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Case Number 224,2023

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| WALTER E. RYAN, JR., and RYAN ASSET MANAGEMENT, LLC, On Behalf of Themselves and All Others Similarly Situated,<br>Plaintiffs Below,<br>Appellants,<br>v.<br>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.,<br>Defendants Below,<br>Appellees. | No. 224, 2023<br><br>Court below:<br>Court of Chancery of the State of Delaware<br><br>C.A. No. 2022-0255-MTZ |

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


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## SUMMARY OF ARGUMENT

All three arguments of appellees (i.e., that the omission was not a material misstatement or omission, that the directors' omissions/misstatements were exculpated, and ADI's liability had no precursor) all rest on the same eight underlying defenses, all of which are either wrong or misstatements.

1. Appellees' assertions that the omissions were not *material* conflicts with their own declarations and filings;

2. Appellees Brief's repeatedly misdescribing the Merger Agreement's dividend suspension provision as a "mere object of interest" "mere curiosity" of the "how and why" or, not subject to consent , or as "standard terms in merger agreements" ignores the Agreement's specific language regarding the operation of the two companies through to the date of closing the merger that unequivocally subjects the dividend prohibition to consent "which shall not be unreasonably withheld, conditioned or delayed;"

3. ADI could not reasonably withhold its consent to the distribution of Maxim's dividends after the IRS Private Letter Ruling eliminated the GILTI tax risk;

4. Materiality includes the post-vote rights and interests of stockholders and their company, and directors can violate their disclosure obligations even in the absence of a request for shareholder action;

5. Comparable transactions transparently disclose the how and why, and certainly the existence of the dividend suspension, its purpose, and its subjection to a consent provision;

6. Maxim made intentionally misleading statements that the dividend suspension was unconditional in the "employee" Q&A revised and posted for investors;

7. Maxim's shareholders have a right to sue the disloyal Maxim directors and ADI to compel a dividend distribution when the sole reason to suspend dividends is eliminated; and

8. ADI is not exculpated from liability for aiding and abetting Maxim's directors' breaches of their fiduciary duties.

Appellees' misstatements notwithstanding, they cannot dispute that they had identified the risk of post-acquisition tax liability was a material risk, such that their intentional concealment of its connection to the dividend suspension to mitigate that risk, along with the elimination of the risk and its reasonable consent obligation, all constitute sufficient allegations to support a non-exculpated claim for bad faith breach of loyalty for their duty of candor, depriving the Maxim shareholders of the information that would have alerted them to their rights to request their dividends be unsuspended, whose consent could not have been reasonably "withheld, conditioned or delayed."

**1. Appellees' assertions that the omissions were not *material* conflicts with their own declarations and filings.**

The Omissions:

1. Maxim agreed to suspend dividend payments to mitigate ADI's asserted 50-50 risk that it be subjected to the GILTI tax;

2. Maxim's dividend suspension was subject to a reasonable consent obligation in ADI;

3. The IRS Private Letter Ruling eliminated the GILTI tax risk three months before the merger closed; and

4. Edited "Q&As" released to investors misleadingly describing the dividend suspension as unconditional.

**The Appellees' assertions that their omissions were not material are utterly without basis or contradicted by the record.** Nor can appellees' labelling the undisclosed connection of the dividend suspension to "mitigate the risk" of a post-closing tax liability and a "Mere Curiosity" be regarded as in good faith.

Dividends and their suspension are material information, especially to shareholders of Maxim. **As described by Maxim itself, substantial dividend distributions each year were a core concept of the company's capital structure**:

**Dividends**

> At Maxim Integrated, an 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 2020, we are currently returning a quarterly dividend of $0.48 per share to our shareholders. Please see our latest quarterly filing for more information.

https://investor.maximintegrated.com/stock-information/default.aspx?section=dividends viewed Oct. 6, 2020. Complaint at ¶21; A21.

**The GILTI foreign tax risk was itself a material risk to Maxim, explicitly identified as such when raised**[1]**,** was material to Maxim shareholders, as was the connection to the dividend suspension, and the omissions to report the connection to the dividend suspension to "mitigate" ADI's risk of post-acquisition tax liability, as was its elimination by the IRS Private Letter Ruling, all of which should have been disclosed and timely reported.

