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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAN KAHN, Plaintiff Below, Appellant, v. MICHAEL D. STERN, EDWARD A. STERN, JOSEPH P. DALY, JOHN W. POLING and JEFFREY P. BACHER, Defendants Below, Appellees.	))))))))))))))	No. 393, 2017 Court Below: Court of Chancery of the State of Delaware, C.A. No. 12498-VCG

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NATURE OF THE PROCEEDINGS

The Court of Chancery's dismissal of Plaintiff Alan Kahn's ("Plaintiff" or "Kahn") Amended Complaint (the "Complaint") should be affirmed.

As a threshold matter, it must be highlighted that even after Plaintiff had the benefit of seeing the deficiencies in his first Complaint raised by the Director Defendant—covered by a Section 102(b)(7) exculpatory clause—in their initial Motion to Dismiss, his Amended Complaint remains, as Vice Chancellor Glasscock noted, at best, "not entirely transparent in its allegations," and at worst "opaque." *Kahn v. Stern*, 2017 WL 3701611, at *1 (Del. Ch. Aug. 28, 2017). Kahn voluntarily elected to stand on the insufficient and entirely conclusory allegations, rather than attempt to cure through presentation of additional alleged facts. By doing so, Kahn waived any right he may have had to file a Second Amended Complaint and the Court of Chancery appropriately dismissed this action with prejudice.[1] Plaintiff's effort on appeal essentially concedes the deficiencies in Plaintiff's Amended Complaint; reveals how far removed the Complaint is from a reasonably conceivable claim under

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[1] *See* Court of Chancery Rule 15(aaa) ("In the event a party fails to timely file an amended complaint or motion to amend under this subsection (aaa) and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) or 23.1, such dismissal shall be with prejudice."); *In re Merge Healthcare Inc.*, 2017 WL 395981 at *11 (Del. Ch. Jan. 30, 2017) ("The Plaintiffs could have sought to amend upon receiving Defendants' Motion to Dismiss, but instead they chose to answer the Defendants' Motion and in doing so assert an additional, and contradictory, argument.").

Delaware law; and confirms the calculated risk Plaintiff took under Chancery Rule 15(aaa).

The Court of Chancery gave Plaintiff the benefit of construing his Complaint as attempting "to plead both process and disclosure claims" related to the sale of Kreisler Manufacturing Corporation ("Kreisler" or the "Company"). *Id.* at *7. The Court "carefully reviewed… the causes of action alleged in the Complaint," applied the correct standard by "drawing all reasonable inferences in the Plaintiff's favor," and appropriately declined to consider mere conclusory allegations, which the Court noted are "scattered within the Complaint." *Kahn* at *1-2. After this thorough analysis, the Court issued its 42-page, well-reasoned Opinion dismissing Plaintiff's Complaint with prejudice for failure to state a claim.

Now on appeal, Plaintiff's claims continue to be a moving target. As the Court of Chancery noted below, Plaintiff advanced theories in briefing that could not be tied to well-pled allegations in his Complaint. *Id*. at *8-10. In his opening brief on appeal, Plaintiff has continued this tactic by making arguments that cannot be tied to the four corners of his Complaint and were not raised at the trial Court level. As discussed further herein, Defendants respectfully submit that disturbing the Court of Chancery's decision would contradict Delaware precedent—Plaintiff did not sufficiently plead a process claim or a disclosure claim against a majority, disinterested board.

For these reasons and those explained further herein, Defendants respectfully submit that this Court should affirm the Court of Chancery's Opinion in its entirety.

SUMMARY OF THE ARGUMENT

1. Denied. This Court need only decide whether the Court of Chancery correctly concluded Plaintiff failed to plead a reasonably conceivable claim regarding whether the Director Defendants acted in bad faith by approving the transaction (Plaintiff's alleged process claim). Plaintiff's Complaint does not provide any factual or legal basis for imposing the extraordinary remedy of personal liability on the former Directors, particularly because Kreisler's charter included a Section 102(b)(7) exculpatory provision. As the Court of Chancery concluded, the Complaint "falls short" of alleging facts from which it could be reasonably inferred that the merger was "so far beyond the bounds of reasonable judgment" that there is no reasonable explanation other than the Directors were acting in bad faith. *Kahn* at *10-11. In addition to the fatal defect that his allegations do not implicate a majority of the board, Kahn's Complaint is easily distinguishable from the rare, extreme circumstances where bad faith is found despite the presence of majority disinterested board. As the Court of Chancery stated, "this is a high standard indeed." *Id.* at *10. Furthermore, Plaintiff's opening brief on appeal fails to argue the Court of Chancery erred in dismissing his alleged disclosure claims. That issue should be deemed waived and not considered by this Court. But even if the Court elects to entertain that issue despite it not being raised on appeal, the Court of Chancery correctly held that

Plaintiff's Complaint fails to state a claim with respect to alleged disclosure violations under Delaware law.

STATEMENT OF FACTS

On May 31, 2016, the Company announced the execution of a merger agreement with UFTI, an ACP portfolio company. A013. Contemporaneous with the announcement, the Board of Directors of Kreisler caused the Company to mail an Information Statement to the Company's stockholders. *Id*. The Information Statement expressly informed stockholders that to "exercise your [statutory] appraisal rights, you must submit a written demand for an appraisal no later than twenty days after the mailing of this Information Statement, or June 20, 2016, and comply precisely with all other procedures and requirements set forth in Section 262 of the" Delaware General Corporation Law. A040–41; *Kahn* at *6.

On June 15, 2016—five (5) days before the deadline for the exercise of appraisal rights—Kahn contacted the Company's counsel, admitted that Kahn had received the Information Statement and requested a copy of the merger agreement. *See* A103; *Kahn* at *6. That same day, June 15, 2016, the Company's counsel responded to Kahn's request, noting that the merger agreement limits access to the merger agreement to stockholders of record, except as otherwise provided in the Information Statement. *See* A105; *Kahn* at *6.

Kahn did nothing after receiving the Company's response. Specifically, Kahn did not:

- Exercise statutory appraisal rights;

- Request access to the merger agreement through a stockholder of record;
- Make a demand under Section 220;
- File an action seeking emergency relief from the Court prior to Closing.

