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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE CORNERSTONE THERAPEUTICS INC. STOCKHOLDER LITIGATION	No. 564, 2014 Court Below: The Court of Chancery of the State of Delaware Consol. C.A. No. 8922-VCG

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NATURE OF PROCEEDINGS

Plaintiffs-Appellees Edwin Myruski, James Parker, Daniel Blaschak, and David Julier (collectively, "Plaintiffs"), by their attorneys, respectfully submit this brief in opposition to Defendants-Appellants'[1] interlocutory appeal from the Court of Chancery's September 10, 2014 Memorandum Opinion (the "Opinion") denying their motions to dismiss the Verified Consolidated Amended Class Action Complaint (the "Motions" and the "Complaint," respectively).

On December 11, 2013, Plaintiffs filed the Complaint against Cornerstone Therapeutics Inc. ("Cornerstone" or the "Company"), the individual members of Cornerstone's Board of Directors (the "Board"), including the Director Defendants, Chiesi Farmaceutici S.p.A. ("Chiesi"), and Chiesi's wholly-owned subsidiary, Chiesi U.S. Corporation ("Merger Sub").[2]

The Director Defendants moved to dismiss the Complaint pursuant to Court of Chancery Rule 12(b)(6) and the exculpatory provision in the Company's Certificate of Incorporation pursuant to Section 102(b)(7) of the Delaware Code. The Court of Chancery correctly denied the Motions, finding that "where, as here, entire fairness is the standard of review *ab initio*, controlling case precedent directs

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[1] Defendants-Appellants are Christopher G. Codeanne ("Codeanne"), Michael D. Enright ("Enright"), James A. Harper ("Harper"), Michael Heffernan ("Heffernan"), Laura Shawver ("Shawver"), Craig A. Collard ("Collard"), and Robert M. Stephan ("Stephan") (collectively, the "Director Defendants").

[2] Chiesi, Merger Sub, Marco Vecchia ("Vecchia"), and Anton Giorgio Failla ("Failla") did not move to dismiss the Complaint.

that negotiating and facilitating directors must await a developed record, post-trial, before their liability is determined." Op. 15.[3] Consistent with *Emerald Partners v. Berlin*, 787 A.2d 85 (Del. 2001) ("*Emerald II*"), the Court of Chancery found that "Plaintiffs have made a sufficient pleading that a stockholder controlled the corporate machinery; that it used that machinery to facilitate a transaction of which it thus stood on both sides; that the transaction was not entirely fair to the minority; and that the Director Defendants negotiated or facilitated the unfair transaction." Op. 31-32.

On September 22, 2014, the Director Defendants filed their Application for Certification of Interlocutory Appeal, which was granted on September 26, 2014 ("Letter Opinion").

On October 1, 2014, the Director Defendants filed their Notice of Appeal from Interlocutory Order, which was accepted on October 9, 2014.

[3] The quoted portion of the Opinion above that discusses a "post-trial" determination is dicta for purposes of this appeal. Whether or not a court, on a summary judgment motion, with a developed factual record, can remove director defendants from a case pursuant to Section 102(b)(7) is not before this Court. The Opinion denied Defendants' motions to dismiss where the Complaint satisfied the four-factor test, described immediately hereafter, and no discovery has commenced.

SUMMARY OF ARGUMENT

1. Denied. The discrete question of law involved in this interlocutory appeal is:

> When dealing with a transaction subject to entire fairness review *ab initio*, whether breach of duty on the part of facially disinterested directors "who negotiated with the controller or otherwise facilitated the transaction needs to be specifically pled; and whether an exculpation provision adopted pursuant to Section 102(b)(7) must be ignored at the motion-to-dismiss stage . . . ."

Letter Op. 3 (quoting Op. 14.)

2. Denied, in part. The Court of Chancery correctly held that Plaintiffs stated a viable claim against the Director Defendants, not simply the controlling stockholder. Op. 32. The Court of Chancery also noted that even under the Director Defendants' proposed pleading standard, i.e. "that particularized pleadings are required that, if true, raise an inference that such director breached a non-exculpated duty[,]" their motion to dismiss is still problematic because Plaintiffs' allegations that Chiesi threatened to remove the members of the Special Committee during negotiations "raises questions about the ability of the Special Committee to act in the best interest of the minority, unconflicted by self-interest." Op. 27, 32.

3. Denied. Rather than create a *per se* rule, the Court of Chancery correctly determined that, under *Emerald II*,

> "when entire fairness is the applicable standard of judicial review, a determination that the director defendants are exculpated from paying monetary damages can be made only . . . upon a fully-developed factual record . . . .

Op. 31 (quoting *Emerald II*, 787 A.2d. at 94).

4. Denied. The Court of Chancery did not create a *per se* rule that conflicts with Court of Chancery Rule 8(a). Rather, it found, entirely consistent with Rule 8(a), that, after Plaintiffs established that the entire fairness review standard applied because the controller had not conditioned its initial offer *ab initio* on a majority-of-the-minority vote:

> Plaintiffs ha[d] made a sufficient pleading that a stockholder controlled the corporate machinery; that it used that machinery to facilitate a transaction of which it thus stood on both sides; that the transaction was not entirely fair to the minority; and that the Director Defendants negotiated or facilitated the unfair transaction. Such a pleading is sufficient, under controlling precedent, to withstand a motion to dismiss on behalf of the Director Defendants.

Op. 32.

5. Denied. The Opinion does not conflict with the pleading standard set forth in *Malpiede v. Townson*, 780 A.2d 1075, 1094 (Del. 2001), decided under the *business judgment*, as opposed to *entire fairness*, standard of review on a motion to dismiss that was converted to summary judgment, in which this Court noted that "[h]ad plaintiff alleged [] well-pleaded facts supporting a breach of loyalty or bad faith claim, the Section 102(b)(7) charter provision would have been unavailing as to such claims, and this case would have gone forward." *Id.*; *see also Emerald II*,

787 A.2d at 90 (describing *Malpiede* as addressing the proper application of a Section 102(b)(7) provision "in a pretrial procedural context, when the applicable standard of judicial review was the business judgment rule."). Numerous Court of Chancery decisions make clear, that "when a case involves a controlling stockholder with entire fairness as the standard of review, and when there is evidence of procedural and substantive unfairness, a court cannot summarily apply Section 102(b)(7) on a motion to dismiss to enter judgment in favor of facially independent and disinterested directors." *See, e.g., Quadrant Structured Prods. Co., Ltd. v. Vertin*, 2014 WL 5099428, at *28 (Del. Ch. Oct. 1, 2014).