When the GILTI tax risk was first disclosed, it was a clearly material item. When first disclosed:

> The calculation of tax liabilities involves significant judgment in estimating the impact of uncertainties in the application of complex tax laws ac740-10 provides clarification on the accounting for uncertainty in income taxes recognized in the

[1] Appellee Brief at 6, quantifying the risk as a potential tax liability of up to $1 Billion with interest calculated to 2028.

financial statements, the recognition threshold require significant judgment by management. Resolution of these uncertainties in a manner inconsistent with the Company's expectations could affect operations.

**Maxim SEC Form 10k for fiscal year ended June 27, 2020[2] at 65-66:**

**MAXIM INTEGRATED PRODUCTS, INC.**
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS**

On June 18, 2019, the U.S. Treasury and the Internal Revenue Service released temporary regulations under Internal Revenue Code ("IRC") Section 245A ("Section 245A"), as enacted by the Act, and IRC Section 954(c)(6) (the "Temporary Regulations"), which apply retroactively to intercompany dividends occurring after December 31, 2017. The Temporary Regulations limit the applicability of the foreign personal holding company income ("FPHCI") look-through exception for certain intercompany dividends received by a controlled foreign corporation. Before application of the retroactive intercompany Temporary Regulations, the Company benefited in fiscal years 2018 and 2019 from the FPHCI look-through exception. The Company has analyzed the relevant Temporary Regulations and concluded that they were not validly issued. Therefore, the Company has not accounted for the effects of the retroactive Temporary Regulations in its results of operations for fiscal year 2019 or fiscal year 2020. The Company believes it has strong arguments in favor of its position and that it has met the more likely than not recognition threshold that its position will be sustained. The Company intends to vigorously defend its position, however, due to the uncertainty involved in challenging the validity of regulations as well as a potential litigation process, there can be no assurance that the relevant Temporary Regulations will be invalidated, modified or that a court of law will rule in favor of the Company. **An unfavorable resolution of this issue could**

[2] https://www.sec.gov/ix?doc=/Archives/edgar/data/0000743316/000074331620000025/maxim10-kfy2020.htm.

**have a material adverse impact on the Company's results of operations and financial condition.**

And, while shareholders had no way to know of the connection between the tax risk and the dividend suspension, the subsequent May 24, 2021 elimination of that tax risk (which defendants estimated at approaching $1 billion, including interest through 2028) was clearly material as well:

**Maxim Form 10K annual report for fiscal year ended June 26, 2021[3] at 20:**

> **The Company received a private letter ruling ("PLR") from the IRS, dated May 24, 2021,** allowing IRC Section 9100 relief to make a late disregarded entity ("DRE") election for the foreign subsidiary that paid the fiscal year 2018 and 2019 intercompany dividends impacted by relevant sections of the retroactive Temporary Regulations or Final Regulations. Fiscal year 2018 and 2019 intercompany dividends impacted by the retroactive Temporary Regulations or Final Regulations will be disregarded for U.S. tax purposes because of the late DRE election, **and therefore will not be subject to the adverse tax consequences generated by relevant sections of the retroactive Temporary Regulations or Final Regulations.** The PLR allows the Company to file a late DRE election by September 21, 2021 and is contingent on the Company filing amended fiscal year 2018 – 2020 federal tax returns, by September 21, 2021, to reflect the tax impact of the late DRE election, which is immaterial. The Company filed the late DRE election on July 7, 2021 and intends to file the amended federal tax returns by September 21, 2021.

[3] https://www.sec.gov/ix?doc=/Archives/edgar/data/0000743316/000074331621000025/mxim-20210626.htm

And thus, it was also quite clear that this revelation, *of the elimination of the material risk*, should no less have been revealed in an SEC 8-K filing within four business days of receipt. https://www.sec.gov/files/form8-k.pdf at 4.02, 9.01.

Maxim's directors intentional concealment of the connection between the dividend suspension and the GILTI tax risk, the elimination of that risk, along with misleading the shareholders that the dividend suspension was not subject to a reasonable consent obligation, all constitute sufficient allegations to support non-exculpated claims for breaches of loyalty, by depriving the Maxim shareholders of the information that would have allowed them to take a full account of their and the company's post-vote, pre-closing rights and interests.

