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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.	No. 316, 2017 Court Below: Court of Chancery of the State of Delaware C.A. No. 12844-VCMR PUBLIC VERSION Filed November 27, 2017

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Defendants' Answering Brief[1] spends 39 pages mischaracterizing the question before this Court as "whether a director's stated reasons for abstaining from a vote . . . are immaterial as a matter of law . . . ."[2] That is not this case. Rather, the question before this Court is whether a board's duty to disclose independently material facts vanishes when those same facts also happen to explain the rationale for a director's abstention from a vote.

As set forth in Plaintiff's Opening Brief, this case presents a unique set of facts not found in any of the precedents on which Defendants rely: Chairman Cloobeck, the founder, former CEO and largest stockholder of Diamond, whose unique ability to assess the value and prospects of the Company was publicly touted in Diamond's SEC filings, objected to the Transaction's price and timing at the full Board's final two meetings before approval of the Transaction. Faced with the undisputed fact that the 14D-9 omitted this material information—as well as the directly on-point *Gilmartin* decision[3]—Defendants' Answering Brief presents

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[1] Answering Brief of The Director Defendants, Appellees, filed October 25, 2017 (Def. Br."). Terms used herein have the meanings indicated in Appellant's Opening Brief, filed September 25, 2017 ("Pl. Br.").

[2] Def. Br. 15-16.

[3] *Gilmartin v. Adobe Resources Corp.*, No. 12467, 1992 Del. Ch. LEXIS 80 (Del. Ch. Apr. 6, 1992).

the following untenable chain of logic to support the contention that the Director Defendants fulfilled their disclosure obligations:

i. Chairman Cloobeck did not, in fact, object to or oppose the price and timing of the Transaction, such that there was "no 'opposition' to disclose;"[4]

ii. Disclosure of Chairman Cloobeck's concerns regarding the price and timing of the Transaction was not required because those concerns constituted merely "the stated reasons for [his] abstention;"[5]

iii. The 14D-9's naked, unexplained disclosure of Chairman Cloobeck's abstention rendered stockholders "fully informed . . . of all material facts about Mr. Cloobeck;"[6] and

iv. Because under Delaware law "[t]he reasons for a director's vote are immaterial as a matter of law," the Director Defendants complied with their disclosure obligations.[7]

Defendants' chain of logic crumbles for at least three reasons.

First, contrary to Defendants' repeated mischaracterizations, Chairman Cloobeck indisputably did oppose the price and timing of the Transaction. Indeed, as Plaintiff highlighted in the Opening Brief—and Defendants completely ignored

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[4] Def. Br. 20. *See also id.* at 3 (repudiating the "***supposed*** 'opposition' of Mr. Cloobeck") (emphasis added); *id.* (repudiating "Mr. Cloobeck's ***supposed*** objection") (emphasis added); *id.* at 32 (repudiating "Mr. Cloobeck's ***supposed*** dissatisfaction") (emphasis added).

[5] *Id.* at 16.

[6] *Id.* at 17.

[7] *Id.* at 3, 16.

in their Answering Brief—Chairman Cloobeck himself affirmatively conceded within his submission to the Court of Chancery that he "was dissatisfied with the purchase price and disagreed with the timing of the Transaction"[8] and that he "disclosed his concerns to the Board on at least two occasions."[9] Defendants were required to—but did not—disclose the indisputable, material fact of Chairman Cloobeck's opposition. Thus, the stockholder vote on the Transaction was not fully informed, ending the inquiry under *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015).

Second, Defendants repeatedly and incorrectly continue to recast the existence of Chairman Cloobeck's opposition as "the reasons why . . . Cloobeck[] abstained from the vote . . . ."[10] In essence, Defendants propose a safe harbor permitting directors to conceal ***any*** fact—no matter how material—so long as the fact also happens to underlie an abstention, the mere existence of which is

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[8] A00610; *see also* Pl. Br. 18 (quoting A00610).

[9] *Id.*

[10] *See* Def. Br. 2 ("Plaintiff now appeals only one aspect of the Court of Chancery's decision: whether the Transaction's solicitation statement adequately disclosed the reasons why [Chairman Cloobeck] abstained from the vote"); *see also, e.g.*, *id.* at 3 ("Plaintiff is attacking the failure of the Director Defendants to disclose the reasons for Mr. Cloobeck's abstention"); *id.* at 15 (identifying the "Question Presented" as "Whether a director's stated reasons for abstaining from a vote of the board of directors to approve a tender offer are immaterial").

disclosed. Under Delaware law, however, Defendants were independently obligated to disclose the material fact of the existence of Chairman Cloobeck's opposition to the price and timing of the Transaction. Defendants may not conceal that material fact merely because it also happens to explain why Chairman Cloobeck abstained.