Instead, Kahn waited until *after* the statutory appraisal deadline had passed, and then he filed this action seeking a "quasi-appraisal" remedy against the Directors based on alleged deficiencies in the disclosures provided in the Information Statement. *Kahn* at *6 (noting Kahn did not seek appraisal, seek to block the merger, or seek other emergency or expedited relief). Kahn admits the Information Statement was sent to stockholders and received by him, and provides substantial information to stockholders, such as:

- The Company's Board of Directors, upon the unanimous recommendation of a special committee of the Board consisting of independent directors, approved the merger (A040; *Kahn* at *5);
- Certain significant stockholders, including AB Value Partners, LP and AB Opportunity Fund LLC, Joseph P Daly, John W. Poling, Edward A. Stern and Michael D. Stern, and their affiliates – who owned 1,004,114 shares or 53.2% of the outstanding shares – approved the merger (A040; *Kahn* at *5);
- The Company's stock is quoted on the OTC Pink Open Marketplace, and the closing price of the Company stock on May 26, 2016 (the last trading

day before the execution of the merger agreement) was $11.46 per share, and that the merger consideration was $18.00 per share (A045, A047; *Kahn* at *4);

- On June 12, 2015, the Company engaged SunTrust Robinson Humphrey to serve as its financial advisor in connection with the Company's consideration of a potential sale or other strategic alternatives (A052);
- Following a meeting on July 7, 2015 between Company management and representatives from SunTrust Robinson Humphrey, a Confidential Information Memorandum was prepared for distribution to potential bidders (*Id.*);
- On August 21, 2015, the Board elected Jeffrey Bacher to the Board and established a Special Committee of the Board to review and evaluate the potential strategic transactions and alternatives. Independent Board members Bacher and Poling were designated as members of the Special Committee (*Id.*);
- SunTrust Robinson Humphrey contacted approximately 55 parties that might be interested in acquiring the Company (*Id.*; *Kahn* at *4);
- The Company entered into 27 non-disclosure agreements with potential bidders (A052; *Kahn* at *4);

- The Company received seven indications of interest from potential bidders (A052; *Kahn* at *4);
- Following Management presentations in which the bidders who submitted indications of interest were invited to participate, four bidders withdrew from the auction process, and three bidders continued to participate in the auction process (A052; *Kahn* at *4);
- Between December 18 and 22, 2015, the three remaining bidders submitted written acquisition proposals with a purchase price ranging from $14.23 per share to $18.25 per share (A053; *Kahn* at *4);
- Following the receipt of these proposals, the Special Committee instructed SunTrust Robinson Humphrey to request the bidders to submit their best and final bids (A053; *Kahn* at *4);
- On January 6, 2016 two bidders submitted revised acquisition proposals, with the highest price of $18.75 per share, subject to adjustments, while the third bidder declined the Company's request to increase its bid (A053; *Kahn* at *4);
- The Special Committee held a series of meetings with representatives of SunTrust Robinson Humphrey, reviewed and discussed the revised acquisition proposals, as well as the risks, uncertainties and benefits that the Company would face if it remained an independent company, and

recommended to the Board that the Board focus on negotiating a potential transaction with UFTI (A053);

- On January 14, 2016, the Board unanimously approved the execution of the Letter of Intent with UFTI based on the recommendation of the Special Committee, and on January 15, 2016, UFTI signed the Letter of Intent with the Company (*Id.*);
- On March 3, 2016, UFTI delivered to the Company a markup of the auction draft merger agreement, and thereafter, the parties negotiated drafts of the merger agreement, and on May 27, 2016, the Board, including the Special Committee, met to finalize their discussions regarding, and to consider approving the merger. At the request of the Special Committee and the Board, SunTrust Robinson Humphrey delivered its oral opinion, confirmed by a subsequent written opinion, that the $18 per share merger consideration was fair from a financial point of view (A053–54; *Kahn* at *5);
- In preparing its opinion to the Board, SunTrust Robinson Humphrey performed a variety of analyses, including a discounted cash flow analysis in which SunTrust Robinson Humphrey applied discount rates ranging from 16.5% to 17.5% and perpetuity growth rates ranging from 3.0% to 4.5%. Such analysis resulted in an implied valuation reference

range of $15.43 per share to $17.77 per share of stock as compared to the $18.00 per share merger consideration. A060.

In light of the above, the Court of Chancery stated the "Information Statement provides a detailed recitation of the Merger negotiations, which spanned several months, and includes the range of initial offers, and the process followed in securing the best and final bids." *Kahn* at *15. Furthermore, as the trial Court concluded, the Information Statement also included an "elaborate explanation" of certain employment agreements and sale bonus agreements—the alleged "side deals" referenced by Plaintiff—including:

- The Information Statement highlights in the summary section that certain insiders have interests in the Merger "that may be different from that of stockholders." *Id.* (citing A046);
- "The Information Statement dedicates approximately four single-spaced pages to delineating the 'interests of [the] executive officers and directors in the merger' including that the "Company's executive officers and directors have interests that are different from, or in addition to, the interests of the stockholders generally' and that '[t]he Board was aware of these interests and considered them, among other matters, in approving the Merger Agreement.'" *Id.* (citing A061-65);

- "The 'Executive Employment Agreements' subsection describes in detail the termination provisions and any severance payments triggered thereby." *Id.* (citing A061-62);
- The "Sale Bonus Agreements" subsection provides details of benefits "to each of the Stern Defendants, including that 'sale bonuses will be paid if the Closing Cash is in excess of $6,100,000' minus certain other defined types of cash." *Id.* (citing A062-63);
- The "'New Arrangements with Parent' and the Stern Defendants are explained, including extensive details about the new Employment and Rollover Agreements." *Id.* (citing A064-65).

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD PLAINTIFF FAILED TO PLEAD A REASONABLY CONCEIVABLE PROCESS CLAIM

A. Question Presented

Did the Court of Chancery correctly hold Plaintiff failed to adequately plead a reasonably conceivable claim related to the sales process the Directors employed to approve the transaction? This issue was raised below at B024-29.

B. Scope of Review

This Court reviews *de novo* questions of law, including whether the Court of Chancery employed the proper legal standard for dismissing a complaint. *See, e.g., LG Elecs., Inc. v. InterDigital Commc'ns, Inc.*, 114 A.3d 1246, 1252 (Del. 2015). The Court of Chancery applied the correct standard of review of Kahn's Complaint, "accepting the well-plead allegations as true and drawing all reasonable inferences in the Plaintiff's favor," but held nonetheless that "the Complaint fails to state a claim upon which relief can be granted." *Kahn* at *1. Importantly, the Court appropriately noted that it "need not accept conclusory allegations unsupported by specific facts or … draw unreasonable inferences in favor of the [Plaintiff]." *Id.* at *7 (internal citations omitted).

In his Opening Brief on appeal, however, Plaintiff attempts to mislead this Court regarding the applicable standard for pleading a breach of a director's duty of loyalty with respect to a sales process. Kahn asserts that the Court applied the wrong

standard, what he refers to as the "defendant friendly" standard – the standard enunciated in *Parnes* – in determining whether his Complaint stated sufficient facts to show that the majority, disinterested Board's action in approving the Merger was so far beyond the bounds of reasonable business judgment that it is inexplicable on the grounds other than bad faith. *See* Br. at 19. Kahn is wrong. The standard set forth in *Parnes* is still Delaware law, and is oft cited by the Court of Chancery and the Supreme Court. *See, e.g., In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig.,* 2017 WL 3568089 (Del. Ch. Aug. 18, 2017); *Allen v. Encore Energy Partners, L.P*., 72 A.3d 93 (Del. 2013). The Supreme Court's 2006 decision in *Disney* did not alter or change that standard. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27 (Del. 2006). In fact, in *Disney*, this Court recognized that Section 102(b)(7) of the DGCL affords "significant protections to directors of Delaware corporations," and held that the Chancellor's definition of bad faith in that case was not error, but legally appropriate.