6. Denied. The Court of Chancery did not misinterpret *Emerald II*. As both this Court and the Court of Chancery have noted on numerous occasions, entire fairness is the applicable standard of review in a controlling stockholder transaction because of the risk that directors who appear to be independent and disinterested are, in fact, influenced improperly by the controller. *See* Op. 30 ("Controller transactions are the corporate transactions where the possibility of divided director loyalties, often cryptic and unknowable at the pleading stage, is of greatest concern, as has been explicitly stated by this Court.") (internal citations omitted). As in *Emerald II*, there are also factual issues here which implicate the Director Defendants' fiduciary duty of loyalty.

7. Denied. While the Court of Chancery did recognize that there are costs associated with holding directors who negotiated or facilitated a controller buyout transaction as defendants until a later point in the proceedings, the Opinion also noted that this standard:

> will undoubtedly result in justice being done in cases where, under the [Director] Defendants' pleading rule, faithless directors would not be called to account. . . . Such a trade-off is experienced in business-judgment rule cases as well, but the rate of director crypto-disloyalty or concealed interest is undoubtedly higher in controller cases.

Op. 30. The Opinion does not undermine the purpose of Section 102(b)(7) because that affirmative defense is still available to independent, disinterested directors when the business judgment rule applies and there are no allegations of a breach of loyalty. Moreover, after this Court's recent decision in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 645 n.14 (Del. Mar. 14, 2014), it will be a rare occurrence where a controlling transaction is not conditioned *ab initio* on a majority-of-the-minority condition and negotiated by a facially disinterested and independent special committee. *See* Op. 29 n.68 (citing *Swomley v. Schlecht*, C.A. No. 9355-VCL, at 66:17-68:14 (Del. Ch. Aug. 27, 2014) (TRANSCRIPT)) (applying the *M&F Worldwide* analysis in granting a motion to dismiss, reasoning that "the whole point of encouraging [the *M&F Worldwide*] structure was to create a situation where defendants could effectively structure a transaction so that they could obtain a pleading-stage dismissal against breach of fiduciary duty claims").

STATEMENT OF FACTS[4]

Prior to the Buyout, Cornerstone was a Delaware pharmaceutical company focused on commercializing products for the hospital and adjacent specialty markets. Op. 2.

Chiesi is a privately-held drug maker headquartered in Parma, Italy that researches, develops, manufactures, and markets products with a focus on respiratory therapeutics and specialist medicines. Op. 3; A19, ¶ 23. Prior to the Buyout, Chiesi beneficially owned approximately 65.4% of Cornerstone's outstanding common stock, which it acquired through a series of transactions with the Company and Collard beginning on May 6, 2009. Op. 4; A24, ¶ 42.

On February 18, 2013, Chiesi sent its initial offer letter (the "Initial Offer") to the Board expressing its interest in acquiring all of Cornerstone's outstanding common stock that it did not already own for a price of between $6.40 and $6.70 per share in cash. Op. 4; A27, ¶ 50. The Initial Offer *was not* conditioned on approval by the majority of the Company's minority stockholders and stated that "we are interested only in acquiring the remaining shares of Cornerstone and we have no interest in a disposition of our controlling interest or in considering any other strategic transaction involving Cornerstone." Op. 5.

[4] The facts are drawn from the Complaint. Capitalized terms not otherwise defined herein shall have the same meaning as in the Complaint.

On February 22, 2013, in response to the Initial Offer, the Board established the Special Committee consisting of Enright, Codeanne, Harper, Heffernan, and Shawver to "coordinate its response" to Chiesi's proposal.[5] Op. 5; A26, A29, ¶¶ 46, 51. The Special Committee was not given the authority to solicit potential third party acquirors. *Id.* The Special Committee lacked true independence and ultimately approved an unfair deal. *See* Op. 6; A34, ¶¶ 66-69. Specifically:

- The Special Committee retained Lazard as its financial advisor, despite Lazard informing the Special Committee that it had current ties to, and recent past financial advisory relationships with, Chiesi. Op. 6-7; A29, ¶ 51.

- The Special Committee concluded, based on Lazard's presentation, that a value range of $11.00 to $12.00 per share was financially fair for the minority stockholders and on April 26, 2013, made a counter-offer of $12.00 per share. Op. 7-8; A29-30, ¶¶ 52-53.

- On May 2, 2013, Chiesi responded with a counter-proposal of $8.25 per share, indicated that it was not willing to go any higher,[6] and threatened the Special Committee: "Chiesi, as the majority stockholder of the Company, *ha[s] the right to remove and replace all of the non-Chiesi directors and the Company's senior management team*."[7] Op. 8; A30, ¶ 54 (emphasis added).

- On May 6, 2013, after discussing Chiesi's response, the Special

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[5] The remaining Director Defendants, Collard and Stephen, were not appointed to the Special Committee.

[6] Chiesi offered $8.25 per share despite the fact that Cornerstone's stock had closed at $8.38 per share just two days earlier. A30, ¶ 54. During June 2013, Cornerstone's stock traded above Chiesi's $8.25 per share offer price on every single trading day but one, and traded above $10.00 per share for six days straight. A32, ¶ 61.

[7] As the Court of Chancery correctly noted, "In addition to the relevance of that allegation to fair process, the threat raises questions about the ability of the Special Committee to act in the best interest of the minority, unconflicted by self-interest." Op. 32.

Committee determined that it would make a counter-proposal of $11.00 per share (*i.e*. the lowest price that the Special Committee concluded would be fair value for the Company's shares). Op. 8; A30, ¶ 55. Two days later, Chiesi's CEO called Enright to express his disappointment and frustration with the Special Committee's $11.00 per share counter-proposal, and threatened to enter into a "cooling-off" period or to terminate discussions altogether. *Id*.