Further, contrary to Appellee Doluca's mischaracterizations, Appellants' allegations also support a non-exculpated claim against him in his capacity as an officer because, (i) the complaint not only specifies the actions Doluca undertook as an officer; but (ii) the same facts that allow for a reasonable inference that Doluca violated his duties as a director, also allow for a reasonable inference that Doluca violated his duties as an officer, consistent with the cases Appellees cited. *See Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) (the alleged facts that make it reasonable to infer that

the defendant violated his duty of loyalty as a director, also establish his violation of that same duty as an officer.); *see also In re Columbia Pipeline Grp, Inc.,* 2021 WL 772562, *139-*140 (Del. Ch. Mar. 1, 2021) (the same acts defendants took as directors breached their duty of loyalty as officers.)

**2. Appellees' Brief repeatedly misdescribing the Merger Agreement's dividend suspension provision as a "mere object of interest" "mere curiosity"[4] of the "how and why" [5]or, not subject to consent[6], or as "standard terms in merger agreements,"[7] ignores the Agreement's specific language regarding the operation of the two companies through to the date of closing the merger that unequivocally subjects the dividend prohibition to consent "which shall not be unreasonably withheld, conditioned or delayed.".**

The actual language of agreement unequivocally subjects the dividend prohibition to ADI's consent "which shall not be shall not be unreasonably withheld, conditioned or delayed."

The Plain language of an agreement governs and is reviewed by this court de novo. Appellees' argument that a plain language reading of the Agreement is "deconceptualizing" from the Appellees' agreed interpretation utterly lacks good faith. As if "it says black, but in context we meant white."

The Agreement's Section 4.1[8] in plain English explicitly identifies the dividend suspension and 22 other actions in which Maxim is restricted

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[4] Appellees' brief description as "mere curiosity": at 20.
[5] Appellees' brief at 13, 16-20, 23, 29.
[6] Appellees' brief describing the obligation without mention of the consent obligation: at 1, 4, 6-9, 14, 16-17, 20 or "unconditional nature of the dividend suspension: at 24, or 26: "That covenant precluding post-signing dividends was unconditional." --all utterly untrue.
[7] Appellees' Brief at 27 n.18.
[8] https://www.sec.gov/Archives/edgar/data/743316/000119312520239753/d20753ddefm14a.htm, Annex A-The Merger Agreement, at A-32; A24; A119; A417.

subject to ADI's consent, "**which consent shall not be unreasonably withheld, conditioned or delayed**":

**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),** (2) as set forth in Part 4.1(a) of the Company Disclosure Schedule, (3) as may be required by applicable Legal Requirements or (4) as expressly required by this Agreement, the Company shall, and shall cause the Company Subsidiaries to, conduct its business in the ordinary course in all material respects and use commercially reasonable efforts to maintain and preserve intact its business organization, keep available the services of key employees and maintain satisfactory relationships with customers, suppliers and distributors. **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),** (2) as set forth in Part 4.1(a) of the Company Disclosure Schedule, (3) as may be required by applicable Legal Requirements or (4) as expressly permitted or required by this Agreement, the Company shall not (and shall not permit any Company Subsidiary to):

**(i)** amend the Company's Organizational Documents or the Organizational Documents of any Company Subsidiary (other than any amendment to the Organizational Documents of any Company Subsidiary that would not reasonably be expected to be adverse to Parent or to impair, prevent or delay the consummation of any of the transactions contemplated hereby);

> **(ii)** split, combine, subdivide, amend the terms of or reclassify any shares of the Company's capital stock;
>
> **(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 Common 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 4.1(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;
>
> **….**
>
> **(xxiii)** enter into any agreement or make any commitment to take any of the actions described in clauses "(i)" through "(xxii)" of this sentence.

Contrary to Appellees' arguments, neither (i) Appellee Doluca's emails; (ii) Doluca's presentation; nor (iii) the disclosure schedule, affect the interpretation of Merger Agreement which clearly states that Maxim may not take any of the prescribed actions including paying dividends without ADI's consent, which shall not be unreasonably withheld.

