of the Board. It was error, therefore, to award extracontractual relief invaliding the actions at the November 15 Meeting based on Anderson's impressions about Alex and Ricardo's intended compliance with the stockholder voting agreement.

STATEMENT OF FACTS

a. The Parties and Relevant Non-Parties

QLess provides mobile queuing services that eliminate the need for people to physically stand in line. Since Alex founded QLess in 2007, it has saved people 6,000 years of time to do things other than wait in line.

Alex is an inventor and entrepreneur with 15 years of experience growing Software as a Service (SaaS) companies. He served as QLess's CEO until June 2019. He holds the majority of QLess common stock through his affiliate Ab Inventio LLC.

Ricardo, Alex's father, is a QLess stockholder. He has served as the managing partner of Andersen Consulting and two of the world's largest executive search firms.

Palisades is a private equity firm that invested in QLess in 2017, receiving Series A Preferred Stock representing an approximate 15% interest in QLess. Anderson and D'Addario are Palisades partners.

Altos is an investment firm that invested in QLess in November 2018, receiving Series A-1 Preferred Stock. Ho Nam is an Altos partner, and Rick Arnold is Altos's general counsel.

Scott Alderton is QLess's outside corporate counsel.

Grauman became QLess's CEO in September 2019.

b. QLess's Governing Documents

When Altos invested in QLess, the following governing documents came into effect: an amended and restated certificate of incorporation (the "Charter"), A41; the bylaws ("Bylaws"), A112; and a stockholder voting agreement (the "Voting Agreement"). A67.

Under the Charter, Alex elects two directors and Palisades and Altos each elect one director in their respective stockholder capacities. Under the Voting Agreement, the parties jointly appoint a fifth independent director. If Alex ceases to be QLess's CEO (called a "Bäcker Termination Event"), any party to the Voting Agreement may act to increase the Board to six directors by creating a CEO Director seat. A67-69 (§§ 1.1, 1.2).

c. After a Bäcker Termination Event, Grauman Becomes CEO

In early 2019, the Board was composed of Alex (common), Ricardo (common), Anderson (Palisades), Nam (Altos), and Ivan Markman (independent). Alex was the CEO and Board chairman.

A deep division existed between Anderson and Alex, and Anderson wanted to remove Alex as CEO, which he eventually accomplished. Op. at 9-12. On June 7, 2019, the Board voted 3-2 to terminate Alex as CEO, not for cause. A1095 (87:25-88:4). This was a Bäcker Termination Event. Alex remained Board chairman.

After a CEO search led by Alex and over Anderson's objection, the Board hired Grauman as CEO on September 7, 2019. Op. at 2; A1096 (91:6-17). After Grauman was hired as CEO, no stockholder acted under the Voting Agreement to expand the Board to six members by creating a CEO Director seat. Op. at 25.

d. On September 30, 2019, Nam Resigns from the Board

On August 14, 2019, Nam told the Board, "At the conclusion of this CEO process, it would make sense for me to resign from the board. The new CEO should take the fifth board seat rather than adding a sixth board seat." A155.

On September 30, 2019, Nam resigned, leaving a vacancy in the Altos Board seat. The Board was composed of Alex (common), Ricardo (common), Anderson (Palisades), and Markman (independent).

After Nam resigned, Altos was "not planning on designating a new Director." A162. Anderson asked Nam on October 3, 2019, "would you give some thought to nominating one of my partners to fill [Altos's] vacant board seat?" A165. Anderson followed up, stating, "I will likely step aside to be backup so one of my partners can become our lead board member but ask you to strongly consider nominating a Palisades guy to be your Altos board

nominee. You would still control the seat so we would serve at the discretion of Altos." A170.

On October 28, 2019, Arnold, Altos's general counsel, asked Alderton, "Would you please draft and circulate the necessary stockholder consent to elect Paul D'Addario, a partner of Jeff's at Palisades, to the QLess Board as the Altos designee?" A294. Arnold continued, "We would like to fill the vacancy left by Ho's resignation as soon as possible." *Id.* Between October 28 and November 9, 2019, at least nine emails were exchanged on this thread among Palisades, Altos, Grauman, and Alderton. Alex and Ricardo were excluded from them all. A179-81.

On November 4, 2019, Grauman asked Anderson, "When do you anticipate that Paul will effectively take over Ho's board seat?" and Anderson replied, it "[s]hould be immediately as Ho sent email to scott [sic] Alderton. I'll email Scott to follow up and copy you[.]" A1490-91. Anderson replied to Arnold's October 28, 2019 email, "We have a board mtg scheduled for Nov 15th. Let's fill the seat in advance of that meeting." A293. Alderton replied, "No issue with that but it requires unanimous (i.e., Alex) signature, otherwise we invite Paul to the meeting and do it as the first order of business." *Id.* Alex and Ricardo were excluded from these emails.

Also on November 4, 2019, Grauman emailed Alderton, "I understand from Jeff Anderson that you are working on replacing Ho Nam on the Board with Palisades' Paul D'Addario before the 11/15 scheduled Board meeting." A281. Grauman wanted to be seated and replace Alex as Board chairman before November 15. *Id.*; A810 (42:9-15). Anderson was pushing to have Grauman become chairman to give the Palisades-Grauman group three of five seats and the chairmanship. A195. Alderton did not believe that Alex would give up the chairmanship. A650 (207:8-208:7) ("I couldn't imagine [Alex] would ever voluntarily give up the chairman position.").

Grauman thought "that we should have it all done before the Board meeting." A281. Alderton told Grauman, "all of the board members have to sign, and my fear is we send that out and one or more of them (i.e., Alex) will say he wants to discuss it at the meeting." *Id.*

Separately on November 4, 2019, Anderson reiterated to Grauman, "I want Paul onboarded in advance" of the November 15 Meeting. A178.

On November 8, 2019, Arnold followed up with Alderton, stating, "Let me know if you want Altos to sign any type of formal nomination before the 15th." A293. Alderton replied:

> No, we are good. I'm going to circulate a Board Consent on Monday that does a bunch of things, including appointing Paul. If we can't get Alex and/o[r] Ricardo to sign that, then the very first

> thing we will do on the 15th is appoint Paul and then move on to everything else.

A292. Nam replied:

> Just for my understanding, does the board appointment require board consent? I thought it was an appointment that could be decided by Altos. I'm fine either way but wanted to make sure I understood the mechanics.

