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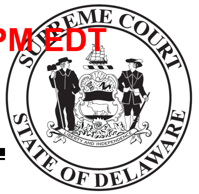

IN THE

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

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NATURE OF PROCEEDINGS

This action arises from the strategic stock-for-stock merger of Maxim Integrated Products, Inc. ("Maxim" or the "Company") and defendant Analog Devices, Inc. ("Analog"), announced in July 2020 and completed in August 2021 (the "Merger").

During the Merger negotiations Analog demanded that Maxim suspend its cash dividend for up to four quarters, to address Maxim's potential exposure to hundreds of millions of dollars in back taxes arising from new tax regulations. A55-56, ¶¶ 78-79. The individual defendants, the nine members of Maxim's board of directors (the "Board"), agreed to Analog's demand because they were "unwilling to scuttle the deal" over this issue. A65, ¶ 93; B338. Reflecting the parties' agreement, the Merger Agreement made clear that Maxim "shall not declare or pay a dividend in any of the next succeeding four fiscal quarters." A24, ¶ 29; B248; B433.

Plaintiffs' complaint (the "Complaint") alleged that the individual defendants breached their fiduciary duties by (1) not describing the negotiating history of, and reasons for, the dividend suspension in the Merger proxy (the "Proxy"), and (2) not seeking Analog's consent to resume dividend payments once the tax issue was

resolved in Maxim's favor seven and a half months after the stockholder vote.[1] A17-18, ¶¶ 1-3. The Complaint also alleged that Analog aided and abetted those breaches. A78-79, ¶¶ 137-42.

The Court of Chancery dismissed the action with prejudice. The Court held that the negotiating history of, and reasons for, the dividend suspension were not material information required to be disclosed in the Proxy. A561-62. The disclosure claim was asserted against all the individual defendants and is the only claim pressed against defendant Tunc Doluca in his capacity as CEO. A75-76, ¶¶ 122-25; A730-31. The Court of Chancery also held that the exculpation provision in Maxim's charter precluded plaintiffs' claims against the director defendants, and that plaintiffs failed to plead an aiding and abetting claim against Analog. A556-57; A562. Plaintiffs challenge all of these holdings on appeal.

Plaintiffs' appeal brief also contains an argument section titled "Interpretation of Contract: De Novo Review and Plain Text of Agreement," pressing their position that the Merger Agreement provided for resumption of dividends if the tax issue was resolved in Maxim's favor. Corrected Opening Brief of Plaintiffs-Below/Appellants Walter E. Ryan, Jr. and Ryan Asset Management ("POB") 30-34. The Complaint did not assert a contract claim, nor would plaintiffs have had standing to assert one.

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[1] The Complaint also alleged, in a subsequently abandoned claim, that the directors breached their fiduciary duties by agreeing to the dividend suspension. A17, ¶ 1.

The interpretation of the Merger Agreement is not necessary for the resolution of this appeal. At most, it informs whether plaintiffs adequately pled that the individual defendants acted in bad faith (or gross negligence as to Doluca in his capacity as CEO) by conducting themselves in accord with their understanding of the parties' agreement, and whether Analog "knowingly participated" in a breach by doing the same.

SUMMARY OF ARGUMENT

1. **Denied.** The Court of Chancery correctly held that the Complaint (i) failed to allege any material misstatement or omission in the Proxy, and (ii) failed to state a non-exculpated claim against the director defendants.

2. **Denied.** The Court of Chancery's dismissal is fully consistent with *In re GGP, Inc. Stockholder Litigation*, 282 A.3d 37 (Del. 2022). *GGP* confirmed long-standing Delaware precedent that an omission is material if it is relevant to the stockholder action being sought. The omitted information here—the negotiating history of, and reasons for, the dividend suspension—was not material to any action being sought by the Proxy. Plaintiffs do not argue otherwise.

3. **Denied.** Analog and Maxim agreed during the Merger negotiations that Maxim would suspend its quarterly dividends for up to four quarters. That agreement is reflected in the contemporaneous documents produced pursuant to 8 *Del. C.* § 220 (and quoted in plaintiffs' Complaint), and in the plain language of the Merger Agreement. After making this concession, the Maxim Board had no basis to seek Analog's consent to resume dividend payments once the tax issue was resolved.

4. **Denied.** Dismissal of the aiding and abetting claim against Analog should be affirmed because plaintiffs failed to adequately plead either an underlying breach of fiduciary duty or knowing participation in any such breach.

STATEMENT OF FACTS

A. The Parties and Relevant Non-Parties

Plaintiffs Walter E. Ryan, Jr. and Ryan Asset Management were beneficial owners of shares of Maxim common stock. A19, ¶ 7.

Defendant Analog is a publicly traded company incorporated and headquartered in Massachusetts. A19, ¶ 17. Before the Merger, non-party Maxim was a publicly traded Delaware corporation based in California. A19, ¶ 6. Both companies were in the semiconductor business and both were widely held companies with no controlling (or significant) stockholders. A20, ¶¶ 19-20; B204-07.

The individual defendants served on the Maxim Board at the time of the Merger. Defendant Doluca was also Maxim's Chief Executive Officer. A19, ¶¶ 8-16. None of the individual defendants was alleged to have had any relationship of any kind with Analog before the transaction. They collectively owned 1,412,368 shares of Maxim common stock. B206.

B. The Merger

On July 12, 2020, Maxim and Analog entered into a merger agreement providing for Analog to acquire Maxim in an all-stock transaction valued at about $21 billion (the "Merger Agreement"), creating a combined company valued at over $68 billion. A20, ¶ 18; B4, B21; B320. The Complaint acknowledged the strategic

rationale of the transaction; that the Merger was predicted to result in $275 million in cost synergies; and that "it was not shocking that the two companies might eventually decide to merge." A21-22, ¶¶ 23-24. The Complaint also alleged that the "[t]he stock-for-stock transaction was a reasonable structure for the merger," and that—other than the dividend suspension—the transaction "appeared fairly typical." A22, ¶¶ 24, 26.