### 3. ADI could not reasonably withhold its consent to the distribution of Maxim's dividends after the IRS Private Letter Ruling eliminated the GILTI tax risk.

Whether an acquirer may reasonably withhold its consent to unsuspend a target's dividend payments has not been previously addressed in this context. ADI could not reasonably withhold its consent to unsuspend $500 million of Maxim's dividends because ADI did not have a legitimate business purpose to withhold its consent after the IRS Private Letter Ruling eliminated the reason, the GILTI tax risk, for the dividend suspension.

Consent to a transaction can be reasonably withheld only for a legitimate business purpose. *Cypress Assocs., LLC v. Sunnyside Cogeneration Assocs. Project*, 2007 Del. Ch. LEXIS 10, *58 (Ch. Jan. 17 2007). In *Cypress*, the defendant sought to amend a material term of a contract with one of its customers, but in order to amend a material term of the contract, the defendant was required to get consent – not to be unreasonably withheld – from 80% of its bondholders. *Id*. at *48-49. The plaintiff held over 20% of the bonds, effectively giving the plaintiff veto power over the amendment, and the plaintiff refused or delayed in giving its consent to the amendment. *Id.* at *49. The court held the plaintiff's refusal to consent would be unreasonable if the facts showed that (i) the plaintiff did not actually believe the amendment posed a harm to the bondholders; (ii) the

plaintiff would not have objected absent an unrelated interest dispute; (iii) and the plaintiff used its veto power to force the defendant to compromise on the unrelated interest rate dispute. *Id.* at *54.

In the present case, ADI admitted that it did not have concerns for Maxim's potential GILTI tax liability. Further, ADI could not actually believe the GILTI tax risk posed a harm upon receipt of the Private Letter Ruling from the IRS because the circumstances for revocation of the Ruling – fraud or a change in the tax laws – were far too remote of a possibility. Finally, ADI could not have objected to Maxim issuing dividends to shareholders absent the GILTI tax risk. The undisclosed merger negotiations are clear that the GILTI tax liability was the sole reason ADI negotiated for the dividend suspension. Any rationale – other than the GILTI tax liability – advanced by ADI for its refusal to consent to lifting Maxim's dividend suspension would be entirely pretextual and unrelated to the suspension of the dividends.

**4. Materiality includes the post-vote rights and interests of stockholders and their company, and directors can violate their disclosure obligations even in the absence of a request for shareholder action.**

The (i) suspension of the dividends for the GILTI tax risk; and (ii) conditional nature of the dividend suspension were material to Maxim's stockholders post-vote rights and interests to demand that the directors seek ADI's consent to unsuspend $500 million in dividends which could not be unreasonably withheld, and Appellees' actions violated their disclosure obligations even if they occurred in the absence of a request for stockholder action.

Appellees' arguments that (i) the alleged violations were not material because they would not have changed the shareholders' vote; and (ii) Appellants may not decontextualize materiality from the stockholder action being sought, not only misstates the materiality standard when a request for stockholder action is pending, but also does not provide the full scope of a director's disclosure obligations under Delaware law. Appellees' Answering Brief at 15.

First, Appellees' citation to, *In re GGP, Inc. Stockholder Litigation*, 282 A.3d 37, 69 (Del. 2022), where the court held that information is considered material "if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote", ignores

that 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." *Id.* at 63 (emphasis added).

Similarly, Appellees citation to *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000), ignores that omitted facts are considered material "if there is a substantial likelihood that a reasonable stockholder would consider them important when deciding how to vote." Moreover, this court's holding in *Skeen v. Jo-Ann Stores, Inc* at 1172 [Appellees brief at 14 n.8], that the duty of candor includes appraisal-post voting rights that need not have changed the vote, and indeed that it is necessary to alert stockholders of their rights during the post-vote pre-closing period and must include advice to them of rights that may exist and be triggered in the pre-closing period, supports Appellants' disclosure claims.

