IN THE SUPREME COURT OF THE STATE OF DELAWARE

WALTER E. RYAN, JR., and RYAN ASSET MANAGEMENT, LLC, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs Below, Appellants, v. TRACY ACCARDI, JAMES R. BERGMAN, JOSEPH R. BRONSON, TUNC DOLUCA, ROBERT E. GRADY, MERCEDES JOHNSON, WILLIAM P. SULLIVAN, WILLIAM D. WATKINS, MARYANN WRIGHT AND ANALOG DEVICES, INC., Defendants Below, Appellees.	No. 224, 2023 Court below: Court of Chancery of the State of Delaware C.A. No. 2022-0255-MTZ

CORRECTED
OPENING BRIEF OF PLAINTIFFS-BELOW/APPELLANTS
WALTER E. RYAN, JR. AND RYAN ASSET MANAGEMENT, LLC

OF COUNSEL: Clinton A Krislov Kenneth T. Goldstein Matthew G. Norgard Krislov & Associates, Ltd. Civic Opera Building, Suite 1006 20 North Wacker Drive Chicago, Illinois 60606 Telephone: 312-606-0500 Fax: 312-739-1098 Dated: August 22, 2023	LOIZIDES, P.A. Christopher D. Loizides (No. 3968) 1225 King Street, Suite 800 Wilmington, DE 19801 (302) 654-0248 *Attorney for Plaintiffs-Below/Appellants Walter E. Ryan, Jr. and Ryan Asset Management, LLC*

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NATURE OF PROCEEDINGS

This is a case about dishonesty of a board of directors. Arising from the merger of Maxim Integrated Products, Inc. ("Maxim") into Analog Devices, Inc. ("Analog" or "ADI"), this stockholder action was brought to redress the Defendants' agreement to "suspend" half a billion dollars of stockholder dividends, conceal its purpose and negotiation, and as well misleadingly diverting Maxim's shareholders from even learning of their right to have their dividends "unsuspended" and distributed three months before the merger closed, rather than just captured by the ADI acquirer.

Remarkably, Maxim's Board never told its stockholders the real reason for the dividend suspension—to mitigate ADI's asserted 50-50 risk that it be subjected to a post-acquisition U.S. tax liability for income from Maxim's offshore subsidiaries, nor that the dividend suspension was subject to a reasonable consent obligation in ADI, nor that the risk was eliminated by the company's receipt of an IRS Private Letter Ruling, eliminating the tax risk three months before the merger closed, such that ADI could not have refused Maxim's request for consent to distribute the suspended dividends. Indeed, although the defendants had concealed the connection between the suspension and the tax risk, such that Maxim stockholders had no knowledge of the connection between them the Board chose not to disclose the receipt of the tax ruling for months after it was received and in a footnote to the Company's annual report just days before the merger closed. The inevitable result was that the purchaser—ADI—pocketed $500 million that should have been distributed to Maxim's stockholders.

At the center of the concealment was Maxim's CEO, Tunc Doluca. In furtherance of his efforts to keep Maxim's stockholders in the dark, Doluca intentionally omitted from the proxy for the merger any discussion of the connection between the tax risk and the dividend suspension. Still worse, Doluca and the other Board members issued misleading "edited Q & A's" misleading stockholders about the basis for the suspension, omitted any explanation about the actual purpose of the dividend suspension, nor its subjection to a reasonable consent obligation in ADI, nor to its purpose, nor to the mooting of the tax risk; diverting them from inquiring of their rights to have the dividends unsuspended when the IRS Private Letter Ruling was issued three months before the merger closed, and did nothing to end the dividend suspension when the tax risk was eliminated. Defendants' disloyal conduct effectively transferred $500 million to ADI with zero benefit for Maxim's stockholders.

Despite this overwhelming factual basis in Plaintiffs' complaint to conclude that the Board breached its disclosure duty of loyalty, the Chancery

Court dismissed Plaintiffs' complaint under Chancery Rule 12(b)(6), as merely an exculpated duty of care. The Chancery Court concluded that despite the concealment and outright misrepresentations by the Board, the Board's conduct, as alleged in the Complaint, gave rise at most to breach of a duty of care which was exculpated under Maxim's articles of incorporation. Particularly when considering that a court must make all reasonable inferences in favor of a non-moving party on a motion to dismiss, the dismissal of the Complaint was a legal error.

Plaintiffs' aiding and abetting claim against ADI, from ADI's knowing initiation, participation and profit from the Defendants' omissions and actions. The Chancery Court dismissed this claim in its view that the claims against the directors constituting only exculpated duty of care, that the aiding and abetting "is dismissed for a lack of a predicate breach" (Opinion at 23.10). Respectfully, the law is that a third party, such as ADI, is not exculpated for its knowing participation and profit from duty of care breaches by those exculpated under Corp. Law §102(b)(7).

Accordingly, this appeal seeks reversal of the Chancery Court's dismissal of the Complaint, because the Complaint amply states a claim for breaches of full disclosure and loyalty, not merely an exculpable duty of care.

And, even if the Maxim defendants' breaches were merely to the duty of care, the aiding and abetting count would still survive as against ADI.

SUMMARY OF ARGUMENT

1. The Defendants' actions, in failing to disclose the negotiation and purpose of the dividend suspension, and in issuing misleading diverting statements, coupled with the concealment of the elimination of the tax risk, each, *whether considered separately or together,* constitute a breach of their duty of disclosure and loyalty--abundantly sufficient for the case to proceed. The Chancery Court erred as a matter of law in holding that the Complaint's allegations did not state a claim for breach of the duty of loyalty.