- On May 9, 2013, the Company provided Lazard with an updated financial forecast prepared by management (the "Forecast"). Op. 8-9; A31, ¶ 56. On May 24, 2013, after discussing, among other things, Chiesi's feedback at a May 16, 2014 telephonic meeting, the Special Committee revised the financial projections contained in the Forecast downward to reflect certain negative adjustments that the *Special Committee* made to management's projections, and to create an updated preliminary financial analysis. Op. 9; A31, ¶ 57. In an apparent effort to make a transaction with Chiesi at a lower price appear to be fair, the Special Committee made a counter-proposal of $10.25 per share based on its adjustments (which had a negative impact on the range of values in Lazard's updated preliminary financial analyses). *Id*. In addition, the Special Committee requested that Chiesi permit Lazard to contact potential third-party acquirors if Chiesi rejected the $10.25 counter-proposal. Op. 9; A31, ¶ 57. In response, on May 29, 2013, Chiesi rejected the counter-proposal and confirmed that it would not support a process in which a third party would acquire the Company. Op. 9; A31, ¶ 58.

- On June 11, 2013, the Company received a letter from Exela Pharma Sciences, LLC (the "Exela Letter"), advising the Company that it was seeking regulatory approval for an injectable drug that would directly compete with one of Cornerstone's products, Cardene I.V., and alleging that the patents associated with Cardene I.V. were invalid, unenforceable, and/or would not be infringed by Exela's product. Op. 9-10; A32, ¶ 59. *Despite the fact that Company management expressed optimism about the outcome of the Cardene I.V. situation*, the Special Committee determined that it would accept a cash transaction at $9.75 per share, apparently by taking its prior $10.25 offer and discounting it to reflect some of the potential loss of value associated with the Cardene I.V.

situation. Op.10; A32, ¶ 60.[8]

- On August 6, 2013, the Company announced its earnings for the second quarter of 2013 ("2Q 2013 earnings"), which were *above* the levels projected in the Company's Forecast. A32, ¶ 62. Nevertheless, on September 11, 2013, representatives of Chiesi and the Special Committee met and agreed in principle to an all-cash transaction at $9.50 per share, Op. 10; A33, ¶ 64, which was a $0.24 per share *discount* to the market price of the Company's shares the day before the Buyout announcement. A16, ¶ 6. Between September 11 and September 15, 2013, the parties' respective counsel negotiated and exchanged drafts of the Merger Agreement, which finally provided for a "majority-of-the-minority" stockholder approval condition. Op. 10; A33, ¶ 64.

On September 15, 2013, the Special Committee convened with Collard and Stephan and approved the Buyout. Op. 10-11; A29, A33, ¶¶ 52, 65. Later that day, the Board met to consider the Buyout. Op. 11; A33, ¶ 65. Collard advised the Board that he agreed to sign a voting agreement on behalf of himself and certain entities controlled by him in favor of the Buyout. A33, ¶ 65. With Vecchia and Failla recusing themselves, the Board then resolved to enter into the Merger Agreement and to recommend that the Company's stockholders vote to approve and adopt the Merger Agreement. Op. 11; A33, ¶ 65.

A definitive proxy was filed on December 26, 2013. Op. 11. A special stockholder meeting was convened on January 31, 2014, adjourned to solicit additional proxies, and reconvened on February 3, 2014 (on which date the Merger Agreement was approved). *Id.*

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[8] The Special Committee temporarily considered structuring a transaction with a contingent value right, but later abandoned that structure. Op. 10; A32, ¶¶ 59-60.

ARGUMENT

QUESTION PRESENTED

In the context of a suit challenging a controlling stockholder transaction in which entire fairness is the standard of review *ab initio*, and plaintiffs have sufficiently alleged that the transaction is unfair, whether the negotiating and facilitating directors must await a developed record before their liability is determined, even where those directors do not initially appear interested in the transaction.

SCOPE OF REVIEW

This Court reviews "de novo the Vice Chancellor's decision to grant a motion to dismiss under Rule 12(b)(6)." *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013) (internal citations omitted).

MERITS OF ARGUMENT

In addressing a motion to dismiss pursuant to Rule 12(b)(6), this Court must:

> Accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as 'well-pleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.

Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 536 (Del. 2011).

In the controller led going private context, this Court has held that a "complaint would state a claim for relief that would entitle the plaintiff to proceed and conduct discovery" if a plaintiff can plead a "reasonably conceivable set of facts" showing that *any* of the following six factors did not exist:

> (i) the controller conditions the procession of the transaction [from the outset] on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.

M&F Worldwide, 88 A.3d at 645. As set forth herein, Plaintiffs easily satisfy this standard and, therefore, the Director Defendants' interlocutory appeal must be denied.

I. THE COURT PROPERLY DENIED THE DIRECTOR DEFENDANTS' MOTIONS BECAUSE PLAINTIFFS MET THE APPLICABLE PLEADING STANDARD TO STATE BREACH OF FIDUCIARY DUTY CLAIMS IN A CONTROLLING STOCKHOLDER BUYOUT TRANSACTION

The Director Defendants contend that the Court of Chancery erred in finding that Plaintiffs met their obligations under Rule 8(a) because Plaintiffs did not plead a non-exculpated breach of fiduciary duty in this controlling stockholder buyout transaction. Appellants Br. 11. However, on a motion to dismiss, Plaintiffs are not required to plead a non-exculpated breach of fiduciary duty. As the Court of Chancery correctly found, Plaintiffs satisfied the pleading requirements in a

controlling stockholder buyout. Op. 31-32. Alternatively, even if this Court finds that Plaintiffs must plead a non-exculpated breach of fiduciary duty, *i.e.* that the Director Defendants breached their fiduciary duty of loyalty or acted in bad faith, Plaintiffs have satisfied this burden by alleging that, *inter alia*, after Chiesi's threats to the Special Committee, its members failed to fulfill their fiduciary duty of loyalty. *See* Op. 32.

A. Entire Fairness Review Applies To The Buyout

As this Court explained in *M&F Worldwide*, entire fairness is the standard of review governing a going-private transaction conducted by a controlling stockholder and "defendants bear the ultimate burden of proving that the transaction with the controlling stockholder was entirely fair to the minority stockholders." 88 A.3d at 642; *see also Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983). Defendants in a controller transaction can only avoid entire fairness under certain limited circumstances.

