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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN APPEL, Individually and on Behalf of All Others Similarly Situated, Plaintiff-Below, Appellant, v. DAVID J. BERKMAN, STEPHEN J. CLOOBECK, RICHARD M. DALEY, FRANKIE SUE DEL PAPA, JEFFREY W. JONES, DAVID PALMER, HOPE S. TAITZ, ZACHARY D. WARREN, and ROBERT WOLF, Defendants-Below, Appellees.	PUBLIC VERSION Filed October 10, 2017 No. 316, 2017 Court Below: Court of Chancery of the State of Delaware C.A. No. 12844-VCMR

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

Plaintiff below-Appellant ("Plaintiff") is a former stockholder of Diamond Resorts International, Inc. ("Diamond" or the "Company"). After conducting a books-and-records investigation under 8 *Del. C.* § 220 ("Section 220"), Plaintiff filed a class action complaint (the "Complaint") in the Court of Chancery alleging that Diamond's former board of directors (the "Board" or the "Director Defendants") breached their fiduciary duties in connection with the sale of the Company to Apollo Management LLC ("Apollo") for $30.25 per share (the "Transaction").

The Transaction was approved and entered into over the opposition of Stephen J. Cloobeck ("Chairman Cloobeck"), Diamond's founder, Board Chairman, largest stockholder and former Chief Executive Officer ("CEO"). During full Board meetings held on June 25, 2016 and June 26, 2016, Chairman Cloobeck objected that he was "disappointed with the price" of the Transaction and that "it was not the right time to sell the Company." Despite this unequivocal opposition from the individual lauded by Diamond in its public filings as possessing a "unique understanding" of the Company's value and prospects, the Board approved the Transaction just hours later, on June 26. Chairman Cloobeck abstained from the vote.

The Board then knowingly and intentionally omitted from the Schedule 14D-9 Solicitation/Recommendation Statement (the "14D-9")—filed with the United States Securities and Exchange Commission (the "SEC") in connection with the Transaction—any mention of Chairman Cloobeck's opposition, let alone the fact that he communicated his objections to the full Board at two critical meetings.

On July 13, 2017, the Court of Chancery issued an order[1] (the "Order") granting the Director Defendants' motions to dismiss Plaintiff's Complaint for failure to plead facts that would prevent dismissal of the action pursuant to this Court's decision in *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015). The Court of Chancery held that, *inter alia*, Plaintiff had failed to adduce allegations creating a reasonably conceivable inference that the stockholders who tendered their shares in the Transaction were not fully informed. Plaintiff appeals from that judgment.

[1] Attached hereto as Exhibit A. Unless otherwise noted, all emphasis has been added by Appellant.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in holding that the Director Defendants satisfied their burden of demonstrating that Diamond stockholders' decision on whether to tender their shares in the Transaction was fully informed, and therefore mandated dismissal under *Corwin*. In condoning the Board's omission of the very ***existence*** of Chairman Cloobeck's opposition to the price and timing of the Transaction, the Court of Chancery improperly disregarded its own prior determination in almost identical circumstances that the omitted facts were patently material and required disclosure pursuant to *Gilmartin v. Adobe Resources Corporation*, No. 12467, 1992 Del. Ch. LEXIS 80 (Del. Ch. Apr. 6, 1992).

2. The Court of Chancery also erred by disregarding this Court's well-established materiality standard. The Court of Chancery mischaracterized the omitted facts establishing the ***existence*** of Chairman Cloobeck's opposition to the Transaction as information concerning "Cloobeck's ***reasoning*** for his abstention," and then relied on inapposite Court of Chancery jurisprudence in applying a *per se* rule to hold that those facts were immaterial as a matter of law. Exhibit A at 5-7. The *per se* rule set forth in the Order conflicts with Delaware's materiality standard set forth in the Court's seminal decision *Lynch v. Vickers Energy Corporation,* 383 A.2d 278 (Del. 1977), which required the Court of Chancery to weigh the facts

surrounding Chairman Cloobeck's concerns from the point of view of the "reasonable shareholder" to determine materiality.

For all the reasons set forth herein, this Court should reverse.

STATEMENT OF FACTS

A. Chairman Cloobeck Builds Diamond Into A Success

Prior to the Transaction, Diamond was a publicly-traded hospitality and vacation ownership company founded by Chairman Cloobeck in April 2007.[2] From April 2007 through December 2012, Chairman Cloobeck served as Diamond's Chairman and CEO, and grew Diamond into a global enterprise.[3] Diamond thrived under Chairman Cloobeck's leadership, resulting in Diamond's highly successful initial public offering ("IPO") on July 19, 2013.[4]

As of March 31, 2016, Cloobeck remained Diamond's Chairman and largest stockholder, beneficially owning 15.1% of its outstanding common stock.[5]

B. Diamond Publicly Recognizes Chairman Cloobeck's "Unique Understanding" Of The Company

In the years following Diamond's IPO, the Company publicly touted Chairman Cloobeck as the person possessing the most institutional knowledge about Diamond, and repeatedly acknowledged his importance to the Company and to its stockholders.[6] For example, in Diamond's April 15, 2016 proxy statement, the Board told stockholders that:

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[2] A00020-A00021

[3] *Id.*

[4] A00021.