Third, disclosure of the naked, unexplained fact of Chairman Cloobeck's abstention did not, as Defendants argue, create a "clear inference" of his opposition to the price and timing of the Transaction, nor make that opposition "evident."[11] Indeed, Defendants' continued insistence on redacting all facts regarding the existence of Chairman Cloobeck's opposition more than a year after consummation of the Transaction belies their claim that Chairman Cloobeck's opposition was patently inferable. Tellingly, Defendants fail within the Answering Brief to even attempt to explain this glaring contradiction, which Plaintiff highlighted in the Opening Brief.[12]

For these reasons and those set forth below and in Plaintiff's Opening Brief, the Court should reverse the lower Court's holding that the Director Defendants

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[11] Def. Br. 22-23.

[12] Pl. Br. 25 & n.56.

were permitted to conceal the material fact of Chairman Cloobeck's opposition to the price and timing of the Transaction.

ARGUMENT

I. DEFENDANTS CONTINUE TO MISCHARACTERIZE PLAINTIFF'S CLAIM AND THE ISSUE BEFORE THIS COURT

In the Opening Brief, Plaintiff explained in detail why, under Delaware law, Chairman Cloobeck's explicit objections at two full Board meetings that he was [redacted] of the Transaction and that [redacted] are material facts requiring disclosure. *See* Pl. Br. 15-19.[13]

Defendants do not and cannot seriously dispute (i) the fundamental rule that all material facts must be disclosed, or (ii) that 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" to their tendering decision. *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)).

Instead, Defendants proffer two meritless arguments. First, Defendants inexplicably dispute the very fact of Chairman Cloobeck's opposition to the price

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[13] Defendants claim that Plaintiff "misconstrues the minutes by selectively omitting from his brief the last sentence highlighted above [*i.e.*, [redacted]]" Def. Br. 18. That is patently and demonstrably false, as Plaintiff included that verbatim sentence on page 11 of the Opening Brief.

and timing of the Transaction. Second, Defendants argue that their obligation to disclose the material fact of Chairman Cloobeck's opposition disappeared because that same fact formed the rationale for his abstention. For the reasons set forth below, both arguments fail.

A. Defendants' Denial Of Chairman Cloobeck's Conceded Opposition Is Demonstrably Baseless

Unable to reasonably dispute that Chairman Cloobeck's opposition to the price and timing of the Transaction would have assumed actual significance in the minds of Diamond stockholders deciding whether to tender, Defendants instead resort to denying the very existence of that opposition. Specifically, in addition to dismissively referring to Chairman Cloobeck's "***supposed*** 'opposition,'" "***supposed*** objection" and "***supposed*** dissatisfaction," Defendants falsely conclude that "there is no 'opposition' to disclose." *See* Def. Br. 3 (emphasis added), 20, 32 (emphasis added).

Defendants' denial of Chairman Cloobeck's opposition contradicts not just the explicit language of the minutes from the full Board's June 25 and June 26 meetings,[14] but also Chairman Cloobeck's own unequivocal concession in this

[14] The minutes unequivocally convey Chairman Cloobeck's statement at both meetings that [redacted]

litigation. As Plaintiff set forth in the Opening Brief, Chairman Cloobeck expressly conceded in his submission to the Court of Chancery 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." *See* A00610; *see also* Pl. Br. 18 (quoting A00610). Defendants declare that "there is no 'opposition' to disclose," yet fail to even address these explicit concessions, let alone explain how they fail to raise a inference that Chairman Cloobeck opposed the price and timing of the Transaction. The Court should therefore reject Defendants' conclusory—and demonstrably false—assertion.

B. Independently Material Facts Are Not Rendered Immaterial Merely Because They *Also* Explain Why A Director Abstained

Unable to refute that Chairman Cloobeck's opposition to the price and timing of the Transaction was material to Diamond stockholders, Defendants instead deny their obligation to disclose that conceded fact on the basis that it also explained why Chairman Cloobeck abstained from voting on the Transaction.[15]

[redacted] A00179-A00180; A00183.