2. The dismissal of the Complaint conflicts with this Court's holdings *In re GGP, Inc. Stockholder Litigation*, 282 A.3d 37 (Del. 2022) [hereinafter "GGP"], that directors are bound by (i) a "fiduciary duty to disclose fully and fairly all material information within the board's control"; (ii) a duty "to avoid misleading partial disclosures"; and (iii) a duty to disclose when "the fact in question would have been *relevant* to [the stockholder]", regardless of how a stockholder might have voted. The Chancery Court wrongly ruled (a) that the Defendants' disclosure obligation comprised a mere duty of care, rather than of loyalty; (b) that the concealed information would not have changed the vote on the merger (which, in any event, is not the right test as held in *GGP*); (c) that the concealed information was mere " 'tell me more' information that our law does not

require"; and (d) that "[a] company is not required to inform stockholders of how every term of a merger agreement was reached and what concessions were given for which benefits."

3. Further, the Chancery Court ignored ADI's obligation in the Merger Agreement not to unreasonably withhold its consent to terminate the dividend suspension. Stated otherwise, once the sole reason for the dividend suspension (*i.e.,* the tax risk for foreign subsidiaries) was eliminated, there was no possible basis to keep the dividend suspension in place.

4. While reversing the dismissal of the claims against the Maxim defendants would also require the reversal of the dismissal of the claim against ADI, ADI nonetheless remains liable for its knowing initiation, participation and profit from its aiding and abetting the Maxim defendants' breaches, and is liable to the Maxim stockholders for their stolen dividends.

STATEMENT OF FACTS

Parties

Maxim was a Delaware corporation based in San Jose California, which, prior to the merger's closing, publicly traded under the symbol MXIM. (Complaint ¶6, Appendix 19 ("A__".)

Plaintiffs Ryan and Ryan Asset Management, LLC, individually were and have been at all relevant times, each a beneficial owner of shares of common stock in Maxim. (Complaint ¶7, A19.)

Defendants Tracy Accardi, James R. Bergman, Joseph R. Bronson, Robert E. Grady, Mercedes Johnson, William P. Sullivan, William D. Watkins and MaryAnn Wright were all directors of Maxim during the relevant period. (Complaint ¶¶ 8-10 and 12-16, A19.)

Defendant Tunc Doluca was President, Chief Executive Officer, and a director of Maxim (Complaint ¶11, A19).

ADI is a Massachusetts corporation, based in Wilmington, Massachusetts, publicly traded under the symbol ADI. (Complaint ¶17, A19.)

__**Key Provisions of Merger Agreement**__

SECTION 4 COVENANTS

4.1 Interim Operations.

(a) **The Company agrees that, during the period from the date of this Agreement through the earlier of the Closing** or the termination of this Agreement, **except (1) to the extent Parent shall otherwise give its prior consent in writing (which consent shall not be unreasonably withheld, conditioned or delayed)** * * * Without limiting the foregoing, during the period from the date of this Agreement through the earlier of the Closing or the termination of this Agreement, except (1) to the extent Parent shall otherwise give its prior consent in writing (which consent shall not be unreasonably withheld, conditioned or delayed)…**the Company shall not** (and shall not permit any Company Subsidiary to):

* * *

> **(iii) declare, set aside, make or pay any dividend or other distribution (whether payable in cash, stock or property) with respect to any shares of the Company's capital stock or the capital stock of any Company Subsidiary, other than (A) the Company's regular quarterly dividend on the Company Comm011 Stock to be declared and paid in the first quarter of the Company's 2021 fiscal year only, in a quarterly amount not to exceed the amount set forth in Part 4. l(a)(iii) of the Company Disclosure Schedule, or (B) dividends or distributions paid by any wholly owned Company Subsidiary to the Company or another wholly owned Subsidiary of the Company**;

A 119.

Exhibit A
Certain Definitions

Exchange Ratio. “Exchange Ratio” shall mean 0.6300. A 164.

Facts

None of the facts are disputed. The tax considerations aside, the facts of the case are really quite simple.

As detailed in the Complaint, (A15), the case arises from the merger of two "dividend dynasty" semiconductor chipmakers, by which ADI acquired Maxim, whose record of continuous and ever-increasing dividends over two decades was an acknowledged core part of its shareholder base capital structure. (Complaint ¶¶18-22, A20.)

Totally omitted from the proxy's extensive discussion of the negotiations over six months, was any disclosure of how and why the dividend "suspension" had come about. In fact, it was only after most all of the terms, including the exchange ratio, had been set, that Analog asserted a risk that it might face a post-acquisition U.S. federal tax liability for Maxim's lower tier foreign subsidiaries' offshore earnings, and inserted, into the Merger Agreement's §4.1 pre-closing operating conditions, a dividend prohibition/suspension for up to four quarters, itself subject to Analog's obligation not to unreasonably deny, delay, or condition consent to declare and distribute the suspended dividends. (Complaint ¶29, A23, Merger Agreement §4.1(a)(1)(iii)), A119.

Defendants’ proxy to Maxim shareholders (A173), despite an otherwise exhaustive eight page history of the negotiations, consideration, board approvals (Proxy at 72-78, A259-265), never disclosed how the dividend suspension had been negotiated, never revealed the connection between the dividend suspension and the tax risk, nor that an IRS private letter ruling was planned, or already being pursued, that would entirely moot and eliminate the risk of the feared post-closing tax liability, nor did they advise any stockholders of the IRS private letter ruling received May 24, 2021, *eliminating* that tax risk three months before the merger closed, such that Analog could not have reasonably refused consent to Maxim's distribution of the suspended dividends, totaling $500 million. (Complaint ¶¶ 33 ff, A26, esp. ¶54, A36-48).

