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IN THE

Supreme Court of the State of Delaware

ALEX BÄCKER and RICARDO BÄCKER, Defendants Below, Appellants, v. PALISADES GROWTH CAPITAL II, L.P., derivatively on behalf of QLESS, INC., Plaintiff Below, Appellees.	**No. 156, 2020** COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 2019-0931-JRS

APPELLEE PALISADES GROWTH CAPITAL II, L.P.'S ANSWERING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

In June 2019, Defendant-Appellant Alex Bäcker, the co-founder of QLess, Inc. ("QLess" or the "Company") and its majority common stockholder, was terminated as CEO by the QLess Board of Directors (the "Board") following an investigation led by outside counsel into troubling workplace complaints by Company employees. Bäcker resisted his removal at first, but eventually appeared to come around. Among other things, Bäcker led QLess's efforts to hire Kevin Grauman as QLess's successor CEO and feigned support for a series of governance actions the Board planned to take at its November 15, 2019 meeting. Those actions included confirming the appointment of Grauman as a director.

Bäcker's superficial support was a ruse. While ostensibly backing the actions planned for the November 15 Meeting, Bäcker secretly plotted his own agenda. And as soon as the November 15 Meeting began, Bäcker abandoned the scheduled governance items, declared that he and his father (Defendant-Appellant Ricardo Bäcker) comprised a Board majority, and passed a cascade of alternative resolutions. Among other things, the Bäckers purported to terminate Grauman as CEO, reappoint Bäcker to the CEO position, and pack the Board.

Five days later, Plaintiff-Appellee Palisades Growth Capital II, L.P. ("Palisades"), the majority holder of QLess's Series A Preferred Stock, filed this action challenging the Bäckers' ambush. Among other relief, Palisades sought a

declaration "that any actions purportedly taken by [the Bäckers] at the November 15, 2019 Board meeting are invalid and a nullity." The parties agreed to an expedited schedule and, over the next five weeks, produced over 15,000 documents and conducted eight fact depositions. On January 7, 2020, the Court of Chancery conducted a paper trial involving 495 joint exhibits. The parties continued honing their arguments in post-trial briefing.

On March 26, 2020, the Court of Chancery issued its post-trial opinion (the "Opinion"). In the Opinion, the Court followed *Schnell* in holding that because the Bäckers deceived Anderson into attending the November 15 Meeting when he otherwise would have abstained and defeated a quorum, their actions at the Meeting were invalid as a matter of equity.

The Bäckers appealed, and filed their Opening Brief in Support of Appeal ("Br. __") on June 9. This is Palisades' Answering Brief.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery did not erroneously construe JX224 (A172), much less "base" its factual determination that the Bäckers deceived Anderson into attending the November 15 Meeting on that exhibit. Rather, the Court relied on numerous pieces of evidence in arriving at its fact-based deception determination. As the Court itself explained, its "findings, and the final outcome, did not rest on any single piece of evidence. Certainly not on any single email." B266.

2. Denied. The Court of Chancery did not impose an "equitable advance-notice requirement," let alone one for a specific type of board meeting. Invalidating the fruits of inequitable deception is fundamentally different than imposing a notice requirement for board meetings. Given its factual determination that the Bäckers deceived Anderson into attending the November 15 Meeting, the Court reasonably determined that their actions at the Meeting should be invalidated as a matter of equity.

3. Denied. The Court of Chancery did not misapply *Koch* in determining that the Bäckers' deception warranted invalidating their actions at the November 15 Meeting as a matter of equity. Regardless of whether the November 15 Meeting was a regular or a special meeting (and the record indicates it was a special one), Delaware law does not countenance directors deceiving fellow directors. And even

assuming that Anderson's presence constituted "participation throughout the November 15 Meeting" (and it did not), the Court correctly concluded that the Bäckers waived the right to make that argument by failing to assert any equitable defenses at trial.

4. Denied. The Court of Chancery did not hold that the Bäckers "did not breach [the Voting Agreement] by refusing to recognize Grauman as a member of the Board." Instead, the Court determined that it "need not decide the issue" given its determination that the Bäckers' deception warranted invalidating their actions at the November 15 Meeting as a matter of equity. Opinion 27. Regardless, the Voting Agreement does not foreclose "extracontractual relief," and corporate actions in Delaware are scrutinized using a "twice-tested" framework that assesses the technicalities and equities alike.

STATEMENT OF FACTS

A. QLess and Its Investors

QLess has three primary stockholders: (i) Alex Bäcker,[1] QLess's co-founder and majority common stockholder; (ii) Palisades, QLess's majority Series A preferred stockholder; and (iii) Altos Ventures ("Altos"), QLess's majority Series A-1 preferred stockholder. Opinion 1, 6-7; A1168-69.

The Company has three key governance documents (A1170): (i) its Charter (A41); (ii) its Bylaws (A109); and (iii) a Voting Agreement between QLess, the Bäckers, Palisades, Altos, and others (A67). Although not all of these documents harmonize, there is no dispute that Bäcker controls the two Common Director seats, Palisades controls the Series A Director seat, Altos controls the Series A-1 Director seat, the parties jointly control a fifth Independent Director seat, and upon Bäcker's termination as CEO, the parties are obligated to create a sixth seat and appoint the successor CEO to fill it. Opinion 1, 6-7, 24-25, 26 n.105.

As of early 2019, the two Common Directors were Bäcker and Mike Bell. The Series A Director was Jeff Anderson (a Palisades principal), the Series A-1 Director was Ho Nam (an Altos principal), and the Independent Director was Ivan

[1] To distinguish between Alex and Ricardo Bäcker, Palisades refers to the former as "Bäcker" and the latter by his full name.

Markman. Opinion 9-10; A1172. Because Bäcker was QLess's CEO, there was no CEO Director seat.

B. Alex Bäcker Is Terminated as CEO.

"In early 2019 … the Company's employees began to report to the Board that Bäcker's leadership was creating a toxic work environment." Opinion 9 & n.23. Over time, "the Board grew worried that the Company was at risk of a mass employee exodus." Opinion 9; *see, e.g.*, B1.

Attempting to address these issues, Nam invited management consultants to meet with Bäcker. Opinion 10 & n.26. The Company also engaged a leadership coach. Opinion 9-10; A611 (50:14-16). Both attempts failed, and the Board ultimately "conclude[ed] that Bäcker should be terminated as CEO." Opinion 10.

Bäcker resisted. "[T]o secure his role as CEO," he replaced Common Director Bell (who supported Bäcker's removal), with someone "staunchly in Bäcker's camp" (his father, Ricardo Bäcker). Opinion 10-11; *see also* A1172; B18; B3; A918 (33:9-14). Bäcker also fired key members of QLess's management team and continued harassing others. Opinion 10; B19; B22.

Faced with mounting upheaval, the Board formed a special committee to investigate the complaints. Opinion 11; 1172; B30-32.[2] The committee hired its

[2] The Board initially attempted to meet on an emergency basis to form the committee, but moved the meeting after Bäcker objected that he was "not prepared

own outside counsel, who interviewed employees and evaluated their claims. Opinion 11. Counsel's subsequent report (a summary of which was entered into evidence) substantiated the complaints, "including that staff reasonably believed [Bäcker] 'retaliated' against employees, 'made demeaning comments or used demeaning language,' and 'made comments about (or to) women' that were offensive." Opinion 11-12 (citing B39). The committee then recommended that Bäcker be removed as CEO. Opinion 12 (citing B42-55).