Specifically, a controlling stockholder buyout is subject to the less-strict business judgment rule if it is conditioned, *ab initio*, upon both "the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority of stockholders." *M&F Worldwide*, 88 A.3d at 642; *see also In re Sauer-Danfoss,*

Inc. S'holder Litig., Consol. C.A. No. 8396-VCL, at 75 (Del Ch. Oct. 23, 2013) (TRANSCRIPT) (recognizing the two conditions must apply "from the time of the controller's first overture"). Defendants concede that entire fairness is the applicable standard of review for the Buyout because Chiesi did not condition the transaction on a vote by the majority-of -the minority stockholders from the outset. Appellants Br. 13 n.8; *see also* Op. 13 ("the [Buyout] is subject *ab initio* to entire fairness review, as Defendants concede.").

B. Plaintiffs Have Sufficiently Pled Claims For Breaches Of Fiduciary Duties Against The Director Defendants

Rule 8(a) states that a "pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief[.]" *Id.* In the context of a controlling stockholder buyout in which entire fairness is the standard of review, the Court of Chancery found that plaintiffs must satisfy a four-factor test to meet this standard. Specifically, the Court of Chancery found that a plaintiff will only survive a motion to dismiss for failure to state a claim in connection with a controller buyout transaction under this Court's precedent if the complaint pleads sufficient facts showing that: "a stockholder controlled the corporate machinery; that it used that machinery to facilitate a transaction of which it thus stood on both sides; that the transaction was not entirely fair to the minority; and that the Director Defendants negotiated or

facilitated the unfair transaction." Op. 31-32 (citing *Emerald II*, 787 A.2d 85). The Court of Chancery then concluded that the Complaint satisfied this standard.

First, Plaintiffs pled that Chiesi, the majority Cornerstone stockholder, controlled the "corporate machinery" and used its control to facilitate a transaction in which it stood on both sides. Op. 13, 31. As the Court of Chancery explained, stockholder control of the "'corporate machinery' is two-fold: First, controlling stockholders may exercise an ability to authorize a transaction by stockholder vote, and second, controlling stockholders may exercise the ability to control the composition of the board." Op. 20. The Complaint specifically alleges that, at the time the Buyout was announced, Chiesi owned approximately 58% of Cornerstone's outstanding stock, thereby giving Chiesi the ability to authorize a transaction by stockholder vote. A15, ¶ 2. It also alleges that, in the Company's 2012 Form 10-K, Cornerstone stated that Chiesi, as the majority stockholder, "without a meeting or prior notice to stockholders," had the ability to "remove [Cornerstone's] directors with or without cause" and "approve or disapprove significant corporate actions, such as a sale of [Cornerstone]." A24, ¶ 43. Consequently, the Plaintiffs have adequately pled the first two factors.

Additionally, Plaintiffs pled that the Buyout was not entirely fair to Cornerstone's minority stockholders because the negotiated price was the result of an unfair process from the time of Chiesi's Initial Offer through the execution of

the Merger Agreement. Op. 32; A15-16, 27-45, ¶¶ 3, 6, 48-101; *see also Weinberger*, 457 A.2d 701. As noted, Chiesi did not condition its offer to purchase the Cornerstone shares it did not own on a vote of the majority-of-the minority *ab initio*.[9] Thus, Chiesi, the controlling stockholder, did not "self-disable" and "pull back to what would be the equivalent of an arms' length transaction." *In re Sauer-Danfoss*, Consol. C.A. No. 8396-VCL, at 76-77 (TRANSCRIPT); *see also M&F Worldwide*, 88 A.3d at 644.

Further, Plaintiffs pled that Chiesi explicitly threatened to remove the members of the Special Committee after some "hard bargaining" between the two sides. Op. 32; A30, ¶ 54. In the weeks following Chiesi's threat, the Special Committee instructed its financial advisor to revise the Company's management's Forecast downward and failed to upwardly adjust the Forecast after 2Q 2013 earnings exceeded those in the Forecast. Op. 9; A31, 43, ¶¶ 57, 96. The Special Committee also reduced its price demands after the Exela Letter, notwithstanding that Company management expressed optimism about the Cardene I.V. situation. Op. 9-10; A32, ¶¶ 59-60. Drawing all reasonable inferences in Plaintiffs' favor, as the Court must at this stage of the proceedings, it is reasonable to infer that Chiesi's threat to remove the Special Committee members as directors, closely

[9] The Complaint also challenges the independence of the Special Committee members. A16, ¶¶ 4-6; A26-27, ¶¶ 46-48; A28-29, ¶ 51; A31, ¶ 57; A34, ¶¶ 66-69.

followed by the Special Committee's just-described reactions, contributed to an unfair process.[10]

Moreover, the Special Committee had limited power, as it did not have authority to, nor did it, engage potential third party acquirors to solicit higher bids for the Company, instead negotiating solely with Chiesi. Op. 6; A26, ¶ 46. It also hired a conflicted financial advisor, Lazard, further tainting the sale process. Op. 6-7; A29, ¶ 51.

Plaintiffs also alleged that the price Cornerstone stockholders received in the Buyout was unfair. A35-45, ¶¶ 70-101. For instance, Plaintiffs alleged that the $9.50 per share Merger Consideration was wholly inadequate since it was below the then-current trading price for Cornerstone; the Special Committee's downward revisions to the Company's Forecast were not revised upward after 2Q 2013 results exceeded the Forecast, A32, ¶ 62; and an analyst report from August 7, 2013 stated that "$14 is a reasonable if not *conservative* valuation," A37, ¶ 77 (emphasis added). Further, following Chiesi's Initial Offer, a Cornerstone institutional investor sent the Board a letter stating that the "Chiesi proposal grossly undervalues Cornerstone" and that "an offer for Cornerstone at 3 times expected 2013 revenues on enterprise value basis would constitute an offer value far more

[10] It also caused the Special Committee to put the interests of Chiesi ahead of the Company's minority stockholders, as discussed below. *See Cent. Mortg. Co.*, 27 A.3d at 536.

typical for the sector, equating to an approximate $16 per share acquisition price for Cornerstone." A37-38, ¶ 78.