Beyond the omissions, defendants separately issued and published an August 25, 2020 release of an “edited and revised ‘Qs and As’ session”, posing the question “Why did we suspend our dividend?” and answering it as merely “not unusual”, without revealing the purpose of the provision, or its negotiation (Complaint ¶56, A48), or its negotiation (¶62 ff., A50); which plaintiffs actually uncovered in their Section 220 records litigation (Complaint ¶¶72-82, A54-59), along with the discovery of Defendants’ “disciplined approach on written communication” (Complaint ¶91, A64) to avoid leaving a trail of their discussions.

It was only by Plaintiffs’ separate 220 records litigation, that uncovered the fact that the dividend suspension had been requested by ADI at the very end, after all other terms had been set, for its assertion of a 50-50 risk of a post-acquisition tax liability arising from Maxim’s earnings in its foreign subsidiaries. While there was disagreement over the likelihood of the liability (due to its questionably-adopted tax regulation, or its applicability to Maxim’s fiscal years involved), the Board agreed to mitigate the tax risk by agreeing to the dividend suspension, subject to a reasonable consent (actually, “which consent shall not be unreasonably withheld, conditioned or delayed” (Complaint ¶29, A23)).

Plaintiff Ryans’ 220 uncovering of the basis also uniquely enabled them to the significance of the later August 2021 disclosure of the fact that the tax risk to be mitigated had actually been rendered moot by an IRS Private Letter Ruling, issued May 24, 2021, three months before the merger closed, such that the Defendants (both the Maxim board and ADI) knew that the tax risk no longer existed, such that consent to unsuspend, declare and distribute the $500 million in suspended dividends could not have been reasonably refused, three months before the merger closed. Complaint ¶¶ 95-102, A66-70.

Plaintiffs assert liability against the Maxim Director Defendants for breach of fiduciary disclosure duties of loyalty for omissions and affirmative misstatements regarding the dividend suspension and choice not to seek consent to payment of the suspended dividends when the tax risk was eliminated by the IRS private letter ruling.

Plaintiffs also assert aiding and abetting liability against ADI for knowing participation and profit from the Maxim Defendants' breach of their fiduciary duties of full disclosure, loyalty and care.

ARGUMENT

I. The Court Below Erred in Granting Defendants' Motion to Dismiss on Plaintiff's Breaches of Fiduciary Claims because:

i. The decision below wrongly viewed the defendants' duty of disclosure as mere exculpable duty of care, rather than the non-exculpable duty of disclosure, requiring the directors to disseminate fully and fairly all material information within the Board's control; not just what might affect the vote, nor just what the Board chooses to disclose.

ii. Defendants' multiple and repeated omissions plus affirmative misstatements regarding the negotiation and purpose of the dividend suspension constitute a breach of the non-exculpable duty of full disclosure; both good faith and loyalty, not just care.

iii. The "suspended" dividends were a material item whose negotiation and purpose were wrongfully concealed from shareholders in the proxy.

iv. The defendants' argument that the dividend suspension was not subject to the obligation to not unreasonably deny, delay or condition consent, is utterly contrary to the explicit terms of the Merger Agreement.

A. QUESTION PRESENTED

Whether the Chancery court erred in dismissing the Complaint, as asserting breach of fiduciary duties of disclosure, care and loyalty. Plaintiffs raised this issue below as follows. Exhibit A, May 2, 2023 Tr. at 12-13; especially 13:8-10.

B. SCOPE OF REVIEW

"We review a trial court's ruling on a motion to dismiss *de novo*." We "(1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) do not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." Naturally, our review recognizes that stockholder plaintiffs often have the ability under Section 220 to obtain corporate documents in support of their claims, as the Plaintiffs did here. These documents, and other public materials that the Plaintiffs refer to, like the Proxy, necessarily shape the range of "reasonably conceivable" outcomes. *GGP,* 282 A.3d 54-55.

C. MERITS OF ARGUMENT

1. The decision below wrongly viewed the Defendants' duty of disclosure as a mere exculpable duty of care, rather than a non-exculpable duty of disclosure requiring the directors to disseminate fully and fairly all material information within the Board's control--not just what might affect the vote, nor just what the Board chooses to disclose.

In most every respect, the decision below (Exhibit A, May 2, 2023 Tr.) conflicts with this court's articulation of the directors' duties, both at the signing of the Merger Agreement and thereafter[1] through closing the merger, and to disseminate fully and fairly all material information within the Board's control; not just what might affect the vote, nor just what the Board chooses to disclose.

The decision below rejected the duty of loyalty claim (for failure to plead a conflicting interest in the transaction beyond the CEO's continued service with the acquirer)(Exhibit A, May 2, 2023 Tr. at 12-13), holding the claim that the directors should have sought consent to unsuspend the dividends as an exculpated breach of care (*Id*. at 13), rejecting the disclosure claim if it would not have affected the vote on the transaction (*Id*. at 14), and that when the IRS Private Letter Ruling was received, "there was nothing left for the stockholders to do with regard to the merger, and no pending request for stockholder action (*Id*. at 14), declared that the decision of whether to request the suspension be lifted was the board's decision, not the stockholders' (*Id*. at 15), discounted the Maxim board's published "edited Q&As" misleadingly describing the dividend suspension as just a typical provision in such deals, ("A company is not required to inform

[1] The directors of a Delaware corporation have a continuing obligation to discharge their fiduciary responsibilities, as future circumstances develop, after a merger agreement is announced. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 938 (Del. 2003)

stockholders of how every term of a merger agreement was reached, and what concessions were given for which benefits." (*Id*. At 17)).