The Board voted to terminate Bäcker on June 8, 2019, with Nam, Anderson, and Independent Director Markman voting in favor. Opinion 12; B45. Bäcker's termination constituted a "Bäcker Termination Event" under the Voting Agreement, Opinion 12 n.41; A1172-73, meaning that the parties were obligated to expand the Board to six directors. A68-69 (§ 1.2).

C. The Leadup to the November 15 Meeting

The Bäcker Termination Event precipitated a series of Board changes.

1. QLess Hires Kevin Grauman as Its New CEO.

After an extensive search run by Bäcker, the Company hired Kevin Grauman as its new CEO. Opinion 12; A986 (55:10-12). As Grauman settled into his

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to discuss the resolution you just sent me …. I have not received proper notice. The resolutions … purport[ing] to remove from daily oversight of operations the CEO require[] a very thorough analysis." A1002-03 (118:3-122:18).

management role, Anderson conveyed to Grauman that he wanted him appointed to the Board, as contemplated by the Voting Agreement. B57; A1283 (134:7-135:3); A68-69 (§ 1.2); *see also* A810-11 (41:10-42:25, 48:1-3).

2. Ho Nam Resigns as the Series A-1 Director, and Altos Identifies a Replacement.

On September 30, Nam resigned as the Series A-1 Director. Opinion 12; A1173. In Nam's words, Altos "did not think we could work with Alex." A734-35 (228:16-24).

Nam expressly reserved Altos's right to fill the Series A-1 Director seat with a replacement. B56. Anderson asked Nam to consider appointing Paul D'Addario, another Palisades principal, as his replacement. Opinion 12-13; A170. After considering the request, Nam agreed. Opinion 12-13; A170.

Rick Arnold, Altos's General Counsel, then asked Scott Alderton, QLess's outside General Counsel, to "draft and circulate the necessary stockholder consent to elect" D'Addario to the Board "as the Altos designee" and "fill the vacancy left by [Nam's] resignation … as soon as possible." B61-62; Opinion 13; A1173. Arnold later asked if Altos needed to provide anything else to effectuate the appointment, and Alderton advised that although Altos had "the contractual right to designate who the Series A-1 director will be," any remaining formalities with the appointment needed to occur at the Board level. B60; Opinion 13 n.49. Relying on

this (incorrect) advice, Altos took no further action to elect D'Addario. Opinion 13-14.[3]

3. The Parties Plan to Address Several Governance Items at the November 15 Meeting, Including Grauman's Appointment as the CEO Director.

By November, QLess had a backlog of governance changes that needed finalizing, including Grauman and D'Addario's appointment to the Board.

In preparing for the November 15 Meeting, Bäcker requested that Grauman be added to the Board's listserv. Opinion 14; A172. On November 11, Grauman circulated a "high-level agenda" that included matters of "Board hygene" [sic] and the "[d]iscuss[ion] and approv[al of] various resolutions." A183. After receiving that agenda, Bäcker asked that Grauman "circulate any proposed resolutions at least 48 hours before the meeting for review." Opinion 14; A204. Grauman asked Alderton to do so, and Alderton circulated draft Board resolutions and consents to the directors on November 13 and 15, respectively. B65; B111; *see also* Opinion 14.

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[3] The Bäckers characterize these actions as a "secret[] plot[]" involving "Palisades[,] … Grauman, [and] [Alderton] … to take control of the Board by convincing Altos to elect D'Addario." Br. 1; *see generally id.* at 8-12 (alleging a "Palisades-Grauman group" and citing communications from which the Bäckers were "excluded"). Not only do they cite no support for this assertion, but the Bäckers argued the opposite below: that Altos "did not have a firm intent to appoint D'Addario." Opinion 13 n.46. The Court of Chancery rejected that argument as "border[ing] on frivolous." *Id.*

The "Board hygiene" items, which Alderton had organized in the order they would be accomplished at the November 15 Meeting, included (i) memorializing Nam's resignation and Altos's election of D'Addario as the new Series A-1 Director, and (ii) expanding the Board to six directors and electing Grauman as the CEO Director. B65; B99; B111. Alderton viewed these items to be "administerial," A625 (107:9-20), and conveyed that passing the "housekeeping" resolutions, B63, would be "the very first" items addressed at the Meeting. B61; A832 (129:3-12).

4. The Bäckers Feign Support for the Planned Governance Items.

After requesting that they be sent, the Bäckers never objected to any of the circulated Board resolutions, including Grauman and D'Addario's appointments. Opinion 14. On the contrary, the only change requested by the Bäckers was to reflect a director option grant to Ricardo Bäcker. Opinion 14 n.56; *see also* B70.

After receiving the resolutions, Bäcker asked Grauman to circulate Board materials "so that *we* may all do *our* homework and be prepared to spend *our* time together most productively." Opinion 29-30 (emphasis in Opinion); A207. Bäcker also continued to assure Nam that he was satisfied with Grauman's performance as CEO. Opinion 29; A740 (249:5-250:22); A301.

To further bolster the appearance of agreement, the Bäckers intentionally ignored reminders from Alderton concerning the planned governance items. *Compare* A263, *with* B118; B119; B120; B121.

5. Ivan Markman Resigns as the Independent Director and the Bäckers Plan a Secret Coup.

Bäcker's ostensible support masked ulterior intentions. On November 13, Independent Director Markman returned a call from Bäcker to discuss the draft resolutions. Opinion 15; A575 (62:18-25). Bäcker's comments on this call "led Markman to believe Bäcker would try to reinstate himself as CEO." Opinion 15 (citing A576-77).[4] The next day, Markman resigned from the Board. Opinion 15; A1173. Like Nam, Markman concluded that he "just didn't have the time …. Alex is relentless. And it was pretty apparent from that conversation that [things] would be no different, if not even more intense, tha[n] what they had been previously." A577 (70:14-19).

Although they did not understand why Markman had resigned, the sudden resignation was disconcerting to Anderson and Alderton. A1099-A1100 (102:19-105:22); A627 (114:12-22). Anderson considered skipping the meeting to avoid a quorum, but he and Alderton ultimately concluded—based on Bäcker's actions and the fact that the "administerial" governance items would be passed at the outset—

[4] As Markman explained, Bäcker "never explicitly said" that he would attempt to reinstate himself, or even that he was dissatisfied with Grauman; rather, Markman developed a "sense" over "different points in time," including during his November 13 conversation. A574-77 (58:25-70:24); *contra* Br. 28-29, 30.

that Anderson should attend. Opinion 30; A627 (114:12-115:12); 651 (210:7-21); A1100 (105:23-109:17).

Unbeknownst to either, however, the Bäckers had already "leapt into action." Opinion 15. Mere hours after Markman's resignation, Bäcker circulated alternate proposed resolutions to Ricardo Bäcker and Patricio Cuesta, who Bäcker furtively planned to appoint to the Board. Opinion 15; A248. Bäcker did not share his alternative resolutions with Anderson or the others. Opinion 15, 30; A1022 (199:5-200:5); *compare supra* note 2.

Bäcker's secret resolutions "differed radically from the set Grauman had circulated a few days earlier." Opinion 15. For example:

- Whereas Alderton's resolutions recognized Nam's resignation and D'Addario's election, Bäcker's resolutions only recognized the resignation. *Compare* B99, *with* A252.