Lastly, the Complaint included factual allegations that the Director Defendants negotiated or facilitated the unfair Buyout. *See* A16, 28-29, ¶¶ 4, 51; Op. 31. *See also* A27-34, ¶¶ 48-65.

The Director Defendants contend that Plaintiffs have failed to plead actionable wrongs against them, insist that no "group pleading" is permitted, and that a complaint must give "fair notice of the *particular* wrong that he is alleged to have committed." Appellants Br. 12. But the Complaint does exactly that. Indeed, the Complaint identifies each member of the Special Committee and the specific misconduct that the Special Committee engaged in. The Director Defendants have been fairly apprised of the wrongs they are alleged to have committed in satisfaction of Rule 8(a).

The Director Defendants imply that Plaintiffs must allege the particular wrong that each Director Defendant committed over the course of negotiations with Chiesi. Without discovery, this is an impossible task. Plaintiffs are not required to allege specifics about the conversations that each member of the Special Committee had with Chiesi, each other and/or their advisors in the absence of discovery because that would require far more than the "short and plain

statement" required by Rule 8(a). The Complaint gives the Director Defendants notice of the wrongs they committed. That is all that is required.

II. THE SECTION 102(b)(7) PROVISION DOES NOT WARRANT THE DIRECTOR DEFENDANTS' DISMISSAL FROM THE ACTION

A. The Director Defendants Distort The Legal Import And Procedural Effect Of The Company's Section 102(b)(7) Provision

The Court of Chancery correctly held that it would be premature on a motion to dismiss, prior to any discovery, in an action where entire fairness applies, to determine whether the Company's Section 102(b)(7) provision exculpated the Director Defendants' from liability. Op. 31-32. The Director Defendants' request for this Court to mandate that the Court of Chancery determine their liability for *damages* before it is able to determine either the nature or fact of their misconduct is contrary to well-established law. *See Emerald II*, 787 A.2d at 92 ("[A] Section 102(b)(7) provision does not operate to defeat the validity of a plaintiff's claim on the merits, [but] it can operate to defeat the plaintiff's ability to recover monetary damages.").

This Court has limited the dismissal of claims based on a Section 102(b)(7) provision to those circumstances where it can be determined, as a matter of law, that plaintiff's "factual basis for the claim *solely* implicates a violation of the duty of care." *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("*Emerald I*") (citations omitted). "If a court cannot make the requisite

determination as a matter of law on the pretrial record, it becomes necessary to hold a trial and evaluate each director's potential liability individually." *Chen v. Howard-Anderson*, 87 A.3d 648, 676-77 (Del. Ch. 2014). Here, the Director Defendants seek to avoid the necessity of a pretrial record altogether, notwithstanding that they admit this is an entire fairness case and do not dispute that the Complaint satisfies the previously discussed four-factor test, which establishes that the Complaint sufficiently alleges that the Director Defendants negotiated and approved an unfair controller buyout.

Section 102(b)(7) permits corporations to adopt charter provisions that eliminate or limit the "the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty" subject to enumerated exceptions, including bad faith and disloyalty. *Id.* at 675; *see also In re LNR Prop. Corp.*, 896 A.2d 169, 178 (Del. Ch. 2005) ("[Section 102(b)(7)] bars any claim for monetary damages against director defendants based solely on the board's alleged breach of its duty of care, but does not provide protection against claims based on, *inter alia*, acts or omissions not in good faith and violations of the fiduciary duty of loyalty."). "[T]he shield from liability provided by a certificate of incorporation provision adopted pursuant to 8 Del. C. § 102(b)(7) is in the nature of an affirmative defense." *Emerald I*, 726 A.2d at 1223 (citations omitted). The provision, however, cannot place challenged conduct beyond judicial review.

Chen, 87 A.3d at 676 (citing 1 David A. Drexler *et al.*, *Delaware Corporation Law and Practice*, § 6.02[7] at 6-18 (2013)).

Simply put, Plaintiffs do not have to plead around a defense to satisfy the elements of their claim pursuant to Rule 8(a). If the Complaint states a claim (which the Opinion found it did and Defendants do not dispute), it is Defendants' burden to sufficiently establish their defense with evidence (*i.e.*, a factual record). Defendants seek to turn the pleading requirements on their head.

1. Dismissal of Plaintiffs' Claims Would be Premature

In *Emerald II*, this Court explained that the level of scrutiny impacted how and when a court should determine whether a Section 102(b)(7) provision eliminated a director defendant's monetary liability. 787 A.2d at 90-94; *see also In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 32 (Del. Ch. 2014) ("The degree to which a court can classify claims as falling only within the duty of care and enter judgment based on the statutory immunity conferred by Section 102(b)(7) depends on the stage of the case, the standard of review and the allegations or evidence to be considered."). In *Emerald II*, this Court examined the impact of the business judgment rule on a court's determination regarding a Section 102(b)(7) provision. 787 A.2d at 90-92. Citing its prior decision in *Malpiede*, the Court explained that when business judgment is the standard of review *ab initio*, a Section 102(b)(7) provision – by eliminating monetary liability

for breaches of due care – obviates the need for a trial where a complaint clearly alleges only a due care violation, absent allegations of bad faith or disloyalty. *Id.* at 92 (citing *Malpiede*, 780 A.2d at 1094). As such, when the business judgment rule applies, once a court determines that a complaint "unambiguously asserts *only* a due care claim," it is appropriate for a court to dismiss a complaint. *Emerald II*, 787 A.2d at 91 (emphasis in original).