Moreover, Kahn explicitly informed the Court that he was making his claim under *Parnes*. *See* Transcript from Oral Argument at A237-38; A250 (Kahn's counsel: "[T]he cases that support us squarely… all build on the Supreme Court decision in *Parnes*… our allegations would satisfy the higher standard, the *Parnes* standard….”). As the Court of Chancery noted,

> "Plaintiff asserts that the cases he cites 'build on the Supreme Court decisions in *Parnes [v. Bally Entertainment Corporation]*, which stands for the proposition that, in certain circumstances, even in the absence of a controller, a majority disinterested Board can breach the duty of loyalty when it approves an unfairly negotiated transaction that benefits an insider at the expense of other stockholders, and that is inexplicable in reference to business judgment. This proposition is true enough; it is the well-pled facts supporting such a conclusion that are absent here."

Kahn at *11. The trial Court applied the correct law and the correct standard, as was urged by Kahn, and correctly determined that the "scant" facts plead "fail to rise to such a level that I may reasonably infer bad faith on the part of the majority of the Director Defendants in approving the Merger." *Kahn* at *13.

Furthermore, Plaintiff's citation to *In re PLX* must be rejected because the sale process claims in that action were subject to "enhanced scrutiny," which "placed the burden on the defendant fiduciaries to show that they acted reasonably to seek a transaction offering the best value reasonably available to stockholders." *In re PLX Tech. Inc. S'holders Litig.*, Del. Ch., C.A. No. 9880-VCL (Sept. 3, 2015), trans. at 23-24 (Plaintiff's Compendium). Here, when asked by Vice Chancellor Glasscock at oral argument on Defendants' Motion to Dismiss whether Plaintiff was "attempting to rely on enhanced scrutiny to get [Plaintiff] by the Motion to Dismiss," Plaintiff conceded that enhanced scrutiny is *not* applicable in this case. A250-251 (Mr. Notis: To answer your question, we're not relying on the *Revlon* side."); *Kahn*

at *8 n. 105 ("I conclude that, at this stage, enhanced scrutiny is inapplicable. At oral argument the Plaintiff clarified that he is not seeking such a standard of review under *Revlon.*").

Given Plaintiff's concession in the Court of Chancery, the burden does not shift to Defendants here to show that their approval of the transaction was reasonable. Rather, Defendants respectfully submit that to affirm the Court of Chancery's dismissal, this Court need only review Plaintiff's scant and wholly conclusory allegations to confirm that he failed to plead sufficient facts to show a *majority* of the board acted in bad faith. *In re NYMEX Shareholder Litigation*, 2009 WL 3206051, at *6 (Del. Ch. Sept. 30, 2009). As the trial Court noted, "[t]his is a difficult standard [for the Plaintiff] to meet." *Kahn* at *10.

C. Merits of Argument

The Court of Chancery correctly held that Plaintiff's Complaint fails to plead a reasonably conceivable claim concerning the Directors' process for approving the merger. Even with the benefit of the Court of Chancery construing Plaintiff's Complaint to find it "attempted" to plead a claim related to the sales process, the Court nonetheless appropriately recognized: (i) due to the protection provided to the Directors by the Charter's Section 102(b)(7) provision, Plaintiff's claims against the Directors "must be dismissed unless those claims sufficiently allege a breach of the

duty of loyalty," (ii) Plaintiff fails to allege a majority of the Board is interested, and (iii) Plaintiff fails to allege a majority of the Board acted in bad faith. *Id.* *7-10.

1. *Plaintiff Has Failed to Plead a Non-Exculpated Claim*

Kahn's Amended Complaint does not provide any factual or legal basis for imposing the extraordinary remedy of personal liability on the former Directors in a putative class action seeking quasi-appraisal relief. This is particularly true because Kreisler's charter included a Section 102(b)(7) exculpatory provision. *See* Kreisler's charter, A107-151; *see, e.g., Arnold v. Society for Sav. Bancorp.,* 650 A.2d 1270, 1286-87 (Del. 1994) (noting that even if defendant directors fail to disclose material information, a Section 102(b)(7) provision protects individual defendants against any personal liability). When an exculpatory clause under Section 102(b)(7) is present, plaintiffs "must plead sufficient facts to show that *a majority of the Board of Directors* breached the fiduciary duty of loyalty. . . . That two directors may have been conflicted does not, by itself, impinge upon the independence of the remaining members of the Board." *In re NYMEX* at *6. As noted above, to prove a breach of loyalty, plaintiffs must plead sufficient facts to show:

(i) a *majority* of the Director Defendants either stood on both sides of the merger or were dominated and controlled by someone who did; or

(ii) a *majority* of the board failed to act in good faith. *Id.*

It is critical to note that if a plaintiff's allegations are too conclusory to support an inference of domination, plaintiff must seek to "convert into a loyalty claim their

aversion to the process of the Board employed in negotiating the merger." *NYMEX* at *6. However, "there is no single blueprint that a board must follow to fulfill its duties" and a claim for flawed process is properly brought as a duty of care, which would be barred by the exculpatory clause. *Id.* at *7.

Since the Kreisler charter included the exculpatory provision, Kahn's claim could not survive a motion to dismiss unless he adequately alleged the violations he complains of were the product of a breach of the duty of loyalty. *See, e.g., In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1175-76 (Del. 2015) ("A plaintiff seeking only monetary damages must plead non-exculpated claims against a director who is protected by an exculpatory charter provision to survive a motion to dismiss, regardless of the underlying standard of review for the board's conduct—be it *Revlon*, *Unocal*, the entire fairness standard, or the business judgment rule."). Hence, to survive dismissal, Kahn must have pled "sufficient facts to show that *a majority of the Board of Directors* breached the fiduciary duty of loyalty[.]" *In re NYMEX* at *6 (emphasis added); *see also In re Alloy S'holder Litig.*, 2011 WL 4863716, at *7 (Del. Ch. Oct. 13, 2011) (requiring that "the complaint must state a nonexculpated claim, *i.e.*, a claim predicated on a breach of the directors' duty of loyalty or bad faith conduct," to survive a motion to dismiss by exculpated defendants). To satisfy his high burden for a showing of bad faith, particularly with a majority of the board being disinterested, Delaware law requires Kahn to have

alleged an "extreme set of facts to establish disinterested directors were intentionally disregarding their duties or that the decision … [was] so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Nguyen v. Barrett,* 2016 WL 5404095, at *10 (Del. Ch. Sept. 28, 2016) (quoting *In re Chelsea Therapeutics Int'l Ltd. S'holders Litig.* 2016 WL 3044721 at *7 (Del. Ch. May 20, 2016)).

2. *Plaintiff Has Failed to Plead a Majority of the Directors Were Interested*

Just as he ignored Defendants' appropriate reliance on *In re NYMEX Shareholder Litigation* in his briefing at the trial level, Plaintiff's Opening Brief on appeal does not even mention, let alone attempt to distinguish, that precedent.