- Whereas Alderton's resolutions effectuated Grauman's appointment as the CEO Director, Bäcker's resolutions "terminated" Grauman as CEO, "[re]appointed" Bäcker as CEO, "ratif[ied]" a new employment agreement for Bäcker, and "appointed" Bäcker as the CEO Director. *Compare* B100-01, *with* A249-52.

- And whereas Alderton's resolutions took no action regarding the Common Directors, Bäcker's resolutions appointed a new Common Director (Cuesta) to replace the seat purportedly vacated by Bäcker in becoming CEO Director. *Compare* B100, *with* A250-51.[5]

[5] Bäcker's resolutions even purported to amend the Bylaws to permit a non-majority quorum. A250.

As the Court of Chancery recognized, "[t]hese moves, in total, would essentially lock in Bäcker's control of QLess." Opinion 16.

Unaware of the Bäckers' plan, Alderton circulated updated Board materials shortly before the November 15 Meeting that "address[ed] the re-constitution of the Board." B111. These materials mirrored Alderton's November 13 email and resolutions, but acknowledged Markman's resignation and were presented as consents. *Id.*; A273.

D. The Bäckers Ambush the November 15 Meeting.

Both sets of materials circulated by Alderton set the first order of business for the November 15 Meeting as the confirmation of D'Addario as the Series A-1 Director, followed by the expansion of the Board and confirmation of Grauman as the CEO Director. B65; B111. Anticipating that they would participate as directors, D'Addario and Grauman joined the Meeting, as did Anderson, the Bäckers, and Alderton. Opinion 16.

But as soon as the Meeting started, "Bäcker demanded D'Addario and Grauman leave the call." Opinion 16. After declaring that D'Addario and Grauman were not directors and that the Bäckers comprised a two-to-one majority, Bäcker "proceeded to vote through each of his proposed resolutions over the objections of Anderson and D'Addario." Opinion 16. Bäcker "passed" these resolutions rapid-fire without any chance for deliberation. A1119 (183:9-23); A520 (82:24-84:5);

A817 (70:13-71:24); A632 (135:8-14, 136:9-137:1). It was, as Anderson put it, "chaos." A1119 (183:9-23). Grauman recalled a "planned mutiny with a lot of forethought." A833 (135:18-136:1). D'Addario described an "ambush" and "a complete setup." A520 (84:4-5). After considering the evidence, the Court of Chancery similarly characterized the Bäckers' actions as an "ambush" and a "coup." Opinion 28, 30.

E. The Court Invalidates the Bäckers' November 15 Actions as a Matter of Equity.

Palisades challenged the Bäkers' actions under 8 *Del. C.* § 225 five days later. A304-27. Following expedited discovery, the Court of Chancery held a half-day paper trial on January 7, 2020.

At trial, the Court asked both sides to elaborate on Grauman's status before the November 15 Meeting. Palisades' counsel pointed to Alderton's communications:

> That's the third agenda item included in resolutions in both the November 13 email from Mr. Alderton and the second November 15 email.… [T]here [was] no question … as to whether that order of business was going to happen. There's no question whatsoever that Grauman was the CEO going into that meeting and that there was a contractual obligation that he be seated.

A1262-63 (49:3-54:7); *see also* A1262 (50:24-51:4) ("It was always the expectation that Mr. Grauman would be seated as the CEO. It was supposed to be at the November 15 meeting. They never got the chance to do that."). Palisades' counsel

also argued that even though "all parties, including the Bäckers, were contractually obligated to expand the board to six and then to [fill] that sixth position with … Grauman," the Bäckers' "blatant breach of [the Voting A]greement and frustration of the ability to have this play out at the board meeting" warranted the "use [of] equity to go back before the meeting where he was the undisputed CEO and to have him seated." A1283-84 (135:12-137:3).

The Bäckers' counsel conveyed that although he "understood" that Palisades "would like to nullify everything that happened in the meeting and reset the clock," the Bäckers viewed the request to be inappropriate. A1280 (122:8-16). According to the Bäckers' counsel, "the voting agreement is an agreement among the stockholders" and "does not impose obligations on people as directors." A1274 (100:2-5).

In post-trial submissions (which the Bäckers contended were not necessary because "[m]ore than fair opportunity ha[d] been provided to make any … arguments" (B203)), Palisades reiterated that the evidence "confirm[ed] that Palisades believed D'Addario and Grauman would be seated at the November 15 [M]eeting." A1402-03. Palisades also argued that "Alderton's choice of documentation did not … permit [the Bäckers] to ignore the meeting agenda and force through their secret plans." A1375. The Bäckers did not substantively respond to those points. A1380-94.

The Court of Chancery issued the Opinion on March 26. In the Opinion, the Court determined that Altos had not validly elected D'Addario to the Series A-1 seat in advance of the November 15 Meeting, holding that "although the intent to act may have been clear, the formalities embedded in Section 228 still must be followed." Opinion 19-22. The Court additionally determined that while "[i]t appear[ed] from the evidence that at least a majority of the QLess Board believed Grauman had been appointed to the Board prior to the November 15 [M]eeting, and stated as much in writing[,]" it "hesitate[d] to find" that these "less formal actions sufficed to evidence a Board 'resolution' that Grauman be seated …." Opinion 26-27. Instead, the Court held that it "need not decide the [Voting Agreement] issue" because the Bäckers' deception warranted invalidating their actions as a matter of equity:

> 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 …. As Anderson's presence at the meeting was secured under deliberately false pretenses, any action taken at that meeting is void.

Opinion 30; *see also id.* at 5, 27, 31.

This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT THE BÄCKERS DECEIVED ANDERSON INTO ATTENDING THE NOVEMBER 15 MEETING.

A. Question Presented

Was the Court of Chancery's factual determination that the Bäckers deceived Anderson into attending the November 15 Meeting clearly erroneous given, among other things, their ostensible support of Grauman's Board appointment while secretly planning to fire Grauman and subvert his impending seating? Opinion 12-16, 28-30.

B. Standard of Review

"The factual findings of a trial judge can be based upon physical evidence, documentary evidence, testimonial evidence, or inferences from those sources jointly or severally." *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000). "The fact that the appellant disagrees with the court's factual determinations is not a basis for reversal. Factual findings will not be disturbed on appeal unless they are clearly erroneous." *Brennan v. Abrams*, 215 A.3d 1283, 2019 WL 3883733, at *1 (Del. Aug. 16, 2019) (Table).[6]

[6] The Bäckers incorrectly assert that "[w]hether the evidence demonstrates affirmative deception is a mixed question of fact and law subject to *de novo* review." Br. 23 (citing *Zirn v. VLI Corp.*, 681 A.2d 1050 (Del. 1996)). The "mixed question[] of law and fact" that invoked *de novo* review in *Zirn* was whether "the VLI Board

C. Merits of the Argument

After considering the evidence, the Court of Chancery found that the Bäckers had "affirmatively deceived" Anderson concerning their purported support of Grauman's Board appointment and that "[i]f Anderson had known of Defendants' change of plans, he would have refused to participate in the [November 15 M]eeting, defeating a quorum and thwarting the coup." Opinion 29-30. These factual determinations were firmly grounded in the evidence.

1. The Court Correctly Concluded that the Bäckers Deceived Anderson Regarding Their Support of Grauman's Board Appointment.