[15] *See, e.g.*, Def. Br. 3 ("The statements by Mr. Cloobeck upon which Plaintiff relies to allege Mr. Cloobeck's 'opposition' . . . are explicitly noted to be his 'reasons' for abstaining"); *supra* at note 10.

Thus, Defendants' position is that independently material facts become immaterial—and may be concealed—so long as those facts ***also*** underlie a disclosed (but unexplained) abstention.

Defendants' argument fails under Delaware law and policy. Defendants do not and cannot cite any case supporting the proposition that a Delaware director's obligation to disclose independently material facts disappears simply because those undisclosed material facts ***also*** happen to form the reason for an unexplained abstention. To the contrary, as established in Plaintiff's Opening Brief—and tacitly conceded in the Answering Brief by Defendants, who fail to dispute the issue—Delaware directors have an affirmative, independent obligation to disclose "reasonably available information [that] would have impacted a stockholder's voting decision." *RBC*, 129 A.3d at 859 (quoting *Rosenblatt*, 493 A.2d at 944).

Thus, Defendants resort to a straw man argument that Plaintiff seeks to create a "false dichotomy" between (i) "disclosure of the 'existence' of Mr. Cloobeck's supposed objection to the Transaction" and (ii) "disclosure of the 'reasoning' behind his votes." Def. Br. 3.[16] Plaintiff does not argue, as Defendants

[16] In apparent contradiction of their "false dichotomy" argument, Defendants elsewhere proffer a purported "revealing statement in [Plaintiff's] brief before this Court" as supposed evidence that Plaintiff has "consistently complained that the Solicitation failed to disclose the reasons for Mr. Cloobeck's abstention." Def. Br.

suggest, that there exists some mutual exclusivity between (i) opposition to the price and timing of a transaction, and (ii) the reasons for an abstention. Rather, Plaintiff's argument—and the dispositive point—is that the existence of Chairman Cloobeck's opposition was independently material information requiring disclosure, and that disclosure obligation did not disappear merely because the same fact ***also*** happened to underlie his unexplained abstention.

Similarly, Defendants' argument that "Plaintiff provides no logical way to distinguish the nearly metaphysical concept of the 'existence' of Mr. Cloobeck's supposed objection from the 'reasons' why he abstained" is a red herring. *See* Def.

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19 (quoting Pl. Br. 24 ("Defendants cannot point to any indication within the 14D-9 of *why* Chairman Cloobeck abstained.") (emphasis in original)). That is absurd. In the Opening Brief, Plaintiff repeatedly confirmed that he is not arguing that the Director Defendants were obligated to disclose the reasons for Chairman Cloobeck's abstention, but rather that they were obligated to disclose the very ***existence*** of Chairman Cloobeck's opposition. *See, e.g.*, Pl. Br. 33 ("[T]he actual dispositive question [on this appeal is] whether the Diamond Board was obligated to disclose the ***existence*** of Chairman Cloobeck's opposition[]" to the price and timing of the Transaction.) (emphasis in original); *id.* at 28 ("Regardless of whether that holding [*i.e.*, that directors need not disclose their reason for abstaining] is correct, it fails to address the dispositive question: whether the Diamond Board was obligated to disclose the ***existence*** of Chairman Cloobeck's opposition.") (emphasis in original). The purported "revealing statement" cited by Defendants is an out-of-context sentence drawn from Plaintiff's refutation of their argument that disclosure of the naked, unexplained fact of Chairman Cloobeck's abstention eliminates their obligation to disclose the independently material fact of his opposition to the price and timing of the Transaction. *Compare* Def. Br. 19-20 *to* Pl. Br. 24.

Br. 20-21. As Plaintiff acknowledged in the Opening Brief,[17] in this particular case there is overlap between (i) the fact of Chairman Cloobeck's opposition to the price and timing of the Transaction, and (ii) the reason for his abstention. But that overlap is irrelevant because, again, the dispositive point is that Defendants were obligated to disclose the independently material fact of Chairman Cloobeck's opposition, and that obligation did not disappear merely because that same fact ***also*** happened to form the reason for his abstention.