[5] A00018.

[6] A00053.

> The Board believes that Mr. Cloobeck, as our founder and the former Chief Executive Officer of Diamond LLC, should continue to serve as a director because of ***Mr. Cloobeck's unique understanding of the opportunities and challenges that we face and his in-depth knowledge about our business, including our customers, operations, key business drivers and long-term growth strategies***, derived from his 30 years of experience in the vacation ownership industry and his service as our founder and former Chief Executive Officer.[7]

C. Centerview Informs The Board That Diamond's Stock Price Is Artificially Depressed And Undervalued

The process to sell Diamond began in early January 2016.[8] On January 12, 2016, David Sambur, an Apollo partner, communicated to Diamond Apollo's interest in potentially investing in Diamond's convertible preferred stock.[9] Later that same day, Centerview Partners LLC ("Centerview")—[redacted]—made a presentation to the full Board concerning Diamond's value.[10]

[redacted][11] Centerview also informed the Board that Diamond's financials [redacted]

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[7] A00053-A00054; A00269.

[8] A00022.

[9] *Id.*

[10] A00022-A00023.

[11] A00023.

[redacted][12]

Centerview also [redacted]

[redacted][13]

Two weeks later, during a follow-up Board meeting, Centerview further cautioned the Board regarding the [redacted][14] For example, during that meeting Centerview explained that [redacted][15]

Despite [redacted] the Board charged forward with a sale of the

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[12] *Id.*

[13] A00024.

[14] A00025.

[15] *Id.*

Company.[16] On February 22, 2016, the Board formed a Strategic Review Committee (the "Committee") composed of Director Defendants Hope S. Taitz, David J. Berkman, Jeffrey W. Jones and Robert Wolf.[17] From May 2016 through June 2016, Centerview continued to inform the Committee and the Board about [redacted][18] For example, in connection with the May 2 2016 Board meeting, Centerview [redacted]

- [redacted]
- [redacted]
- [redacted]"[19]

By June 2016, the Committee [redacted]

[16] A00025-A00026.
[17] *Id.*
[18] A00035-A00038.
[19] A00035-A00036.

[redacted]

[redacted]

D. Chairman Cloobeck Voices His Opposition To The Transaction At Two Critical Board Meetings

Just two months after [redacted] [redacted] the Board and Committee finalized discussions to sell the Company to Apollo.[21] On June 25, 2016, the Board and Committee held joint meetings during which the Committee recommended that the Board authorize Centerview to negotiate a final transaction with Apollo for $30.25 per share.[22] According to the June 25 Board minutes produced in response to Plaintiff's Section 220 demand, Chairman Cloobeck objected to the price and timing of the deal.[23] Specifically, Chairman Cloobeck stated that:

> he was ***disappointed with the price*** and the Company's management for not having run the business in a manner that would command a higher price, and that in his view, it was ***not the right time to sell the Company.***[24]

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[20] A00038.

[21] *Id.*

[22] A00039.

[23] *Id.*, A00179-A00180.

[24] A00039, A00179-A00180.

The Board reconvened the following day, June 26, 2016, to approve the Transaction.[25] At the meeting, Centerview presented its final DCF analysis, [redacted] After observing Centerview's fairness presentation, Chairman Cloobeck reiterated his objections.[28] According to the June 26 Board minutes:

> Mr. Cloobeck again stated that he was ***disappointed with the price*** and the Company's management for not having run the business in a manner that would command a higher price, and that in his view, ***it***

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[25] A00041.

[26] *Id.*, A00040.

[27] A00041. Indeed, as set forth in the Complaint and Plaintiff's Omnibus Opposition Brief to Defendants' Motions to Dismiss (the "MTD Opposition") (*see* A00068-A00171), Centerview's DCF analysis was flawed and undervalued Diamond. Among other things, Centerview [redacted]

[28] A00041-A00042, A00182-A00183.

was not the right time to sell the Company. He stated that for those reasons, he abstained from the vote.[29]

Nevertheless, the Board approved the Transaction despite Chairman Cloobeck's objection and subsequent abstention.[30]

E. The Board Issues A Materially Misleading 14D-9

On July 14, 2016, Diamond filed the misleading 14D-9 with the SEC.[31] The 14D-9 omitted the *existence* of Chairman Cloobeck's (i) disappointment with the $30.25 Transaction consideration, and (ii) view that "it was not the right time to sell the Company."[32] The omission of this material information also rendered other statements contained in the 14D-9 false and misleading.[33] For example, the 14D-9 stated that "the Board" – not a majority of the Board – determined "that the merger agreement and the transaction [were] advisable and *fair to, and in the best interests of*, the Company and its stockholders" and that the Board "recommend[ed] that the Company's stockholders accept the tender offer and tender their Shares pursuant to the tender offer."[34] The 14D-9 created the misleading impression that *all* of Diamond's directors believed that the deal price

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[29] A00041-A00042, A00183.
[30] A00042, A00183.
[31] A00017, A00241.
[32] A00052-A00053.
[33] A00054-A00056.
[34] A00055-A00056.