This Court's considered explication of the duties of directors in *GGP* makes it clear that the fiduciary obligation to disclose includes all information that stockholders would view as important, not just information that might have changed the vote**:**

> W[e] turn next to the Plaintiffs' claim that *GGP*'s directors violated their fiduciary duty of disclosure when they drafted the Appraisal Rights Notice and the rest of the Proxy.
>
> IV
> The Complaint alleges that the Defendants made materially misleading disclosures regarding the *GGP* stockholders' appraisal rights.[138] According to the Plaintiffs, these flawed disclosures were part of an intentional effort to structure and describe the Transaction in a way that would mislead stockholders and dissuade them from dissenting from the Transaction and exercising their appraisal rights.[139] …Accepting, as we must, all well pleaded factual allegations in the Complaint as true, and drawing all reasonable inferences in the Plaintiffs' favor, we conclude that the Plaintiffs have stated a claim that the Director Defendants violated their fiduciary duty of disclosure with Brookfield's support. [*Footnotes omitted*.]

GGP, 282 A. 3d at 62

The Court then defined the fiduciary duty of disclosure as "a fiduciary duty to disclose fully and fairly *all material information* within the board's control:

> The fiduciary duty of disclosure is a sharpened application of corporate directors' omnipresent duties of care and loyalty that obtains when directors seek stockholder action, such as the approval of a proposed merger, asset sale, or charter

amendment.[140] In these situations, directors have "a fiduciary duty to disclose fully and fairly all material information within the board's control[.]"[141]

[140] *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998); *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000) ("The duty of disclosure is a specific formulation of those general duties that applies when the corporation is seeking stockholder action."); *see also Orchard Enters.*, 88 A.3d at 16-17 (summarizing duty of disclosure doctrine).

[141] *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992); *Appel v. Berkman*, 180 A.3d 1055, 1057 (Del. 2018) ("Precisely because Delaware law gives important effect to an informed stockholder decision, Delaware law also requires that the disclosures the board makes to stockholders contain the material facts and not describe events in a materially misleading way.") (internal citation omitted) (citing 2 Stephen A. Radin, *The Business Judgment Rule* 1715 (6th ed. 2009)).

This specific disclosure duty is independent from a corporation's statutory obligation to notify its stockholders of their appraisal rights under Section 262. It is also distinct from a director's fiduciary duty to avoid misleading partial disclosures.[142] Of course, these separate obligations may overlap, especially where, as here, corporate directors seek stockholder ratification of a proposed transaction that triggers the statutory appraisal remedy.

[142] *Zirn v. VLI Corp.*, 681 A2d 1050, 1056 (Del. 1996); *see also Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994) ("[O]nce defendants traveled down the road of partial disclosure of the history leading up to the Merger and used the vague language described, they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events").

….. **Notably, "the question is not whether the information would have changed the stockholder's decision to accept the merger consideration, but whether 'the fact in question would have been relevant to him.'" [Emphasis added.]**[146]

[146] *Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 115 (Del. 1992) (citing *Barkan v. Amsted Indus.*, 567 A.2d 1279, 1289 (Del. 1989).

GGP, 282 A.3d at 63.

The court then sorts between care and loyalty, in analyzing the directors' obligations:

> Because the duty of disclosure sounds in the fiduciary duties of both care and loyalty, certain violations fall within the coverage of exculpatory charter provisions authorized by 8 Del. C. § 102(b)(7). Section 102(b)(7) allows stockholders, via a provision in the corporate charter, to eliminate or limit "the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as director[.]"[147]
>
> [147] *8 Del. C. § 102(b)(7)*.
>
> Critically, Section 102(b)(7) provisions may not exculpate directors for their breaches of the duty of loyalty or "acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law[.]"[148]
>
> [148] *Id.* Two other categories also may not be exculpated: violations of *8 Del. C. § 174* and violations relating to "any transaction from which the director derived an improper personal benefit." *Id.*
>
> Thus, "[a] good faith erroneous judgment as to the proper scope or content of required disclosure implicates the duty of care rather than the duty of loyalty" and may be exculpated.[149] However, "where a complaint alleges or pleads facts sufficient to support the inference that the disclosure violation was made in bad faith, knowingly or intentionally, the alleged violation implicates the duty of loyalty" and may not be exculpated.[150] Here, *GGP*'s charter includes a provision that exculpates directors to the fullest extent authorized by Section 102(b)(7).[151] The Plaintiffs allege that this does not protect the Director

> Defendants because they intentionally misled stockholders about their appraisal rights in the Proxy.[152] [*Footnotes omitted.*]

This Court in *GGP* concluded the disclosures there, relevantly informing GGP's stockholders of their rights and benefits in seeking appraisal of their stock confusing and misleading, in one respect over the calculation of appraisal results; the other over their ability to claim appraisal rights at all. *GGP*, 282 A.3d at 45-47.[2]

As applied here, the question of Maxim's shareholders' ability to obtain their suspended dividends, which (had they known of the consent connection to the tax risk) would clearly have required someone to request and obtain ADI's consent to unsuspend and distribute the dividends when

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[2] Similarly, *see In re PLX Tech. Stockholders Lit.*, 2018 Del.Ch. LEXIS 336, *70-71, 2018 WL 5018535 (Del.Ch. 2018):

> **1. The Disclosure Claim**
>
>] When asking stockholders to tender into the first step of the medium-form ***Merger***, the members of the Board owed a "***fiduciary duty*** to disclose fully and fairly all material information within the board's control when it seeks shareholder action."[434] A fact is material "if there is a substantial likelihood **[*71]** that a reasonable shareholder would consider it important in deciding how to vote."[435] **The test does not require "a substantial likelihood that [the] disclosure . . . would have caused the reasonable investor to change his vote."**[436] The question is rather whether there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[437]

(and if) they had also been apprised timely of the May 24, 2021 receipt of the IRS Private Letter Ruling mooting the tax risk purpose of the suspension and rendering a refusal to consent as unreasonable.