The Court of Chancery considered several pieces of evidence in finding that "Bäcker affirmatively misrepresented to Anderson and others that he wanted Grauman on the Board, and that he assumed Grauman had already joined the Board." Opinion 29. For example, the Court considered:

- An email from Bäcker "request[ing]" that Grauman be "added" to a Board listserv, which the Court read to say: "Kevin [Grauman] is on the thread, assuming [the Board] now includes him, *which I requested it does*," Opinion 29 (citing JX224 (A172)) (emphasis in Opinion);

- Grauman's November 11 email "circulat[ing] a 'high-level agenda' for the November 15 meeting" and "Bäcker['s] respon[se] thanking him

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of Directors breached its fiduciary duty of disclosure …." *Zirn*, 681 A.2d at 1055. In contrast, the Court of Chancery's determination that the Bäckers deceived Anderson is a factual one independent of any legal determination like violations of the "duty of disclosure."

and asking him to 'circulate any proposed resolutions,'" Opinion 29 (citing A204);

- Draft documents circulated by Alderton to formalize Grauman's Board appointment, after which neither "Ricardo [or] Bäcker gave any indication that their position [concerning Grauman's appointment] had changed," Opinion 30 (citing A273)[7];

- An email from Bäcker to Grauman "[o]n the day before the [November 15 M]eeting, … 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," Opinion 29-30 (citing A207) (emphasis omitted);

- Testimony from Nam that "[Bäcker] said everything was fine" when Nam "asked [Bäcker]" in advance of the November 15 Meeting "how he thought [Grauman] was doing," Opinion 29 n.116 (citing A301); and

- Testimony from Grauman that he "also understood [Bäcker's JX224 (A172)] email to mean he was now a member of the Board," Opinion 29 n.116 (citing A812-13 (52:11-53:5)).

After evaluating this evidence, the Court reasonably concluded that the Bäckers gave "the impression that Bäcker had no issue with Grauman joining the Board" and that "Bäcker approved of Grauman's Board membership." Opinion 29-30.

The Court of Chancery also considered several pieces of evidence in finding that the Bäckers' ostensible support for Grauman was "deliberately false." Opinion 30. For example, Bäcker concocted alternative resolutions in secret, which he used to "railroad his position" at the November 15 Meeting. A817 (71:7); *supra* 12-14;

[7] While the Court cited the November 15 Board consents at A273 for this proposition, it also cited the substantively identical draft resolutions circulated by Alderton on November 13 at B67 and B99. Opinion 14 n.55.

Br. 15-16. Bäcker shared this alternative plan only with Ricardo Bäcker and Cuesta—not with Anderson, Grauman, D'Addario, or even Alderton. Opinion 15, 30; Br. 15-16. Indeed, the Bäckers intentionally ignored reminders from Alderton regarding the governance items that were to be effectuated at the outset of the November 15 Meeting. *See* A263; B111; B118; B119; B120; B121. All of this secret plotting occurred *after* the Bäckers signaled their support of Grauman's Board appointment, and *after* Bäcker requested that Grauman share intended Board materials in advance "so that *we* may all do *our* homework and be prepared to spend *our* time together most productively." Opinion 29-30 (citing A207).[8]

a. JX224 Was Not "The Foundation" of the Court's Deception Finding.

Ignoring most of the foregoing evidence, the Bäckers focus on the Court of Chancery's interpretation of JX224 (A172), an email in which Bäcker states that he "requested" that Grauman be "added" to "bod," a Board listserv. According to the Bäckers, this email, which they claim the Court wrongly interpreted, was "[t]he foundation of the Court of Chancery's finding of affirmative deception." Br. 26.

[8] To counter the finding that Bäcker had expressed approval of Grauman's Board appointment, the Bäckers misleadingly assert that Bäcker informed a "fellow director" that he actually wanted "to replace Grauman." Br. 29. It is unclear which "fellow director" Bäcker contends he informed. If Markman, the Bäckers are incorrect. *See supra* note 4. And if Ricardo Bäcker, then Bäcker's informing his own co-conspirator of his planned ambush is irrelevant.

First, the Opinion makes clear that the Court considered numerous pieces of evidence in determining that the Bäckers deceived Anderson. Opinion 29-30; *see also* Opinion 5-6, 14-16. As the Court itself subsequently confirmed, its "findings, and the final outcome, did not rest on any single piece of evidence. Certainly not on any single email." B266.

The Bäckers quibble with much of this additional evidence. For example, they:

- discount the Court's reliance on Bäcker's statements to Nam that he approved of Grauman's performance because Nam was no longer a director (omitting Nam's status as a significant stockholder and Nam's agreement with Anderson to appoint D'Addario), Br. 30;

- dismiss the parties' discussions concerning the November 11 "high-level" agenda (Opinion 29; A182-83; A187; A172; B66) because the agenda itself only stated "Board hygiene" and did not expressly discuss Grauman's appointment (omitting the multiple communications on the specific issue that followed, including the subsequent resolutions drafted and circulated *at the request of Bäcker himself*), Br. 31;

- characterize Alderton's November 13 circulation of the planned Board resolutions as "the first indication to Alex and Ricardo of these resolutions" (omitting that Alderton had just drafted them—again *at the request of Bäcker himself*—and that the intended Board appointments had been contemplated beforehand), Br. 13, 33;

- reject the Court's emphasis on Bäcker's use of "we" and "our" in JX296 (A207) (omitting that Bäcker's email, which he sent directly to Grauman, came after the parties had all received the November 11 agenda and November 13 resolutions), Br. 31; and

- charge the Court with conflating the November 13 resolutions with the November 11 agenda, (Opinion 14; B65) (omitting that the November 13 resolutions clearly contemplated Grauman's seating), Br. 32-33.

But even if these interpretations were plausible, "[t]he fact that the appellant disagrees with the court's factual determinations is not a basis for reversal." *Brennan*, 2019 WL 3883733, at *1. The Bäckers fail to explain why the Court's findings were unreasonable, let alone clearly erroneous.[9] Nor do they explain how any of the other evidence was contingent on the meaning of "bod."

Regardless, the Bäckers miss the point. Bäcker's request that Grauman be added to "bod" was deceptive regardless of whether the term "bod" simply referred to a listserv or carried more significant meaning. Bäcker's "request" that Grauman be "added to bod" conveyed that Bäcker believed Grauman would be participating at the Board level. A172. That "request" would have been pointless had Bäcker been candid about his plan to kick Grauman out of the Meeting and terminate him. Likewise, had Bäcker informed Anderson (and others) that there would be no need for Grauman to participate because Bäcker would seek his termination, all constituencies could have acted, or at the very least attended the November 15 Meeting prepared to discuss Bäcker's plan.

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[9] Indeed, the Bäckers' interpretation of "bod" is debatable at best. When Grauman was hired, the parties assumed that he would join the Board as required by the Voting Agreement. *See supra* 7-10. Against this backdrop, it was reasonable to interpret that Bäcker requested adding Grauman to the Board listserv because Grauman had been, or was being, added to the Board. Grauman believed just that. *See* A812-13 (52:11-53:5).

b. Deception as to Grauman Does Not Hinge on Deception as to D'Addario.

The Bäckers also point to the Court of Chancery's determination that it could not "turn back the clock and appoint D'Addario to the Board" because the Bäckers did not take any "deceptive action" to "prevent Altos from exercising its rights with respect to the Series A-1 Board vacancy." Opinion 4. According to the Bäckers, the Court's finding that there was no "deceptive action" as to D'Addario's appointment means that the Court cannot have found "deception" as to Grauman's appointment. Br. 24, 33-34.