was "fair to, and in the best interests of," Diamond's stockholders, and that it was an appropriate time to sell the Company.[35]

By August 9, 2016, the day before the original expiration date of the tender offer (the "Tender Offer"), only 27.96% of Diamond's common stock had been tendered.[36] Stockholders' tepid reception of the Transaction price forced Apollo to extend the Tender Offer until August 24, 2016.[37] Presumably aware that Diamond was approaching the 50.1% threshold necessary to close the Transaction, Chairman Cloobeck finally tendered his shares on August 16 and August 17, 2016.[38] Following multiple additional extensions, the Tender Offer expired at 5:00 P.M. on September 1, 2016.[39]

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[35] *Id.*
[36] A00060.
[37] *Id.*
[38] *Id.*
[39] A00061.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN HOLDING THE *EXISTENCE* OF CHAIRMAN CLOOBECK'S OPPOSITION TO THE TRANSACTION IMMATERIAL AS A MATTER OF LAW

A. Question Presented

Did the Complaint allege facts giving rise to a reasonably conceivable inference that the Director Defendants failed to meet their burden to show that Diamond stockholders were fully informed in tendering their shares in the Transaction despite stockholders never knowing about Chairman Cloobeck's opposition to the price and timing of the Transaction?[40]

B. Scope of Review

This Court reviews a trial court's ruling on a motion to dismiss pursuant to Rule 12(b)(6) *de novo*, *RBC Capital Markets, LLC v. Education Loan Trust IV*, 87 A.3d 632, 639 (Del. 2014), to "determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) (quoting *Feldman v. Cutaia*, 951 A.2d 727, 730-31 (Del. 2008)). The Court must accept all well-pleaded allegations of the Complaint as true and draw all reasonable inferences from those facts "in favor of plaintiff, not the defendant[.]" *Sandys v. Pincus*, 152 A.3d 124, 128 (Del. 2016).

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[40] This issue was preserved for appeal. *See* A00146, A00148, A00407, A00389-A00406, A00419.

Disclosure claims turning on materiality typically raise factual issues not suitable for disposition at the pleadings stage. *See, e.g.*, *Branson v. Exide Elecs. Corp.*, No. 452, 1992, 1994 Del. LEXIS 129, at *8 (Del. Apr. 25, 1994) ("Whether or not a statement or omission . . . was material is a question of fact that generally cannot be resolved on a motion to dismiss, but rather it must be determined after the development of an evidentiary record.").

C. Merits of Argument

1. Applicable Materiality Standard

Under the law of this Court, omitted facts are material if there is "'a substantial likelihood that a reasonable stockholder would consider them important in deciding how to vote.'" *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 859 (Del. 2015) (quoting *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000)). "Materiality 'does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote,' only that such reasonably available information would have impacted upon a stockholder's voting decision." *Id.* (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)). Further, a plaintiff's materiality allegations "need not be pleaded with particularity," as a plaintiff need only provide "some factual basis . . . from which the Court can infer materiality of an identified omitted fact." *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 146 (Del. 1997).

Finally, where a defendant seeks to invoke a ratification defense under *Corwin*, "[t]he burden to prove that the vote was fair, uncoerced, and fully informed falls squarely on the board." *Corwin*, 124 A.3d at 312, n. 27 (quoting *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, (Del. Ch. 1999) (Strine, L.)); *see also, e.g.*, *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 748 (Del. Ch. 2016) ("[A] defendant bears the burden of demonstrating that the stockholders were fully informed when relying on stockholder approval to cleanse a challenged transaction.").

2. Given The Circumstances, Chairman Cloobeck's Opposition To The Price And Timing Of The Transaction Is Material Under Delaware Law

The existence of Chairman Cloobeck's opposition to the price and timing of the Transaction is a quintessential example of facts raising "a substantial likelihood that a reasonable stockholder would consider them important in deciding how to vote." *RBC*, 129 A.3d at 859.

The tender decision presented through the 14D-9 raised two critical issues for stockholders: (1) the advisability of a merger of the Company—and the tender of Diamond shares—at that particular point in time, and (2) the fairness of the consideration the stockholders would receive in exchange for tendering their

shares.[41] Chairman Cloobeck was uniquely qualified to assess and answer both questions. In addition to being Diamond's founder, Chairman and former CEO, Chairman Cloobeck was publicly recognized by the Company as possessing a "unique understanding of the opportunities and challenges that [Diamond] face[s] and [an] in-depth knowledge about our business."[42]

Drawing upon his unique experience, knowledge and understanding of Diamond and its prospects, Chairman Cloobeck determined that the Transaction consideration was too low and that the timing of the Transaction was wrong. Indeed, in a brief submitted to the Court of Chancery, Chairman Cloobeck