Lastly, Plaintiff respectfully submits that Defendants' proposed rule[18]—*i.e.*, that even patently material facts need not be disclosed so long as those facts also underlie an abstention decision—is absurd. Under Defendants' logic, Delaware directors may conceal, for example, a director's crippling conflict with respect to a

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[17] *See, e.g.*, Pl. Br. 28 ("Rather than examining the materiality of those facts [*i.e.*, Chairman Cloobeck's opposition] 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.' 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.") (internal citations omitted) (emphasis in original).

[18] The Court should disregard Defendants' averment that Plaintiff is presenting a "proposed rule" that would force directors "to draw artificial and highly subjective lines between the 'reasons' for directors' votes . . . and the 'existence' of their views on that same transaction[.]" *See* Def. Br. 21. Plaintiff proposes no new rule. Rather, Plaintiff merely asks the Court to apply the well-settled rule that independently material facts must be disclosed, and to reaffirm that the rule applies even if those facts also happen to explain why a director abstained from a vote.

transaction that he or she originated, cultivated and negotiated so long as (i) the director abstained from the vote on the transaction, and (ii) the board ***did*** disclose without any explanation the naked fact of the director's abstention. That is not—and cannot be—Delaware law, and it would be antithetical to Delaware's well-established policy in favor of fully-informed stockholder decision-making.

II. DEFENDANTS' SECONDARY ATTACKS ON THEIR OBLIGATION TO DISCLOSE CHAIRMAN CLOOBECK'S OPPOSITION TO THE PRICE AND TIMING OF THE TRANSACTION ALSO FAIL

Defendants mount various secondary attacks on their obligation to disclose Chairman Cloobeck's opposition to the price and timing of the Transaction. First, Defendants argue that Chairman Cloobeck's opposition was "evident" from the naked, unexplained fact of his abstention. Second, Defendants argue that the Court should disregard as meaningless Diamond's repeated, public declarations of Chairman Cloobeck's "unique understanding" of the Company's prospects and value. Third, Defendants argue that Court of Chancery case law finding no ***independent*** obligation to disclose a director's rationale or subjective views is dispositive. Fourth, and finally, Defendants argue that Plaintiff has failed to identify any affirmative misstatements within the 14D-9. Each argument fails.[19]

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[19] Defendants' additional argument that the Director Defendants' failure to disclose Chairman Cloobeck's opposition to the price and timing of the Transaction was not in bad faith because "the omission of ***immaterial*** information, even if intentional, cannot constitute bad faith" is both circular and wrong. Def. Br. 35-36 (emphasis added); *see also id.* at 37 ("the Complaint nowhere alleges facts that suggest that the Director Defendants knowingly concealed *material* information from stockholders, as opposed to Mr. Cloobeck's immaterial reasons for his vote.") (emphasis in original). That argument merely rehashes Defendants' materiality arguments, which fail for the reasons set forth in Plaintiff's Opening Brief and herein. As explained in Plaintiff's Opening Brief, the Board's knowing and intentional decision to conceal material information from stockholders creates, at a minimum, a reasonably conceivable inference of bad faith. Pl. Br. 34-37.

A. The Undisclosed—And Repeatedly Redacted—Fact Of Chairman Cloobeck's Opposition To The Price And Timing Of The Transaction Was Neither Evident Nor Clearly Inferable

Defendants incorrectly insist that a "clear inference" exists as to Chairman Cloobeck's opposition to the price and timing of the Transaction merely because the 14D-9 discloses without any explanation that he abstained. Def. Br. 22-23.[20] As alleged in the Complaint and explained in the Opening Brief, multiple inferences can be drawn from the 14D-9's disclosure of the unexplained fact of Chairman Cloobeck's abstention. *See* Pl. Br. 24-25. Indeed, one—and perhaps the most—logical and reasonable inference was that he abstained due to a conflict of interest. *Id.* Diamond was acquired by one of the largest private equity firms in the world and Chairman Cloobeck abstained rather than voting against the Transaction, making it entirely reasonable to infer that his "abstention" arose from a conflict of interest with Apollo.

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[20] *See also, e.g.*, *id.* at 17 ("[T]he Solicitation fully informed stockholders of all material facts about Mr. Cloobeck. In particular, the Solicitation repeatedly disclosed that Mr. Cloobeck abstained from the Board's vote on the Transaction."); *id.* at 22 ("At bottom, further disclosure of Mr. Cloobeck's subjective views about the Transaction simply would not be material in light of the disclosures already made in the Solicitation. The Solicitation disclosed that Mr. Cloobeck abstained and that he had not yet decided whether to tender his shares."); *id.* at 23 (arguing that disclosure of Chairman Cloobeck's objections "would add nothing to a stockholder's consideration of Mr. Cloobeck's already evident doubts").