The Bäckers' argument ignores the distinction between the Court's narrow determination that the Bäckers did not "prevent Altos from exercising its rights" and its broader determination that the Bäckers nonetheless acted inequitably. It also rests on the false premise that acting with fidelity as to one potential director means acting with fidelity as to all. Unlike D'Addario (who Bäcker tried to convince Nam not to appoint, *see, e.g.*, A202-03; Opinion 13 n.46), Bäcker ostensibly supported Grauman's position on the Board, and included Grauman in several Board communications before the November 15 Meeting. Opinion 29-30; B65; A172; A187. And unlike D'Addario, Bäcker repeatedly communicated with Grauman about the Board materials before the Meeting. A207; B65; Opinion 29-30.

To be sure, Palisades believes that Bäcker acted deceptively concerning D'Addario too. But the Court of Chancery did not need to "find deception" as to

D'Addario in order to "find deception" as to Grauman. Because the Court's distinction was "supported by the record" and was "the product of an orderly and logical deductive reasoning process," it was not "clearly erroneous." *CDX Hldgs., Inc. v. Fox*, 141 A.3d 1037, 1041-42 (Del. 2016).

2. The Court Correctly Concluded that the Bäckers' Deception Caused Anderson to Attend the November 15 Meeting.

The Court of Chancery determined that "[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." Opinion 30. The Bäckers contend that this was erroneous because Alderton, not Bäcker, procured Anderson's attendance. Not so.

First, in concluding that Anderson "would have refused to participate in the meeting" if he "had known of Defendants' change of plans," the Court of Chancery cited testimony from Anderson, who explained that he considered not showing up to the November 15 Meeting so as to defeat a quorum, but ultimately decided to attend because he "believed Bäcker did not control a Board majority." Opinion 30 n.122. If anything, Anderson's decision to attend the Meeting reinforces his

unawareness of Bäcker's impending ambush. The Court's crediting of Anderson's testimony was proper.[10]

In any event, the Bäckers' blank assertion that *Alderton* caused Anderson to attend the November 15 Meeting because he advised Anderson to do so, Br. 38-39, begs the question of *why* Alderton advised Anderson to attend. Alderton explained that although Markman's November 14 resignation was "surprising," A627 (115:13-116:5), he expected the actions in his draft resolutions (and email) to form the basis of the Board's discussions, and had no "indication … that Mr. Bäcker may have had something else planned." A625 (108:11-18). And even supposing that Bäcker might try to do something, Alderton "still wasn't overly concerned," because he "felt that … the board would … be obligated to take up the matter of the proper constitution of the [B]oard first before it took any action." A627 (114:12-115:4). When presented with Bäcker's secret alternative resolutions at his deposition, Alderton expressed shock: "I had no idea … until just now." A629 (122:1-16). In other

[10] Anderson's supposed "ultimatum" (Br. 39) changes nothing. What matters is that Anderson became comfortable attending given his (and Alderton's) belief, based on Bäcker's actions, that the planned governance items would be approved at the outset. *See supra* 11-12. Relatedly, Nam and Anderson's prior discussions about what might happen if the Independent Director seat was vacated does not mean that they "had prepared for Markman's resignation since at least 2019." Br. 14. If anything, these discussions underscore the serious problems with Bäcker's directorial fidelity and candor.

words, Alderton was just as tricked as Anderson. Whether through his own conduct or Alderton's, Bäcker's deception was the basis for Anderson's attendance.

At best, the Bäckers raise the possibility that multiple factors contributed to Anderson's decision to attend. But even if the Bäckers have identified a second potential interpretation of the evidence—*i.e.*, that Anderson's deception was the product of both Bäcker's ostensible support of the planned governance items and Aldertons' advice—"the factfinder's choice" "between two permissible views of the evidence" "cannot be clearly erroneous." *Poliak v. Keyser*, 65 A.3d 617, 2013 WL 1897638, at *2 (Del. May 6, 2013) (Table) (citation omitted).

3. The Court's Use of the Term "Affirmative Deception" Does Not Transform Its Factual Determination Into a Legal One.

Seeking higher scrutiny, the Bäckers repurpose the Court of Chancery's descriptive term "affirmative deception" as a doctrinal "standard," and describe the Court's factual determination as a "mixed question of fact and law subject to *de novo* review." Br. 4, 23. But far from defining a discrete legal theory (indeed, the term does not appear in any other Section 225 decision), the words "affirmative" (*i.e.*, "involving or requiring application of effort"[11]) and "deception" (*i.e.*, "the act of

[11] Merriam-Webster, "Legal Definition of affirmative," *available at* https://www.merriam-webster.com/dictionary/affirmative.

causing someone to accept as true or valid what is false or invalid"[12]) describe a common factual scenario justifying equitable intervention where directors mislead a fellow director.

The Bäckers nevertheless latch onto the term, claiming that "[f]or affirmative deception, the evidence must show unequivocally that the person intended to mislead." Br. 34. To be sure, overt lies present a straightforward basis for invalidating inequitable board action. The Bäckers cite three such cases, and there are many others. *Id*. (citing *Kalisman v. Friedman*, 2013 WL 1668205 (Del. Ch. Apr. 17, 2013); *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431 (Del. Ch. 1972); *Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d 437 (Del. Ch. 2012)); *see also Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035 (Del. 2014); *Koch v. Stearn*, 1992 WL 181717 (Del. Ch. July 28, 1992); *Fogel v. U.S. Energy Sys., Inc.,* 2007 WL 4438978 (Del. Ch. Dec. 13, 2007). But none of these fact-specific rulings requires an outright lie for relief. Nor could they, as deception can also occur through "deliberate concealment of material facts." *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). The scenarios in *Kalisman*, *Schroder*, *Hockessin*, *Klaassen*, *Koch*, and *Fogel* merely represent one half of the established principle that inequitable "disadvantage" at the Board level can arise "when [a] director lack[s] the ability to

[12] Merriam-Webster, "Definition of deception," *available at* https://www.merriam-webster.com/dictionary/deception.

engage, *either* because he was deceived … *or because the issue raised was entirely new and unanticipated*." *Klaassen v. Allegro Dev. Corp.*, 2013 WL 5967028, at *9 (Del. Ch. Nov. 7, 2013) (emphasis added).

At bottom, the determination of whether conduct is deceptive is a factual one. Because "affirmative deception" is not a discrete legal theory or prerequisite for relief, the Bäckers' contention that "[t]he evidence, properly interpreted, does not meet the standard for affirmative deception" is a non-sequitur. Br. 4.

4. Deception as to Grauman Was Fairly Presented Below.

In a final effort to contest the Court of Chancery's factual determinations, the Bäckers argue that "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' theory hinged on D'Addario." Br. 35. That argument is meritless.

In its complaint, Palisades sought the precise relief granted below: invalidation of all of the Bäckers' purported November 15 actions. A326. Indeed, the parties jointly identified that request in the very first paragraph of their stipulated pre-trial order. A1168; *see also* A1175.

The record moreover confirms that the parties understood Grauman's appointment to be a key part of Palisades' deception theory. For example, just five

days into the case, Palisades' counsel described the facts as follows during the parties' status quo argument:

> In short, it was everyone's understanding … going into the November 15th meeting that, one, Altos had designated Mr. D'Addario as its replacement director; two, *that Mr. Grauman would be confirmed as the CEO director*; three, that company counsel had circulated the documents necessary to effect these appointments; and four, that the parties would confirm the appointment at the meeting as required by the company's governance documents. But that is not what happened.