Id. Alderton replied:

> It is mechanics Ho. Your appointment is contractual, in other words you have the contractual right to designate who the Series A-1 director will be, but that person still needs to be either elected by the stockholders under Delaware law, or in this case since it is filling a vacancy, appointed by the Board.

A291. Nam replied:

> Got it. From a mechanics perspective it's easier to appoint with board approval. For some strange reason if the board does not approve then we can do it the hard way. Why do it the hard way when it's simple to do with board consent. Is that correct?

Id. Alex and Ricardo were excluded from all these emails.

On November 11, 2019, Alderton informed Grauman that he had prepared a "Written Board Consent" to "Accept[] resignation of Ho [Nam] (formality, not require[d]) and appoint[] Paul [D'Addario] as the A-1

Director." A184. The draft consent also purported to expand the Board to six members and appoint Grauman as the CEO Director. *Id.*

Alderton asked Grauman if he "want[ed] to just wait on all this until the Board meeting, or do you want me to remove the option grants … and at least try to get the other stuff approved by Consent?" A184. Grauman responded, "I do not believe that we will get all of the consents before the meeting, so we will be left to get the approvals then." *Id.* According to Grauman, the "only 2 appointments that are likely to be 'problematic' (in terms of possible push-back) are Paul's proxy for Ho and [Grauman's] appointment as Board Chairman." *Id*. Alderton responded, "I think Paul's election is the least controversial, as it is required by contract. You being Chairman is something I see Alex possibly having an issue with if it is a new issue to him." *Id.* Alex and Ricardo were excluded from these emails and, to this point, no resolutions were circulated to them.

On November 13, 2019, Alex emailed QLess employee Simon Heyrick following up on a resolution regarding director equity compensation that was approved in June 2019 but never memorialized. A198-199.

Later that day, Alderton circulated draft Board resolutions he had prepared with Grauman. A211. Alderton wrote that the proposed Board resolutions "clear up a whole host of issues," including "[a]ccepting the

resignation of Ho Nam and replacing him with Paul D'Addario as the Series A-1 director" and appointing Grauman to the Board. *Id.* This was the first indication to Alex and Ricardo of these resolutions. Alderton later added resolutions regarding director equity compensation, incorporating Alex's request to Heyrick earlier in the day. *Id.* At no point did Alex or Ricardo respond to Alderton's emails attaching proposed resolutions.

Later on November 13, 2019, Alex asked Nam to consider a candidate named Alex Eckelberry instead of D'Addario for the Altos seat. A190. Nam forwarded Alex's email to Anderson, who replied in part, "Yes Eckelberry would be a value added board member but ideally holding an independent seat. Preferred seats should be held by investors. Paul can be a transition to when the board gets reconstituted at some financing or some other event. Up to you." A186.

e. On November 14, 2019, Markman Unexpectedly Resigns from the Board

On November 14, 2019, Markman resigned from the Board. A208. His reason was "not enough time." A243; A816 (66:18-24); A563 (15:8-13); A577 (69:9-70:24).

Alex and Ricardo were surprised by Markman's resignation. A246; A247. Markman had not notified them of his intent to resign. A563 (16:14-18); A949-50 (160:21-161:19).

Palisades and Altos had prepared for Markman's resignation since at least early 2019. A148 (Anderson stating to Nam in April 2019, "I fear Alex will convince Ivan to resign before voting him out"); A1092-93 (75:14-79:25); A1099 (102:22-103:7) (testimony regarding email from Nam to Anderson in October 2019 "If Ivan ever resigned we would want to fill a 5th seat ASAP").

Upon Markman's resignation, the Board was composed of Alex (common), Ricardo (common), and Anderson (Palisades). The Altos and independent Board seats were vacant.

Grauman emailed Alderton for confirmation that Markman's resignation "has minor structural implications and not much else." A241. Alex and Ricardo were excluded from this email.

Between Markman's resignation and the November 15 Meeting the next day, Alderton advised Anderson about whether Alex would "get rid of Kevin and take back control of the company as CEO." A639 (162:24-163:14). Alderton further advised Anderson about whether Alex might "tak[e] advantage of the fact that the—that he believed the A-1 seat was empty. … so he would constitute a majority of the board; and that he was going to step in and take all of these, what I refer to as aggressive actions to take back control of the company." *Id.* (161:7-163:24). They also discussed

quorum requirements and "what would [Alex] try to do and should [Anderson] show up on the board." A1100 (107:20-24); *Id.* (107:6-8). Alderton's advice was concealed from Alex and Ricardo. A639 (161:7-163:24).

f. The November 15 Meeting

On November 15, 2019, before the Board meeting, Alderton emailed Alex, Ricardo, Anderson, Grauman, and D'Addario a draft Board written consent, having converted the previous resolutions to written-consent form. JX 318. Alderton advised that Alex and Ricardo were required to sign: "This action is necessary to properly constitute the Board pursuant to the Voting Agreement." A273. Alderton then delivered an ultimatum from Anderson:

> It is my understanding from Jeff that execution of this Consent prior to the Board meeting is a prerequisite, and that he will not be joining the call if it is not signed in advance, which would leave us without a quorum and thus unable to conduct business.

A263. Alex and Ricardo did not sign the consent, indicate they would do so, or otherwise fulfill the condition of Anderson's ultimatum.

Also on November 15, 2019, before the Board meeting, Alex emailed Ricardo and Patricio Cuesta, an experienced private and public company executive whom Alex planned to elect to the Board, draft board resolutions that he began drafting after Markman resigned the day before. A248-56;

A1022 (198:21-25). Alex finished the draft just before the meeting and used it to conduct the meeting. A1027 (218:18-20); A629 (122:19-123:1); A934 (99:16-19).

As of the beginning of the November 15 Meeting, the Board was composed of Alex, Ricardo, and Anderson. Op. at 31; A265, A272 (proposed written consent circulated by Alderton on November 15, 2019, indicating Alex, Ricardo, and Anderson as directors); A263.

The telephonic meeting was attended by Alex, Ricardo, Anderson, Alderton, Grauman, and D'Addario. Alex, presiding as chairman, requested that D'Addario and Grauman leave the meeting because they were not directors; Grauman left and D'Addario remained. Op. at 3.