In re NYMEX provides that when, as is the case here, a Section 102(b)(7) exculpatory clause is present, plaintiffs "must plead sufficient facts to show that *a majority of the Board of Directors* breached the fiduciary duty of loyalty. . . . That two directors may have been conflicted does not, by itself, impinge upon the independence of the remaining members of the Board." *In re NYMEX* at *6 (emphasis in original).

At the trial level, Plaintiff conceded that, from the five member board, (a) Poling was not interested, and (b) Bacher was not interested. *Kahn* at *8. In other words, Plaintiff admitted that at least two board members were disinterested. As such, in his trial level briefing and at oral argument, Plaintiff focused on whether his

Complaint adequately pled that Daly was interested in the transaction. The Court of Chancery stated "resolution of this issue … is clear: The Plaintiff has failed to adequately allege that Daly was interested." *Id.* at *9. The Court explained:

> Notably absent from the Complaint is any allegation that Daly received different or unique consideration. Nor does the Complaint allege that he faced a liquidity crisis or a particular exigent need that would necessitate a fire sale of his interest. Absent such a circumstance, it is apparent that his incentives were the same as that of common holders: to maximize the value of his investment. The Complaint fails to plead a disabling interest.

Id. Now on appeal, it is clear that Plaintiff knows the trial Court applied the appropriate standard for evaluating the process allegations under *In re NYMEX*, and the trial Court correctly noted "whether the majority of the Board was interested turns solely on whether the Plaintiff has sufficiently alleged that Director Daly was interested." *Id.* at *8. Recognizing the four corners of his Complaint fail to plead Daly was interested, Plaintiff now hopes to cure that fatal pleading deficiency by changing his argument entirely. Plaintiff's new position is that "Daly's independence or lack thereof is not outcome determinative here as his acquiescence to the process that led to the diversion of consideration from stockholders to the Sterns was in bad faith." Opening Brief at 22, n. 11. Thus, as discussed further below, it now seems Plaintiff concedes that Daly was independent, just as Defendants argued below and the trial Court concluded. *Kahn* at *9.

Furthermore, the Court of Chancery also correctly rejected Plaintiff's footnote argument that Daly "was not considered independent for purposes of the Merger." A183 (citing Compl. ¶ 23 (A019)). The paragraph of the Complaint that Plaintiff cited for alleged support of that proposition, however, does not even include the word "independent" or any variation thereof.[2] The Court of Chancery appropriately disregarded the new, conclusory allegations asserted *in Kahn's brief*[3] and only considered the plain language of his Complaint. *Kahn* at *9 ("The Plaintiff points to no facts in support of the conclusion that Daly lacked independence, and I do not consider this bare allegation well-pled in light of the Plaintiff's failure to point to any specific facts supporting it."). Finally, it should be noted that in the related *AB Value* opinion, Vice Chancellor Parsons also noted that Daly was independent:

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[2] *See* Paragraph 23 of the Complaint. A019. The Complaint lacks any allegation suggesting why "favoring a sale" or the non-compete agreement meant Mr. Daly stood on both sides of the transaction. Even assuming Mr. Daly favored a sale, as a stockholder as well as a director, Mr. Daly would have every incentive to maximize the value of his shares to the benefit of any other stockholder. *See In re Zale Corp. Stockholders Litigation*, 2015 WL 5853693, at *13 (Del. Ch. Oct. 1, 2015) (noting director as a stockholder "had as much of an incentive to maximize the value of its investment as any stockholder"), *opinion amended on reargument*, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015).

[3] It is a "well-settled rule that on a motion to dismiss the Court will consider only facts alleged in the complaint, not subsequent briefing." *In re INFOUSA, Inc. Shareholders Litig*., 953 A.2d 963, 973 (Del. Ch. 2007). Also, Kahn elected to oppose the Motion to Dismiss, rather than attempt to cure his insufficient allegations. Therefore, his claims are dismissed with prejudice. *See* Oral Argument Transcript: "The Court: It's clearly under 15(aaa) if its dismissed." A255.

"Joseph P. Daly also is an independent director on the Kreisler Board." *AB Value Partners, LP v. Kreisler*, 2014 WL 7150465 at *2 (Del. Ch. Dec. 16, 2014).

At bottom, Kahn cannot rely on his briefing, at either the trial level or here on appeal, to cure his Complaint's fatal flaw of failing to allege that Mr. Daly or another third board member was interested or lacked independence. No such facts exist, nor were (or could be) pled by Plaintiff in good faith.

3. *Plaintiff Has Failed to Plead the Disinterested Majority of the Directors Acted in Bad Faith*

Despite his efforts to argue below that Daly lacked independence, Plaintiff now does an about face and suggests that "Daly's independence or lack thereof is not outcome determinative here." Opening Brief at 22, n. 11. Thus, Plaintiff now appears to concede that Daly was independent (altering his theory yet again). Plaintiff's new downstream efforts to amend his Complaint and his theory must be rejected. This new theory is a transparent effort to escape the fact that his Complaint doesn't adequately plead Daly was conflicted (as found by the trial Court). *Kahn* at *9.

Importantly, nowhere in Plaintiff's Complaint is there a single allegation that could be construed, even with the benefit of all reasonable inferences in Plaintiff's favor, to suggest Daly, Poling, and Bacher—a disinterested majority of the board—approved the sale in bad faith. Notably, this argument in Plaintiff's briefing on appeal fails to provide even a single citation to his Complaint. *See* Opening Brief at

22.[4] Indeed, the phrase "bad faith" does not even appear in the Complaint.[5] Kahn is simply unable to point to any allegations in his Complaint supporting a reasonable inference that Mr. Daly, Mr. Poling or Mr. Bacher—the disinterested majority—engaged in bad faith conduct in approving the transaction. That fact alone should highlight the impropriety of Plaintiff's "Hail Mary" effort to revive his claim on appeal.

As the Court of Chancery stated, "the question is whether facts pled imply that these employment agreement and sale bonus agreements were not reasonable conditions of the Merger, but instead are inexplicable in the interest of the Company and its stockholders so that I must infer bad faith." *Kahn* at *13. The Complaint "falls short" of alleging facts from which it could be reasonably inferred that the merger was "so far beyond the bounds of reasonable judgment" that there is no

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[4] At oral argument, Plaintiff contended his allegations (or stated differently, his "conclusions") purporting to support a process claim were found in Paragraphs 57-58, "where we wrap up our claims." A233. The Court highlighted that these allegations were "nested within the sole Count alleged for breach of fiduciary duty," rather than pled anywhere within the 54 paragraphs of factual allegations that proceed the sole cause of action. *Kahn* at *7.