B131 (emphasis added). Later during that argument, the Court correctly summarized Palisades' position as "*Schnell*, *Schnell*, *Schnell*." B137.

Grauman remained a central part of Palisades' theory throughout the litigation. Grauman was the subject of both parties' discovery requests. B169; B184; B193. Grauman's presumed directorship was likewise explored during depositions. *See, e.g.*, A513 (54:15-22); A578 (73:25-74:22); A625-26 (108:11-109:3); A631 (129:16-19); A635 (146:3-15); A739-40 (248:10-250:6); A742 (257:9-258:12); A812-16 (52:11-53:5, 60:17-62:11, 68:1-69:25). And Grauman's presumed role as the CEO Director was highlighted by Palisades in its pretrial brief. A1245-48. Indeed, just four pages after the D'Addario-specific passage focused on by the Bäckers in support of their argument, Br. 35, Palisades argued that "Bäcker [did not] indicate to Nam in response to his specific questioning that there were any issues with Grauman's performance as CEO, which has now become Defendants' pretextual justification for their November 15 actions." A1245-46.

Exploration of Grauman's directorship continued at trial, with the Court of Chancery asking both sides to elaborate on Grauman's status. A1261-62 (48:21-52:4); A1274 (97:4-100:24); *see also supra* 14-15. After trial, Palisades accepted the Court's invitation for supplemental briefing on the issue, B208, reiterating that the record "confirm[ed] that Palisades believed D'Addario and Grauman would be seated at the November 15 [M]eeting." A1402-03. The Bäckers resisted, asserting that "[m]ore than fair opportunity ha[d] been provided to make any … arguments" concerning the "CEO Director provision." B202-03.[13]

In short, there was no surprise and the Bäckers' suggestion that they "did not have a fair opportunity to respond" to the "theory that Anderson was duped by Alex and Ricardo into believing that they wanted Grauman on the Board" should be rejected.

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[13] The Bäckers' reliance on the recent *Aruba* decision is therefore inapposite. Br. 37. In *Aruba*, this Court reversed the lower court's "use [of] the trading price as [its] sole basis for determining fair value" after finding that it was "not grounded in the record" because neither party suggested that approach or subjected the theory "to the crucible of pretrial discovery, expert depositions, cross-expert rebuttal, expert testimony at trial, and cross examination at trial." *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128, 133-34, 139 n.58, 140 (Del. 2019). Again, Palisades requested the very relief the Court granted, and everyone understood that Palisades' deception theory included Grauman's seating as the CEO Director.

II. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT THE BÄCKERS' NOVEMBER 15 ACTIONS SHOULD BE INVALIDATED AS A MATTER OF EQUITY.

A. Question Presented

Did the Court of Chancery err by invalidating the actions taken by the Bäckers at the November 15 Meeting as a matter of equity given, among other things, its factual determination that they deceived Anderson into attending the Meeting? Opinion 12-16, 28-30.

B. Standard of Review

This "Court reviews questions of law *de novo*." *Klaassen*, 106 A.3d at 1043. "[W]hether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*, but application of … facts to the correct legal standards … [is] reviewed for an abuse of discretion." *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013) (citation omitted).

C. Merits of the Argument

The Court of Chancery determined that the Bäckers acted inequitably by "affirmatively represent[ing] … that [they] supported Grauman's appointment to the Board" and then "keeping mum as they planned their ambush." Opinion 30. "As Anderson's presence at the [November 15 M]eeting was secured under deliberately false pretenses," the Court invalidated "any action taken" by the Bäckers at the Meeting. *Id.* Far from the novel extension of law portrayed by the Bäckers, the

Court's holding reflects a straightforward application of Delaware's foundational principal that "inequitable action does not become permissible simply because it is legally possible." *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

1. The Court's Invalidation of the Bäckers' November 15 Actions Was Consistent With Bedrock Delaware Law.

Delaware law fosters policies that "allow … directors the ability to deliberate openly and candidly with each other." *Disney v. Walt Disney Co.*, 2005 WL 1538336, at *4 (Del. Ch. June 20, 2005). Our law "value[s] the collaboration that comes when the entire board deliberates on corporate action and when all directors are fairly accorded material information." *OptimisCorp v. Waite*, 137 A.3d 970, 2016 WL 2585871, at *3 (Del. Apr. 25, 2016) (Table). And "[s]tockholders can entrust directors with broad legal authority precisely because they know that the authority must be exercised consistently with equitable principles of fiduciary duty." *Sample v. Morgan*, 914 A.2d 647, 664 (Del. Ch. 2007).

For this reason, "[c]ourts weighing claims under Section 225 … must review issues that could infect the composition of a company's '*de jure* directors and officers' under Section 225, notwithstanding formal compliance with the voting procedures and requirements for those offices." *Brown v. Kellar*, 2018 WL 6721263, at *6-7 (Del. Ch. Dec. 21, 2018) (quoting *Genger v. TR Inv'rs*, *LLC*, 26 A.3d 180, 200 (Del. 2011)).

> [In] every case, corporate action must be twice tested: first, by the technical rules having to do with the existence and proper exercise of the power; second, by equitable rules somewhat analogous to those which apply in favor of a *cestui que trust* to the trustee's exercise of wide powers granted to him in the instrument making him a fiduciary.

Adolphe A. Berle, *Corporate Powers As Powers In Trust*, 44 HARV. L. REV. 1049, 1049 (1931); *accord In re Inv'rs Bancorp, Inc. Stockholder Litig.*, 177 A.3d 1208, 1222 (Del. 2017); *In re Dell Techs. Inc. Class V Stockholders Litig.*, 2020 WL 3096748, at *33 (Del. Ch. June 11, 2020). This "balance between law (in the form of statute and contract, including the contracts governing the internal affairs of corporations, such as charters and bylaws) and equity (in the form of concepts of fiduciary duty)" is "[a]n essential aspect of our form of corporate law." *Sample*, 914 A.2d at 664.

Delaware courts have accordingly "displayed … vigilance … in ensuring the fairness of the corporate election process, and in particular the process by which directors are elected …." *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 67 (Del. Ch. 2008). In so doing, they have invalidated numerous technically compliant intra-director actions on equitable grounds, including:

- a bylaw amendment to accelerate the date of a stockholders' meeting and "obtain an inequitable advantage in the contest," *Schnell*, 285 A.2d at 439;
- a CEO termination at a meeting called purportedly to discuss financial issues, because even though the CEO director waived advance notice for the meeting, he "was disadvantaged by the other directors' failure

to communicate their plans to him," *Koch*, 1992 WL 181717, at *5, *overruled on other grounds by Klaassen*, 106 A.3d at 1047;

- a CEO termination and issuance of stock diluting the CEO director's ownership, because even though the CEO called the meeting, the other directors misrepresented their plans by discussing some agenda items with the CEO while keeping their intended dilution secret, *Adlerstein v. Wertheimer*, 2002 WL 205684, at *9, *11 (Del. Ch. Jan. 25, 2002);

- a CEO termination at a meeting called "with the stated purpose of interviewing and hiring a financial advisor" because the CEO director was "deceived into attending" by the other directors' "deci[sion] to keep secret their plan," *Fogel.*, 2007 WL 4438978, at *1, *4, *overruled on other grounds by Klaassen*, 106 A.3d at 1047;

- a board's ratification at a special meeting of its prior decision to remove its chairman because the chairman was told "that the meeting would not be held," *Schroder*, 299 A.2d at 436; and

- resignations of directors that were "obtained under false pretenses," *Hockessin Cmty. Ctr.*, 59 A.3d at 458.