When the standard of review *ab initio* is entire fairness, which, as the Director Defendants concede, it is here, Appellants Br. 13 n.8, the *Emerald II* Court emphasized the need for a more probing inquiry; "[t]he category of transactions that require judicial review pursuant to the entire fairness standard *ab initio* do so because, by definition, the inherently interested nature of those transactions are inextricably intertwined with issues of loyalty." 787 A.2d at 93; *see also* Op. 30 n.69. That is to say, there is always a risk "that the outside directors might be more independent in appearance than in substance." *Quadrant*, 2014 WL 5099428, at *28 (quoting *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 619 (Del. Ch. 2005)).[11] Indeed, the purpose for imposing entire fairness review in controlling stockholder transactions is to identify situations in which "facially independent and disinterested directors have failed to act loyally and in

[11] In *Quadrant*, the Court of Chancery reiterated that a controlling stockholder is like an "800-pound gorilla whose urgent hunger for the rest of the bananas is likely to frighten less powerful primates like putatively independent directors[.]" 2014 WL 5099428, at *28 (citing *In re Pure Res., Inc., S'holder Litig.*, 808 A.2d 421, 436 (Del. Ch. 2002)).

good faith to protect the interests of the corporation and stockholders as a whole and instead given in to or favored the interests of the controller." *Quadrant*, 2014 WL 5099428, at *28. "Under those circumstances [*i.e.*, circumstances that warrant an independent assessment that a transaction is entirely fair] it is not possible to hold as a matter of law that 'the factual basis for the claim *solely* implicates a violation of the duty of care.'" *Id.* at *28 (quoting *Emerald I*, 726 A.2d at 1224).

Thus, in *Emerald II* this Court instructed lower courts to save the Section 102(b)(7) inquiry into whether director defendants are exculpated from monetary liability until after the court conducts an entire fairness hearing in which it untangles whether the misconduct that occurred, if any, involved a mere breach of the duty of care or something more. 787 A.2d at 93 ("[W]hen entire fairness is the applicable standard of judicial review . . . injury or damages becomes a proper focus only *after* a transaction is determined *not* to be entirely fair.") (emphasis in original). Therefore, *Emerald II* is best read – in contrast to the Director Defendants' interpretation – to bar dismissal at the pleading stage based on the invocation of a Section 102(b)(7) provision when the applicable standard of review is entire fairness.

In short, *Emerald I & II* and *Malpiede* establish that a Section 102(b)(7) provision provides a sufficient basis to dismiss prior to any discovery only if two preconditions are met: (i) the business judgment rule applies *and* (ii) the complaint

on its face unambiguously asserts only a due care claim. *See In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 490 (Del. Ch. 2013) (finding it premature to grant a motion to dismiss for claims brought against purportedly independent *and* disinterested directors based on a Section 102(b)(7) provision when the standard of review was entire fairness); *In re LNR Prop.*, 896 A.2d at 178-79 (declining to grant dismissal based on a Section 102(b)(7) provision where the appropriate standard of review was unresolved and plaintiff had alleged directors acted in bad faith when approving a merger). It should be dispositive that Appellants concede that the first precondition, application of the business judgment rule, has not been met here. Appellants Br. 13 n.8.[12]

The Director Defendants contend that *Emerald II* is restricted to "the appropriate sequence of determining entire fairness and exculpation *at trial*." Appellants Br. 19 (emphasis in original). Nothing in *Emerald II* suggests that this is the case. In fact, such a reading contradicts the Court's rationale articulated therein and described *supra*. 787 A.2d at 93, 94, 97-98 (remanding with specific instructions for the court below to conduct an entire fairness hearing to determine the nature and fact of the director defendants' misconduct *before* considering whether Section 102(b)(7) exculpates them from monetary liability). To ask a court to dismiss a well pleaded claim because Section 102(b)(7) will immunize

[12] It is equally dispositive that, as described *supra* and *infra* and consistent with the Opinion, the second precondition has not been met either. *See* Op. 32.

director defendants from monetary liability before the court determines the nature and fact of their misconduct puts the cart before the horse.

Indeed, the Director Defendants cite no post-*Emerald II* controller led going private case that supports their ultimate contention that the Company's Section 102(b)(7) provision could have warranted granting their motion to dismiss (i) before any discovery has occurred; and (ii) when the applicable standard of review is entire fairness.

The Director Defendants' reliance on *DiRienzo v. Lichenstein* is misplaced for multiple reasons. Appellants Br. 27-28. First, the parties in *DiRienzo* conducted "several months" of discovery before the special committee moved to dismiss all counts against it. 2013 WL 5503034, at *8 (Del. Ch. Sept. 30, 2013). As such, the factual record, although not as developed as mandated by *Emerald II*, was significantly more developed than the factual record here – where there has been no party discovery whatsoever. The Director Defendants' reliance on *In re Southern Peru Copper Corp. Shareholder Derivative Litigation* is equally inapt, because the Court of Chancery's dismissal of the plaintiff's claims against the special committee defendants occurred at the summary judgment stage, not the pleading stage. 52 A.3d 761, 785 (Del. Ch. 2011), *aff'd sub nom. Am. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

Moreover, insofar as *DiRienzo* suggests that the inquiry into a director defendant's liability is entirely distinct from the assessment of the entire fairness of a controlling stockholder transaction or that the entire fairness of a challenged transaction reflects only on the controlling stockholder's liability, *DiRienzo* conflicts with *Emerald II*. In *Emerald II*, this Court expressly stated that the entire fairness analysis "must begin with an examination of the *process* by which the directors discharged their fiduciary responsibilities." 787 A.2d at 96 (emphasis in original). It also stated that director defendants cannot "avoid the unflinching demand of demonstrating entire fairness," even if they are ultimately exculpated by a Section 102(b)(7) provision. *Id.* at 96-97.

Furthermore, the *DiRienzo* court improperly inferred that the *Emerald II* Court had concluded entire fairness was the appropriate level of scrutiny by "virtue of [the directors'] conduct," *i.e.* because the Court had found that the special committee was not disinterested. 2013 WL 5503034, at *11. This is not so. Rather, this Court emphasized in *Emerald II* that "[the controlling stockholder CEO]'s stance on both sides as a corporate fiduciary, *alone*, is sufficient to *require* the demonstration of entire fairness." 787 A.2d at 94 (quoting *Emerald I*, 726 A.2d at 1221 n.8) (emphasis in *Emerald II*). This accords with the rationale, described *supra*, that the very purpose of entire fairness review is to "uncover situations where facially independent and disinterested directors have failed to act

loyally and in good faith to protect the interests of the corporation and the stockholders as a whole and instead have given in to or favored the interests of the controller." *In re Orchard*, 88 A.3d at 37 (citing *Tremont Corp.*, 694 A.2d at 428-29).