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[41] *See, e.g.*, *Lynch*, 383 A.2d at 281 ("Without question, Harrell's estimate, which contained information pertaining to the net value of TransOcean's assets and the per share value of its stock, was germane to the tender offer in that it included the type of information which a reasonable shareholder would consider important in deciding whether to sell or retain stock."); *Frank v. Arnelle*, No. 15642, 1998 Del. Ch. LEXIS 176, at *13 (Del. Ch. Sept. 16, 1998), *aff'd* 725 A.2d 441 (Del. Jan. 22, 1999) ("[F]acts that relate either to the terms of the [tender offer], or the stock's market price (current and historical) would affect the total mix of information a reasonable stockholder would consider in deciding whether to tender shares"); *Weiss v. Samsonite Corp.*, 741 A.2d 366, 374 (Del. Ch. 1999) (stockholder faced with a tender offer "must decide whether or not to (a) tender the shares into the offer; (b) sell the shares on the open market; or (c) retain the shares. In that context the stockholder must be apprised of all available information that is material to the decision."); *Gilmartin*, 1992 Del. Ch. LEXIS 80 at *31 ("[I]t is axiomatic that the fairness of the consideration offered in a merger or tender offer is material to a shareholder considering whether to vote in favor of the transaction."); *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1059 (Del. Ch. 1987) ("Shareholders are entitled to be informed of information in the fiduciaries' possession that is material to the fairness of the price.").

[42] *See supra* note 7.

explicitly acknowledged that he "was dissatisfied with the purchase price and disagreed with the timing of the Transaction[,]" and that he "disclosed his concerns to the Board on at least two occasions."[43]

The existence of Chairman Cloobeck's concerns and dissatisfaction[44] regarding the two most dispositive factors guiding stockholders' tender decision—*i.e.*, price and timing—is highly material information that any "reasonable stockholder would consider [] important in deciding how to vote." *RBC*, 129 A.3d at 859.[45] Plaintiff respectfully submits that the Court of Chancery erred in holding instead that Chairman Cloobeck's opposition was immaterial as a matter of law.

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[43] A00610.

[44] Importantly, at this early procedural stage, the full extent of Chairman Cloobeck's opposition remains unknown. Plaintiff's knowledge of that opposition derives exclusively from the minutes secured through Plaintiff's Section 220 demand, and those minutes likely mask the full extent of Chairman Cloobeck's concerns. The concerns are relegated to a single paraphrasing sentence repeated ***verbatim*** in the June 25 and June 26 minutes. Discovery is necessary to explore those concerns, and Plaintiff submits that standing alone, the minutes satisfy his "minimal" burden to present "a reasonably conceivable set of circumstances susceptible of proof" that could lead to recovery. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011).

[45] *See also, e.g.*, *Frank*, 1998 Del. Ch. LEXIS 176, at *13; *Weiss*, 741 A.2d at 374; *Gilmartin*, 1992 Del. Ch. LEXIS 80 at *1.

3. Former Vice Chancellor and Justice Jacobs's *Gilmartin* Opinion Is Directly On-Point, Well-Reasoned and Should Be Endorsed By This Court

Former Vice Chancellor and Justice Jacobs's *Gilmartin* decision exemplifies the correct application of Delaware's materiality standard to Chairman Cloobeck's concerns relating to the price and timing of the Transaction, eliminating any doubt as to their materiality.

In *Gilmartin*, plaintiffs sought to enjoin the merger of Adobe Resources Corporation and Santa Fe Resources, Inc. on the basis of alleged material omissions. 1992 Del. Ch. LEXIS 80, at *8. Among the "multitudinous disclosure violation claims" alleged, plaintiffs argued that "the defendants failed to disclose that [Chairman and CEO] Mr. Rawn (and at least one other key board member) believed that this was a bad time to sell Adobe . . . and that Mr. Rawn informed Adobe's board . . . of that belief." *Id.* at **27-28. Based on the omission of this "one critical fact," the Court of Chancery granted plaintiffs the extraordinary remedy of a preliminary injunction, finding Rawn's beliefs and objections material to a reasonable stockholder. *Id.* at **30, 42.

In granting the preliminary injunction, the Court of Chancery made an independent finding that Rawn's belief that it was not "an appropriate time to sell the Company" was material:

> insofar as the Proxy Statement conveys the message that the Preferred Stockholders will receive a fair price in the merger, ***it is materially misleading without an additional simultaneous, tempering disclosure that two Adobe directors believed that this was a bad time to sell Adobe, and had expressed that viewpoint to others on the Adobe board. The omitted fact was material, because if disclosed, it would have alerted the Preferred Stockholders to the possibility that a fair price might not be obtainable in this depressed market,*** and that, therefore, a merger might not be in their best interests. That the persons who entertained that view were Adobe's two most senior executives would have given heightened credibility.

Id. at **30-31.

As in *Gilmartin*, Plaintiff's Complaint alleges—and the Board's minutes and Chairman Cloobeck's submissions to the Court of Chancery confirm—that Chairman Cloobeck believed "it was not the right time to sell the Company."[46] Indeed, for several reasons, a finding of materiality is even more warranted in this action than in *Gilmartin*.

First, and indisputably, Chairman Cloobeck not only "disagreed with the timing of the Transaction[,]" but also was "dissatisfied with the purchase price[.]"[47] *Gilmartin*'s fundamental holding that the "timing" concerns were material is predicated upon the relevance of those concerns to the sufficiency and fairness of the transaction consideration. 1992 Del. Ch. LEXIS 80, at *31 ("The omitted fact was material, because if disclosed, it would have alerted the Preferred

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[46] A00012, A00016, A00039, A00042, A00052.
[47] A00610.