But, far worse than the mere confusion of GGP's description of stockholders' appraisal rights (*GGP* at 52-57), the Maxim Defendants not only concealed any information about the negotiation of the suspension and its purpose, they chose to issue the plain "edited Q&As" statement, misrepresenting the suspension as a given, routine thing, without any disclosure of its connection to the tax risk, nor that it was subject to a reasonable consent obligation.

Thus, while the GGP statements might have confused stockholders about their rights, the Maxim Defendants intentionally omitted anything that would have even alerted them at all to their right to receive the $500 million in suspended dividends due to an event that might (and later did) occur subsequent to the vote. And, different from the GGP shareholders, whose harm was merely "reasonably conceivable" (*GGP* at n.176), here the harm -- $500 million in dividends captured for the Analog acquirer -- is concrete and measurable to the penny.[3]

[3] At its regular quarterly rate of $.49 per share, the 266.8 million outstanding Maxim shares' loss exceeds $512 million.

And, while it was no defense there, that the stockholders in *GGP* could have figured out the truth (*GGP* at n.177):

> Third, at oral argument, the Defendants suggested that the Proxy was not misleading at all because stockholders could have disregarded the defined terms and come to the independent conclusion that "consideration provided in the merger" included *both* the Pre-Closing Dividend and the Per-Share Merger Consideration.

By contrast, here the relevant facts (that the dividend suspension was to mitigate a tax risk, and was itself subject to a reasonable consent obligation) were entirely concealed from Maxim's stockholders. If their merely confusing disclosures in *GGP* were insufficient to discharge the Board's duty of disclosure, then *a fortiori,* the willful concealment of the entire purpose of the dividend suspension was still more clearly a breach of that duty.

If this were not enough, the Defendants' issuing the "edited Q&As" explicitly posing the question of why the dividends were being suspended, their posed answer labeling this as a routine thing, obligated them to be forthright and full in their disclosure of the reason for the dividend suspension, its negotiation and its being subject to a reasonable consent obligation when it was no longer needed.[4] In short, having chosen to speak, issuing posed "Questions and Answers" they had an obligation to be truthful and full. *See GGP*, 282 A.3d at 57-58:

> Thus, whether or not the Defendants were originally required to tell stockholders how the complex Transaction they designed would affect their appraisal rights, once the Defendants attempted to offer such an explanation, they were required to be correct and complete.

Against this standard, that the way in which the appraisal rights were presented were misleading, the *entirely concealed* suspension negotiations and consent provision were omissions that left stockholders with *no* information whatsoever of how the dividend suspension was negotiated, the fact that a consent provision existed, and how it worked with the tax risk—are vastly greater breaches, because stockholders had no knowledge whatsoever of their rights to their "suspended" dividends.

Misstatements and omissions are actionable when done to induce, or lull into, *inaction* as well. While the Chancery Court's ruling (Exhibit A,

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[4] *In re Mindbody, Inc.*, 2023 Del. Ch. LEXIS 65, at *97-98 (Del. Ch. Mar. 15, 2023) ("Although a fiduciary need not give a play-by-play account, "when fiduciaries choose to provide the history of a transaction, they have an obligation to provide shareholders with 'an accurate, full, and fair characterization of those historic events.'" "[O]nce defendants travel[] down the road of partial disclosure of the history leading up to the [transaction] ..., they ha[ve] an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events.").

May 2, 2023 Ruling Tr. at 14:12, "Our law requires directors 'to disclose fully and fairly all material information within the board's control when it seeks shareholder action'"), views misstatements as material if seeking to induce shareholder *action (which this court viewed as the shareholders' vote on the merger)*, the directors' obligation is to disclose fully and fairly all material information within the board's control when they seek to induce *inaction*, as well. Nonetheless, in context, the obligation to fully disclose is not limited to facts which would induce action, but requires the disclosure of all material facts per se.

The *"Edited and Revised Q&A's".* Even if the *omissions* were alone insufficient to convince the Court to permit this Complaint to proceed, the Maxim board's self-initiated "Edited and Revised Q&A's" which raised the dividend suspension issue and answered it in a way that diverts any further focus on the issue, as if it were a generic restriction, must bring the aggregate of the Defendants' actions over any acceptable line of honest fair dealing with their stockholders to whom they owed fiduciary duties to the instant of closing.

Delaware law is well-established that where a board affirmatively chooses to speak, that obligates it to do so fully, honestly and transparently. As this court noted in *GGP*:

> *Zirn v. VLI Corp.*, 681 A2d 1050, 1056 (Del. 1996); *see also Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994) ("[O]nce defendants traveled down the road of partial disclosure of the history leading up to the Merger and used the vague language described, they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events"). *GGP*, n. 142.