C. The Merger Negotiations and Dividend Suspension

In the final days of the merger negotiations—after the exchange ratio had been agreed upon—Analog raised a concern about Maxim's exposure to a substantial potential tax liability identified in due diligence. A55-56, ¶¶ 76-79. Maxim's internal calculations put the potential tax liability, with interest, at nearly $1 billion.[2] B326.

To address this potential exposure, which Analog described as "a 50/50 situation," Analog insisted that Maxim forgo paying a cash dividend for up to four

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[2] The exposure stemmed from temporary regulations of the U.S. Treasury and the IRS, issued in June 2019 under Internal Revenue Code §§ 245A and 954(c)(6), that limited the applicability of the foreign personal holding company income look-through exception for certain intercompany dividends received by a controlled foreign corporation (the "Temporary 245A Regulation"). A55-58, ¶¶ 79-80. Maxim faced exposure because the Temporary 245A Regulation applied retroactively to intercompany dividends paid after December 31, 2017, and Maxim had benefited from the exception in fiscal years 2018 and 2019. *Id.*

quarters. A58, ¶ 81. Four quarterly dividends would total approximately $512 million, or about 50 percent of the potential tax liability. *See* A589; B21.

Maxim ultimately decided to give on the issue. Though senior management disagreed with Analog's position on the tax risk, they understood this was not something that could be "resolved based on the tax issue," but instead was a negotiating point that had to be addressed. A59, ¶ 83, quoting B327.

On July 10, 2020, Maxim CEO Doluca sent an email to his counterpart at Analog, confirming where the parties "landed" on the tax issue:

1. Tax Issue
    a. *Agreed to using suspension of dividend to mitigate Angel [i.e., Analog] risk.*
    b. Maxim will pay out FY20 Q4 dividend that will be declared in our earnings in July 2020.
    c. *Maxim will suspend dividend payments for up to a maximum of 4 quarters.*[3]
    d. I don't have authority to make this decision but will support it during tomorrows [sic] board meeting.

A63, ¶ 89, quoting B329 (emphasis added).

That same day, Doluca circulated a deck to the Maxim Board titled "Issues To Resolve for Merger Agreement." The deck explained the tax issue as follows:

- [Analog] sees this is a risk item

[3] Closing was expected to take about a year, until the summer of 2021, but the exact timing depended on the timing of regulatory approvals. A33, ¶ 43; B366. The dividend suspension was capped at a maximum of four quarters ($512 million), regardless of whether the transaction closed in a year, or later. B433.

- Their advisors claim 50% risk
- Concession
  - *Maxim to suspend dividend payments between announce and close*
  - June Q dividend would be paid to shareholders
  - Suspend dividend for a maximum of 4 quarters
- NEEDS BOARD APPROVAL

A63-64, ¶ 90, quoting B332 (emphasis added).

The Board met later that day to discuss the issue. They heard from management and their outside advisors, and received a presentation from financial advisor J.P. Morgan "review[ing] for the Board similar merger transactions in which dividends were suspended in the period between signing and closing of the transaction." B336. Having informed themselves on the issue, the Board made a business decision to suspend the dividends and remove one of the remaining hurdles to getting the deal done. B338-39.

The Board's decision was not made lightly. Contemporaneous emails between Doluca and Maxim independent director Joseph Bronson—quoted in plaintiffs' Complaint—show that Bronson and three other directors had "reservations" about the dividend suspension but were "unwilling to scuttle the deal" over this issue. A65-66, ¶ 93; B338. Bronson concluded that suspending the dividend was a "good resolution," and later observed that "too many boards do the wrong thing for shareholders by being stubborn and this deal should not be cratered for 1.5%." B338.

With the dividend issue resolved, the Board unanimously approved the Merger Agreement two days later. A47-48, ¶ 54. The Merger Agreement provided that Maxim "shall not declare or pay a dividend in any of the next succeeding four fiscal quarters." A24, ¶ 29; B433.

In August 2020, after the filing of the preliminary proxy statement, Maxim held an employee Q&A session about the Merger. A "recap" of the questions answered was filed with the SEC. B500-505. The Q&A addressed, among other things, "[w]hy did we suspend the dividend? Is it considered traditional in an acquisition?" and responded in part that "[i]t is not unusual for companies to have restrictions on dividends while a merger is pending." B501; A48, ¶ 56.

Maxim issued the Proxy on September 4, 2020. B5. On October 8, 2020, the Maxim stockholders—fully aware that the Merger Agreement would suspend up to four quarters of the Company's traditional quarterly dividends until closing—approved the Merger.[4] B364.

D. Resolution of the Tax Issue

On May 24, 2021—over seven and a half months *after* the stockholder vote—Maxim received a private letter ruling from the IRS providing relief from the

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[4] Because the stockholder vote occurred before any dividend payments were missed, the stockholders had a fully uncoerced choice: approve the Merger with the dividend suspension, or vote down the Merger and continue dividend payments without interruption. *See* A598-99.

Temporary 245A Regulation and Final 245A Regulation.[5] A66, ¶ 96, B370-71. Maxim disclosed this letter ruling in its next quarterly filing, a Form 10-K filed on August 20, 2021. A70, ¶ 103; B376. Maxim further disclosed that the IRS could revoke the private letter ruling. B371.

The Merger closed on August 26, 2021. A70, ¶ 103.

E. The Complaint and Procedural History

Plaintiffs filed this action after receiving books and records under 8 *Del. C.* § 220. A54, ¶¶ 74-75. The Complaint alleged, among other things, that the Proxy was materially misleading in failing to disclose the negotiating history of, and reasons for, the dividend suspension; that the Maxim directors should have sought Analog's consent to resume dividend payments once the tax issue was resolved; that director and CEO Doluca breached duties in his capacity as CEO; and that Analog aided and abetted the alleged breaches. A17-18, ¶¶ 1-3; A50, ¶¶ 60-61; A67, ¶ 99; A79, ¶ 141.