Stockholders to the possibility that ***a fair price might not be obtainable***[.]"); *id* at *32 (omitted information was "material to all shareholders ***because of its relevance to fair price.***"). Delaware courts have repeatedly recognized that information concerning "the fairness of the consideration offered in a merger or tender offer is material to a shareholder considering whether to vote in favor of the transaction." *Id.* at **31-32 (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1977); *Joseph v. Shell Oil Co.*, 482 A.2d 335 (Del. Ch. 1984); *Eisenberg*, 537 A.2d at 1059 ("Shareholders are entitled to be informed of information in the fiduciaries' possession that is material to the fairness of the price.")).

Further, Chairman Cloobeck's "dissatisfaction"[48] and "disappoint[ment] with the price" was justified.[49] As Chairman Cloobeck confirmed in (twice) presenting his objections, the very timing of the process laid a foundation for an unfair transaction price.[50] The Company was [redacted]

[48] A00610.

[49] A00012, A00016, A00039, A00052-A00056; A00608.

[50] A00176-A00188; A00052-A00056.

[redacted][51] Centerview's analyses—[redacted]—confirm that the Company was severely undervalued by both the market and the $30.25 Transaction price.[52]

Chairman Cloobeck's concerns about the Transaction were material and should not have been concealed. These facts would have informed stockholders of the primary reasons for potentially rejecting the Tender Offer: the Transaction's price and timing. *See In re Siliconix Inc., S'holders Litig.*, No. 18700, 2001 Del. Ch. LEXIS 83, at *56 (Del. Ch. June 19, 2001) ("The disclosure that the Special Committee was unable to come to a recommendation, ***and the reasons behind its inability to do so***, are material because those facts may well be viewed by minority shareholders as tending to suggest that there are reasons for considering rejection of the exchange offer."). The Court of Chancery erred by failing to holistically consider all of the alleged facts and the reasonable inferences emanating therefrom, and instead ruling Chairman Cloobeck's opposition immaterial to an objective stockholder as a matter of law. *See, e.g., Del. Cnty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019 (Del. 2015) ("[I]t is important that the trial court consider all the particularized facts pled…in their totality and not in isolation ").

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[51] A00035-A00036.

[52] A00023.

Second, Chairman Cloobeck's objections to the Transaction carried substantial weight given his status as Diamond's founder, largest stockholder, Chairman and former CEO, whom the Board touted as having a "***unique understanding*** of the opportunities and challenges that [Diamond] face[s] and his ***in-depth knowledge*** about our business."[53] Chairman Cloobeck's unique ability to evaluate the Transaction only "heightens the credence a reasonable shareholder would attach to such information." *Gilmartin*, 1992 Del. Ch. LEXIS 80, at *31 (internal citation omitted). The Court of Chancery failed to give any weight to this factor.

Third, then-Vice Chancellor Jacobs found that the disclosure claim in *Gilmartin* was material under a reasonable probability of ultimate success standard, *id.* at *42, which is significantly more demanding than the "reasonable conceivability" standard applicable here.[54] In rejecting *Gilmartin*, the Court of Chancery erred by failing to address this key difference.

Finally, the materiality of Chairman Cloobeck's concerns is heightened by his eventual decision to tender his shares. Acknowledging as they must that the 14D-9 never disclosed Chairman Cloobeck's objections to the price and timing of

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[53] A00053-A00054; A00269.

[54] The Court's ruling in *Gilmartin* also arose from a record developed in discovery, where plaintiffs were given the opportunity to develop their claims. *Id.* at *3.

the Transaction, the Director Defendants argued below—and the Court of Chancery accepted—that disclosure of the bare fact of Chairman Cloobeck's abstention obviated the need to do so.[55] That argument fails because it draws a false equivalency between (1) the naked, unexplained fact of Chairman Cloobeck's abstention; and (2) Chairman Cloobeck's specific objections to the price and timing of the Transaction. Indeed, Defendants cannot point to any indication within the 14D-9 of *why* Chairman Cloobeck abstained. The most logical and likely inference arising from Chairman Cloobeck's unexplained abstention was that he abstained due to a conflict of interest, not due to severe and undisclosed concerns regarding the fairness and timing of the Transaction. Defendants tacitly conceded that Chairman Cloobeck's opposition to the price and timing of the Transaction remained unknown by redacting all such information from Plaintiff's Complaint and brief in opposition to Defendants' motions to dismiss.[56]

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[55] A00331, A00333.

[56] Notably, despite arguing that Chairman Cloobeck's concerns were both easily inferable from the Proxy and immaterial, Defendants repeatedly concealed this information from the public, even well-after the Transaction closed. Indeed, Defendants diligently redacted from Plaintiff's Complaint and MTD Opposition *every mention* of Chairman Cloobeck's objections to the price and timing of the Transaction. *Compare* Plaintiff's Complaint (A00009-A00067) and MTD Opposition (A00068-A00171) *to* Diamond's Proxy (A00192-A00248). If Chairman Cloobeck's concerns were easily inferable and immaterial as Defendants claim, there would be no reason to redact them from Plaintiff's filings.