This is more than a mere breach of the duty of care. This is affirmative disloyalty. Having decided to speak, the defendants had an obligation to speak truthfully and fully. *In re Mindbody, Inc.*, 2023 Del. Ch. LEXIS 65, at *97. Instead, their posing the question and answering it in a way that diverts any further exploration, is disloyal, without our having to show either the speakers' financial conflict, nor stockholders damages, regardless of showing CEO Doluca's receipt of any consideration beyond his continuation on the buyer's board and attending compensation.

Finally, Plaintiffs respectfully submit that the Court below erred in holding that "Plaintiffs did not argue that this omission was material to the stockholder vote on the merger." Exhibit A, May 2, 2023 Ruling Tr. at 13:24-14:2. That holding led the Court to conclude that: "It is undisputed that the disclosure of the risk that inspired the negotiated suspension of dividends would not alter the total mix of information stockholders needed to vote on the merger." *Id*. at 14:2-6.

This is incorrect, and Plaintiffs expressly rejected this suggestion at oral argument.

> THE COURT: And what is the source of the duty to tell the stockholders that if it wasn't material at the time of the vote?
>
> ATTORNEY KRISLOV: Well, at the time of the vote -- here's our view of -- at the time of the vote it was -- it was material. They should have disclosed it.

Jan. 26, 2023 Tr. at 42:6-8, A525; *see also* 43:5-6, A526 ("At the time of the vote, it would have been a material item."). Plaintiffs adequately pled in their Complaint that the issuance of dividends was an integral and material interest of Maxim's stockholders. Complaint ¶¶ 20-27, A20-23. Plaintiffs argued the same at the motion to dismiss hearing. Jan. 26, 2023 Tr. at 43:5-44:9, A526-527.

2. The "suspended" dividends were a material item whose negotiation and purpose were wrongfully concealed from shareholders in the proxy.

When a stockholder asserts a disclosure violation linked to a request for her vote, "the essential inquiry . . . is whether the alleged omission or misrepresentation is material," and the stockholder need not prove reliance, causation, or damages. Information is considered material "if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote." Stated another way, there must be "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the 'total mix' of information made available." **Notably, "the question is not whether the information would have changed the stockholder's decision to accept the merger consideration, but whether 'the fact in question would have been relevant to him.'" [Emphasis added.]** *GGP,* 282 A.3d at 63 (Del. 2022).

By this standard, there can be no question that, for the Maxim shareholders the suspension of half a billion dollar of dividends was *highly* material. Indeed, Maxim had explicitly and repeatedly declared that dividends were an intrinsic part of the Maxim corporate capital strategy:

> Dividends
> At Maxim Integrated, and integral part of our capital strategy is to ensure that we are returning cash to our shareholders regularly. Since 2002, Maxim has methodically issued quarterly dividend payouts to our shareholders with consecutive annual increases since 2010. For fiscal year, we are currently returning a quarterly dividend of $0.48 per share to our shareholders. Please see our latest quarterly filing for more information.[1]
>
> [1] https://investor.maximintegrated.com/stock-information/default.aspx?section=dividends viewed Oct. 6, 2020.

Thus, for Maxim stockholders, the dividends were indisputably a material consideration[5], such that the reasoning, negotiations, and connection to and mooting of the tax risk, were material items that should have been disclosed in the proxy, even if they would have still voted in favor of the merger -- especially since, if the connection had been disclosed to them, they would have certainly demanded the unsuspension/distribution of tax risk for the suspension three months before the merger's closing.[6]

3. Defendants' multiple and repeated omissions plus affirmative misstatements regarding the negotiation and purpose of the dividend suspension constitute a breach of good faith and loyalty, not just care.

Plaintiffs fundamentally dispute the Court's conclusion below that Defendants' intentional omissions and misstatements, resulting in a $500 Million transfer to Maxim's acquirer, should be viewed as a mere exculpated breach of the duty of care. Rather, Plaintiffs believe that the Defendants' actions, *viewed as a whole* (and as pled), considering Defendants' **omissions *and* affirmative statements**, support the claim of bad faith disloyalty.[7] *See*

[5] At the time the merger was signed, the $1.92 annual dividend itself represented a 2.2% additional annual payment for Maxim's shareholders.
[6] While dividend declarations are usually the board's to declare, in context, an individual shareholder's request could not have been reasonably denied.

[7] Conceptually, the wrong here could be likened to the difference between a Lithium battery company's management negligently parking the truck with

Morris, Nichols, Arsht & Tunnell v. R-H Int'l, Ltd., 1987 WL 33980, at *2 (Del. Ch. Dec. 29, 1987) ("[T]he Court must review the complaint as a whole to determine what [the plaintiff] is really seeking.").

That this is disloyalty rather than mere duty of care goes to the heart of the matter. In wrongfully capturing $500 Million of "suspended" dividends for the ADI acquirer, rather than either seeking ADI's consent for the distributions, or even giving the Maxim shareholders just the information that would have alerted them to their right to this money is, Plaintiffs submit, non-exculpable disloyalty, certainly for someone like Doluca, who would continue onto the acquirer's Board and payroll, without having to identify specific individual profit for each compliant director.[8]

Defendants' multiple Omissions. Defendants' Proxy omission of any explanation how the dividend suspension came about or its relation to the tax risk is inexcusably disloyal. That is especially so, in light of Defendants' own twelve cited examples of other transactions with dividend

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$500 million of Lithium in street parking and it being towed away and destroyed by the City (a gross breach of care), versus secretly parking it in the acquirer's lot without disclosing it to the acquired company's stockholders (a violation of loyalty).