The first order of business was an evaluation of Grauman's performance and fitness as CEO. A262; A1040-41 (272:24-276:25). Alex and Ricardo discussed why Grauman was failing as CEO. A491-98 (Grauman performance evaluation). Bookings YTD were at 242% of Plan when Alex was terminated in June 2019. *Id.* QLess' growth rate slowed by 47% in the semester following Alex's termination. A482. Furthermore, during Grauman's tenure, the employee quit rate was at least five times greater than it was during Alex's tenure, and the company lost key employees at an alarming rate. A496; A1041 (274:16-19). Grauman's

financing efforts were nonexistent. A491. Grauman was also dishonest as to basic facts. A1041 (273:6-13) (discussing Grauman's false claim that Alex agreed to pass the chairmanship to him).

After discussion, Alex and Ricardo voted to terminate Grauman and Anderson voted against. Op. at 3. Alex and Ricardo then voted for Alex to fill the vacant CEO and CFO positions. *Id.*

Next, Alex and Ricardo voted to amend the Bylaws to set the quorum at 3 of 6 directors when the Board consisted of 6 members; triggered the Bäcker Termination Event rights under the Voting Agreement to expand the Board to 6 members; and voted to appoint Alex to the CEO Director seat. Alex and Ricardo also voted to approve an employment agreement for Alex on the same terms as Grauman's. *Id.*; A249-56.

Cuesta was then elected by the written consent of holders of a majority of common stock to the Common Director seat previously held by Alex. Op. at 3; A249-56. Alex delivered the written consent and then Cuesta joined the meeting. A285.

All of this "action was undertaken over Anderson's dissenting vote and D'Addario's heated objection." Op. at 3; *id.* at 16 ("With Ricardo's support, Bäcker proceeded to vote through each of his proposed resolutions over the objections of Anderson and D'Addario.").

Alex and Ricardo's actions at the November 15 Meeting resulted in the following Board: Cuesta (common), Ricardo (common), Anderson (Palisades), and Backer (CEO Director). The Altos and independent Board seats remained vacant.

g. The Parties Discuss the (Non)Election of D'Addario

Palisades insisted that Alex and Ricardo's votes on November 15 were ineffective because D'Addario was a director and thus the votes tied 2-2. On November 17, 2019, Alex emailed Alderton:

> I just recovered my email account [which Grauman had disabled] and did a search for any emails from Ho to you, and didn't see any since this one [dated September 30, 2019], which as you can read, indicated that he was NOT planning on designating a new Director for his seat, and that [he] thinks smaller boards are better.

A296. Alderton replied:

> Alex, I'm sending you the communication from Altos designating Paul D'Addario to the Board [i.e., the October 28, 2019 email from Arnold]. I'm copying all parties so my communications are transparent. It came from Altos' General Counsel, attached, not directly from Ho as I had indicated to you. I did receive another communication from Ho confirming the designation, and I advised Ho (as I told you I had) that it required a procedural step of an actual election either by Stockholders, or in the case where there is a vacancy, by the Board. Based on this designation, we prepared the written Consent that was circulated to the Directors in advance of the meeting but not signed. Also, to be

> transparent, and as I told you when we spoke on one of our calls, the Altos nominee, Paul D'Addario advised me (consistent with the position that he and Jeff took on the Board call) that under Delaware law the mere designation of the seat by Altos was sufficient to constitute him a director for purpose[s] of the Board meeting. I do not know if that is a correct or incorrect position under Delaware law. I could research it, but I think that would be waste of the Company's money since it is likely going to be determined in a Delaware Chancery court soon.

Id. To this point, the email chain with nine exchanges beginning on October 28, 2019, had never been shared with Alex and Ricardo.

After Palisades filed this action on November 20, 2019, Nam wrote to his partners admitting that Altos and Palisades made mistakes leading to the November 15 Meeting:

> One critical mistake we made was when we hired the new CEO we should have had in the offer specifying that he was immediately appointed to the board as soon as he took the job. I had assumed that was the case. But technically, I'm not sure th[at] is true. It's going to come down to legal technicalities.
>
> Another surprise[] was that Ivan abruptly resigned from the board the night before a board call. Zero notice. Not sure how Alex manipulated all this but it's our mistake for not being 100% sure about things before I resigned from the board. In hindsight, we should have appointed Palisades immediately to the board as I resigned and the CEO should have been appointed to the board with

> majority consent as we approved his hiring with a board vote of 4-1.

A490.

h. Palisades's Section 225 Claims

Palisades asserted the following Section 225 claims.

i. Count I

Palisades alleged that "the Charter and Voting Agreement give Altos the unqualified right to designate one director to the Board"; "Altos designated Paul D'Addario"; and the "Court should accordingly declare pursuant to 8 *Del. C.* § 225 that the Board currently comprises—at a minimum—Jeff Anderson, Paul D'Addario, Alex Bäcker, and Ricardo Bäcker, and that any actions purportedly taken by the Bäckers alone at the November 15, 2019 Board meeting are a nullity." A320-21 (¶¶ 35-38).

ii. Count II

Palisades alleged that "the Board, of course, has the right to terminate the CEO [Grauman]"; "the Board may only take such action by majority"; the "Bäckers purported to terminate Mr. Grauman as QLess's CEO at the November 15, 2019 Board meeting"; and the "Bäckers did not constitute a majority of the Board" and their "attempt to unilaterally terminate Mr. Grauman was therefore ineffective." A321-22 (¶¶ 39-41).

iii. Count III

Palisades alleged that Alex and Ricardo breached the Voting Agreement and Palisades was entitled to specific performance requiring Alex and Ricardo, as stockholders, to consent to Grauman as the CEO Director. A322 (¶¶ 42-49).

i. The Court of Chancery's Decision

The Court of Chancery found that "D'Addario was never validly appointed to the Board," in part because "Company counsel misunderstood the mechanics of how a Series A-1 Director vacancy is filled." Op. at 4, 13, 19-22. Further, Alex and Ricardo "did not take any affirmative action to prevent Altos from exercising its rights with respect to the Series A-1 Board vacancy." *Id.* at 4.

The Court of Chancery relatedly declined to credit Palisades's theory that Grauman's termination as CEO during the November 15 Meeting was ineffective on the basis that D'Addario was a director and Alex and Ricardo therefore did not compose a Board majority. Op. at 31 (holding that Alex, Ricardo, and Anderson were the directors as of November 15, 2019).