Additionally, Appellees do not provide the full scope of their disclosure obligation in their citation to *Malone v. Brincat*, 722 A.2d 5, 12-14 (Del. 1998), where this Court held that materiality is determined with respect to the shareholder action being sought only when a disclosure violation occurs in connection with a request for stockholder action*, but*

*Delaware law also protects shareholders who receive false communication from directors even in the absence of a request for shareholder action.*

Appellees again do not provide the full extent of a director's disclosure duties in their citation to *Dohmen v. Goodman,* 234 A.3d 1161, 1170 (Del. 2020), where this Court confirmed its holding in *Malone v. Brincat*, that (i) when a disclosure violation occurs in connection with a request for stockholder action, then materiality is determined with respect to the shareholder action being sought; but (ii) *directors who knowingly disseminate materially false information could be liable for breach of fiduciary duty, even if the false disclosures were not part of a request for stockholder action.*

*Here*, as in *In re GGP, Inc. Stockholder Litigation*, 282 A.3d at 63 and *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d at 1172, Maxim violated its duty of disclosure, because the reason for and nature of the dividend suspension was relevant to the stockholders' vote since they required that information to make a full planning for the post-signing rights of the shareholders and their company.

Further, to the extent that any of the disclosure violations occurred in the absence of a request for stockholder action, unlike in *Malone v. Brincat*, 722 A.2d 5, Appellants may assert claims for those disclosure violations

because Appellees disseminated materially false information about the dividend suspensions' unconditional nature, and Appellants properly asserted a cause of action for damages on behalf of the class.

**5. Comparable transactions transparently disclose the how and why, and certainly the existence of the dividend suspension, its purpose, and its subjection to a consent provision.**

The Maxim-ADI Merger Proxy omits any meaningful discussion of the dividends' suspension and consent provision contrary to Appellees' arguments that (i) Maxim disclosed all material information, that if the Merger were approved then dividend payments would be suspended, in connection with the shareholder action being sought, i.e., the Merger vote; (ii) the disclosures made in 7 of the 12 transactions cited below do not bear on whether additional details about the dividend suspension here were material to the shareholders' votes; (iii) even if shareholders had a right to seek resumption of the dividends, that right did not exist at the time of the stockholder vote; (iv) no stockholder action was pending when Maxim received the IRS private ruling letter eliminating the tax risk, are inapposite to the twelve transactions Appellees cited below. Appellees' Answering Brief at 15-21.

Appellees disparage Appellants for relying on the twelve transactions, originally cited by Appellees, as evidence that (i) the reasons for and conditional nature of the dividend suspension were material to the stockholders' vote; and (ii) Maxim's partial disclosures that described the suspension as unconditional in the Proxy materials and edited "Q&As" were

misleading, while at the same time Appellees cite the transactions as evidence that dividend suspensions are common.

Instead, the same twelve transactions that Appellees cite support Appellants' arguments because (i) all twelve proxy statements attached the Merger Agreements, which all contained identical consent provisions, as annexes[9]; (ii) eleven transactions state that the dividend suspensions are

[9] Full proxy statements available at:
1.https://www.sec.gov/Archives/edgar/data/1053112/000119312515393296/d15539ddefm14c.htm (Cablevision Systems Corporation Schedule 14C Information) Annex A- The Merger Agreement at A-24-25;
2.https://www.sec.gov/Archives/edgar/data/877890/000119312522077283/d219122ddefm14a.htm (Citrix Systems, Inc. Schedule 14A Proxy Statement) Annex A- The Merger Agreement at A-45;
3.https://www.sec.gov/Archives/edgar/data/714603/000114420418011059/tv485255_defm14a.htm (DST Systems, Inc. Schedule 14A Proxy Statement) Annex A- The Merger Agreement at A-27;
4.https://www.sec.gov/Archives/edgar/data/1115222/000104746918006525/a2236822zdefm14a.htm (The Dun and Bradstreet Corporation Schedule 14A Proxy Statement) Annex A- The Merger Agreement at A-35-36;
5.https://www.sec.gov/Archives/edgar/data/1018003/000119312516596054/d186759ddefm14a.htm (Ingram Micro, Inc. Schedule 14A Proxy Statement) Annex A- The Merger Agreement at A-18, A-20-21;
6.https://www.sec.gov/Archives/edgar/data/1783317/000119312522001754/d170185ddefm14a.htm (McAfee Corp. Schedule 14A Proxy Statement) Annex A- The Merger Agreement at A-43;
7.https://www.sec.gov/Archives/edgar/data/75829/000119312515236154/d936197ddefm14a.htm (Pall Corporation Schedule 14A Proxy Statement) Annex A- The Merger Agreement at A-18;
8.https://www.sec.gov/Archives/edgar/data/1000180/000119312516452485/d126387ddefm14a.htm (Sandisk Corporation Schedule 14A Proxy Statement) Annex A- The Merger Agreement at A-53-54, A-57-58;