[8] Additionally, the lack of any mention in the 220 discovery of Maxim seeking a private letter ruling from the IRS, is strong evidence that the defendants began working on the ruling *post-signing*, to protect the *acquirer's* interests.

suspensions. *See* Defendants' Opening Brief at 22, A604, Exhibits 19-30, A616. Each one of those proxies included a detailed explanation of how the dividend restriction had been negotiated, and for what the suspension was exchanged. *See* Plaintiffs' Answering Brief at pg. 18, n.42, A719, and attached Exhibit A, A733. Defendants' proxy omission utterly conflicts with their own cited examples.

Compounding the disloyalty was the Defendants' further omission to file an SEC Form 8K report when the May 24, 2021 tax ruling was received.[9] Instead, three months later, Defendants mentioned it as a note in the interim SEC Form 10K (initial Annual Report for the June 23, 2021 fiscal year) filed just six days before the August 26, 2021 closing, explicitly recognizing that the tax risk no longer existed (Complaint at ¶¶ 95-102, A66-70), still without disclosing its relevance to the dividend suspension, such that no shareholder other than Plaintiff Ryan (whose 220 books and records pursuit unearthed the concealed connection) would have realized its connection to the dividend suspension.

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[9] SEC form 8-K events, such as the receipt of the Private Letter Ruling dated May 24, 2021, and "therefore will not be subject to the adverse tax consequences generated by relevant sections of the retroactive Temporary or Final Regulations" are to be reported *within four business days*. http://www.sec.gov/answers/form8k.htm. Not three months later. (*See* August insert to Annual Report, in Complaint at ¶102, A69-70).

II. Interpretation of Contract De Novo Review and Plain Text of the Agreement.

A. QUESTION PRESENTED

The defendants' arguments that the dividend suspension was not subject to the obligation to not unreasonably deny, delay or condition consent, are all utterly contrary to the explicit terms of the Merger Agreement. Plaintiffs raised this question below as follows. Exhibit A, May 2, 2023 Tr. at 13-17.

B. SCOPE OF REVIEW

Contract terms are reviewed de novo. *Terrell v Kiromic Biopharma,* 2023 Del. LEXIS 147 (Del. May 4, 2023) interpreting contract by applying plain text of agreement. *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 268 A.3d 198 (Del. 2021) appellate court reviews the contract interpretation de novo.

C. MERITS OF ARGUMENT

Defendants' assertions that the dividend suspension was not subject to the reasonable consent obligation ignores the Merger Agreement's plain text. It appears that the Court below credited Defendants' assertions that the dividend suspension was not subject to the reasonable consent obligation. Defendants below variously (i) ignored its location squarely within the

Merger Agreement's explicit § 4.1 consent provision or (ii) labelled the consent obligation as mere "generic" (Jan. 26, 2023 Tr. at 16:2, A499) or "boilerplate" (*Id*. at 13:13, A496), (as if that would render it meaningless, or to be ignored); or (iii) asserted that the 4.1 disclosures provision overrides the Agreement's 4.1 obligation (despite the fact that they explicitly do not.[10]) All of these simply contradict the explicit terms of the merger agreement and should not have been credited.

Indeed, Defendants' assertions in their briefs below, in support of dismissal, (Defs'. Br. at pgs. 28-29, A610-611) are all demonstrably meritless:

"First, …" that the stockholders "were far better off with the suspension of "up to" four quarters of dividends rather than a fixed $500

[10] The Agreement's 4.1 disclosures are preceded by the language disavowing them as affecting the interpretation of the Merger Agreement:

> ***Nothing set forth in this Company Disclosure Schedule***, including any headings and subheadings, *shall be deemed* to expand or otherwise broaden the scope of the information required to be disclosed in this Company Disclosure Schedule, to expand or limit the effect of the disclosures contained in this Company Disclosure Schedule *or to otherwise affect the interpretation of the Agreement* or this Company Disclosure Schedule (emphasis added).

million reduction through the exchange ratio"….ignores that there was never such a negotiation; neither discussed, offered or accepted.

"Second, "the Maxim shareholders would continue to own 31 percent of the combined company, and would therefore continue to have an interest in the suspended dividends—whether $500 million or some lesser amount"—ignores that the other ADI shareholders had all received their regular ADI dividends, and would have an additional 69% of an amount to which they had no entitlement.

"Third, and relatedly," that they were better off than a reduced exchange percentage would have put them, again ignores that there was no such negotiation or deal to that effect.

"Fourth," that dividends are taxable, while a changed exchange ratio would not be—again ignores that that was never proposed not agreed to.

Regardless, the bottom line here is that the actual Merger Agreement is simple and clear: ADI's prohibition on up to four quarters of dividends is explicitly subject to its obligation to not unreasonably deny, delay or condition consent in precisely the situation that occurred—that the elimination of the tax risk cause for the suspension ended with the May 24, 2021 receipt of the IRS Private Letter Ruling ended, as well, any reasonable basis to deny consent to release and distribute the suspended dividends.

Defendants' assertion that the suspension did not demonstrate reckless indifference or deliberate disregard "of the whole body of [Maxim] stockholders"—also ignores Maxim's own published statements that return of profits to its shareholders was a core constituent of its capital structure.

And finally, still ignoring the plain terms of the Merger Agreement, the assertion (Def.'s Br. at 30 n.14, A612) that "any renegotiation of the dividend issue also would have required another stockholder vote" ignores that the Merger Agreement, as actually voted on by both companies' stockholders, *explicitly* subjected ADI to a reasonable consent obligation; or, more precisely, a prohibition on unreasonably denying, delaying or conditioning its consent. In short, no revote would have been triggered, and Defendants' contrary assertion is without any basis in fact or law.