The Court of Chancery denied Palisades's request for specific performance, finding that "it is not at all clear that Bäcker breached the Voting Agreement by refusing to recognize Grauman as a duly appointed

member of the Board." *Id.*; *id.* at 25 n.104 (finding it "far from clear how any party breached by not voting their shares when no party formally requested such a vote (assuming the Voting Agreement was triggered)"); *id.* at 6 n.3 ("I ultimately do not grant [specific performance] relief").

The Court of Chancery nevertheless invalidated Alex and Ricardo's actions at the November 15 Meeting on the following basis:

> The Bäckers were fiduciaries and must conduct themselves accordingly. While they took no steps to interfere with Altos's right to elect its Board designee, they did affirmatively deceive the other QLess directors into attending the November 15 meeting on the belief that the Bäckers would honor the Voting Agreement by appointing Grauman to the vacant CEO director seat. As Grauman should have been appointed to the Board as of, or at, the November 15 meeting, the actions taken at that meeting lacked approval by a majority of the Board and are, therefore, voided, regardless of whether *vel non* Bäcker breached the Voting Agreement.

Op. at 5. The Court of Chancery concluded:

> [A]ll actions taken at the contested November 15 meeting are void. The QLess Board comprises Alex Bäcker and Ricardo Bäcker as common directors and Jeff Anderson as the Series A Director. The Series A-1 Director, independent director and CEO director seats remain vacant. Kevin Grauman remains as QLess's CEO.

Id. at 31; Ex. 2 (Order and Partial Final Judgment of Claims Pursuant to Rule 54(b) dated April 9, 2020 (the "Final Judgment")).

ARGUMENT

1. The Court of Chancery Erred by Holding that Alex and Ricardo Affirmatively Deceived Anderson

a. Question Presented

Whether the Court of Chancery committed reversible error by finding that Alex and Ricardo affirmatively deceived Anderson into attending the November 15 Meeting by misrepresenting that they wanted Grauman on the Board and assumed Grauman had already joined the Board. Preserved at Op. at 29; A1381-88.

b. Scope of Review

Whether the evidence demonstrates affirmative deception is a mixed question of fact and law subject to *de novo* review. *Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996). Factual findings are reviewed for clear error. *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 508 (Del. 2005).

c. Merits of Argument

Palisades argued below that Alex and Ricardo affirmatively deceived Anderson into believing that D'Addario would be elected to the Altos seat during the November 15 meeting:

> [E]ven assuming arguendo that there was a technical deficiency in Altos's designation of D'Addario, the Bäckers' deceptive actions in advance of the November 15 Meeting—**including remaining silent as to any purported issue with *D'Addario's* appointment, and leading Altos and**

> **the Company's other directors to believe that *D'Addario's* appointment would be formalized as the first order of business at the meeting—** should not be countenanced.

A1231-32 (emphasis added); *see also id.* at A1246 ("[E]ven if the Bäckers are correct that a document titled "formal written stockholder consent" was necessary—and it was not—their inequitable conduct precluded them from **preventing D'Addario to be seated** at the outset of the November 15 Meeting.") (emphasis added); A1378 (Palisades arguing after trial that the Bäckers "*subvert[ed] **Altos's** undisputed right to **the A-1 director seat***") (emphasis added); A1400-01 (Palisades arguing after trial that "although the Bäckers are quick to say that they 'never disputed **Altos's right** to elect [D'Addario] to the Board,' they do not respond to Palisades' contention that the Bäckers 'subverted' those rights") (emphasis added).

The Court of Chancery rejected this theory, holding that "there was no deceptive action relating to the appointment of the Series A-1 director [D'Addario] in advance of the November 15 meeting" and thus "equity cannot be invoked to turn back the clock and appoint D'Addario to the Board prior to that meeting." Op. at 4; *see also id.* at 28 (holding that "our case law makes clear ... there must be *some* affirmative deception before equity will intervene; if the Bäckers had simply acted in secret to plot their boardroom coup d'état without any affirmative action to mislead other

members of the Board, Plaintiff's call to equity would rest on softer ground") (emphasis in original).

Despite finding no affirmative deception as to D'Addario, the Court of Chancery found affirmative deception as to Grauman and invalidated the actions at the November 15 Meeting on that basis.

The Court of Chancery's decision must be reversed because: (i) the Court of Chancery made clearly erroneous factual findings; (ii) the Court of Chancery's decision is unsupported by the record and not the product of an orderly and logical deductive process; (iii) Palisades did not argue below that there was affirmative deception as to Grauman; and (iv) Alex and Ricardo did not cause Anderson to attend the November 15 Meeting.

i. The Court of Chancery Made Clearly Erroneous Factual Findings as to Grauman's Prospective Board Appointment

The Court of Chancery found that "the Bäckers did not stay silent in all matters related to the November 15 meeting" and that Alex "affirmatively misrepresent[ed] to Anderson and others that he wanted Grauman on the Board, and that he assumed Grauman had already joined the Board …." Op. at 29. The Court of Chancery stated, "After having affirmatively represented to Anderson (and Markman) that Defendants supported Grauman's

appointment to the Board, keeping mum as they planned their ambush was inequitable." Op. at 30.

The foundation of the Court of Chancery's finding of affirmative deception was JX 224, from which the Court found that Alex "assumed Grauman had already joined the Board, writing, 'Kevin [Grauman] is on the thread, assuming [the Board] now includes him, *which I requested it does.*'" Op. at 29 (quoting JX 224) (**textual alterations and emphasis added by Court of Chancery**). The Court of Chancery separately characterized JX 224 as "Bäcker expressing his belief that Grauman had been added to the Board, per his request." Op. at 26 n.107.

The Court of Chancery's textual alterations to JX 224—from "bod" to "[the Board]"—made a substantive, material change to the evidence. The original text of JX 224 had nothing to do with the composition of the Board (i.e., the governing body of QLess), and the reference to "bod" was not a reference to Grauman being a director.

The emails in JX 224 related to who received emails sent to bod@qless.com. The reference to "bod" was to Grauman being "on the email thread" by virtue of being on the "bod" email distribution list.[1] There

[1] An email distribution list, or listserv, allows users to distribute an email to multiple recipients simultaneously by sending the email to a single email address that is associated with each of the multiple recipients.

is no dispute about this between the parties. Palisades recognized that JX 224 reflected Alex's "request[] that Grauman be added to the Company's Board listserv." A1224 (citing JX 224 (aka Grauman Ex. 8)).