subject to a consent provision, one transaction states that the dividend suspension is subject to certain exceptions set forth in the merger agreement, and no transaction states that the dividend suspension is unconditional [10];

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9.https://www.sec.gov/Archives/edgar/data/1633651/000119312520071574/d874113ddefm14a.htm (Tallgrass Energy, LP Schedule 14A Proxy Statement) Annex A- The Merger Agreement at A-43, A-54;
10.https://www.sec.gov/Archives/edgar/data/1024657/000119312517215084/d412858ddefm14a.htm (West Corporation Schedule 14A Proxy Statement) Annex A- The Merger Agreement at A-27;
11.https://www.sec.gov/Archives/edgar/data/1045309/000114036121027791/nc10024379x12_defm14a.htm (W.R. Grace & Co. Schedule 14A Proxy Statement) Annex A- The Merger Agreement at A-24-25;
12.https://www.sec.gov/Archives/edgar/data/743988/000110465921032782/tm2037748-1_defm14a.htm (Xilinx, Inc. Schedule 14A Proxy Statement) Annex A- The Merger Agreement at A-35-36, A-39.

[10] Full proxy statements available at:
1.https://www.sec.gov/Archives/edgar/data/1053112/000119312515393296/d15539ddefm14c.htm (Cablevision Systems Corporation Schedule 14C Information) at 23, 60, 72;
2.https://www.sec.gov/Archives/edgar/data/877890/000119312522077283/d219122ddefm14a.htm (Citrix Systems, Inc. Schedule 14A Proxy Statement) at 76;
3.https://www.sec.gov/Archives/edgar/data/714603/000114420418011059/tv485255_defm14a.htm (DST Systems, Inc. Schedule 14A Proxy Statement) at 14, 16, 74-75, 92;
4.https://www.sec.gov/Archives/edgar/data/1115222/000104746918006525/a2236822zdefm14a.htm (The Dun and Bradstreet Corporation Schedule 14A Proxy Statement) at 93;
5.https://www.sec.gov/Archives/edgar/data/1018003/000119312516596054/d186759ddefm14a.htm (Ingram Micro, Inc. Schedule 14A Proxy Statement) at 10, 70-71, 87;
6.https://www.sec.gov/Archives/edgar/data/1783317/000119312522001754/d170185ddefm14a.htm (McAfee Corp. Schedule 14A Proxy Statement) at 90-91;

and (iii) 7 transactions provided a description of the negotiation of the dividend suspension in the background of the merger.[11]

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7.https://www.sec.gov/Archives/edgar/data/75829/000119312515236154/d936197ddefm14a.htm (Pall Corporation Schedule 14A Proxy Statement) at 73-74;
8.https://www.sec.gov/Archives/edgar/data/1000180/000119312516452485/d126387ddefm14a.htm (Sandisk Corporation Schedule 14A Proxy Statement) at 44-45, 103, 150, 165-167;
9.https://www.sec.gov/Archives/edgar/data/1633651/000119312520071574/d874113ddefm14a.htm (Tallgrass Energy, LP Schedule 14A Proxy Statement) at 15, 101, 105-106, 127;
10.https://www.sec.gov/Archives/edgar/data/1024657/000119312517215084/d412858ddefm14a.htm (West Corporation Schedule 14A Proxy Statement) at 83;
11.https://www.sec.gov/Archives/edgar/data/1045309/000114036121027791/nc10024379x12_defm14a.htm (W.R. Grace & Co. Schedule 14A Proxy Statement) at 13, 100, 124;
12.https://www.sec.gov/Archives/edgar/data/743988/000110465921032782/tm2037748-1_defm14a.htm (Xilinx, Inc. Schedule 14A Proxy Statement) at 162, 165.

