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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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This is an appeal of the dismissal of a diverted Merger[1] consideration case where the Defendants accepted a lower Merger price after insiders negotiated side deals for themselves, including cash payments for the sale of the Company and increased employment termination payments. After the Merger was approved by written consent, Defendants provided Plaintiff and other public stockholders with an Information Statement that failed to include material information about the Company and the Merger. Defendants' brief – like their argument before the Court of Chancery – ignores the Complaint[2] and wrongly claims that Plaintiff asserted no allegations of bad faith, well-pleaded or otherwise. Defendants are also wrong to claim that Plaintiff has changed his position on appeal. The Complaint alleges a claim that Defendants breached their fiduciary duties by agreeing to side deals that benefitted the selfish interests of insiders and, thereby, failed in their duties to Kreisler's stockholders. Plaintiff argued consistently

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[1] All capitalized terms have the same meaning as defined in Appellant's Opening Brief ("Pl. Op. Br.").

[2] Defendants' claim that "Plaintiff's briefing on appeal fails to provide even a single citation to his Complaint" as it relates to the bad faith argument. Appellees' Answering Brief ("Def. Opp.") at 20-21; *see also id.* at 23, 25. Defendants are wrong. Plaintiff's argument on this point opens at page 20 and extends through page 28, where Plaintiff references his Complaint more than 15 times, citing to A011-13, A018-20, A022-29. *See also* Pl. Op. Br. at 8-17 (including approximately 65 references to the Complaint).

below, and now on appeal, that these well-pleaded allegations overcome Defendants' affirmative defense based on Section 102(b)(7).

None of Defendants' attempts to ignore the allegations of the Complaint or lay blame at Plaintiff or his lawyers change these allegations.[3] Addressing the merits of the Complaint, without Defendants' head-in-the-sand approach, demonstrates that the Complaint should be sustained. A213, A215, B012-13, B015, B026-28, B032-46.

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[3] Defendants' attempt to deflect blame for their wrongdoing by claiming that Plaintiff should have made a demand under Section 220 (which they later wrongly argue is limited to record holders, *see infra* at n.3) or request that a stockholder of record review the Merger Agreement on his behalf (and presumably memorize its contents to report back to him since it was not available for copying) is unfounded. Def. Opp. at 6-7. As Plaintiff argued in his brief below (A162, A190-91), there is no Delaware authority to support turning "an affirmative duty of the directors to disclose material information into a duty on the part of the stockholders to call the company and seek the information the stockholders believe is material." *Turner v. Bernstein*, 776 A.2d 530, 544 (Del. Ch. 2000) ("it would undermine the premise of our law's respect for *fully informed* stockholder choices if Delaware courts enabled boards of directors to default entirely on their affirmative disclosure obligations and force their stockholders to ask a series of detailed questions to elicit the material facts.").

ARGUMENT

I. PLAINTIFF'S COMPLAINT ADEQUATELY ALLEGES DEFENDANTS' BAD FAITH

A. Plaintiff Alleged Facts Supporting Bad Faith in the Complaint, Briefed Those Facts to the Court Below, and Has Not Changed His Arguments on Appeal

1. The Complaint

Defendants have consistently argued that Plaintiff's Complaint fails to include allegations related to the Merger process.[4] Defendants' deer-in-the-headlights approach is proven disingenuous when reviewing the actual allegations of the Complaint. While Plaintiff did not use the term "bad-faith" in the Complaint, the facts alleged support a pleading-stage finding of bad faith. A sampling of the Complaint's allegations demonstrates as much:

> The directors put the Company up for sale, but that process was limited to seeking a buyer that would accommodate a sibling (and hedge fund) in seeking an end-stage exit while also providing the other sibling continued equity participation and a management position in the business under the new owner. Potential buyers who would not accommodate those differing interests were not considered.