Defendants' reliance on Plaintiff's Section 220 demand letter as purported evidence that Chairman Cloobeck's opposition was easily inferable is misplaced. Def. Br. 22. As the explicit language of Plaintiff's Section 220 letter makes clear, Plaintiff sent his demand to [redacted] B1 (emphasis added); *see also id.* [redacted] (emphasis added). Defendants may not transform one Diamond stockholder's theories and concerns—which were ultimately borne out by documents produced by the Company under Section 220—into evidence that every reasonable Diamond stockholder would have recognized a "clear inference" of "Mr. Cloobeck's already evident doubts." Def. Br. 22-23.

Indeed, Defendants' assertion that Chairman Cloobeck's opposition to the price and timing of the Transaction was "evident" and clearly inferable to Diamond stockholders is irreconcilable with Defendants' continued practice of redacting all evidence of Chairman Cloobeck's opposition from filings with the Court. Defendants do not and cannot explain why, if the undisclosed fact of Chairman Cloobeck's opposition to the price and timing of the Transaction was

"evident" as they claim, they nevertheless felt compelled to redact all such facts from the public record. Tellingly, although Plaintiff highlighted this contradiction in his Opening Brief,[21] Defendants do not even address—much less attempt to explain—why they insisted on redacting the very information that they repeatedly claim was so clearly inferable.

Further, even if Defendants are correct (which they are not) that Chairman Cloobeck's opposition to the price and timing of the Transaction was "evident" from disclosure of the naked fact of his abstention, they still do not refute that Chairman Cloobeck's subsequent (and unexplained) decision to tender rendered the 14D-9 misleading.[22] Defendants cannot have it both ways. If the 14D-9's disclosure of Chairman Cloobeck's "abstention" made it "evident" that he was opposed to the price and timing of the Transaction, then his eventual decision to tender—as explained in *Gilmartin*—triggered the Director Defendants' obligation to supplement the 14D-9 and disclose Chairman Cloobeck's "prior belief and then

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[21] *See* Pl. Br. 25 & n.56.

[22] Notably, Defendants conclusorily assert—but do not, and cannot, establish—that Chairman Cloobeck ultimately tendered his shares because he grew comfortable with the fairness of the Transaction. *See* Def. Br. 23 ("The only reasonable inferences to be drawn are that Mr. Cloobeck had initial concerns about the price offered in the Transaction, but ultimately resolved these concerns when he tendered his shares."). Drawing that highly Defendant-friendly inference would be inappropriate, particularly given the total lack of support for it.

explain[] why [he] changed [his] mind[].”[23] Once again, Defendants fail altogether to dispute or even address this point, which Plaintiff featured in the Opening Brief.[24]

B. Defendants May Not Strategically Disregard Diamond's Repeated, Public Declarations Of Chairman Cloobeck's "Unique Understanding" Of Diamond's Prospects And Value

As set forth in Plaintiff's Opening Brief, in the years preceding this litigation, Diamond repeatedly and publicly touted Chairman Cloobeck's "unique understanding" of the Company's value and prospects.[25] Now, to support their litigation position, Defendants dismiss those public statements as meaningless and urge the Court to ignore them on the basis that the Company also made complimentary statements regarding other directors. This meritless argument actually highlights the importance of the Company's public statements about Chairman—and Diamond's largest stockholder, founder and former CEO—Cloobeck.

Tellingly, none of the laudatory language highlighted by Defendants—let alone the language that Defendants omitted from their Answering Brief—

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[23] *Gilmartin*, 1992 Del. Ch. LEXIS 80, at *41, n.15 (citing *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977)).

[24] *See* Pl. Br. 25-26.

[25] Pl. Br. 5-6 (quoting A00053-A00054; A00269).

characterizes any director other than Chairman Cloobeck as possessing a "unique understanding" of Diamond's value and prospects.[26] Indeed, most of the laudatory language cited by Defendants has little to no bearing on the specific question of Diamond's prospects or value, and therefore the propriety of the price and timing of the Transaction. *See, e.g.*, Def. Br. 6 ("Mr. Wolf is the CEO of a global consulting firm and previously was a senior executive at UBS," giving him "'experience in the financial services and investment banking industries'") (quoting A00629); *id.* at 7 (noting that "Mr. Warren is a senior executive in the financial services industry"); *id.* (noting that "Mr. Daley is the former mayor of Chicago and is a prominent business leader and specialist in government affairs").