[5] On August 21, 2020, the U.S. Treasury and IRS released final regulations under I.R.C. §§ 245A and 954(c)(6) (the "Final 245A Regulation"), which generally applied to years ending on or after June 14, 2019. *See* B370. The Final 245A Regulation was substantially the same as the Temporary 245A Regulation, which would continue to apply to fiscal year 2018. *Id.*

The Complaint also alleged that the directors breached their fiduciary duties in negotiating the dividend suspension,[6] and had "[c]onflicted [i]nterests in [those] [n]egotiations." A52, header. Specifically, the Complaint alleged that the directors purportedly held non-dividend-eligible restricted shares, and "given the choice between paying dividends during the pre-closing period or increasing the exchange ratio," the directors favored the dividend suspension. A52-53, ¶¶ 66-70.

The issues were significantly narrowed in the Motion to Dismiss briefing below. In Plaintiffs' Answering Brief in Opposition to Defendants' Motion to Dismiss ("Plaintiffs' Opposition Brief"), plaintiffs: (1) abandoned their challenge to the Board's decision to suspend dividends;[7] (2) did not defend, and therefore abandoned, the related allegations that the defendants were conflicted in that decision-making (A727); and (3) pressed only a disclosure claim against Doluca in his capacity as CEO. A730-31.

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[6] Plaintiffs alleged that the directors wrongfully "abandoned the dividends, and committed to simply not paying the dividends, with no plans to seek their revival, regardless of any further developments." A26, ¶ 34; *see also* A72, ¶ 111 (alleging that, in suspending the dividends, the Board failed to "negotiate further protections for Plaintiff").

[7] Plaintiffs pivoted to the argument that "the problem is not with the terms of the Merger Agreement that was approved, but rather the manner in which the Board's pre-closing actions, in not seeking approval for a dividend on suspension in light of the nonexistence of the relevant tax liability [sic]." A718. *See also* A709 (arguing that the "sole" issue is "whether the Maxim directors had an obligation to seek [Analog's] consent to distribute the dividend").

The Court of Chancery dismissed the Complaint with prejudice. The Court:

(1) dismissed the claim against Doluca in his capacity as CEO on the basis that the Complaint failed to allege any material misstatements or omissions in the Proxy (A557-62);

(2) dismissed the claims against the directors on the basis of exculpation, finding that plaintiffs (i) failed to respond to defendants' arguments that the directors were independent and disinterested in the transaction such that the claim could not implicate the duty of loyalty, and (ii) did not plead that any alleged disclosure violations involved bad faith (A556-57); and

(3) dismissed the aiding and abetting claim against Analog on the basis that plaintiffs failed to plead a predicate breach. A562.

Plaintiffs filed a Rule 59(f) Motion for Reargument, which the Court of Chancery denied on May 30, 2023. A565, A572-73.

This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DISMISSED THE CLAIM AGAINST DOLUCA IN HIS CAPACITY AS CEO ON THE BASIS THAT THE PROXY DID NOT CONTAIN ANY MATERIAL MISSTATEMENTS OR OMISSIONS.

A. Question Presented

Whether the Court of Chancery correctly held that the Proxy did not contain any material misstatements or omissions. A557-62.

B. Scope of Review

This Court reviews *de novo* the "decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)." *Allen* v. *Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013). Although well-pled allegations are accepted as true, the Court will not "credit conclusory allegations that are unsupported by specific facts or draw unreasonable inferences in plaintiff's favor." *Id.*

C. Merits of the Argument

The Court of Chancery correctly held that (1) Delaware law requires that an alleged proxy omission be material *to the stockholder action being sought*, and (2) the omitted information—the "how and why" of the dividend suspension—was not material to the stockholder action being sought (*i.e.*, the vote on the Merger). A557-62. Dismissal of the disclosure claim can be affirmed for the further reason, not addressed below, that the premise of the claim—that Maxim stockholders had a

purported right to demand resumption of dividends some seven-plus months after the vote (POB 27)—is incorrect.

1. Whether information is "material" depends on the stockholder action being sought.

Under long-standing Delaware precedent, information "is material if there is a substantial likelihood that a reasonable shareholder would consider it important *in deciding how to vote*." *Rosenblatt* v. *Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (emphasis added) (citing *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976)). Materiality is "determined with respect to the shareholder action being sought," and plaintiffs must allege that "the challenged disclosure[s] have a connection to the request for shareholder action." *Malone* v. *Brincat*, 722 A.2d 5, 12 (Del. 1998). *See also Dohmen* v. *Goodman*, 234 A.3d 1161, 1170 (Del. 2020) ("Materiality is determined with respect to the shareholder action being sought.") (citation omitted); *Skeen* v. *Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000) ("Omitted facts are material if there is a substantial likelihood that a reasonable stockholder would consider [them] important in deciding how to vote.") (citation and quotations omitted).[8]

[8] In *Skeen*, the Court clarified that "stockholder action" includes appraisal, because "stockholders who vote against the merger also must decide whether to exercise those rights." 750 A.2d at 1172.

This Court's recent decision in *In re GGP*, *Inc. Stockholder Litigation*, 282 A.3d 37 (Del. 2022), confirmed this settled principle:

> 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"...*Information is considered material* "*if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote.*"

Id. at 63 (emphasis added) (quoting *Malone*, 722 A.2d at 12, and *Loudon* v. *Archer–Daniels–Midland Co.*, 700 A.2d 135, 142 (Del. 1997)).

GGP addressed whether a merger proxy failed to provide information "relevant to GGP stockholders *and their decision whether to support the [t]ransaction*." *Id*. at 70 (emphasis added). The claimed disclosure violation went directly to the stockholder action being sought—whether to dissent from the merger and seek appraisal. *Id.* Nothing in *GGP* purports to change over 35 years of consistent Delaware precedent on the importance of context in applying the standard for "materiality."