Nor can *Shandler v. DLJ Merchant Banking, Inc.*, which is both factually and legally distinct from the allegations here, bear the weight of the Director Defendants' contentions. 2010 WL 2929654 (Del. Ch. July 26, 2010). *Shandler* involved derivative claims brought by the creditor trustee of an insolvent corporation against the corporation's directors and controlling stockholder for the pre-bankruptcy sale of a corporate asset to the controlling stockholder. *Id.* The context in *Shandler* was thus wholly distinct from that of the controller led going private transactions addressed by *Emerald I* and *II*, *M&F Worldwide*, and other decisions bearing directly on this appeal. Further, the plaintiff in *Shandler* never even raised the argument that 102(b)(7) should not apply at the pleading stage, instead focusing on an argument that he had adequately pled non-exculpated breaches of fiduciary duty. *Id.* at *4-5. As such, the *Shandler* court had no basis from which to discuss what effect, if any, its determination that entire fairness applied to the transaction bore on how it resolved one director defendant's invocation of the company's Section 102(b)(7) provision. *Id.*

No other case the Director Defendants cite supports their contention that a

Section 102(b)(7) provision could warrant dismissing claims against director defendants in the context of a controller buyout when the standard of review is entire fairness. Indeed, each and every case cited by the Director Defendants for that proposition, not previously distinguished above, was decided *before Emerald II*. Appellants Br. 28 n.19.[13] In any event, many of those pre-*Emerald II* cases, in fact, support Plaintiffs' position. For instance, in *In re Lukens Inc. Shareholder Litigation*, the Court of Chancery, anticipating *Emerald II*, interpreted *Emerald I* to require that "where a complaint adequately alleges an entire fairness claim (implicating, at least initially, elements of good faith, loyalty, and care), the burden will be on a director defendant to show his or her entitlement to the immunizing effect of the charter provision." 757 A.2d 720, 733-34 (Del. Ch. 1999). The court in *Lukens* further stated "if a complaint adequately alleges bad faith or disloyalty, or some other exceptional circumstances under [Section] 102(b)(7), *or* if the nature of the alleged breach of the duty is unclear, the complaint will not be dismissed on a motion made under Rule 12(b)(6) on the basis of an exculpatory charter provision." *Id.* at 734 (citations omitted; emphasis added).[14]

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[13] *See In re Lukens Inc. S'holder Litig.*, 757 A.2d 720 (Del. Ch. 1999); *In re Gen. Motors Class H S'holder Litig.*, 734 A.2d 611, 616, 619 (Del. Ch. 1999); *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902 (Del. Ch. 1999); *In re Frederick's of Hollywood, Inc.*, 2000 WL 130630 (Del. Ch. Jan. 31, 2000).

[14] In arguing that *Emerald II* did not change the pleading requirements in controlling stockholder transactions, Appellants conflate two distinct issues: (i) the pleading requirements for establishing a controlling stockholder transaction that is reviewed under entire fairness with (ii) the proper procedure for determining if a Section 102(b)(7) provision exculpates a director

III. THE OPINION IS CONSISTENT WITH FUNDAMENTAL PRINCIPLES OF DELAWARE CORPORATE LAW AND DOES NOT DISPLACE BASIC PLEADING REQUIREMENTS

As explained *supra*, the Director Defendants' contention that the Opinion would "wipe away basic pleading requirements and force a company director to face the burdens of trial without any allegations of wrongdoing against him or her" is completely unfounded. Appellants Br. 29. On the contrary, there are policy considerations that support this Court and the Court of Chancery's reluctance to dismiss director defendants early in litigation based solely on a Section 102(b)(7) exculpation provision. As the Court of Chancery recognized:

> Holding directors who negotiated or facilitated the transaction as defendants until a post-trial determination of entire fairness has been made, for purposes of determining at that point whether those defendants have breached non-exculpated fiduciary duties, will undoubtedly result in justice being done in cases where, under the [Director] Defendants' pleading rule, faithless directors would not be called to account.

Op. 30.

While each of the Director Defendants' policy arguments will be addressed in turn *infra*, it should be noted that the Court of Chancery recognized that it was "not free to make a policy determination here, because controlling precedent

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defendant from liability for monetary damages with respect to the claims asserted. *See* Appellants Br. 18-29. Indeed, the burden is on defendants, not plaintiffs, to invoke a Section 102(b)(7) provision and to establish their entitlement to its protections. *See Emerald I*, 726 A.2d at 1223-24 ("Defendants seeking exculpation under such a provision will normally bear the burden of establishing each of its elements.").

require[d the court] to deny the Motion to Dismiss under these circumstances." Op. 31.

First, this Court and the Court of Chancery have recognized that in a controller transaction there is a higher risk that directors who appear to be disinterested are in fact suffering from divided loyalties:

> "A controlling stockholder transaction of course is the context in which the greatest risk of undetectable bias may be present." Under controlling Delaware Supreme Court precedent, entire fairness governs a controlling stockholder transaction, even if a special committee of independent directors or a majority-of-the-minority vote is used, because of the risk that when push comes to shove, directors who appear to be independent and disinterested will favor or defer to the interests and desires of the majority stockholder.

In re Orchard, 88 A.3d at 37 (quoting *Kahn v. Tremont Corp.*, 1996 WL 145452, at *7 (Del. Ch. Mar. 21, 1996)). Rather than make an automatic inference that a disinterested director would disregard his fiduciary obligations in favor of a controller transaction as the Director Defendants contend, Appellants Br. 30-31, the Opinion mandates that only when a controlling stockholder transaction is not conditioned on a majority-of-the minority vote *ab initio* and a plaintiff sufficiently pleads that (i) a stockholder controlled the corporate machinery; (ii) it used that machinery to facilitate a transaction of which it thus stood on both sides; (iii) the transaction was not entirely fair to the minority; and (iv) the director defendants negotiated or facilitated the unfair transaction (in other words, where plaintiffs

have sufficiently pled that those charged with guarding the rights of the minority shareholders failed in their duty by approving an unfair transaction with a controller), entire fairness prevents a Section 102(b)(7) provision from exculpating director defendants at the motion to dismiss stage.