[5] Any mention of the Directors' "duty of loyalty" is notably absent from the Complaint. These material differences between Kahn's Complaint and his briefing are telling, and are even more troubling in light of the fact that Kahn amended his Complaint and was still unable to cure his pleading deficiencies after reviewing the Directors' initial motion to dismiss. The vastly different story told in Kahn's brief (and the different arguments he now raises on appeal) demonstrate further the insufficiency of his allegations.

reasonable explanation other than the Directors were acting in bad faith. *Kahn* at *10-11 (citing *Alidina v. Internet.com Corp.*, 2002 WL 31584292, at *4-5 (Del. Ch. Nov. 6, 2002)). Given that the deal was consummated after a "lengthy and wide-ranging attempt to generate the best price," the Court correctly concluded that Kahn's "scant facts pled" were simply not enough to infer bad faith by a majority of the board. *Id.*

a. The Case Law Relied Upon by Kahn Actually *Supports* the Court's Dismissal of His Claims

Despite Plaintiff's efforts to draw similarities between his Complaint and a few Delaware cases where a disinterested board majority was found to have acted in bad faith, a cursory review of those opinions show how easily distinguishable this case is from the rare, extreme circumstances presented in those opinions. In fact, a close read of the cases cited by Plaintiff *support the Court of Chancery's dismissal of this action* because they highlight why the allegations pled in Kahn's Complaint utterly fail to rise to the level found in *Parnes*[6], *Crescent*[7], or *Alidina*.[8] As the Court of Chancery stated, bad faith "is a high standard indeed." *Id.* at *10.

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6 *Parnes v. Bally Entertainment Corp.*, 722 A.2d 1243 (Del. 1999).

7 *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963 (Del. Ch. 2000).

8 Plaintiff also cites to *Golaine v. Edwards* even though the Court of Chancery dismissed plaintiff's claims in that action because the complaint failed to allege a "side-deal" tainted the entire merger transaction. 1999 WL 1271882 (Del. Ch. Dec. 21, 1999). The Court, acknowledging the convoluted nature of Plaintiff's claims, dismissed the complaint because it failed to allege the "side-deal" tainted the merger transaction.

In conclusory fashion *in his brief,* Kahn argues the board "acted in bad faith by consciously failing to exercise their fiduciary duties and by putting the interests of the Stern brothers above the interests of the public stockholders." Opening Brief at 22. Once again, however, Kahn fails to provide any citation to the operative Complaint because he cannot do so—as these "facts" were not asserted in the Complaint. *Id.* Nonetheless, in an effort to support this argument, Kahn relies on the line of cases which emanate from *Parnes,* where the Court held that an extreme set of facts—amounting to outright bribery—gave rise to bad faith. 722 A.2d 1243 (Del. 1999). Following the *Parnes* decision, *Crescent* and *Alidina* similarly held a disinterested majority board could have acted in bad faith, but only if its acts were so "far beyond the bounds" of reasonable judgment that the acts "tainted" the entire transaction. *Crescent* at 982; *Alidina* at *4.

As the trial Court concluded, Kahn's Complaint utterly lacks "the well-plead facts supporting" a reasonable inference of bad faith by the disinterested majority board and "the cases the Plaintiff relies on make this clear." *Kahn* at *11. Unlike the Complaint in *Parnes*, Kahn's Complaint lacks any allegations of "egregious" acts or "illegal transactions" on the part of the disinterested majority board. *Parnes* at 1246; *see also Kahn* at *12 (noting the insider in *Parnes* illegally extracted "tens of millions of dollars that otherwise would have flowed to the stockholders"). Similarly, Kahn's Complaint is easily distinguishable from that in *Crescent* because Kahn does not

allege self-interested acts by the Board rising "to the level of tainting the entire merger process such that it was reasonably conceivable the independent directors acted in bad faith to enable the majority stockholder to wrongfully benefit at the expense of the corporation." *Kahn* at *12; *Crescent* at 983 (holding the Complaint pled circumstances so egregious that the disinterested directors essentially "aided and abetted" the majority stockholder's breach of his duty of loyalty). Finally, the operative Complaint in *Alidina* also contained far more allegations from which bad faith could be reasonably inferred. There, the target company's board approved a lucrative insider deal and the merger without a special committee, and closed on the transaction for a grossly inadequate "purchase price … paid by a fiduciary 'demanding' he be sold a valuable asset 'on the cheap' and thereby caused a diversion of 'significant funds from the Company to [the insider]." *Kahn* at *12; *Alidina* at *4–5.

Rather than provide any reasonable basis for the Court to infer bad faith from the allegations asserted in Kahn's Complaint, the cases to which he cites actually demonstrate the appropriateness of the trial Court's dismissal of this action.[9] As the

[9] Plaintiff also cites to *In re El Paso Pipeline Partners, L.P. Derivative Litigation* even though it has no bearing on any issue before the Court. 132 A.3d 67 (Del. Ch. 2015); Opening Br. at 25. The Court in *El Paso* merely noted that materiality standards vary, and that "a large deal priced in the billions" could affect this determination. Id. at 117. The case overall neither (1) addressed the issues before this Court nor (2) even make a determination of what is or is not material in merger negotiations.

Alidina Court held, a showing of bad faith is a "narrow escape hatch" to be used in "those *rare* cases where the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Id.* at *4 (emphasis in original) (internal quotation marks and citations omitted). This standard requires that "[t]he decision must be egregious, lack any rational business purpose, constitute a gross abuse of discretion, or be so thoroughly defective that it carries a badge of fraud." *Id.*

Despite the story he asserts in his briefing, his Complaint plainly fails to include any factual allegations from which a Court could reasonably infer a disinterested board majority consciously ignored their fiduciary duties in order to benefit the Sterns above the remaining stockholders. Similarly, his Complaint is devoid of factual allegations suggesting that the acquiescence of the board to approve the transaction was egregious. Kahn cannot provide citations to his Complaint for such allegations because they were not pled. The trial Court agreed, noting that "an inference alone is unavailing" to show the reduction of the sale price "resulted from the [employment and sale bonus agreements];" rather, to survive the Directors' Motion to Dismiss, Kahn's Complaint must have alleged facts making it "reasonably conceivable that such portion of reduction allocable to the [employment and sale bonus agreements], if any, makes Board approval inexplicable absent bad faith. Here, the Complaint falls short." *Kahn* at *11. The Complaint alleges only that the "bid of $18.75 per share,

subject to adjustments, was changed into a Merger Agreement at $18 per share, *though it appears* that the adjustment from $18.75 to $18 was *made in part due* to costs associated with the [employment and sale bonus agreements.]" *Id.* (emphasis in Court's opinion). Vice Chancellor Glasscock correctly picked-up on this hypothetical conjuncture and determined that even if such allegations were considered non-conclusory (Defendants maintain they are purely conclusory allegations), Kahn still did not plead facts concerning "the amount of the reduction actually arising from" the employment and sale bonus agreements. *Id.* The Complaint merely speculates that "it appears" that the adjustment was "made in part" due to the negotiated agreements—far from sufficiently pled allegations to reasonably infer bad faith, as the Court concluded: "pleadings to negate the good faith of the independent directors approving the Merger in light of the [employment and sale bonus agreements] are absent." *Id.*[10]

b. The Court of Chancery Correctly Concluded Kahn's Allegations are Most Akin to those in *Alloy*