Chairman Cloobeck's eventual decision to tender his shares further masks his concerns regarding the price and timing of the Transaction, as it arguably suggests—without any factual basis[57]—that any concern regarding the Transaction dissipated. The *Gilmartin* court confirmed, however, that any such change of viewpoint would impose *additional* disclosure obligations. As the *Gilmartin* court held, "even if . . . Messrs. Rawn or Vagt had changed their minds and later came to believe that it was a good time to sell Adobe, ***the Proxy Statement should nonetheless have disclosed their prior belief and then explained why these gentlemen changed their minds***." *Id.* *41 n. 15 (citing *Lynch*, 383 A.2d at 281) ("If management believed that one estimate of value was more accurate than another, it was free to endorse that estimate and to explain the reason for doing so; but full disclosure, in our view, was a prerequisite."). As acknowledged in *Gilmartin*, Chairman Cloobeck's eventual decision to tender his shares does not

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[57] The motion to dismiss record is devoid of evidence regarding the reason(s) why Chairman Cloobeck ultimately tendered his shares. Absent discovery, it is unknown the degree to which Chairman Cloobeck's tender decision might have been driven by personal motivations not shared by Diamond's other stockholders. For example, it is conceivable that: (1) Chairman Cloobeck's objections to the Transaction produced a boardroom conflict that motivated him to cash out his share of the Company; (2) Chairman Cloobeck possessed unique financial reasons to liquidate his sizeable Diamond holdings; (3) Diamond directors and/or officers pressured, induced or otherwise motivated Chairman Cloobeck to tender his shares; or (4) after failing to persuade the Board to reconsider the Transaction, Chairman Cloobeck preferred to wash his hands of the situation rather than pursue a potentially protracted, costly and contentious appraisal proceeding.

render his concerns any less material; if anything, it imposes additional disclosure obligations.

4. The Director Defendants' Failure To Disclose The Existence Of Chairman Cloobeck's Opposition To The Transaction Rendered Other Statements In The 14D-9 Materially False Or Misleading

The Director Defendants' omission of the existence of Chairman Cloobeck's conceded "dissatisf[action] with the purchase price and disagree[ment] with the timing of the Transaction" also rendered other statements in the 14D-9 materially false or misleading.[58] The 14D-9 states that the board of directors determined "that the merger agreement and transaction [were] advisable and ***fair to, and in the best interest of, the Company's stockholders*** and [] recommend[ed] that the Company's stockholders accept the tender offer and tender their Shares pursuant to the tender offer."[59] This statement is materially misleading because it suggested to Diamond stockholders that ***all*** directors believed that (i) the Transaction price was "fair," and (ii) it was a good time to sell the Company. Without a tempering disclosure that Chairman Cloobeck believed it was a bad time to sell the Company and that the price was inadequate, the 14D-9's statement that the Board believed

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[58] A00610.

[59] A00055, A00199, A00208, A00215.

the Transaction was "fair to, and in the best of, the Company's stockholders" was materially false or misleading.

The 14D-9 states that the "board of directors" evaluated "possible strategic and financial alternatives to a sale of the Company[,]" but "determined" that those alternatives "were less favorable to the Company's stockholders than the transaction in light of the potential risks, rewards and uncertainties associated with those alternatives."[60] Chairman Cloobeck's objection to the price and timing of the Transaction evidence that he did ***not*** reach that "determin[ation]," rendering the attribution of that "determin[ation]" to the full "board of directors" false and misleading. *Id.*

5. The Court of Chancery Erred By Disregarding *Gilmartin* And Instead Treating Inapposite Court Of Chancery Case Law As Controlling Precedent

As set forth above, Chairman Cloobeck's opposition to the price and timing of the Transaction created an affirmative disclosure obligation for the Board. Rather than examining the materiality of those facts on their own merits, however, the Court of Chancery improperly defaulted to a bright-line rule that directors need not disclose the "reasoning for [an] abstention." *See* Ex. A at 6; *cf. Basic, Inc. v. Levinson*, 485 U.S. 224, 236 (1998) ("Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as

[60] A00192-A00321 (14D-9 at 22).

materiality must necessarily be over- or underinclusive."). Regardless of whether that holding is correct, it fails to address the actual dispositive question: whether the Diamond Board was obligated to disclose the *existence* of Chairman Cloobeck's opposition. The cases relied upon by the Court of Chancery on this issue illuminate its error.

(i) *Newman v. Warren*

In deeming the omission of Chairman Cloobeck's opposition to the price and timing of the Transaction immaterial, the Court of Chancery relied primarily on *Newman v. Warren*, 684 A.2d 1239, 1246 (Del. Ch. 1996). Under the heightened standard applicable to a request for a temporary restraining order, the *Newman* court rejected the plaintiff's claim that the subject board breached its disclosure duty by failing to disclose "*the reasons* that one of the directors [*i.e.*, Wiggins] . . . opposed board action to further pursue negotiations with HEALTHSOUTH[.]" *Id.* at 1240 (emphasis in original). Critically, however, "according to the proxy and accepted by all parties, at the meeting, some significant discussion and disagreement among board members . . . occurred[,]" and "the proxy statement report[ed] that director Wiggins 'opposed' further negotiations with HEALTHSOUTH." *Id.* at 1242.