[11] Pl.'s Answer in Opposition of Def.'s Mot. to Dismiss, Exhibit A, at A734-A820.
1.https://www.sec.gov/Archives/edgar/data/1053112/000119312515393296/d15539ddefm14c.htm (Cablevision Systems Corporation Schedule 14C Information) at 18;
2.https://www.sec.gov/Archives/edgar/data/877890/000119312522077283/d219122ddefm14a.htm (Citrix Systems, Inc. Schedule 14A Proxy Statement) at 35-36;
3.https://www.sec.gov/Archives/edgar/data/1115222/000104746918006525/a2236822zdefm14a.htm (The Dun and Bradstreet Corporation Schedule 14A Proxy Statement) at 47-48;
4.https://www.sec.gov/Archives/edgar/data/1783317/000119312522001754/d170185ddefm14a.htm (McAfee Corp. Schedule 14A Proxy Statement) at 43-46;

Finally, as previously outlined and further supported by the disclosures in the twelve transactions above, the directors violated their disclosure obligations even if the alleged violations did not occur when a request for stockholder action is pending because Appellees disseminated materially false information to stockholders that the dividend suspension was unconditional.

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5.https://www.sec.gov/Archives/edgar/data/1633651/000119312520071574/d874113ddefm14a.htm (Tallgrass Energy, LP Schedule 14A Proxy Statement) at 26, 28, 30-31,;
6.https://www.sec.gov/Archives/edgar/data/1024657/000119312517215084/d412858ddefm14a.htm (West Corporation Schedule 14A Proxy Statement) at 35, 37-39;
7.https://www.sec.gov/Archives/edgar/data/1045309/000114036121027791/nc10024379x12_defm14a.htm (W.R. Grace & Co. Schedule 14A Proxy Statement) at 39-41.

### 6. Maxim made intentionally misleading statements that the dividend suspension was unconditional in the "employee" Q&A revised and posted for investors.

Appellees' argument, implying that the "edited Q&As" posted on Maxim's website (but recently removed) somehow was a communication limited to employees, ignores that Appellees posted the "employee" Q&A cited in Plaintiffs' Complaint at ¶¶55-61[12] (defendants/Appellees edited the one cited by the Appellees), to Maxim's website, and issued it as a reporting document on the SEC's website, hence eliminating any basis for asserting that the Q&A was other than a self-initiated Form 425[13] benignly and misleadingly concealing plain-vanilla ascribing dividend restrictions as:

> **Why did we suspend our dividend? Is it considered traditional in an acquisition? Why is it the right thing to do for shareholders, many of whom are employees?**
>
> It is not unusual for companies to have restrictions on dividends while a merger is pending.
>
> In this pending-merger period, our stock price will not be driven as much by our cash return, which historically was very fundamental to our investor's thesis and investing in Maxim. We expect that Maxim stock will trade more based on the price of ADI stock and the exchange ratio in the merger as it relates to their stock.
>
> Since this is an all-stock transaction, our shareholders do not lose the benefit of the funds that will not be paid as dividends. When

[12] A48-49.

[13] https://www.sec.gov/Archives/edgar/data/743316/000119312520231430/d46363d425.htm

> the companies combine, Maxim shareholders will be shareholders in the combined company, and so will benefit from the combined company's balance sheet, including the cash that has accumulated on our balance sheet coming in to the merger. That money will be available in the future to benefit the combined company's shareholders, including existing Maxim shareholders.

Complaint at ¶56; A48-49.

Further, Appellees' argument that the "employee" Q&A's statement that dividend suspensions are common is accurate and not misleading, once again fails to provide the full scope of their disclosure duties under Delaware law. It is well-settled that having chosen to speak to the issue and post it to both Maxim's and the SEC's website, Appellees breached their duties of loyalty by failing to be correct and complete in their characterizations of the dividend suspension.

Appellees' citation of *In re GGP, Inc. Stockholder Litigation*, 282 A.3d 37, 71 (Del. 2022), that generally directors do not have to justify each element of a proposed transaction ignores that the plaintiffs in that case plead non-exculpated disclosure claims because (i) the defendants made intentionally misleading statements in order to dissuade stockholders from exercising their appraisal rights; and (ii) "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*

*such an explanation, they were required to be correct and complete.*" *Id.* at 69.