Plaintiffs seek to decontextualize materiality from the stockholder action being sought, by arguing that "the obligation to fully disclose is not limited to facts which would induce action, but requires the disclosure of all material facts per se." POB 22-23. Plaintiffs cite no authority for this position and have provided no basis to depart from the well-worn precedent cited above. Equally misplaced are plaintiffs' arguments that "the fiduciary obligation to disclose includes all information that

stockholders would view as important." POB 16; *see also* POB 5 (arguing a duty to disclose where the information "would have been relevant to [the stockholder]") (brackets in POB). *GGP* requires disclosure of "material information," with "material" defined in reference to the stockholder vote.[9] *GGP*, 282 A.3d at 62-63.

2. The negotiating history of, and reasons for, the dividend suspension were not material to the stockholder vote.

The Court of Chancery correctly applied controlling precedent in holding that the "how and why" of the dividend suspension was not material to the stockholder vote. A559; A561; A562.

The Proxy disclosed the material facts about the Merger and the dividend suspension. It disclosed that the transaction offered Maxim stockholders 0.6300 shares of Analog common stock for each Maxim share held at closing; that the exchange ratio valued Maxim at $78.44 per share on the last trading day before the Merger announcement; and that the Maxim stockholders would own about 31 percent of the combined company. B19; B28; B122. The Proxy also told stockholders that, as part of the deal, they would have to forgo up to four quarters of dividends (a total of $1.92 per share) to obtain the benefits of the premium

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[9] Plaintiffs' related argument that the Board was required to "disseminate fully and fairly all material information within the Board's control" (POB 15) ignores the threshold question of what constitutes "material" information.

transaction and the upside of the combined company. A17, ¶ 2; A26, ¶ 33; B148. Plaintiffs do not dispute any of this.

Given these disclosures, the Court of Chancery correctly held that plaintiffs did not allege any facts showing that the additional information sought—the "how and why" of the dividend suspension—would have been material to the vote. A559-62. The key material fact was disclosed: to get the benefits of the Merger, you had to accept the detriment of the dividend suspension. Information about the "how and why" of the suspension was not itself material to the choice before the stockholders.

The decision below is fully in line with long-standing precedent that Delaware law does not require "'play-by-play' disclosure of merger negotiations," *Arnold* v. *Soc'y for Sav. Bancorp*, 650 A.2d 1270, 1285 (Del. 1994) (citation omitted), or the "reasons why" a board took action, *Skeen*, 750 A.2d at 1173. As this Court recently confirmed in *GGP*, "it is generally true that corporate directors do not have to justify each element of a proposed transaction structure when they communicate with stockholders." *GGP*, 282 A.2d at 71.[10]

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[10] *See also, e.g.*, *In re Merge Healthcare Inc. S'holders Litig.*, 2017 WL 395981, at *13 (Del. Ch. Jan. 30, 2017) (proxy "was not required to disclose [director's] subjective motivation" for board decision); *In re Williams Cos., Inc. S'holder Litig.*, 2016 WL 197177, at *2 (Del. Ch. Jan. 13, 2016) ("asking why a fiduciary took certain action does not state a meritorious disclosure claim"); *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1130 (Del. Ch. 2011) (Delaware law "does not require that a fiduciary disclose its underlying reasons for acting."); *In re Cogent,*
(…continued)

The Maxim-Analog Merger, like any other merger, involved many issues, and many other Board decisions, beyond just the dividend suspension, as the complex terms of the Merger Agreement show. Plaintiffs offer no explanation as to why this single issue supposedly should have been the subject of granular disclosure, when there were countless other issues reflecting give and take between the parties.

Though plaintiffs proffer several arguments attempting to establish the materiality of the "how and why," none warrants departure from this Court's precedents.

Materiality of dividends. Plaintiffs argue that "the suspension of half a billion dollars of dividends was *highly* material," and that the dividends were "indisputably a material consideration" for Maxim stockholders. POB 26, 27 (emphasis in original). That may be so, but the suspension of dividends was indisputably disclosed; plaintiffs do not argue otherwise. At issue here is plaintiffs' tell-me-more demand.

The twelve precedent transactions. Plaintiffs point to the 12 precedent transactions involving dividend suspensions cited in defendants' briefing below and

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Inc. S'holder Litig., 7 A.3d 487, 511-12 (Del. Ch. 2010) ("Delaware law does not require a play-by-play description of every consideration or action taken by a Board."); *Globis Partners, L.P.* v. *Plumtree Software, Inc.*, 2007 WL 4292024, at *14 (Del. Ch. Nov. 30, 2007) (rejecting claims that the board should have disclosed "why" it did certain things during negotiations as the "type of rhetorical question [that] does not present a valid disclosure claim").

argue that "[e]ach of those proxies included a detailed explanation of how the dividend restriction had been negotiated[] and for what the suspension [sic] was exchanged." POB 28-29, citing A719 & Exhibit A thereto (A733). That claim is demonstrably incorrect.

Exhibit A of Plaintiffs' Answering Brief below contains the "Background of the Merger" sections of only *seven* of the 12 precedent proxies—not "each one." And the "Background of the Merger" sections from the other five transactions—which plaintiffs chose to exclude in that Exhibit A—do not say anything about how the dividend restriction had been negotiated. B445-99; 506-22. Plaintiffs' argument is thus factually incorrect. It is also irrelevant. Disclosures made by other companies, in other deals, do not bear on whether additional detail would have been material to the stockholder vote here.

The stockholders' alleged "right to unsuspend" the dividends. Plaintiffs argue that the "how and why" of the dividend suspension became material after resolution of the tax issue in May 2021, some seven-and-a-half months after the stockholder vote. *See, e.g.,* POB 20, 27-30. They argue that "if the connection had been disclosed to [the stockholders], they would have certainly demanded the unsuspension/distribution of tax risk for the suspension [sic] three months before the merger's closing." POB 27. *See also* POB 20 (arguing that information would have

"alerted" stockholders "to their right to receive the $500 million in suspended dividends to an event that might (and later did) occur subsequent to the vote.").

As set forth more fully *infra* at pages 24-28, neither plaintiffs nor the Maxim Board had any basis to demand or expect the resumption of dividends. The "how and why" of the dividend suspension was therefore irrelevant to the vote and irrelevant to events seven months later.