In sum, Defendants may not strategically dismiss as meaningless the Company's repeated declarations of Chairman Cloobeck's "unique understanding" of the Company's prospects and value.

C. Relevant Chancery Court Precedent Supports The Materiality Of Chairman Cloobeck's Opposition To The Price And Timing Of The Transaction

As they did below, Defendants urge the Court to wholly disregard the directly on-point *Gilmartin* decision, and instead base its decision on inapposite

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[26] Indeed, as any dictionary confirms, the Company could not possibly have characterized more than one director as having a "unique understanding" of any subject.

Court of Chancery precedent suggesting that, in a vacuum, a director's subjective views and underlying rationale for a decision need not be disclosed. Yet Defendants do not and cannot identify any case holding that a director's independent obligation to disclose material information vanished because those same material facts *also* happened to explain why a director voted a certain way. Rather, as Plaintiff explained in the Opening Brief,[27] in *Gilmartin* former Vice Chancellor and Justice Jacobs reached the opposite conclusion, and enjoined a merger on the basis of a startlingly similar—and in fact *less* material[28]—undisclosed concern.

Tellingly, Defendants beseech the Court to ignore *Gilmartin*, as they recognize that former Vice Chancellor and Justice Jacobs "reached an arguably inconsistent result" but urge the Court to "reject [its] application here[.]" *See* Def.

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[27] *See* Pl. Br. 19-26.

[28] As discussed in Plaintiff's Opening Brief at page 21, whereas the *Gilmartin* decision deemed undisclosed directorial concern regarding the timing of the transaction material because of its potential relevance to the price of the transaction (*see* 1992 Del. Ch. LEXIS 80, at **31-32), here Chairman Cloobeck not only objected that [redacted] but also specifically stated that [redacted] *See* A00610; A00179-A00180; A00183.

Br. 24.[29] Yet *Gilmartin*'s fundamental teachings have not been overruled by subsequent Chancery Court precedent, and for all the reasons set forth in Plaintiff's Opening Brief, none of the post-*Gilmartin* cases cited by Defendants support their position. *See* Pl. Br. 29-34.[30]

D. Defendants Falsely Assert That The 14D-9 Contains No Misrepresentations

To be certain, the 14D-9 may be false and misleading through omission rather than affirmative misrepresentation. *See, e.g.*, *RBC*, 129 A.3d at 859; *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 146 (Del. 1997). Indeed, the

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[29] Defendants repeatedly assert that Plaintiff has "admitted[]" that their "case law on this point [is] 'undisputed.'" Def. Br. 16, 19, 26. Those assertions are misleading at best, as they are predicated entirely on Plaintiff's statement within its briefing below that Defendants "string cite[d] several cases standing for the general, undisputed proposition that ***boards need not disclose in vivid detail the reasons for a director's decision***[.]" A00108 (emphasis added).

[30] Briefly, (i) two of the cases—*Newman v. Warren*, 684 A.2d 1239 (Del. Ch. 1996) and *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116 (Del. Ch. 2011)—actually did disclose the material information omitted by the Director Defendants here (*i.e.*, the existence of directorial opposition); (ii) two other cases—*Dias v. Purches*, No. 7199, 2012 Del. Ch. LEXIS 227 (Del. Ch. Oct. 1, 2012) and *In re Williams Cos. Inc. S'holder Litig.*, No. 11236-VCN, 2016 Del. Ch. LEXIS 7 (Del. Ch. Jan. 13, 2016)—merely restated as background principles the inapposite holdings from *Newman* and *Sauer-Danfoss*; and (iii) the remaining case (*i.e.*, *Huff Energy Fund, L.P. v. Gershen*, No. 11116, 2016 Del. Ch. LEXIS 150 (Del. Ch. Sept. 29, 2016) involved demonstrably less material omitted facts, and the parties failed to present the *Gilmartin* case for Vice Chancellor Slights' consideration.