Additionally, Appellees' discussion of *Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270, 1277-1280 (Del. 1994), does not acknowledge that the Court in that case did not need to address whether the information about a bid was material as a matter of law because once the defendants *traveled down the road of partial disclosure, "they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events.*" Instead, the stockholders were granted summary judgment because (i) the defendants' partial disclosures in the proxy materials made a bid for its subsidiary material; and (ii) the defendant's failure to disclose the bid's contingent nature was misleading. *Id.* at 1280.

*Here,* consistent with *Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270 and *In re GGP, Inc. Stockholder Litigation*, 282 A.3d 37, Maxim's directors committed non-exculpable breaches of their duty of loyalty once they made partial disclosures in the "employee" Q&A filed with the SEC that attempted to explain the impact of the merger agreement on shareholders' dividend payments because, (i) the partial disclosures made the negotiation history of, and reasons for the dividend suspension material; and (ii) Appellees' partial disclosures intentionally misled stockholders about the tax risk and consent

provision in an attempt to dissuade them seeking to resume the dividend payments.

### 7. Maxim's shareholders have a right to sue the disloyal Maxim directors and ADI to compel a dividend distribution when the sole reason to suspend dividends is eliminated.

The question of who had the right to seek the consent is also an issue not previously addressed in this context. If the tax risk mitigation connection to the dividend suspension and the Private Letter Ruling had not been concealed, a shareholder's demand of the Maxim board could not have been unreasonably withheld by them, and there is no decision that would have foreclosed a Maxim shareholder from suing her disloyal board and ADI to compel the dividend distribution.

**8. ADI is not exculpated from liability for aiding and abetting Maxim's directors' breaches of their fiduciary duties.**

Finally, Appellees' arguments that the Court correctly dismissed Appellants' aiding and abetting claim against Appellee ADI because Appellants did not plead either (i) a predicate breach by Maxim's directors; or (ii) that ADI knowingly participated in any breaches by Maxim's directors, (Appellees' Answering Brief at 36-37), are inapposite to the facts here because ADI knowingly participated in either (i) Maxim's directors' non-exculpable breaches of their duty of loyalty; or alternatively, (ii) Maxim's directors' exculpable breaches of their duty of care.

Appellees' reliance on in *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 864-65 (Del. 2015), is misplaced because the defendant in that case *was liable for aiding and abetting* since (i) Section 102(b)(7) exculpation only covers directors and does not extend to aiders and abettors; and (ii) the defendant did more than fail to prevent the directors from breaching their fiduciary duty of care but purposefully misled the directors into breaching their duty by failing to fully disclose the defendant's conflicts and ulterior motives which the board, in turn, omitted from the Proxy Statement.

Appellees' reliance on *Malpiede v. Townson*, 780 A.2d 1075, 1097-98 (Del. 2001), is similarly misplaced because in that case, the plaintiff's plead an exculpated predicate breach of the duty of care, but the claim was

dismissed since there was no indication that the defendant knowingly, during arms-length negotiations, participated in the board's decisions, conspired with the board, or otherwise caused the board to make the decisions at issue.

Finally, Appellees' citation to *Weil v. Morgan Stanley DW Inc*., 877 A.2d 1024, 1039 (Del. Ch. 2005), is inapplicable here because the plaintiff in that case failed to state *any* underlying breach of fiduciary duty to support an aiding and abetting claim.

Contrary to Appellees' arguments, and the Court's reasoning below, Plaintiffs' Complaint sufficiently alleged a predicate breach for either (i) a non-exculpable breach of the duty of loyalty because Maxim's directors intentionally misled shareholders about the reasons for, and the nature of the dividend suspension; or (ii) an exculpable breach of the duty of care, to support their aiding and abetting claim against ADI, just like in *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d at 864-65 and *Malpiede v. Townson*, 780 A.2d at 1097-98. Further, unlike in *Malpiede v. Townson*, 780 A.2d at 1097-98, ADI knowingly participated in Maxim's breach through its initiation, concealment, capture, and profit of $500 million of Maxim's dividends.

## CONCLUSION

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

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