Alex referred to the "Board" or "board" four times in the email in question, but only "bod" when referring to the distribution list. No one used the term "bod" except in reference to the distribution list. In fact, Alex was responding to Anderson asking whether "Kevin [should] *be on thread for scheduling*." A172 (emphasis added). Alex responded that "Kevin is *on the thread*, assuming bod now includes him, which I requested it does." *Id.* (emphasis added). Alex did not say Grauman was or should be a director.

Citing Grauman's deposition, the Court of Chancery found that "Grauman also understood [JX 224] to mean he was now a member of the Board." Op. at 29 n.116 (citing Grauman testimony). But the Court of Chancery omitted reference to Grauman's admission in the same deposition that he "**didn't** infer" from JX 224 that he was a director and that "bod" referred to a distribution list:

> Q. **"You didn't infer from this email that you were a member of the Board of Directors, did you?**
> A. **I didn't infer anything from this email.**
> Q. If you look at the very top, there's an email address that's, that's bod@qless.com. Do you see that? . . . **Looking at it now, you**

> **understand don't you, that Alex was referring to a Board distribution list?**
>
> A. **Yeah, I do.** But that could have included Scott [Alderton], too. He's not on the Board of Directors."

A824 (97:18-98:13) (emphasis added). Alderton's inclusion in the distribution list, as Grauman suggested, A824 (98:20-21), underscores that Grauman's inclusion was not an appointment to the Board.

There is no evidence that Anderson subjectively inferred from JX 224 that Grauman was or would become a director. Palisades correctly recognized this as a request regarding a listserv. And Grauman did not believe he was a director before the November 15 Meeting. A835 (142:5-9) ("Q. Did you believe that you had become a director before the November 15th Board meeting?" A. "I don't believe I -- I didn't act in the capacity of director or participate in any Board stuff, so no.").

With respect to the Court of Chancery's finding that Alex "affirmatively represented to … Markman … that Defendants supported Grauman's appointment to the Board," Op. at 30, there is no evidence of such a representation. The Court of Chancery itself found the opposite, stating that Markman resigned "**after a phone call with Bäcker that led Markman to believe Bäcker would try to reinstate himself as CEO**." Op. at 15 (emphasis added). Far from representing that he approved of Grauman

and wanted him on the Board, the day before the November 15 Meeting Alex conveyed to a fellow director that he wanted to replace Grauman.

A clearly erroneous factual finding is one that is not sufficiently supported by the record or is not the product of an orderly and logical deductive process. *Biolase, Inc. v. Oracle Partners, L.P.*, 97 A.3d 1029, 1035 (Del. 2014). There is only one reasonable interpretation of JX 224—as Palisades put it, a "request[] that Grauman be added to the Company's Board listserv." A1224. The Court of Chancery's inference from JX 224 that Alex "affirmatively misrepresent[ed] to Anderson and others that he wanted Grauman on the Board, and that he assumed Grauman had already joined the Board" is not supported by the record or the product of an orderly and logical deductive process. Accordingly, it was clearly erroneous to find that in JX 224 Alex affirmatively misrepresented—or that anyone else reasonably and subjectively inferred—that he wanted Grauman to be a director or assumed Grauman was already a director. The Court of Chancery's finding of affirmative deception was based on a clearly erroneous interpretation of JX 224.

ii. The Evidence Cited by the Court of Chancery Does Not Demonstrate Affirmative Deception

The following evidence relied on by the Court of Chancery (in addition to JX 224) does not contain affirmative misrepresentations by Alex and Ricardo and does not constitute affirmative deception.

(1) The Court of Chancery quoted Ricardo responding to Alex's email in JX 224: "Looks good to me." Op. at 29 (citing JX 224 at 1). Because Alex's "bod" statement was not an affirmative misrepresentation that Alex and Ricardo wanted Grauman on the Board or assumed Grauman had already joined the Board, Ricardo's endorsement was not either.

(2) The Court of Chancery partially quoted Nam saying "[w]hen I did speak to [Bäcker] about a week ago, I specifically asked him how he thought Kevin was doing. I also asked him how the relationship was between him and [Grauman]. He said everything was fine." Op. at 29 n.116 (quoting JX 500). Alex saying to a former director no longer subject to confidentiality his relationship with Grauman was "fine" was not an affirmative misrepresentation that Alex and Ricardo wanted Grauman on the Board or assumed Grauman had already joined the Board. Alex's dissatisfaction with Grauman was clear enough that Markman believed when he resigned that Alex "would try to reinstate himself as CEO." Op. at 15.

(3) The Court of Chancery stated, "When Grauman circulated a 'high-level agenda' for the November 15 meeting, Bäcker responded by thanking him and asking him to 'circulate any proposed resolutions,' further giving the impression that Bäcker had no issue with Grauman joining the Board." Op. at 29 (citing JX 293 at 3). There was, however, no mention of Grauman's appointment in the "high-level agenda." It simply referred to Alderton leading a "Board hygiene" discussion involving "various resolutions" without specifying what was proposed. A183. Alex asking the CEO to circulate resolutions was not an affirmative misrepresentation that Alex and Ricardo wanted Grauman on the Board or assumed Grauman had already joined the Board.

(4) The Court of Chancery stated, "On the day before the contested meeting, Bäcker emailed Grauman, copying the QLess Board, requesting that Grauman circulate board materials 'so that *we* may all do *our* homework and be prepared to spend *our* time together most productively,' again giving the impression that Bäcker approved of Grauman's Board membership." Op. at 29-30 (citing JX 296) (emphasis added by Court of Chancery). Alex's use of the pronouns "we" and "our" in an email copying the Board and asking the CEO to circulate materials was not an affirmative misrepresentation that Alex and Ricardo wanted Grauman

on the Board or assumed Grauman had already joined the Board. Grauman, as the requested distributor of the materials, already had the Board materials and thus was not part of the collective "we" that needed to do "our" homework before the Board meeting.