As explained in Plaintiffs' Complaint and Answering Brief, Maxim's stockholders were misled to believe that the dividends were to be suspended in the ordinary course of negotiations over the exchange ratio and omitted the material, true nature of the dividend suspension. *See* Compl. ¶¶ 55-61, A48-50; Pltfs.' Ans. Br. at pgs. 8-13, A709-714.

Notably, Plaintiffs adequately pled that Maxim Director and CEO Doluca made these material misstatements and omissions in his capacity as an officer, which at the very least would sustain the claim against him personally. *See* Complaint ¶¶ 60-61, A50; *see also In re Pattern Energy Grp. Inc. Stockholders Litig.*, 2021WL 1812674, at *74 (Del. Ch. May 6, 2021) ("Plaintiff has pled that the Proxy was materially misleading and that Garland, who prepared the Proxy, was aware of its inaccuracies, and has therefore stated a claim for breach against him.").

III. The Aiding and Abetting Count Against ADI Should be Reinstated because the §102(b)(7) exculpation does not insulate it from liability from knowing participation with persons who are exculpated.

A. QUESTION PRESENTED

Whether the Chancery Court wrongly dismissed the aiding and abetting claim against ADI either (a) on the merits or (b) because ADI was not an exculpated party under the 102(b)(7) statute. Exhibit A., May 2, 2023 Tr. at 18.

B. SCOPE OF REVIEW

De novo.

C. MERITS ARGUMENT

The court below, finding that the Maxim defendants' actions should be viewed as an exculpable duty of care (Exhibit A, May 2, 2023 Tr. at 16), then dismissed the aiding and abetting count as against ADI, as lacking a predicate breach to which to attach liability to the acquirer. (*Id*. at 23). That is simply not the law.

Per this court's declaration in *RBC Capital Markets, LLC v. Jervis*, 129 A. 3d 816, 874 (Del. 2015):

> Importantly, while Section 102(b)(7) insulates directors from monetary damages stemming from a breach of the duty of care, its protection does not apply to third parties such as RBC. As the Court of Chancery observed, "[t]he literal language of Section 102(b)(7) only covers directors; it does not extend to aiders and

> abettors." [247] Our Legislature did not intend for Section 102(b)(7) to safeguard third parties and thereby create a perverse incentive system wherein trusted advisors to directors could, for their own selfish motives, intentionally mislead a board only to hide behind their victim's liability shield when stockholders or the corporation seeks retribution for the wrongdoing. RBC cannot essentially commit a fraud upon the very directors who hired and relied upon it, and subsequently seek to exploit the Board's exculpatory provision.
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> [247] *Rural I*, 88 A.3d at 86 (citations omitted).

And *see also*, *Firefighters' Pension Sys. v. Presidio, Inc.*, 251 A.3d 212, 285 (Del.Ch. 2021):

> But there is a plain-language problem with extending exculpation to controllers. Section 102(b)(7) only applies to directors. *See* 8 Del. C. § 102(b)(7). Based on the language of Section 102(b)(7), the Delaware Supreme Court has declined to extend exculpation to aiders and abettors, even when the aider and abettor facilitated otherwise exculpated breaches of duty by directors. *RBC*, 129 A.3d at 874. [11]

And, given the applicable standard to allege aiding & abetting liability,

> To plead a reasonably conceivable claim, the complaint must allege facts addressing four elements: (i) the existence of a fiduciary relationship, (ii) a breach of the fiduciary's duty, (iii) knowing participation in the breach by a non-fiduciary defendant, and (iv) damages proximately caused by the breach. *Malpiede*, 780 A.2d at 1096. (*Firefighters v. Presidio* at 273.)[12]

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[11] Although §102(b)(7) was subsequently amended to include officers, it has not been further amended to exculpate third parties, such as ADI.

[12] *See Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001) and *Penn Mart Realty Co. v. Becker*, 298 A.2d 349, 351 (Del.Ch. 1972) ("[O]ne who knowingly joins with any fiduciary in a breach of his obligation to the beneficiaries of the trust

there can be no question that ADI’s knowing initiation, knowledge, participation and profit from the concealment and capture of the “suspended” Maxim dividends, makes it an actionably liable “aider & abetter”, subject to full liability under all applicable common law equitable relief provisions.

And, of course, if the duty is, as Plaintiffs assert, a non-exculpable breach of the disclosure duty of good faith, honesty and loyalty, there can be no dispute that ADI was a knowing participant, who profited from the breach, and would be fully liable.

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relationship.”; and Rigby, *Financial Advisor Aiding and Abetting of a Breach of a Fiduciary Duty Post rural metro: Clarifying “Knowing Participation*”, 41 Del. J. Corp. L. 545 (2017)

CONCLUSION

The Defendants' concealments, omissions, and self-initiated diverting/lulling communications, all done to prevent shareholders from even knowing of either the reason for the dividend "suspension" or its ceasing to be needed three months before the closing, and diverting shareholders from full and fair knowledge by which they would have demanded that Maxim's Board and CEO seek the acquirer's consent to distribute the $500 million to the Maxim shareholders, which (per the explicit terms of the merger agreement 4.1(a) could not have been "reasonably withheld, conditioned or delayed"; whether taken separately or together, amply support Plaintiffs' Complaint to proceed against all defendants.

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