Beyond that, plaintiffs' argument does not even pretend to link the omitted information to the vote—as required by *GGP* and other controlling case law. The Proxy was issued on September 4, 2020, in advance of the stockholder vote on October 8, 2020. B5; B364. Even if (counterfactually) plaintiffs had a theoretical right to seek resumption of Maxim dividends following issuance of the IRS private letter ruling in May 2021, that right did not exist at the time of the stockholder vote many months earlier. The "how and why" of the dividend suspension was at most a mere curiosity at the time of the vote and did not have to be disclosed. *See Arnold*, 650 A.2d at 1280 (Delaware law "does not require disclosure of inherently...speculative information which would tend to confuse stockholders or inundate them with an overload of information").

Disclosure of the IRS private letter ruling. Plaintiffs argue that the directors "conceal[ed] the elimination of the tax risk" by disclosing the IRS private letter ruling in Maxim's next regular quarterly filing, rather than in a Form 8-K promptly

after the ruling came out. POB 5, 29. But the fiduciary duty of candor attaches to requests for stockholder action, *Malone*, 722 A.2d at 9, and plaintiffs have not identified any basis for a duty to disclose the IRS ruling (or anything else) in May 2021, some seven-plus months after the vote. The Court of Chancery directly pressed plaintiffs' counsel on this point 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.

POB 25, quoting A525.[11]

The Court of Chancery correctly found that there was no pending request for stockholder action in May 2021 and that plaintiffs had not identified any other basis for disclosure at that time.[12] A558-60.

To the extent plaintiffs complain more generally about the lack of an 8-K filing (POB 29), plaintiffs did not identify any requirement under Form 8-K requiring disclosure of the IRS private letter ruling, and none exists. *See* Current

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[11] Plaintiffs cite this colloquy as supposed evidence that they argued below that the "omission was material to the stockholder vote on the merger." POB 24-25 (quotations removed). The exchange does no such thing.

[12] The Court of Chancery also correctly noted that any "decision of whether to request that the dividend suspension be lifted was the board's decision, not the stockholders." A559.

Report (Form 8-K), § B(1), https://www.sec.gov/files/form8-k.pdf. And even if an 8-K filing had been required—and it was not—"the fiduciary duty of disclosure does not apply" to "communication[s] not associated with a request for stockholder action, such as when directors make periodic financial disclosures required by securities laws." *Dohmen*, 234 A.3d at 1168-69 (citing *Malone*, 722 A.2d at 14) (further citations omitted).

3. The Q&As did not contain any material misstatement or omission.

Plaintiffs also challenge the employee "Q&A," which explains that "[i]t is not unusual for companies to have restrictions on dividends while a merger is pending." A48-49, ¶ 56; B501. Plaintiffs argue that the statement "misleadingly describe[ed] the dividend suspension as just a typical provision in such deals," failed to disclose the "connection to the tax risk," and "divert[ed] any further focus on this issue."[13] POB 15, 20, 23. The Court of Chancery correctly rejected plaintiffs' challenge to this disclosure. A560-62.

The Q&A statement is accurate—it is not unusual to suspend dividends in merger transactions. There are at least 12 instances between 2015 and May 2022 in which dividends were suspended in U.S. public company mergers valued at over

[13] The Complaint also challenged other statements in the Q&A (A49, ¶ 57), but the Court of Chancery rejected these claims (A560), and plaintiffs do not press them on appeal.

$5 billion.[14] POB 28-29; A604; A616-93; B377-402.[15] Agreements to suspend dividends are not uncommon. Whether or not to suspend or otherwise restrict dividends is part of the give-and-take of merger negotiations.

Nor does the statement omit material information. The Q&A confirmed the material fact that the dividend would be suspended for up to four quarters. B501. Nothing more was required. For the same reason that the "how and why" of the dividend suspension was not required to be disclosed in the full Proxy, it was not required to be disclosed in this public filing, either—the information was not material to the stockholder vote (or even relevant to the employees, to whom the communication was directed). It would be odd to suggest, as plaintiffs apparently do, that a Q&A session for employees was required to disclose more information and in greater detail than the fuller and more comprehensive Proxy mailed to stockholders.

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[14] Though the Complaint alleged there had been only one such instance during the (much longer) time frame of January 1, 2007–August 6, 2020 (A28-32, ¶¶ 40-41), plaintiffs have since acknowledged the higher number. A719.

[15] Defendants' Appendix reattaches five of the precedents included in plaintiffs' Appendix, as plaintiffs omitted the highlighting of the relevant language included below. B377-402.

4. The underlying premise of plaintiffs' disclosure claim—that Maxim and/or its stockholders had the right to demand resumption of dividends once the tax issue was resolved—is wrong.

The Court of Chancery's decision should be affirmed for the additional reason, not reached below, that neither Maxim nor its stockholders had any basis to demand resumption of dividends once the tax issue was resolved.

Schedule 4.1(a) to the Merger Agreement documented the Merger parties' agreement on the dividend suspension: Maxim "shall not declare or pay a dividend in any of the next succeeding four fiscal quarters." B433. Nothing in the Schedule, or anywhere else in the Merger Agreement, links the dividend suspension to the tax issue. Plaintiffs do not point to any contractual language creating a legal connection between the two, and there is none.[16]

To the contrary, the *un*conditional nature of the dividend suspension is confirmed by the contemporaneous documents—quoted in the Complaint—reflecting the parties' understanding of the deal. Maxim CEO Doluca sent an email to his Analog counterpart confirming where Maxim "landed" on the tax issue: "Agreed to using suspension of dividend to mitigate Angel risk...Maxim will suspend dividend payments for up to a maximum of 4 quarters." A63, ¶ 89, quoting

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[16] The tax dispute is not mentioned in the Merger Agreement at all, and appears in the schedules only once, as a disclosure of a "Tax Matter[]" in Part 2.12. B431-32.

B329. Doluca also circulated a deck to the Maxim Board titled "Issues To Resolve for Merger Agreement," proposing a "concession" on the tax issue: "Maxim to suspend dividend payments between announce and close."[17] A63-64, ¶ 90, quoting B332.