While the Court acknowledged the general proposition that a majority disinterested board could, on rare occasion, breach the duty of loyalty, the Court

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[10] In fact, as to the Sale Bonus Agreements, Kahn's Complaint only alleges the Sterns "will receive ***up to*** a $105,000 payment." A022 at para. 32 (emphasis added). Hence, he concedes the actual amount could be $0. Thus, this allegation, too, falls far short from providing a reasonable basis for the Court to find a disinterested majority board must have acted in bad faith to have approved the transaction with the Sale Bonus Agreements included.

explicitly held simply that "well-pled facts supporting such a conclusion" "are absent" in Kahn's Complaint. *Kahn* at *11. In comparison to the extraordinary benefits—bribes and other illegal conduct—at issue in *Crescent*, *Parnes*, *and Alidina,* the trial Court considered the employment and sale bonus agreements at issue here more akin to those in *Alloy*, where the Court held that similar agreements were reasonable conditions to a merger and did not "taint" the entire transaction. *Alloy* at *7.

In *Alloy*, plaintiffs alleged the board acted in bad faith by approving a merger transaction where, among other allegations, two directors would (a) remain as the post-merger company's CEO and COO and (b) exchange their existing company shares for shares in the new post-merger company. *Id.* at *12. In dismissing the complaint, the Court explained how these terms sharply contrasted with those in *Parnes*. *Id.* There, the Court stated, "these terms can be explained on grounds other than bad faith. One plausible, and legitimate, explanation is that [acquirer] wanted to ensure that those members of Alloy's management with the best knowledge and expertise regarding the Company continued to manage its affairs after the Merger and that they were properly incentivized to so do." *Id.*

Kahn's Complaint is wholly devoid of allegations dripping with bad faith like those present in *Crescent*, *Parnes*, *and Alidina.* Kahn fails to acknowledge that as in *Alloy*, M. Stern and E. Stern's employment, compensation and rollover agreements were fully disclosed in the Information Statement. A081. None of these agreements

involved Mr. Daly, Mr. Poling or Mr. Bacher, or otherwise impacted the interests of the majority of the Kreisler's board. As the Court stated in *Alloy*, when considering allegations similar to those Kahn makes here, it is not reasonable to infer these "side-deals" must have been made or approved in bad faith. Rather, the far more "plausible" and "legitimate" explanation is that the acquirer sought to insure Kreisler's management remained involved post-closing to manage Kreisler's "affairs after the Merger and that they were properly incentivized to so do." *Alloy* at *12. As the trial Court determined, "the Complaint falls short of pleading facts with respect to Edward [Stern's] benefits" and "necessary details to reach the Plaintiff's desired inference, that no good-faith ground existed to approve the Merger with those benefits included, are wholly lacking." *Kahn* at *13.

Finally, even if Kahn had properly asserted bad faith allegations (which the trial Court correctly held he has not), Kahn seeks an "appraisal" remedy that is not properly available when suing *individual* director defendants. In fact, as Chancellor Bouchard recently commented, a quasi-appraisal should not be available against individual directors. *See* Transcript at Oral Argument at 15, *In re Cyan Inc.*, C.A. No. 11027-CB (Del. Ch. June 14, 2016); Transcript at Oral Argument at 98:18-22, *In re Cyan Inc.*, C.A. No. 11027-CB (Del. Ch. Feb. 7, 2017) ("the party that was liable was the controller [in quasi-appraisal cases *Gilliland v. Motorola, Inc.* and *Berger v. Pubco*], which I think was an entity, not individual directors; right?"). Accordingly, the

Board's approval of the merger was not made in bad faith as defined under Delaware law.[11]

For these reasons, Defendants respectfully request this Court affirm the Court of Chancery's dismissal of Kahn's process claims.

[11] While Kahn argues the agreements tainted the entire transaction, he did not seek to enjoin the transaction even though the agreements were fully disclosed in the Information Statement. A061-65. As the trial Court concluded, the Information Statement included an "elaborate explanation" of the employment and sale bonus agreements complained of by Plaintiff. *Kahn* at *16. If Kahn truly believed these agreements somehow negatively impacted the merger or the merger price, he had the opportunity to seek injunctive relief pre-merger or to seek appraisal post-merger.

II. THE COURT OF CHANCERY CORRECTLY HELD PLAINTIFF FAILED TO PLEAD A REASONABLY CONCEIVABLE DISCLOSURE CLAIM

A. Question Presented[12]

Did the Court of Chancery correctly hold Plaintiff failed to adequately plead a reasonably conceivable claim related to alleged disclosure deficiencies? This issue was raised below at B029-46.

B. Scope of Review

This Court reviews *de novo* questions of law, including whether the Court of Chancery employed the proper legal standard for dismissing a complaint. *See, e.g., LG Elecs., Inc. v. InterDigital Commc'ns, Inc.*, 114 A.3d 1246, 1252 (Del. 2015). "The merits of any argument that is not raised in the body of [Plaintiff's] opening brief [on appeal] shall be deemed waived and will not be considered by the Court on appeal." Del. Supr. Ct. R. 14(b)(vi)(A)(3).

C. Merits of Argument

The Court of Chancery dismissed Plaintiff's disclosure claim because "nothing in the record creates an inference that the Defendants *deliberately* withheld the information or disregarded a manifest duty." *Kahn* at *16 (quoting *Nguyen* at *6 (emphasis in original)). This Court should affirm this dismissal for two reasons. First, Plaintiff has conceded his Complaint did not sufficiently allege a disclosure claim

[12] To be clear, Plaintiff failed to pursue this issue on appeal.

because he does not raise the issue on appeal, thus waiving any argument that the Court of Chancery erred in dismissing his disclosure claim. Second, even if Plaintiff did not waive the argument, the Court of Chancery's opinion is well reasoned and supported by Delaware law.

1. *Plaintiff Conceded His Disclosure Claim Should Be Dismissed Because He Failed To Raise the Issue on Appeal*

Supreme Court Rule 14(b)(vi)(A)(3) states "[t]he merits of any argument that is not raised in the body of [Plaintiff's] opening brief [on appeal] shall be deemed waived and will not be considered by the Court on appeal." Del. Supr. Ct. R. 14(b)(vi)(A)(3); *Storick v. CFG LLC*, 2015 WL 1469088, at *5 (Del. Supr. Mar. 30, 2015). As Plaintiff acknowledges, the sole issue on appeal is his process claim: "Did the Court of Chancery err in holding that the Complaint did not plead reasonably conceivable allegations that Defendants acted *in bad faith in approving a Merger…*" Opening Brief at 18, Question Presented (emphasis added).