Although these cases are highly fact-specific, they share the commonality of contested corporate action that was technically compliant yet nevertheless inequitable given director deception. As this Court has emphasized, "our courts do not approve the use of deception as a means by which to conduct a Delaware corporation's affairs …." *Klaassen*, 106 A.3d at 1046.

Of course, the deception present in *Schnell* and its progeny does not encompass the universe of inequitable conduct that might render board action invalid. "[A] court of equity generally does not favor bright-line rules, instead using its discretion to make decisions on a case-by-case basis." *Park Emps.' & Ret. Bd.*

Emps.' Annuity & Benefit Fund of Chi. v. Smith, 2016 WL 3223395, at *10 (Del. Ch. May 31, 2016), *aff'd*, 175 A.3d 621 (Del. 2017). Given the innumerable ways in which a board's deliberative process might be disrupted, the *Schnell* doctrine protects the "elasticity inherent in equity jurisprudence." *Nixon v. Blackwell*, 626 A.2d 1366, 1378 n.17 (Del. 1993).

Just four years ago, this Court reaffirmed the importance of the Court of Chancery's equitable authority to rectify director misconduct. In *OptimisCorp v. Waite*, this Court reviewed a controller-director's "claim … that the defendants who were directors of the company behaved inequitably by intentionally failing to provide him with notice that an important amendment to a stockholders agreement … would be on the agenda at a special meeting of the board." 2016 WL 2585871, at *2. After the Court of Chancery expressed skepticism that the director had a right to receive notice of the amendment because neither the DGCL nor OptimisCorp's governance documents required notice, this Court cautioned that the lower court's reasoning:

> obscure[d] the core equitable question, which is whether all directors are entitled to fair and non-misleading notice of the agenda for a special meeting. *Be it a director with a controlling interest or a director with only a handful of shares, we are uncomfortable embracing the idea that cliques of the board may confer and sandbag a fellow director*. … [W]e are reluctant to accept the notion that it vindicates the board's right to govern the corporation to encourage board factions to develop Pearl Harbor-like plans to address their concerns ….

2016 WL 2585871, at *2 (emphasis added). Notably, the director-defendants in *OptimisCorp* did not expressly "mislead" like the directors in *Koch*, *Fogel*, *Hockessin*, *Klaassen*, or many other Section 225 invalidation decisions had. Br. 34. But this Court found the distinction immaterial because "blindsiding" a fellow director is inequitable. *Id.* It furthermore commanded that "[o]ur law should develop in future cases when the outcome turns on it." *Id.*

Palisades' claims presented a classic twice-tested situation. From a technical standpoint, the Court of Chancery concluded that "Altos was the recipient of some erroneous legal advice," and failed to formally elect D'Addario prior to the November 15 Meeting. Opinion 28-29. And although it "appear[ed] from the evidence that at least a majority of the QLess Board believed Grauman had been appointed to the Board prior to the November 15 meeting," the Court "hesitate[d] to find" that there was any formal "'resolution' that Grauman be seated … in advance of the November 15 Meeting." Opinion 26-27. With neither D'Addario nor Grauman formally seated at the outset of the November 15 Meeting, the Bäckers arguably comprised a majority.

Yet the Bäckers also acted inequitably. Opinion 29. When the opportunity arose, they "leapt into action," plotting alternative Board actions that "differed radically from the set Grauman had circulated a few days earlier." Opinion 15.

While continuing to feign support for the Board's planned governance actions, the Bäckers worked behind the scenes to do the exact opposite. Opinion 14-16, 29-30.

The sandbagging continued during the November 15 Meeting itself. At the outset of the Meeting, the Bäckers took control, forcing through their alternate resolutions and engaging in the same "Pearl Harbor-like plans" that this Court renounced in *OptimisCorp*., 2016 WL 2585871, at *3. Because the Bäckers provided no indication of their plans in advance when it served their interests, *compare supra* note 2, Anderson was left "wholly unprepared for [several] important decision[s]," including firing QLess's CEO and approving Bäcker's proposed compensation package. *Klaassen*, 2013 WL 5967028, at *8. And by forcing through his resolutions over Anderson's objections, *see supra* 13-14, Bäcker "deprived [Anderson] of his ability as a director to participate" and "the board as a whole of its ability to engage in the type of informed deliberative process that Delaware law expects and requires." *Kalisman v. Friedman*, C.A. No. 8447-VCL, at 5 (Del. Ch. May 14, 2013) (Transcript).

Faced with this inequitable conduct, the Court of Chancery embraced the "bedrock doctrine" that Delaware courts "will not sanction inequitable action by corporate fiduciaries simply because the act is legally authorized." Opinion 28. The Court accordingly held that the Bäckers' actions, which were the byproduct of their

troubling deception, were "voidable" as a matter of equity. Opinion 28. That determination was reasonable and appropriate.

2. The Bäckers' Arguments Do Not Support Reversal.

The Bäckers pitched their actions below as "silence," asserting repeatedly that they merely "stay[ed] silent over a 24-hour period" before the November 15 Meeting, that "there was no deception[;] the Bäckers simply did not tip off the other side to their plans," and that "[s]ilence does not establish inequity." A1280 (122:23-123:1); A1282 (131:22-132:1); A1384-85; A1416-17. Palisades countered that *Schnell*'s equitable principles do not turn on wooden requirements like overt manipulation. *See, e.g.*, A1375-77. Palisades also highlighted the difference between passive acceptance of a windfall and strategic conduct that, although linguistically "silent," is intended to deceive. *See, e.g.*, A1377-79. After considering these arguments, the Court of Chancery sided with Palisades, finding that the Bäckers' deceit was "affirmative" regardless of whether it was clandestine.

On appeal, the Bäckers abandon their previous position, opting instead to employ a kitchen sink approach. None of their new arguments warrant reversal.

a. The Court Did Not Impose an "Equitable Advance-Notice Requirement."

Referencing this Court's holding in *Klaassen* that "corporate directors are not required to be given notice of regular board meetings" or "of the specific agenda items to be addressed at a regular board meeting," 106 A.3d at 1043-44, the Bäckers

contend that "the November 15 Meeting was not a special meeting," meaning "no legal or equitable advance notice was required," and "[t]he Court of Chancery's creation of an equitable advance-notice requirement for regular meetings was reversible error." Br. 42-43. The Bäckers' strawman argument does not support reversal.

Contrary to the Bäckers' suggestion (Br. 42), the Court of Chancery never decided whether the November 15 Meeting was a regular meeting or a special one. And the lone piece of contemporaneous documentary evidence—Alderton's draft minutes of the November 15 Meeting—states that the Meeting was a *special* one. A1413-18. Thus, even taking the Bäckers' interpretation of *Klaassen* as true, their argument rests on a false premise.