These documents reflect the Merger parties' contemporaneous understanding of their deal. And that deal is documented in Schedule 4.1(a) of the Merger Agreement: Maxim "shall not declare or pay a dividend in any of the next succeeding four fiscal quarters." B433. There is nothing in the documents, the Complaint, or anything else in the record, suggesting that the dividend suspension was conditional or otherwise dependent on the outcome of the tax issue. That was not the deal. And plaintiffs apparently agreed. Plaintiffs' main takeaway from the Section 220 production was that the directors "abandoned" the dividends, "with no plans to seek their revival, *regardless of any further developments*." A26, ¶ 34 (emphasis added).

Plaintiffs' "conditional" suspension argument rests entirely on a misreading of Section 4.1(a) of the Merger Agreement, which contains the "Interim Operations"

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[17] These documents were produced pursuant to 8 *Del. C.* § 220 and quoted in plaintiffs' Complaint. Plaintiffs did not object to their use in the Motion to Dismiss briefing, and stated at oral argument that "the facts are really essentially undisputed" (A516, Tr. 33:11), which they repeated in their Opening Brief: "[n]one of the facts are disputed." POB at 9.

covenants. A23-24, ¶ 29, quoting B248. According to plaintiffs, that provision purportedly made the dividend suspension "explicitly subject to [Analog's] obligation to not unreasonably deny, delay or condition consent." POB 32.

Plaintiffs are wrong. Section 4.1(a) of the Merger Agreement does not say anything about the tax issue. It contained Maxim's covenants regarding interim operations between signing and closing, and restricted Maxim's ability to undertake a long list of corporate actions, including issuing dividends, subject to four specifically defined circumstances. B248. Those circumstances were:

> (1) to the extent [Analog] shall otherwise give its prior consent in writing (which consent shall not be unreasonably withheld, conditioned or delayed), (2) ***as set forth in Part 4.1(a) of [Maxim's] Disclosure Schedule***, (3) as may be required by applicable Legal Requirements or (4) as expressly permitted or required by this Agreement[.]

B248 (emphasis added). Part 4.1(a) of Maxim's Disclosure Schedule, incorporated into Section 4.1(a) of the Merger Agreement, expressly stated that Maxim "shall not declare or pay a dividend in any of the next succeeding four fiscal quarters." B433. That covenant precluding post-signing dividends was unconditional.

Plaintiffs ignore the specific dividend restriction of subsection (2) above—they do not even quote it in their brief. Instead, they rely exclusively on the general consent provision in subsection (1), which permitted Maxim to undertake various

corporate actions subject to Analog's reasonable consent.[18] POB 33. But the list contains four separate and independent subsections, each addressing a distinct exception to the general covenants. Subsection (1) does not modify subsection (2). As the court below recognized, "[W]e have operating covenants and then we have exceptions to operating covenants. Those include prior consent in writing, not to be unreasonably withheld, and those include part 4.1(a) of the disclosure schedule.... I don't see them to modify each other." A528.

Plaintiffs argue that the Schedule 4.1(a) dividend suspension cannot "affect the interpretation of the Agreement." POB 31 n.10, quoting B430. That argument is nonsensical. Section 4.1 of the Merger Agreement expressly incorporates the dividend suspension as a distinct carve-out to the operating covenants. Giving effect to an express provision in the Merger Agreement does not "affect the interpretation of the Agreement"—it enforces the agreement as written.

Plaintiffs argue that "once the sole reason for the dividend suspension...was eliminated, there was no possible basis to keep the dividend suspension in place."

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[18] Such interim operating covenants governing a seller's operation of the business pre-closing absent the buyer's consent are standard terms in merger agreements. *See, e.g.*, Lou R. Kling et al., *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* § 13.03 (2022); *Merger Agreement* § 5.01 Practical Law Corporate & Securities, Westlaw (2022). Plaintiffs describe Section 4.1 of the Merger Agreement as "provisions incorporated by ADI [*i.e.*, Analog]" (A705), but they do not cite any source for that statement.

POB 6. But that is not how contracts work. It would not have been reasonable, much less obligatory, for Maxim to request (or for Analog to permit) resumption of dividend payments once the tax dispute was resolved. That was not the deal. The parties could have agreed that dividends would resume if the tax matter was satisfactorily resolved, but they did not. The fact that the parties negotiated the dividend suspension to address a potential tax risk does not mean that Maxim could demand a "do-over" on the definitive Merger terms once the tax risk was resolved. There is no legal requirement to ask for a mulligan. Merger parties expect deal certainty.[19]

Plaintiffs' argument is even weaker to the extent plaintiffs suggest that Maxim's stockholders could have demanded resumption of the dividends. POB 27, n.6. As the Court of Chancery correctly held, "the decision of whether to request that the dividend suspension be lifted was the board's decision, not the stockholders." A559.

[19] The "Interpretation of Contract" section of plaintiffs' Opening Brief, at pages 31-32, contains a series of non-contract based arguments about the dividend suspension. These arguments respond to defendants' arguments below (A609-11) addressing plaintiffs' now-abandoned challenge to the Board's decision to agree to suspend dividends and are irrelevant to any issues pressed on appeal.

5. Dismissal of the disclosure claim against Doluca in his capacity as CEO can be affirmed for the further reason that plaintiffs have not sufficiently pled (i) acts taken in Doluca's capacity as CEO, or (ii) acts of gross negligence.

A claim against a director-officer is exculpated where a "plaintiff [] fail[s] to highlight any specific actions [defendant] undertook as an officer (as distinct from actions as a director)" that fall within the exceptions to 8 *Del. C.* § 102(b)(7). *Arnold*, 650 A.2d at 1288. Plaintiffs must therefore allege "sufficiently detailed acts of wrongdoing...that [the officer defendants]...breached their fiduciary duties *as officers*." *Gantler* v. *Stephens*, 965 A.2d 695, 709 (Del. 2009) (emphasis added).

Plaintiffs fail to point to any material act that Doluca did as an officer rather than a director and therefore fail to carry their burden.