Gilmartin court explicitly held that the "omitted fact" of two[31] directors' concerns about the timing of the transaction was material because "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." *Gilmartin*, 1992 Del. Ch. LEXIS 80 at **30-31. Similarly, standing alone, the Director Defendants' omission of the fact that Chairman Cloobeck was "dissatisfied" and "disappointed" with the Transaction price and that he believed "it was not the right time to sell the Company"[32] rendered the 14D-9 materially misleading.

As in *Gilmartin*, however, the Director Defendants' failure to disclose the material facts of Chairman Cloobeck's objections and opposition also renders other disclosures false and misleading. *Gilmartin*, 1992 Del. Ch. LEXIS 80 at *34 ("Besides being materially misleading in its own right, the omitted fact that two key Adobe board members believed that this was a bad time to sell Adobe ***also rendered other Proxy Statement disclosures materially false and misleading***.")

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[31] The *Gilmartin* court explicitly noted that "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." *Gilmartin*, 1992 Del. Ch. LEXIS 80 at *41, n.15.

[32] A00610; A00179-A00180; A00183.

(emphasis added). Specifically, the 14D-9 created the false impression that (i) the entire Board "determined" that the Company's "possible strategic and financial alternatives to a sale of the Company . . . were less favorable to the Company's stockholders than the transaction," and (ii) the entire Diamond Board believed that it was a good time to sell the Company and that stockholders would receive a good price in a sale. Pl. Br. 20, 26-27. Absent disclosure of Chairman Cloobeck's objections to the price and timing of the Transaction, those representations are false and misleading. *Id.*

Defendants miss the point in arguing that those representations cannot be false and misleading because the Board "indisputably *did* make those determinations[.]" Def. Br. 33 (emphasis in original). As *Gilmartin* confirms, the dispositive question is not whether the representation is literally true, but rather whether the statement creates a false and misleading impression. *Gilmartin*, 1992 Del. Ch. LEXIS 90, at **34-40. For example, the *Gilmartin* court held that despite being literally true, the proxy's disclosure that the board "unanimously recommend[ed]" that stockholders vote for the merger was materially misleading because "entire candor required disclosure of the fact that Messrs. Rawn and Vagt believed (and stated) that it was a bad time to sell Adobe." *Id.* at **34-35. Similarly, although the Diamond Board "indisputably *did* make those

determinations" such that the statements were literally true,[33] "entire candor required disclosure of the fact that [Chairman Cloobeck] believed (and stated) that it was a bad time to sell [Diamond]."[34] *Gilmartin*, 1992 Del. Ch. LEXIS 80, at **34-35.

Further, in *Gilmartin*:

> the third misleading Proxy Statement disclosure [wa]s that in deciding to recommend the merger to the shareholders, Adobe's directors considered the various alternatives . . . and determined that neither of those alternatives would result in values to all of Adobe's stockholders equal to or greater than those realizable in the Merger.

Id. at *36 (internal quotations omitted). The *Gilmartin* court deemed that disclosure "materially misleading, because had the Preferred Stockholders been told that two of Adobe's key board members believed it was a bad time to sell the entire company, they might conclude otherwise....To put it differently, disclosure of that omitted fact would have afforded the Preferred Stockholders a more balanced view of the risks attendant to the merger alternative." *Id.* at *37.

The same conclusion is compelled here. The Director Defendants disclosed that the "board of directors" evaluated "possible strategic and financial alternatives

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[33] Def. Br. 33 (emphasis in original).

[34] For the reasons set forth *supra* at Section II(A), the Court should reject any suggestion that disclosure of the unexplained fact of Chairman Cloobeck's abstention fulfilled Defendants' obligation to disclose the existence of his opposition to the price and timing of the Transaction.

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." Pl. Br. 27 (quoting A00192-A00321 (14D-9 at 22)). Thus, just as in *Gilmartin*, "disclosure of that omitted fact would have afforded [Diamond stockholders] a more balanced view of the risks attendant to the merger alternative," 1992 Del. Ch. LEXIS 80, at *37, and the failure to disclose that omitted fact rendered the 14D-9 affirmatively false and misleading.

CONCLUSION

For the reasons set forth herein and in Plaintiff's Opening Brief, Plaintiff respectfully requests this Court to reverse the Order of the Court of Chancery and remand the matter for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 27, 2017, he caused a copy of the foregoing *PUBLIC Version Appellant's Reply Brief* to be served via File & Serve*Xpress* upon the following counsel:

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