In any event, the type of meeting is immaterial given the circumstances of this case. Here, the source of inequity is not the lack of notice *per se*, but the Bäckers' decision to secretly plan an ambush after feigning support for the planned governance items. Having deceived Anderson into attending, equity did not permit the Bäckers to impose their own contrary actions at the November 15 Meeting.[14] As

[14] *Cf. Fort Meyers Gen. Empls' Pension Fund v. Haley*, --- A.3d ---, 2020 WL 3529586, at *12 (Del. June 30, 2020) ("It is elementary that under Delaware law the duty of candor imposes an unremitting duty on fiduciaries, including directors and officers, to 'not use superior information or knowledge to mislead others in the performance of their own fiduciary obligations.'" (quoting *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1989)); *Scion Breckenridge Managing*

this Court noted in *Klaassen*, *which itself involved a regular meeting*, "[o]ur courts do not approve the use of deception as a means by which to conduct a Delaware corporation's affairs, and nothing in this Opinion should be read to suggest otherwise." 106 A.3d at 1043-44 & n.68.

Far from imposing an "advance-notice requirement" on the Bäckers, the Court of Chancery invoked equity to invalidate the actions taken by the Bäckers after misleading their fellow director. That determination, which differs markedly from a holding requiring directors to always provide advance notice of their plans, reflects the principles of candor that apply regardless of whether a meeting is a regular or special one. The Bäckers tellingly identify no case holding that directors can secretly plot to deceive each other merely because the meeting in question is a regular one. Their "advance-notice" argument does not warrant reversal.

b. Anderson's Attendance at the November 15 Meeting Does Not Preclude Equitable Relief.

In the Opinion, the Court of Chancery cited *Koch v. Stearn* to support its conclusion that it "was inequitable" for the Bäckers to "affirmatively represent[] to Anderson (and Markman) that [they] supported Grauman's appointment to the

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Member, LLC v. ASB Allegiance Real Estate Fund, 68 A.3d 665, 679-80 (Del. 2013) (equitable remedy "available where a party can show that it was mistaken and that the other party knew of the mistake but *remained silent*") (internal quotation marks and citation omitted) (emphasis added).

Board" and then "keep[] mum as they planned their ambush." Opinion 30 & n.121. The Bäckers argue this was error too because (i) "the *Koch* rule applies only to special meetings, not regular meetings like the November 15 Meeting," and (ii) "even if the *Koch* rule applied to the November 15 Meeting …, [Anderson's] thorough participation precludes invalidation." Br. 44-45. Both theories fail for three reasons.

i. The Court Did Not Misapply *Koch*.

First, the Bäckers' legal argument regarding *Koch* – namely, that no notice is required for regular meetings – fails for the same reasons their *Klaassen* argument did. Again, statutory or contractual notice requirements do not preclude equitable relief. *See supra* 39-40. And as Palisades argued (and the Court of Chancery agreed) below, the Bäckers' "selective quotation [of *Koch*] ignores the actual result, which was that even though the director showed up at the meeting and objected to the actions being taken, he was nonetheless 'disadvantaged by the other directors' failure to communicate their plans to him.'" B258-59; B267-68.

ii. The Bäckers Waived Their Right to Assert a "Participation" Defense.

Second, the Bäckers' argument that Anderson's "thorough participation precludes invalidation," Br. 45, is one the Bäckers never raised below. Opinion 30 n.123. Instead, the Bäckers "simply denied that what they did was wrong or inequitable, a contention with which [the Court] disagreed, both as a matter of fact

and as a matter of equity." B267; *see also supra* 38. The Bäckers cannot assert their new "participation" defense for the first time on appeal. Del. Sup. Ct. R. 8.

iii. Palisades Did Not "Thoroughly Participate."

Finally, their waiver aside, the Bäckers' contention that Anderson "participat[ed] throughout" the November 15 Meeting is unsupported by the record. Participation by a director hinges not on "whether the director chose to vote or speak," but rather on his "familiarity with the issues being addressed." *Klaassen*, 2013 WL 5967028, at *8. "[W]hen [a] director lack[s] the ability to engage, *either* because he was deceived … *or* because the issue raised was entirely new and unanticipated," he cannot sufficiently participate. *Id.* at *9 (emphasis added).

By any reasonable measure, the Bäckers' deception materially deprived Anderson of his ability to participate. In failing to provide any indication of their proposed alternative agenda, the Bäckers left Anderson (and the other attendees) "wholly unprepared for [several] important decision[s]." *Id.* at *8; *compare supra* note 2. And by taking over the November 15 Meeting and forcing through his alternative resolutions, *see supra* 13-14, Bäcker "deprived [Anderson] of his ability as … a director *to participate*." *Kalisman*, Tr. at 5 (emphasis added). Although the Bäckers note that Anderson "voted against all matters presented," Br. 44, merely voting is not the same as "participating."

c. The Court Did Not "Supplant[] the Voting Agreement."

The Court of Chancery declined to find that the parties breached the Voting Agreement by failing to seat Grauman on the Board, determining that it "need not decide the issue" given that the Bäckers' deception rendered their actions invalid. Opinion 27. The Bäckers claim this constituted a holding that "Alex and Ricardo did not breach" the Voting Agreement, and that "[i]t was error, therefore, to award extracontractual relief invalidating the actions at the November 15 Meeting." Br. 5. This strawman does not support reversal either.

i. The Bäckers Used Their Directorships to Further Their Interest As Stockholders.

First, the Court of Chancery did not hold that the Bäckers "did not breach" the Voting Agreement. Br. 5. Rather, the Court determined that it "need not decide" whether the Bäckers breached the Voting Agreement. Opinion 27, 31.[15]

But even assuming the Court of Chancery determined whether a breach of the Voting Agreement occurred, the Bäckers' argument only works if they acted as stockholders and not directors. Most of the Bäckers' actions could only be taken by directors, including:

- terminating Grauman as CEO, A249;

[15] Nor did the Court of Chancery "seat Grauman and his hypothetical blocking vote." Br. 49. On the contrary, it held that "[t]he QLess Board comprises Alex Bäcker[,] Ricardo Bäcker[,] … and Jeff Anderson." Opinion 31.

- reappointing Bäcker as CEO and ratifying his employment agreement, A249-51;
- amending the Bylaws to change the quorum, A250; and
- appointing Bäcker to the CEO Director seat, A251.

Because the Bäckers were acting as directors, they were duty-bound to act in the best interest of the Company. *See Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) ("Corporate [fiduciaries] are not permitted to use their position of trust and confidence to further their private interests."). And because the Bäckers were bound to "conduct themselves accordingly," Opinion 5, the Court of Chancery was not constrained by the contractual limitations of the Voting Agreement in crafting relief. The Bäckers understood this distinction below, where they argued that the Voting Agreement only bound them as stockholders. A1274 (100:3-5); *see supra* 15.

ii. The Voting Agreement Does Not Foreclose Extracontractual Relief.

The Bäckers also posit that the Court of Chancery's ruling "supplanted" the Voting Agreement. Br. 47. But not only does the Voting Agreement provide for specific performance and other relief, A74-75 (§§ 4.2, 4.3), it expressly provides that "[a]ll remedies, either under this Agreement or *by law or otherwise afforded to any party*, shall be cumulative and not alternative." A75 (§ 4.4) (emphasis added). The parties to the Voting Agreement thus agreed that they could seek remedies not

specified in the agreement. As such, the Opinion did not "supplant" the Voting Agreement, even assuming it awarded "extracontractual" relief.

CONCLUSION

None of the many disagreements the Bäckers have with the Court of Chancery's determinations discredit the Court's core conclusion that the Bäckers acted inequitably, and that the fruits of their inequity should not be sanctioned "simply because [they were] legally authorized." Opinion at 28. For the foregoing reasons, the Court's invalidation of the Bäckers' actions at the November 15 Meeting should be affirmed.

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