Plaintiffs also fail to allege any act of gross negligence by Doluca, *i.e.*, an act involving "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." *In re Columbia Pipeline Grp., Inc.*, 2021 WL 772562, at *50 (Del. Ch. Mar. 1, 2021) (citation omitted). The only claim pressed against Doluca as CEO is that he failed to disclose the "how and why" of the dividend suspension. A730-31. That claim fails to rise to a level of gross negligence for the same reasons that plaintiffs' allegations fail to plead "bad faith." *See* pp. 33-34, *infra*.

II. THE COURT OF CHANCERY CORRECTLY DISMISSED THE CLAIMS AGAINST THE MAXIM DIRECTORS ON THE BASIS OF EXCULPATION.

A. Question Presented

Whether the Court of Chancery correctly concluded that the claims against the directors—the disclosure claim and the failure to seek Analog's consent to resume dividend payments—were exculpated under Maxim's charter. A555-57.

B. Scope of Review

De novo. See Point I.B., *supra*.

C. Merits of the Argument

The Court of Chancery's decision should be affirmed because plaintiffs (1) waived any argument that the claims are not exculpated; (2) did not allege facts sufficient to plead that the directors were conflicted; and (3) did not allege that the directors acted in bad faith.

1. Plaintiffs waived any argument that the claims against the directors are not exculpated.

The Court of Chancery correctly found that "plaintiffs abandoned their argument that the directors were conflicted due to their holdings of RSUs and MSUs," and that the argument was therefore "waived." A555.

The Complaint alleged that individual defendants were conflicted in negotiating the dividend suspension. A52, ¶ 66. According to plaintiffs, the directors owned restricted shares that were not dividend-eligible, and "given the

choice [in the negotiations] between paying dividends during the pre-closing period or increasing the exchange ratio, the Board members were concerned about their own interests, rather than their shareholders' dividends."[20] A52-53, ¶¶ 67-70. The Complaint did not allege any supposed conflict motivating the Board not to seek resumption of dividend payments once the tax issue was resolved or relating to the disclosures.

Defendants addressed the conflict allegations in the briefing below. Defendants cited the exculpation provision in Maxim's charter and discussed the applicable standard under *In re Cornerstone Therapeutics Inc*, *Stockholder Litigation*, 115 A.3d 1173, 1179-80 (Del. 2015). A605 (citing B342). Defendants demonstrated that the conflict allegations failed to state a non-exculpated claim as a matter of law. A605-08.

Plaintiffs did not respond to the exculpation argument in their Opposition Brief. They did not dispute the existence of the exculpation clause or the applicable pleading standard under *Cornerstone*. They did not defend their conflict allegations or otherwise address defendants' arguments on the inadequacy of those allegations.

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[20] Plaintiffs also alleged in conclusory fashion that the independent directors "deferred to" to Doluca, without any explanation as to why they might have done so. A53, ¶ 68.

And plaintiffs did not assert that they had pled bad faith or any other non-exculpated breach of the duty of loyalty. They were entirely silent on the issue.

The only reference to exculpation in Plaintiffs' Opposition Brief below is the following statement: "even if the exculpatory provisions are applied, the elimination still requires Defendants to act in the best interests of their [sic] entity until the close of such mergers." A727. In support of that statement, plaintiffs cited only two cases, both involving contractual duties in alternative entities. A727-28 & n.67, 68 (citing *In re Atlas Energy Res., LLC*, 2010 WL 4273122 (Del. Ch. Oct. 28, 2010) and *Norton* v. *K-Sea Transp. Partners L.P.*, 67 A.3d 354 (Del. 2013)).

Because plaintiffs did not respond to defendants' exculpation argument below, they have abandoned any argument that the claims against the directors are not exculpated. *Emerald Partners* v. *Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."). On this basis alone, the dismissal of claims against the directors should be affirmed.

2. The Complaint does not allege bad faith.

Plaintiffs now seek to avoid exculpation by arguing that the directors acted in bad faith. POB 27. But even if plaintiffs had not abandoned their claim of a non-exculpated breach, the Court of Chancery correctly held that plaintiffs did not allege that the directors acted in bad faith. A556-57, 12:23-13:7. The term "bad faith" does not appear in the Complaint or the briefing below, and plaintiffs did not argue

bad faith at oral argument. It appeared for the first time in plaintiffs' Motion for Reargument. A565.

Nor did plaintiffs allege any "facts that support a rational inference of bad faith," *Kahn* v. *Stern*, 183 A.3d 715 (Del. 2018), which involves an "intentional dereliction of duty" or a "conscious disregard for one's responsibilities." *Lyondell Chem. Co.* v. *Ryan*, 970 A.2d 235, 240 (Del. 2009) (citation omitted). To the contrary, facts pled in the Complaint refute any inference of bad faith—they establish that the directors acted entirely consistent with the dividend suspension agreement as reflected in their internal documents.

Plaintiffs allege that Doluca confirmed to Analog where the parties "landed on" the dividend issue: "Maxim will suspend dividend payments for up to a maximum of 4 quarters." A63, ¶ 89, quoting B329. The presentation to the Maxim Board similarly confirmed the deal: "Maxim [was] to suspend dividend payments between announce and close." A63-64, ¶ 90, quoting B332. Plaintiffs' own takeaway from these documents was that the directors had "abandoned the dividends, and committed to simply not paying the dividends, with no plans to seek their revival, regardless of any further developments." A26, ¶ 34.

Given these allegations, it is not reasonably conceivable that the directors acted with an intentional dereliction of duty or conscious disregard of their duties. The directors acted consistent with the terms of the agreement as reflected in the

contemporaneous documents quoted in the Complaint.[21] Though plaintiffs may urge a different interpretation of the Merger Agreement, they did not allege any facts supporting a reasonably conceivable inference that the directors shared that interpretation or otherwise acted in bad faith.[22]

The Maxim directors collectively owned over 1.4 million shares of Maxim common stock (B206), and had every reason to seek resumption of the dividends had that been the deal. Plaintiffs provide no explanation why these independent directors would have chosen not to seek resumption of the dividends or omit material information from the Proxy.