Plaintiff does not argue any error in the Court's dismissal of his disclosure claim. Indeed, changing his position again, Plaintiff now argues the alleged disclosure issues are not breaches of a fiduciary duty, but are suggestive of Defendants' alleged bad faith in approving the transaction, *i.e.*, evidence to support *his process claim*. *See* Opening Brief at 27 ("the Complaint alleges that the Defendants' bad faith was evidenced by misrepresentations and omission in the Information Statement"). This new argument was neither alleged in Plaintiff's

Complaint, nor raised before the trial Court below. *See* Del. Supr. Ct. R. 8; *see also Shawe v. Elting*, 157 A.3d 152, 168–69 (Del. 2017) (finding argument waived because not raised in the court below). Indeed, at oral argument, Plaintiff explicitly stated his "separate substantive process claim" "has nothing to do with the disclosures." A233. As Plaintiff did in his motion to dismiss briefing and at oral argument at the trial level, he is attempting to shift or supplant his argument on appeal to "hit" on something even though his Complaint contains no supporting factual allegations.[13]

Even if it were proper for Plaintiff to raise this new argument (which it is not), it nonetheless misses the mark. Plaintiff relies on *O'Reilly v. Transworld Healthcare, Inc.* to argue the alleged disclosure violations support an inference of bad faith. 745 A.2d 902, 912–13 (Del. Ch. 1999); *see* Opening Brief at 28. The Complaint in that case, however, pled specific facts to support an inference that defendant was a controlling stockholder of the company at issue ("HMI"), not that

[13] The fact that Plaintiff's opposition to the Motion to Dismiss devoted only two pages to his alleged "process claim" (A181-83), as opposed to twelve pages arguing his alleged disclosure claim (A188-200) is telling. This further clarifies that when filed, Plaintiff's Complaint was about alleged disclosure omissions—not a disinterested board majority's approval of the transaction. Indeed, a review of Kahn's Complaint reveals that the bulk of his Complaint was purportedly focused on his alleged disclosure claim, not a process claim. *See e.g.*, A026-29, Amended Complaint, ¶ 40 ("Defendants failed to provide those disclosures as required by their fiduciary obligations); ¶ 43 ("No projections disclosure"); ¶ 45 ("no disclosure of merger negotiations").

the defendant acted in bad faith. In *O'Reilly*, plaintiff brought fiduciary duty claims against defendant, an alleged controlling stockholder that allegedly forced HMI to merge with one of defendant's subsidiary companies. Defendant sought to dismiss the complaint, claiming plaintiff failed to sufficiently allege defendant was a controlling stockholder of HMI. The Court disagreed because the complaint alleged (1) defendant owned 49% of the company's stock, (2) defendant held an option to purchase another 2% of the company's outstanding voting stock, and (3) defendant owned substantially all of the company's debt. *Id.* at 913. Taken together, these alleged facts were enough because they supported an inference that defendant had enough influence to control HMI, particularly because HMI was on the verge of bankruptcy. *Id.* at 911, 913.

Here, unlike in *O'Reilly*, the issue is not whether defendants owe a fiduciary duty to plaintiff, it is whether defendants breached that duty. Thus, to sufficiently allege defendants breached that duty, plaintiff must allege sufficient facts to overcome the *presumption* that defendants acted in good faith. *Nguyen* at *5 ("Under Delaware law, directors are presumed to be independent, disinterested, and faithful fiduciaries."). Accordingly, Plaintiff has a higher bar to overcome than the plaintiff in *O'Reilly*, and the Court of Chancery correctly concluded that Kahn failed to meet that standard. *Kahn* at *14, 16 ("Here, to state a non-exculpated claim the Plaintiff cannot simply point to erroneous judgment in the failure to make a

disclosure, implicating the duty of care, but rather must point to facts in the Complaint supporting an inference that the Board acted in bad faith in issuing the disclosure, implicating the duty of loyalty. … Even assuming materiality, however, to my mind the disclosures, made or omitted, fall short of implying bad faith.”).

In sum, Plaintiff has (a) waived any argument that the Court of Chancery erred in dismissing his disclosure claim because he does not raise the issue on appeal and (b) waived his new argument that the alleged disclosure issues are somehow evidence of Defendants’ bad faith for his alleged process claim as that was neither plead nor raised below. *See Wilmington Trust Co. v. Conner*, 415 A.2d 773, 781 (Del. 1980) (“It is the general rule of this State that issues not raised in the trial court shall not be heard on appeal.”).

2. *Even If Plaintiff Did Not Waive His Disclosure Claim, The Court Should Affirm Dismissal of those Allegations*

Plaintiff attempts to allege three disclosure violations: “(1) that the Information Statement contained an affirmative misrepresentation about access to the Merger Agreement, (2) the Information Statement’s purported failure to include a ‘fair summary’ of the financial advisor’s valuations, as well as to provide financial projections that management provided to the financial advisory and (3) the purported failure of the Information Statement to provide details of the negotiations with the stern Defendants regarding the Side Deals.” *Kahn* at *14; *see* A18–20.

As the trial Court noted, because these claims were brought *post-closing*, the issue is not whether defendants withheld material information, it is whether defendants are "conceivably liable to the stockholder Plaintiff for *damages*." *Kahn* at *14 (emphasis in original). Accordingly, to adequately plead a post-closure disclosure claim Plaintiff must allege "facts making it reasonably conceivable that there has been a *non-exculpated breach* of fiduciary duty by the board in failing to make a material disclosure." *Id.* (emphasis in original); *see Nguyen* at *3. Here, because Defendants are protected by an exculpation clause, "Plaintiff must point to facts in the Complaint supporting an inference that the Board acted in bad faith in issuing the disclosure, implicating the duty of loyalty." *Kahn* at *14; *Nguyen* at *3, *see also* A145. To plead a bad faith claim, Plaintiff must allege an "extreme set of facts to establish that disinterested directors were intentionally disregarding their duties or that the decision . . . [was] so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Nguyen* at *3; *Kahn* at *14.

The Vice Chancellor held that Plaintiff failed to plead the "extreme set of facts" necessary to meet this necessarily high burden. *Kahn* at *14. In so doing, the Court acknowledged that the Information Statement provided a "detailed recitation of the Merger negotiations." *Id.* Specifically, the Court noted that the Information Statement:

- provides a "detailed recitation" of the Merger Agreement, reviewing the several months of negotiations, including the range of initial offers, and reciting the process that followed in securing the best and final bids (*Id.*; A052–54);
- highlights that certain insiders "have interests in the Merger—the Side Deals—that may be different from that of stockholders," and "dedicates approximately four single-spaced pages" describing these insider interests, including "that the 'Company's executive officers and directors have interests that are different from, or in addition to, the interests of stockholders of the Company generally' and that '[t]he Board was aware of these interests and considered them, among others matters, in approving the Merger Agreement" (*Kahn* at *14; A061–65);
- devotes a section to "Executive Employment Agreements" detailing "the termination provisions and any severance payments triggered thereby" (*Kahn* at *14; A061–62);
- details the sales bonus agreements of each of the Stern Defendants, "including that 'sale bonuses will be paid if the Closing Cash is in excess of $6,100,00' minus certain other defined types of cash," and also details the number and exercise price of the options given to the Stern Defendants and others (*Kahn* at *14; A062–64);

- devotes its own section to the "Indemnification and Exculpation of Directors and Executive Officers" (*Kahn* at *14; A078); and
- includes "extensive details about the new Employment and Rollover Agreements." (*Kahn* at *14; A064–65).