Second, after *M&F Worldwide* it will be rare that a controller transaction is not conditioned, *ab initio*, on a majority-of-minority vote and review by a disinterested special committee. Indeed, we may never see this situation again in our lifetimes. Thus, the Director Defendants' insinuation that the Court of Chancery's decision will severely impact directors' willingness to serve on special committees is a bit overstated. *See* Appellants Br. 34. In fact, even prior to *M&F Worldwide* and, at least since *Emerald II*, directors serving on special committees in entire fairness transactions virtually never prevailed on a motion to dismiss. *See, e.g.*, *In re Cox*, 879 A.2d at 647-48 (noting generally that "a [*Kahn v.*] *Lynch* suit attacking [a] negotiated merger's [entire] fairness. . . would be, under current law, not susceptible to a motion to dismiss."). Yet there have been many dozens of special committees of boards of directors formed in entire fairness cases in the thirteen years since *Emerald II* on which directors willingly sat because, among other things: (i) the board members understood their fiduciary responsibilities; (ii) they were paid (in some cases rather handsomely); (iii) the companies on whose boards they sat indemnified them from liability; (iv) they were covered for "loss"

by Directors' and Officers' Liability insurance; and (v) Section 102(b)(7) exculpates them from paying any damages if they acted loyally, even though incompetently.

Furthermore, notwithstanding that so-called independent directors have historically failed to prevail on their motions to dismiss in entire fairness cases, they have dutifully entered into negotiations with controllers because they have a duty to act in the best interests of the minority stockholders and, to do otherwise, would expose them to liability. Therefore, the Director Defendants' argument that, should the Opinion be upheld, special committees will avoid negotiating with controllers altogether is not credible. *See* Appellants Br. 32.

Third, keeping the Director Defendants in the case will not make the disposition of controlling stockholder cases more inefficient and expensive to resolve, as "judicial scrutiny of the directors' actions in the context of the fairness of the transaction [] would occur whether or not they remain[] defendants." Op. 30. The Director Defendants are essential fact witnesses who will be required to participate in the proceedings regardless of whether they remain named defendants, so no judicial economy will be achieved through their dismissal.

Fourth, the Director Defendants' argument that granting their Motions will not adversely affect the minority stockholders because they can still pursue their claims against the controller, Appellants Br. 33, while potentially true in other

situations, is not true here because the controller in this case is a foreign entity, which to date, has refused to subject itself to the jurisdiction of the Court and has not cooperated with Plaintiffs' discovery requests under the Hague Convention. Thus, there is no guarantee that any judgment granted in favor of Plaintiffs will be enforceable against Chiesi or the other foreign defendants.

Fifth, the Opinion is not a watershed decision, nor does it undermine the purpose of Section 102(b)(7), which is to protect disinterested directors against a monetary judgment for the breach of the duty of care. Entire fairness review exists, in part, to allow for thorough discovery and fact-finding in order to "uncover" possible violations of the duty of loyalty by "facially independent disinterested directors" who may be unduly influenced by a controller. *In re Orchard*, 88 A.3d at 37. As such, the purpose of entire fairness review would be defeated if director defendants were exculpated based on a Section 102(b)(7) provision before discovery and fact-finding have taken place. Plaintiffs have more than met their Rule 8(a) pleading burden by alleging facts that, at a minimum, implicate the Director Defendants in negotiating and approving a transaction with the controlling defendant that elected them to their Board seats, that was not entirely fair to Cornerstone's public shareholders, as the Court of Chancery found.

IV. EVEN IF THIS COURT ADOPTS THE DIRECTOR DEFENDANTS' PROPOSED PLEADING STANDARD, BECAUSE THE COMPLAINT ALLEGES FACTS THAT IMPLICATE THE DIRECTOR DEFENDANTS' DUTY OF LOYALTY, THE MOTIONS MUST STILL BE DENIED

A Section 102(b)(7) provision will justify granting a director defendant's motion to dismiss if a stockholder's "complaint *unambiguously* asserts only a due care claim." *Emerald II*, 787 A.2d at 91 (citing *Malpiede*, 780 A.2d at 1095 (emphasis added). Put conversely, a claim should not be dismissed if the factual allegations make it reasonably conceivable that the misconduct alleged implicates bad faith or disloyalty. *See O'Reilly*, 745 A.2d at 914-15 (denying motion to dismiss based on Section 102(b)(7) provision where complaint alleged misconduct implicating bad faith and disloyalty).

In the event the Court finds that Plaintiffs must plead a non-exculpated breach of fiduciary duty, Plaintiffs have done so here. Op. 32. As discussed *supra*, Chiesi threatened to remove members of the Special Committee following "hard bargaining." Op. 32. It is reasonable to infer that Chiesi's threat influenced the Special Committee. That is because, in the weeks following the threat, the Special Committee took a number of steps that evidence favoritism to Chiesi at the expense of Cornerstone's minority stockholders. *Supra* at 9-11. Most notably, the Special Committee instructed its financial advisor to make downward adjustments to the Company's Forecast, which directly, and negatively, impacted the

consideration ultimately received by Cornerstone's minority stockholders. Moreover, even after the original Forecast was proven to be too conservative after the release of 2Q 2013 earnings, the Board failed to upwardly adjust it. Since all reasonable inferences must be drawn in Plaintiffs' favor on a motion to dismiss, the Court of Chancery properly concluded that the "threat raises questions about the ability of the Special Committee to act in the best interest of the minority, unconflicted by self-interest." Op. 32.

Indeed, the Court of Chancery noted that Plaintiffs' allegations likely precluded it from finding that the Director Defendants' alleged misconduct was merely the result of a breach of the duty of care. Op. 32. As it stated, "even under the Director Defendants' proposed pleading standard, their motion to dismiss would be problematic[.]" *Id.*; *cf. DiRienzo*, 2013 WL 5503034, at *12-16 (finding that it was not reasonably conceivable from plaintiff's allegations that the special committee acted disloyally or in bad faith). Thus, even if the Court adopted Appellants' proposed pleading standard, which it should not, it should still affirm the Court of Chancery's dismissal of the Motions.

<u>CONCLUSION</u>

For the foregoing reasons, the Court should affirm.

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