The issue in this appeal boils down to whether the Diamond Board should have disclosed precisely that which indisputably ***was*** disclosed in *Newman*: the

existence of opposition to the proposed transaction.[61] Unlike the plaintiff in *Newman*, Plaintiff has never argued that the Board was obligated to disclose the specific "reasons" underlying Chairman Cloobeck's opposition to "board action," which would entail the significantly more granular level of detail deemed unnecessary in *Newman*. *Id.* at 1240, 1246.

Newman's holding that directors need not disclose "***the grounds*** of their judgment for or against a proposed shareholder action" is thus inapposite because, unlike in *Newman*, the Diamond Board concealed not just the "grounds" for Chairman Cloobeck's judgment that the price and timing of the Transaction were improper, but indeed the very existence of that "judgment." *Id.* at 1246.

(ii) *In re Sauer-Danfoss*

In re Sauer-Danfoss Inc. Shareholders Litigation also fails to support the Court of Chancery's decision. 65 A.3d 1116 (Del. Ch. 2011). Of the myriad purported disclosure failures alleged in connection with "setting up a disclosure-only settlement" in that case, the plaintiff sought to compel disclosure of the special committee's rationale for opposing a condition that the tendering company would need to secure at least 90% of the target company's outstanding stock (the

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[61] Indeed, because *Newman* provides no indication that the objecting director in that case was uniquely qualified to opine on the transaction at issue (as Chairman Cloobeck indisputably was here), the existence of the Chairman Cloobeck's opposition is even more material than the opposition in *Newman*.

"90% Condition"). *Id.* at 1130. Importantly, the ***existence*** of the special committee's opposition to the 90% Condition was indisputably disclosed. *Id.* Thus, as the *Sauer-Danfoss* court held, with respect to that fairly nuanced yet straightforward deal point, the plaintiff merely "asked 'why?'" *Id.*; *see also id.* at 1131 ("Asking 'why' does not state a meritorious disclosure claim") (citing *Newman*, 684 A.2d at 1246).

Thus, like *Newman* itself, *Sauer-Danfoss* involved the undisputed disclosure of the ***existence*** of directorial opposition to a proposal, and a mere failure to disclose the "why"[62] underlying that opposition. Here, by contrast, the Diamond Board failed in the first instance to disclose Chairman Cloobeck's opposition.

(iii) *Dias v. Purches*

Dias v. Purches involved a mootness fee application in connection with certain supplemental disclosures made in response to the plaintiff's ***65*** alleged disclosure failures. No. 7199, 2012 Del. Ch. LEXIS 227, at *34 (Del. Ch. Oct. 1, 2012). Without any meaningful analysis or application, the *Dias* court merely restated as background principles the holdings of *Sauer-Danfoss* and *Newman*, *id.*,

[62] Moreover, the rationale for opposing a deal term that injects meaningful uncertainty into a proposed transaction—*i.e.*, to "mak[e] the proposed offer less conditional, thereby increasing the likelihood it would be consummated[]" (*id.* at 1130)—is so obvious as to represent a near truism.

which for the reasons set forth *supra* do not support the holding from which Plaintiff appeals here. *Id.* at *30-34.

(iv) *In re Williams*

The Court of Chancery's two-page decision in *In re Williams Companies, Inc. Stockholder Litigation* involved an evolving disclosure theory so illogical as to be labeled a "mystery," and an alleged failure to disclose what a particular director "did during the course of the fairly length period leading up to and including negotiations and how he may have been able to delay entry into the merger agreement." No. 11236-VCN, 2016 Del. Ch. LEXIS 7, at **4-5 (Del. Ch. Jan. 13, 2016). Ruling that a decision to reschedule a dinner and other undisclosed facts were not material, the *Williams* court – like the *Dias* court – merely cited as background principles the holdings of *Newman* and *Dias*, which are distinguishable as set forth herein. *Id.* at *5-6.

(v) *Huff v. Gershen*

The Court of Chancery relied upon *Huff Energy Fund, L.P. v. Gershen*, No. 11116, 2016 Del. Ch. LEXIS 150 (Del. Ch. Sept. 29, 2016), to support its ultimate conclusion that because the Diamond Board disclosed the naked, unexplained fact of Chairman Cloobeck's abstention, it had no obligation to disclose "Cloobeck's

reasoning for his abstention[.]"[63] Exhibit A at 6. Respectfully, that determination ignores the dispositive question on the issue, which is also the dispositive question on this appeal: whether the Diamond Board was obligated to disclose the ***existence*** of Chairman Cloobeck's opposition to the price and timing of the Transaction. As set forth *supra*, the fact of Chairman Cloobeck's opposition to the price and timing of the Transaction was material and required disclosure, and the Board's disclosure of the bare fact of Chairman Cloobeck's abstention failed to satisfy that obligation.