3. The Complaint does not allege any conflicts.

Nor can plaintiffs avoid exculpation on the basis of alleged director conflicts—they do not even press their "conflict" theory on appeal. All they argue is that they can plead a disloyalty claim "without [] having to show [] the speakers' financial conflict." POB 24.

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[21] Documents produced under Section 220 "necessarily shape the range of 'reasonably conceivable' outcomes." *GGP*, 282 A.3d at 54-55.

[22] As this Court recognized in *Lyondell*, "there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties." 970 A.2d at 243. Here, of course, there is not even an inadequate or flawed effort.

Plaintiffs' Opening Brief states in passing that Doluca "would continue onto [Analog's] Board and payroll" (POB 28), but that was not alleged in the Complaint, and it is well established that continued board service with the merged entity does not constitute a conflict. *See*, *e.g.*, *C&J Energy Servs.* v. *City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1068 n.90 (Del. 2014) (citation omitted).

III. THE COMPLAINT DOES NOT STATE AN AIDING AND ABETTING CLAIM AGAINST ANALOG.

A. Question presented

Whether the dismissal of the aiding and abetting claim against Analog should be affirmed. A562.

B. Standard of Review

De novo. See Point I.B., *supra*.

C. Merits of Argument

A valid claim for aiding and abetting a breach of fiduciary duty requires (1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary. *See Malpiede* v. *Townson*, 780 A.2d 1075, 1096 (Del. 2001). Plaintiffs failed to adequately plead either a predicate breach or knowing participation in any such breach.

1. Plaintiffs failed to plead a predicate breach.

Regardless of exculpation, plaintiffs failed to state a claim that the individual defendants either breached the duty of candor or breached a supposed duty to "unsuspend" the dividends. *See* Points I.C.1-4, *supra*. And plaintiffs abandoned, and did not pursue, any predicate claim based on the directors' initial agreement to suspend dividends. *See* A730-31; POB 15. Because plaintiffs have not adequately

pled a predicate breach, the dismissal of the aiding and abetting claim against Analog should be affirmed. *See Weil* v. *Morgan Stanley DW Inc.*, 877 A.2d 1024, 1039 (Del. Ch. 2005) (dismissing aiding and abetting claim where the underlying breach of fiduciary duty claim failed to state a claim), *aff'd*, 894 A.2d 407 (Del. 2005) (TABLE).

2. Plaintiffs failed to plead "knowing participation" in any breach.

"Knowing participation" requires non-conclusory allegations that a "third party act[ed] with the knowledge that the conduct advocated or assisted constitute[d] … a breach." *Malpiede*, 780 A.2d at 1097. The third party must "act with *scienter*," meaning with "an illicit state of mind" and "actual or constructive knowledge that their conduct was legally improper." *RBC Cap. Mkts., LLC* v. *Jervis*, 129 A.3d 816, 862 (Del. 2015) (citations omitted).

Plaintiffs have not come close to satisfying this standard. A "bidder's attempt to reduce the sales price through arm's-length negotiation cannot give rise to liability for aiding and abetting." *Malpiede* at 1097.[23] Plaintiffs have not identified any

[23] *See also In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 837 (Del. Ch. 2011) (a third-party acquiror is "free to seek the lowest possible price."); *Morgan* v. *Cash*, 2010 WL 2803746, at *4 (Del. Ch. July 16, 2010) ("the Delaware Supreme Court has explained that a bidder's attempt to reduce the merger price through arm's-length negotiations cannot give rise to liability for aiding and abetting") (citing *Malpiede*, 780 A.2d at 1097-98).

action taken by Analog, an arm's-length merger counterparty, outside of the ordinary course of dealing.

Plaintiffs' claim is particularly deficient to the extent it is based on alleged "knowing[] participat[ion] in the Maxim's board's unlawful *inaction*" in not seeking resumption of dividend payments once the tax issue was resolved in May 2021. A78, ¶ 140 (emphasis added). Plaintiffs thus allege that Analog knowingly participated in a failure to act.

Plaintiffs do not cite any support for the proposition that an arm's-length merger partner can knowingly participate in a Board's failure to act. This Court rejected that proposition as to financial advisors in *RBC*, recognizing it would be inappropriate to expand the Court's "narrow holding here by suggesting that any failure by a [third party] to prevent directors from breaching their duty of care gives rise to an aiding and abetting claim against the [third party]." *RBC*, 129 A.3d at 865 n.191. The point has even greater weight when dealing with an arm's-length merger counterparty rather than a retained sell-side advisor.[24]

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[24] *See also In re Oracle Corp. Derivative Litig.*, 2020 WL 3410745, at *11-13 (Del. Ch. June 22, 2020) (silence does not constitute knowing participation required for aiding and abetting claim); *In re Xura, Inc., S'holder Litig.*, 2018 WL 6498677, at *15 (Del. Ch. Dec. 10, 2018) ("an aiding and abetting claim based on a third-party's alleged failure somehow to *prevent* a board from [acting] rests on thin ice").

Plaintiffs' aiding and abetting claim also fails because it is not reasonably conceivable that Analog believed Maxim had any right to resume dividends payments. Though plaintiffs may think (incorrectly) that Maxim was required to seek consent to resume dividend payments, there is no basis to believe that Analog shared that view. Analog bargained for a dividend suspension and was told by Maxim CEO Doluca that "Maxim will suspend dividends payments for up to a maximum of four quarters." B329. Schedule 4.1(a) of the Merger Agreement reflected that agreement: Maxim "shall not declare or pay a dividend in any of the next succeeding four fiscal quarters." B433. Given these terms, it is not reasonably conceivable that Analog knowingly participated in a breach simply because it never received a request to unsuspend the dividends, or because the Proxy did not disclose a supposed consent right that Analog had no reasonable basis to believe existed. Dismissal of the aiding and abetting claim should be affirmed.

CONCLUSION

For the reasons set forth above, the Court should affirm the decision of the Court of Chancery.

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