(5) The Court of Chancery stated, "When Alderton circulated draft Board resolutions that would formalize Grauman's appointment to the Board, as requested by Grauman and Bäcker, neither Ricardo nor Bäcker gave any indication that their position had changed." Op. at 30 (citing JX 318). First, Alex did not expressly or implicitly request "Board resolutions that would formalize Grauman's appointment to the Board." Second, Alex and Ricardo's failure to specifically object to a draft proposed resolution prior to the November 15 Meeting was not an affirmative misrepresentation that Alex and Ricardo wanted Grauman on the Board or assumed Grauman had already joined the Board. The Court of Chancery recognized below that more than silence is required to find affirmative deception. Op. at 28-29. Directors need not object to proposed board resolutions ahead of a meeting or else be bound by them.

(6) The Court of Chancery found, "On November 11, per Bäcker's request, Grauman circulated proposed resolutions for the [November 15 Meeting]. The resolutions included, among

other items, replacing Nam on the Board with D'Addario and confirming Grauman's role as the CEO director. Neither of the Bäckers objected to these agenda items." Op. at 14 (citations omitted). That is incorrect. No resolutions of any kind were circulated until November 13 when Alderton did so. The Court of Chancery continued, "Bäcker did inform Alderton that there was an issue with an option grant to Ricardo in the proposed resolutions and requested new resolutions correcting the error." *Id.* at 14 n.56 (citing JX 290, 452, 700). It was clearly erroneous to find that Alex responded to the proposed resolutions insofar as they related to the option grant but remained silent as to Grauman's appointment. Alex's email concerning the option grant, initially to Heyrick, *preceded* Alderton's circulation of the resolutions. A198. That email eventually went to Alderton and caused him to include the option grant in revised resolutions later circulated. *Id.* At no point did Alex or Ricardo respond to Alderton's emails attaching proposed resolutions.

With respect to the option-grant issue, Palisades argued:

> the Bäckers took several specific actions to mislead and frustrate Altos's rights. First, Bäcker objected to a proposed resolution relating to options for his father, but "said nothing about the directorships." Alderton Dep. (JX452) 110:24-112:18. Bäcker's action—which created the impression that he would not object to the other

> proposed resolutions—was not silence. It was affirmative conduct calculated to mislead.

A1377. The Court of Chancery rejected this argument, holding that "there was no deceptive action relating to the appointment of the Series A-1 director [D'Addario] in advance of the November 15 meeting." Op. at 4. The same evidence of "no deceptive action" as to D'Addario cannot constitute evidence of affirmative deception as to Grauman. Apart from JX 224, which the Court of Chancery misinterpreted, there was no separate act of Alex and Ricardo related to Grauman but not D'Addario.

For affirmative deception, the evidence must show unequivocally that the person intended to mislead. In *Kalisman v. Friedman*, 2013 WL 1668205, at *5 (Del. Ch. Apr. 17, 2013), which Palisades proffered below, there was deception where "Company counsel [working in concert with one faction of the board] went so far as to represent to Kalisman, days before the March 30 meeting, that no transaction was under consideration," which was false. *Id.* Kalisman was also "told nothing was in the works"; told "the timing of the transaction was not known"; "assured that the transaction was not imminent"; and given misleading information in response to direct requests for information, all of which were untrue. *Id*. at *1; C.A. No. 8447-VCL, at 25-26, 31, 35 (Transcript) (Del. Ch. May 14, 2013) (Ex. 3); *see also Schroder v. Scotten, Dillon Co.*, 299 A.2d 431, 436 (Del. Ch. 1972) ("Mr.

Berg's absence from the December 23 meeting was obtained by Mr. Schroder's [false and express] representation that the meeting would not be held."); *Hockessin Community Ctr., Inc. v. Swift*, 59 A.3d 437, 458 (Del. Ch. 2012) (finding that an email falsely and expressly "represented that a transaction … was 'complete' … [and] sought to create the misleading and incorrect impression that the directors' only choice was whether or not to continue on a new advisory committee"). The evidence here does not show intentional misrepresentation by Alex and Ricardo.

iii. Palisades's Failure to Present the Theory of Affirmative Deception as to Grauman Confirms the Court of Chancery's Error and Prejudiced Alex and Ricardo

Palisades did not present below the theory that Anderson was duped by Alex and Ricardo into believing that they wanted Grauman on the Board or that they assumed Grauman had already joined the Board. Palisades's theory hinged on D'Addario.

The Court of Chancery, citing page 52 of Palisades's pretrial brief, recast Palisades's actual argument when it stated that "Palisades argues that even if D'Addario **and Grauman** were not elected to the Board, this Court should invoke its equitable powers to invalidate all actions undertaken by the Bäckers at the November 15 meeting." Op. at 18 (citing Palisades's Pre-Trial Brief at 52) (emphasis added); Op. at 27 (same). Page 52 of Palisades's

pretrial brief focused solely on the (non)election of D'Addario. Grauman was not even mentioned:

> Even if the Court were to determine that, as a technical matter, a unanimous written consent formally executed by Altos was necessary to seat D'Addario as the Series A-1 Director on October 28, equity independently warrants invalidating all of the actions purportedly taken by the Bäckers at the November 15 Meeting. **There were at least two inequities perpetuated by the Bäckers in advance of this meeting: the first was surprising the other directors at the November 15 Meeting with their objection to D'Addario's directorship; the second was refusing to allow Altos to correct any alleged mistake and seat D'Addario during the meeting, before any Board business, decisions, or votes took place**.

A1241-42 (emphasis added).

The grounds on which the Court of Chancery invalidated the November 15 Meeting were reached after trial for reasons not advanced by Palisades. This presents two independent bases for reversible error.

First, Palisades's failure to argue affirmative deception as to Grauman shows that the Court of Chancery misinterpreted the evidence. Palisades knew of JX 224, questioned Grauman about it, and properly characterized it as a request regarding a listserv. A1224. Had Anderson been deceived by JX 224 into thinking Alex had approved Grauman joining the Board, Anderson would have said so and Palisades would have argued as much. They did not.

Second, the Court of Chancery's holding, divorced from any theory advanced by Palisades, prejudiced Alex and Ricardo because they did not have a fair opportunity to respond. Had they known they would be accused of affirmatively deceiving Anderson into believing they would support Grauman's appointment, they could have tried the case differently. *See In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *22 n.117 (Del. Ch. Aug. 18, 2006) (raising defense in pre-trial briefing was too late and prejudiced other side who may have tried case "very differently"); *HOMF II Inv. Corp. v. Altenberg*, 2020 WL 2529806, at *1, *41 (Del. Ch. May 19, 2020) (post-trial claim "was never validly introduced into the case" and defendant was not "on notice of that theory before trial," even when similar theories and claims were made).