Again, as noted by the trial Court, because the majority of the Board were independent and disinterested, the Company's directors "are presumed to have acted in good faith." *Kahn* at *14; *Nguyen* at *5 ("Under Delaware law, directors are presumed to be independent, disinterested, and faithful fiduciaries."). As the Court stated, while additional information would "no doubt" be of interest:

> Plaintiff alleges only that material deficiencies exist, and points to nothing that would explain the deficiencies in a way that implicates bad faith. He points to nothing in the disclosures withheld that would have been adverse to the deal. Pleading material disclosure deficiencies, without more, is not sufficient for a pleading that independent, disinterested directors breached a duty of loyalty.[14]

a. The Stockholders Received a Fair Summary of the Financial Advisor's Analysis.

Despite Kahn's conclusory allegations to the contrary, the Information Statement provided Kreisler's stockholders with a complete and fair summary of the Financial Advisor's analysis and fairness opinion. Under Delaware law, stockholders are entitled only to a fair summary of a financial advisor's work. Directors are not,

[14] *Id.* at *15.

however, required to provide stockholders with all data provided to or used by a financial advisor so that the stockholders could make an independent determination of fair value. *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180 (Del. Ch. June 30, 2014). Kahn's claim is very similar to that asserted in *Dent,* where the Court held such conclusory allegations do not provide a reasonably conceivable set of facts for the claim to survive dismissal. Notably, Kahn's opening brief on appeal fails to address *Dent.*

In *Dent*, a former stockholder asserted a breach of fiduciary duty claim against alleging that disclosures provided to the stockholders were insufficient. Dent sought "details of how and why" the financial advisor employed certain discount rates and ranges in its analysis of the proposed transaction and the Court noted that level of detail is "well beyond the 'fair summary' that is required under our law." *Id.* at *14. The Court dismissed Dent's action in its entirety.

Like in *Dent*, Kahn's Amended Complaint must be dismissed because it is simply a "'tell me more' request that, unlike a viable disclosure claim, fails to identify how the [disclosed] analysis is misleading or incomplete." *Id.* at *13.

b. Stockholders are Not Entitled to Financial Projections.

Kahn also asserted that the Information Statement was required to include Kreisler's five-year financial projections. A028. It appears Kahn believes the mere fact the projections were provided to the Financial Advisor automatically requires

their production to Kreisler's stockholders. Again, Kahn's understanding of Delaware law is mistaken.

A corporation is not required to disclose all financial projections given to and considered by a financial advisor. *County of York Emples. Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053 at *12 (Del. Ch. Oct. 28, 2008); *see also Dent* at *11 ("There is no *per se* duty under Delaware law to disclose to stockholders financial projections given to and relied on by a financial advisor."). The *Dent* opinion is also directly on-point with regard to this issue.

In *Dent,* the Court noted that "other than making the conclusory allegation that the projections are 'crucial' to stockholders, Dent has failed to explain how disclosing the Company's management projections used in the [fairness opinion] would significantly alter the total mix of information available to the Company's stockholders." *Dent* at *11. Here, as in *Dent*, stockholders holding a majority of the outstanding shares already had approved the merger; but, unlike *Dent*, the Information Statement informed Kreisler's stockholders that the merger consideration of $18.00 per share was *higher* than the DCF valuation reference range disclosed in the Information Statement. Kahn's three sentence projections allegation is just as conclusory as that in *Dent*. Kahn simply alleges the projections are reliable, suggesting that is enough to mandate their disclosure, but he fails to offer any explanation for how the stockholders' ability to consider the projections may have

impacted their decision on whether to seek appraisal. A028; *Kahn* at *16 n.175 (emphasizing that "the disclosures made were not in aid of a vote, as the Merger was to be approved via written consent: they were made to inform stockholders to permit an informed choice whether to seek appraisal").

As the trial Court noted, the directors' "decision to limit access to… valuation metrics could have a valid business purpose." *Kahn* at *15. Therefore, just as in *Dent,* without a more specific allegation from which bad faith could be reasonably inferred, dismissal of Kahn's claim is necessary. Kahn "has made no allegation that the undisclosed projections are in any way inconsistent with … the information that was disclosed" and "the Delaware Supreme Court has held that such a failure can be fatal to a claim for breach of the duty of candor." *Dent* at *12.

c. Kreisler's Stockholders were able to Access the Merger Agreement.

Kahn admits that the Information Statement disclosed "that a copy of the Merger Agreement was available 'upon the request of any stockholder.'" A013. Kahn's protest is rooted in the fact that he was only a beneficial owner of Kreisler stock—not a record owner—and only record owners of Kreisler stock were granted access to the merger agreement.

Kreisler and the Directors fully complied with their obligations with respect to disclosures relating to the merger agreement. First, in compliance with 8 Del. Code Ann. Tit. § 251(c), the Information Statement included a summary of the merger

agreement. *See* 8 Del. Code Ann. Tit. § 251(c) ("The notice shall contain a copy of the agreement ***or a brief summary thereof*.")** (emphasis added). Second, record owners were free to access the merger agreement pre-closing in accord with the procedure outlined in the Information Statement. Kahn has failed to provide any Delaware authority prohibiting the procedures used, and Directors are unaware of any such authority.[15] *Kahn* at *15 (noting Plaintiff must allege facts showing that the lack of disclosure was for reasons "promoting an interest inimical to the Company," but Plaintiff has failed to allege facts showing limiting access to the merger agreement and valuation metrics was for a reason other than a "valid business purpose"). Kahn simply failed to plead that this was a breach of fiduciary duty.

d. Directors Are Not Required to Disclose the History of the Merger Negotiations.

Kahn's final issue with the Information Statement was his contention that it did not disclose the history of the merger negotiations and price adjustments leading up to the agreed upon $18 per share. This position, too, demonstrates Kahn's misunderstanding of the level of disclosures required under Delaware law. All information material to the transaction was included in the Information Statement, such that the details Kahn seeks are not required to be disclosed. As concluded by the

[15] Section 220 reflects a Delaware public policy of limiting inspection rights solely to record shareholders and voting trust beneficial owners or their nominees. Kahn does not claim that he falls within any of these categories.

trial Court, Kahn seeks, but is not entitled to, the “why” or a “play-by-play” of the merger negotiations, or “side deals.” *Kahn* at *16; *Dent* at *16. The Court of Chancery corrected held that “the disclosures, made or omitted, fall short of implying bad faith,” and thus, Plaintiff’s disclosure allegations “are insufficient to state a claim.” *Kahn* at *16.

CONCLUSION

For these reasons, the Court of Chancery's decision to dismiss Plaintiff's claims with prejudice should be affirmed.

BLANK ROME LLP

Dated: December 13, 2017

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