Moreover, the abstention (and rationale therefor) deemed immaterial in *Huff* is readily distinguishable from the existence of Chairman Cloobeck's opposition to the price and timing of the Transaction. The abstention in *Huff* was by the lone designee of Huff Energy Fund, L.P., an investment fund that was differently situated from all other stockholders due to, *inter alia*, a shareholders' agreement granting the fund special rights in the company. 2016 Del. Ch. LEXIS 150, *1.[64]

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[63] Plaintiff is not suggesting that the rationale for every abstention must be disclosed (*i.e.*, a bright line rule). But as set forth *supra*, the ***existence*** of Chairman Cloobeck's opposition to the price and timing of the Transaction was material information requiring disclosure, and that obligation did not vanish upon the Board's disclosure of the bare fact of Chairman Cloobeck's abstention. Indeed, to hold otherwise would allow directors to withhold patently material facts so long as the facts were accompanied by a completely unexplained—yet disclosed—abstention.

[64] It bears mention that in *Huff*, no party placed the *Gilmartin* decision in front of the Chancery Court. Indeed, the *Huff* court explicitly stated that "[n]either party cited a case, and I am aware of none, that stands for the proposition that a proxy

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In sum, none of the cases upon which the Court of Chancery relied in upholding the omission of Chairman Cloobeck's opposition to the price and timing of the Transaction support that ruling. For the reasons set forth in *Gilmartin*, the ***existence*** of Chairman Cloobeck's opposition was material information mandating disclosure. At most, the cases relied upon by the Court of Chancery in holding otherwise—none of which involved opposition to, disagreement with and dissatisfaction with the price and timing of the transaction, vocalized by the individual uniquely qualified to assess the proposed transaction, and none of which even addressed *Gilmartin*—merely establish that the specific "rationale" or "reasoning" ***underlying*** that opposition (*i.e.*, the "grounds of [Cloobeck's] judgment") did not require disclosure.

6. The Board Indisputably Knew About—And Therefore *Knowingly* Omitted From the 14D-9—Chairman Cloobeck's Opposition to the Price and Timing of the Transaction

As this Court has established, an inference of bad faith arises "'where the fiduciary intentionally fails to act in the face of a known duty to act.'" *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2005) (quoting *In re Walt*

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statement's omission of the fact that a board's approval of a transaction was other than unanimous, much less that the only dissent was one director's abstention…is a material omission." *Huff*, 2016 Del. Ch. LEXIS 150, at *49. Had the *Huff* court been presented with *Gilmartin*, it might have ruled differently.

Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. Aug. 9, 2005)). It is also well-settled that directors have a fundamental obligation to provide stockholders "all information that is material to the action being requested and 'to provide a balanced, truthful account of all matters disclosed in the communications with shareholders.'" *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1223 (Del. 1999) (quoting *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998)). *See also, e.g.*, *Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270, 1280 (Del. 1994) ("[O]nce 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."). Combining these fundamental principles, where a director knowingly elects not to disclose material information, that failure to act in the face of a known duty raises a reasonably conceivable inference of bad faith.[65]

As set forth *supra*, the existence of Chairman Cloobeck's opposition to the price and timing of the Transaction was material information that required disclosure. There can be no dispute that the Board was aware of Chairman

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[65] *See, e.g.*, *Chen v. Howard-Anderson*, 87 A.3d 648, 653, 691 (Del. Ch. 2014) (finding an inference of a bad faith disclosure failure given evidence that the directors knew about undisclosed information); *In re PLX Technology S'holder Litig.*, No. 9880-VCL, Transcript of Oral Opinion at 52:17-24 (Del. Ch. Sept. 3, 2015)(TAB 1)("PLX Tr.") ("[T]he allegation is that ***the directors knew about this stuff*** . . . So if the disclosure claim goes forward, that's a knowing violation. ***It is not a care violation; it is a knowing violation.***"). *See* A00115, A00116, A00119; A00941.

Cloobeck's opposition because, at a minimum, each member of the Board attended the June 25 and June 26 meetings at which Chairman Cloobeck voiced his opposition.[66] Indeed, at the oral argument on Defendants' motions to dismiss, counsel for Chairman Cloobeck expressly confirmed that "Mr. Cloobeck completely disclosed to the board all of his concerns, the nature of his concerns. The company was well aware of it." *See* A00375 (Tr. at 54:8-11); *see also id.* at 120:14-15 (Company counsel concedes that "[o]f course the other directors knew why [Cloobeck] abstained.").

The Board therefore faced a simple, binary decision: it could either honor its duty "to provide a balanced, truthful account of all matters" by disclosing the existence of Chairman Cloobeck's opposition, or it could choose to exclude that information. *Emerald*, 726 A.2d at 1223 (quoting *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998)). By choosing to withhold material information from stockholders, the Board "'intentionally fail[ed] to act in the fact of a known duty to act,'" creating at least a reasonably conceivable inference of bad faith. *Walt Disney*, 906 A.2d at 67.

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[66] As noted *supra* at note 43, in his briefing before the Court of Chancery, Chairman Cloobeck explicitly acknowledged that he "was dissatisfied with the purchase price and disagreed with the timing of the Transaction" and that he "disclosed his concerns to the Board on at least two occasions."

CONCLUSION

Because the Court of Chancery dismissed Plaintiff's complaint based on errors of law, the Court of Chancery's Order Granting Motions to Dismiss, dated July 13, 2017, must be REVERSED.

Respectfully submitted,

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