In *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, this Court reversed the Court of Chancery's calculation of a market price that was "not grounded in the record," as "neither party presented any evidence" to support the Court of Chancery's calculation. 210 A.3d 128, 133-34 (Del. 2019). Without "the ordinary adversarial process for testing the relevant factors," the decision was made by "the trial court alone." *Id.* at 139 n.58. The Opinion in this case suffers from the same procedural flaw.

iv. Alderton's Advice Secured Anderson's Attendance at the November 15 Meeting

The Court of Chancery found that "Anderson's presence [at the November 15 Meeting] was secured under deliberately false pretenses" and that if "Anderson had known of Defendants' change of plans, he would have refused to participate in the meeting, defeating a quorum and thwarting the coup." Op. at 30 (citing Anderson testimony).

The Court of Chancery erred by holding that Alex caused Anderson's attendance at the November 15 Meeting.

The night before the November 15 Meeting, Anderson and Alderton discussed the exact scenario that occurred on November 15. A639 (161:7-163:24). They discussed whether Alex might "tak[e] advantage of the fact that the – that he believed the A-1 seat was empty. … so he would constitute a majority of the board; and that he was going to step in and take all of these, what I refer to as aggressive actions to take back control of the company," and specifically "get rid of Kevin and take back control of the company as CEO." A639 (161:8-14); *id.* (163:9-14).

Palisades admitted that it "considered having Anderson and D'Addario not attend the November 15 Meeting to prevent a quorum, but **ultimately attended on the advice of Alderton** when Alex Bäcker did not propose any alternative agenda items." A1410 (emphasis added).

Anderson even issued an ultimatum, through Alderton, that Anderson "will not be joining the call if [the consent seating Grauman and D'Addario] is not signed in advance, which would leave us without a quorum and thus unable to conduct business." A263. Alex and Ricardo refused to comply with Anderson's ultimatum, and he attended and participated anyway.

During the November 15 meeting, Anderson and D'Addario had a side call with Alderton (excluding Alex and Ricardo) about whether they should leave the meeting. A523 (93-94). Relying again on Alderton's advice, Anderson and D'Addario remained in the meeting. *Id.* (94:22-23) ("Yeah, I think [Alderton] said this. Better to be on the call than not.").

It was Anderson's unshakeable confidence and belief that he and D'Addario held two votes—enough to block Alex and Ricardo's votes—that led him to attend and remain for the entire meeting. Through trial, Palisades insisted it was legally correct as to D'Addario's (non)election.

Finally, when Alex referred to the "bod" listserv in his October 28, 2019 email in JX 224, no one knew that Markman would resign weeks later on November 14, 2019, and leave Alex and Ricardo with a Board majority for the November 15 Meeting. Before Markman's resignation, Anderson's attendance was inconsequential for quorum purposes and Alex had no reason to "secure" it. And in the hours between Markman's resignation (when

Anderson's attendance suddenly had significance for quorum purposes) and the November 15 Meeting, Alex did not "secure" Anderson's attendance "under deliberately false pretenses" or even have an opportunity to do so.

2. The Court of Chancery Imposed an Equitable Advance-Notice Requirement for the November 15 Meeting That This Court Has Held Is Not Cognizable

a. Question Presented

Whether directors must disclose in advance of a regular board meeting their intent to act in a particular way at the meeting. Preserved at Op. at 30; A1280-81; A1390-92; A1413-17.

b. Scope of Review

This Court reviews legal issues *de novo*. *Kaung*, 884 A.2d at 508.

c. Merits of Argument

In *Klaassen*, this Court held that directors did not "violate[] an equitable notice requirement" when they plotted in secret to fire a fellow director as CEO. *Klaassen*, 106 A.3d at 1036. Klaassen argued that his fellow directors kept their plan secret because he would have "pre-empt[ed] those plans by changing the composition of the Board." *Id.* at 1040 n.30. "Klaassen's claim—that the Director Defendants were required to give him advance notice of their plan to remove him as CEO" at a regular meeting was not "cognizable under Delaware law." *Id.* at 1043.

In this case, the Court of Chancery held that "keeping mum as [Alex and Ricardo] planned their ambush was inequitable" because "[i]f Anderson had known of Defendants' change of plans, he would have refused to participate in the meeting, defeating a quorum and thwarting the coup." Op.

at 30. In so holding, the Court of Chancery relied on the general proposition from *Klaassen* that Delaware law does "'not approve the use of deception as a means by which to conduct a Delaware corporation's affairs.'" Op. at 30 n.121 (citing *Klaassen*, 106 A.3d at 1046 (citing *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971)). This Court did not, however, apply such a broad principle in *Klaassen*. This Court ruled more narrowly that advance notice of business is not required for regular board meetings. *Klaassen*, 106 A.3d at 1043-45. That specific rule must be applied here.

After post-trial briefing, the Court of Chancery requested supplemental briefing as to whether advance notice of Alex and Ricardo's actions at the November 15 Meeting was required. A1405-06 (Letter from Vice Chancellor Slights); A1413-18 (Bäckers' Letter Submission); A1407-12 (Palisades's Letter Submission). All the evidence showed that the November 15 Meeting was a regular meeting, except for one errant reference to a special meeting in Alderton's draft minutes. A1413-18. The Court of Chancery did not find that the November 15 Meeting was a special meeting. *Cf.* Op. at 10 (referring to "a special meeting of the Board" called in March 2019 as such, consistent with the parties' characterizations).

Because the November 15 Meeting was not a special meeting, *Klaassen* mandates that no legal or equitable advance notice was required.

The Court of Chancery's creation of an equitable advance-notice requirement for regular meetings was reversible error.

3. Anderson's Participation Throughout the November 15 Meeting Precludes Invalidation of the Board Actions

a. Question Presented

Whether the affirmative-deception rule of *Koch*, 1992 WL 181717, applies to regular board meetings, and if so, whether actions at the meeting can be invalidated where the deceived director participated and voted against all matters presented. Preserved at Op. at 30; A1416-17.

b. Scope of Review

This Court reviews legal issues *de novo*. *Kaung*, 884 A.2d at 508.

c. Merits of Argument

The Court of Chancery ruled below that the votes of a majority of *de jure* directors at a regular meeting must be voided if a dissenting director was deceived into attending the regular meeting even though the dissenting director participated throughout the meeting and voted against all matters presented during the meeting. Op. at 30. The Court of Chancery created this rule by expanding *Klaassen* and *Koch*, which described and applied, respectively, a rule voiding actions at special meetings where a director's attendance is procured by deceit or trickery and the director does not participate further in the meeting.

The Court of Chancery erred for two reasons. First, the *Koch* rule applies only to special meetings, not regular meetings like the November 15

Meeting. In *Koch*, the Court of Chancery held that if a director's presence at a special meeting was obtained by false pretenses, then the harmed director could seek to void the meeting actions. 1992 WL 181717, at *4. In *Klaassen*, the *Koch* rule was inapplicable because a regular meeting was at issue. 106 A.3d at 1044. A director cannot be deceived into attending a regular meeting for purposes of voiding action taken at the meeting.

Second, even if the *Koch* rule applied to the November 15 Meeting and this Court found that Anderson was deceived into attending, his thorough participation precludes invalidation. "Notwithstanding any deceit that may have been involved in calling a meeting, the actions taken **will not be invalidated where the deceived director remains at the meeting and participates throughout**." 1992 WL 181717, at *4 (citing *Dillon v. Berg*, 326 F. Supp. 1214, 1221 (D. Del. 1971), *aff'd*, 453 F.2d 876)) (emphasis added). "It is well established that the rule against obtaining a quorum through trickery does not apply where the director who has allegedly been tricked not only attends the meeting but also remains and participates in the entire meeting and in all its proceedings." *Dillon*, 326 F. Supp. at 1221 (citing 2 Fletcher, *Cyclopedia of Corporations* § 422 (Perm. Ed. 1969)); *see also Fogel v. U.S. Energy Sys., Inc.*, 2007 WL 4438978, at *3 (Del. Ch. Dec. 13, 2007) ("Where a director is tricked or deceived about the true purpose of

a board meeting, **and where that director subsequently does not participate in that meeting**, any action purportedly taken there is invalid and void.") (emphasis added).

The Court of Chancery in *Klaassen* recognized the full scope of the *Koch* rule: "where the deceived director remains at the meeting and participates throughout" the action taken at the meeting is not void or voidable. *Klaassen v. Allegro Dev. Corp.*, 2013 WL 5967028, at *8 (Del. Ch. Nov. 7, 2013) (quotation and citation omitted). Further, "[n]one of the precedents considered disadvantage in terms of rights held in other capacities, such as stockholder voting rights, nor did they frame the concept in terms of the individual's ability to affect the board's composition and preempt the board's decision." *Id.* at *9.

Because Anderson participated throughout the November 15 Meeting and voted against Grauman's termination, he was not disadvantaged. His inability to impose his preferred outcome is not a disadvantage. Even if *Koch* applied to regular meetings, the Court of Chancery should have found that the actions at the November 15 Meeting were not void or voidable because Anderson was not disadvantaged.

4. Palisades Is Not Entitled to Extracontractual Relief Related to the Voting Agreement

a. Question Presented

Whether it was reversible error to award extracontractual relief supplanting the Voting Agreement where the contract was not breached and contains its own enforcement mechanism. Preserved at Op. at 30; A1368-69.

b. Scope of Review

This Court reviews legal issues *de novo*. *Kaung*, 884 A.2d at 508.

c. Merits of Argument

The Court of Chancery rejected Palisades's argument that Alex and Ricardo breached the Voting Agreement: "it is not at all clear that Bäcker breached the Voting Agreement by refusing to recognize Grauman as a duly appointed member of the Board." Op. at 4; *id.* at 25 n.104. Moreover, Palisades did "not contend that the Voting Agreement, standing alone, impose[d] obligations on Alex Bäcker in his capacity as a director of the Company." A884-85 (No. 11). Thus, Alex and Ricardo, as directors, could not have breached the Voting Agreement.

But it was Alex and Ricardo's actions related to the Voting Agreement that led to the Court of Chancery's equitable invalidation. The Court of Chancery found that Alex and Ricardo:

> did affirmatively deceive the other QLess directors into attending the November 15 meeting on the

> belief that the Bäckers would honor the Voting Agreement by appointing Grauman to the vacant CEO director seat. As Grauman should have been appointed to the Board as of, or at, the November 15 meeting, the actions taken at that meeting lacked approval by a majority of the Board and are, therefore, voided, regardless of whether *vel non* Bäcker breached the Voting Agreement.

Op. at 5. Through equity, the Court of Chancery effectively seated Grauman as a director for the November 15 Meeting and cast his vote against the actions presented, creating a hypothetical 2-2 tie. *Id.* ("As Grauman should have been appointed to the Board as of, or at, the November 15 meeting, the actions taken at that meeting lacked approval by a majority of the Board").

Generally, "where a dispute relates to obligations expressly treated by contract, it will be governed by contract principles. If the fiduciary claims relate to obligations that are expressly treated by contract then this Court will review those claims as breach of contract claims and any fiduciary claims will be dismissed." *Nemec v. Shrader*, 2009 WL 1204346, at *4 (Del. Ch. Apr. 30, 2009) (internal citations and alterations omitted), *aff'd*, 991 A.2d 1120 (Del. 2010).

If Alex and Ricardo had breached the Voting Agreement, the Voting Agreement contains its own enforcement mechanism. If a party fails to take required action, the other parties have the right to exercise a proxy on behalf

of any defaulting party. A74-75 (§ 4.2). The contractual remedy is not the effective retroactive seating of Grauman and his hypothetical blocking vote.

Where the Voting Agreement was not breached, the Court of Chancery's award of extracontractual relief based on Anderson's impressions about Alex and Ricardo's intended compliance with the Voting Agreement was reversible error.

CONCLUSION

This Court should reverse the Court of Chancery's Opinion and Final Judgment and hold that the actions at the November 15 Meeting are valid.

/s/ Thomas A. Uebler
Thomas A. Uebler (#5074)
Joseph L. Christensen (#5146)
Hayley M. Lenahan (#6174)
MCCOLLOM D'EMILIO SMITH
UEBLER LLC
2751 Centerville Road, Suite 401
Wilmington, DE 19808
(302) 468-5960

Attorneys for Alex and Ricardo Bäcker

June 9, 2020