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[4] For example, during the oral argument on the motion to dismiss, Defendants suggested the Court of Chancery limit its reading of the Complaint to 10 paragraphs, stating that the Complaint: "starts on maybe paragraph 36 to 47. So it's a ten-paragraph complaint. It's a skeletal of a complaint." A255. Defendants thus asked the Court of Chancery to ignore the allegations under the headings "The Special Committee was Formed after M Stern and E Stern Had Already Hired Bankers and Lawyers and Set the Parameters for a Sale" and "M Stern and E Stern Negotiate Side Deals for Themselves" and "Arlington Lowers its Bid as a Result of the Side Deals." A018-24.

A Special Committee was created, but before it was formed, the siblings who worked for the Company hired advisors, set the parameters for a sale and determined the contents of the Confidential Information Memorandum. The Special Committee then used the same bankers and lawyers that had been hired by the Company. A011.

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After receiving the $18.75 per share bid, the two siblings who worked for the Company negotiated a series of agreements and amended agreements to pay themselves more money. One sibling received an amended employment agreement that increased his termination benefits. The other got a new employment agreement with the buyer, and a Rollover Agreement giving him an equity position in the buyer (a privately held company). Both siblings and the buyer also entered into a new agreement, a "Sale Bonus Agreement," whereby the Company would pay the two of them a cash bonus depending on Kreisler's cash balance as of the closing of the Merger. Saddled with these new obligations (the sale bonuses alone cost $0.11 per share), Arlington lowered its bid to $18 per share, which Defendants accepted in a definitive merger agreement, dated May 27, 2016 (the "Merger Agreement"). The Merger was approved by written consent, eliminating the need for a stockholder vote. A011-12.

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These facts amount to a classic case of insiders obtaining disparate and superior consideration for themselves that directly resulted in a lower Merger price for public stockholders. A014.

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Defendants Permit M Stern and E Stern to Hire Bankers and Lay the Groundwork for a Sale. A017.

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Any sale would have to accommodate those members of the Stern family seeking an end-stage exit while also permitting M Stern's

continued equity participation and management position in the business. Potential buyers who would not accommodate those differing interests would not be considered. A017-18.

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While there would later be a Special Committee, M Stern and E Stern first hired bankers and lawyers and set the parameters for the sales process and an acceptable merger partner. Before the Special Committee was formed, SunTrust Robinson, Inc. ("Robinson Humphrey") was hired by M Stern and E Stern on June 12, 2015. On July 7, 2015, M Stern and E Stern met with Robinson Humphrey "to discuss the potential strategic transaction, timeline and process" (according to the Information Statement). After that meeting, M Stern and E Stern, "with the assistance of Sun Trust Robinson Humphrey, prepared a Confidential Information Memorandum" for potential bidders. Blank Rome, which is Kreisler's main outside counsel, was the Company's legal advisor in the sales process. A018.

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The Special Committee was Formed after M Stern and E Stern Had Already Hired Bankers and Lawyers and Set the Parameters for a Sale. A018.

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After Arlington made its $18.75 bid, M Stern and E Stern negotiated extra benefits for themselves, none of which is explained fully in the Information Statement. A021.

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First, at the same time the Company was negotiating the Merger Agreement, M Stern was negotiating with Arlington to secure new employment with the post-Merger entity, and a rollover of a portion of his existing equity position into a new equity position in Arlington's subsidiary, United Flexible Technologies, Inc. ("United Flexible"). Concurrently with the execution of the Merger Agreement, M Stern entered into a Rollover Agreement with United Flexible, and an

Employment Agreement with Kreisler and Arlington. Under the terms of the Employment Agreement, M Stern will become President and a director of post-Merger Kreisler, and will be permitted to attend all board meetings of United Flexible. A021.

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Second, at the same time the Company was negotiating the Merger Agreement, E Stern was negotiating with the "Compensation Committee" (unknown who was on that committee) for an amendment to his Employment Agreement (which was only a few months old) in order to obtain better benefits upon his desired termination from the Company when the Merger was completed. E Stern and Kreisler entered into that amendment to his Employment Agreement on May 3, 2016. A022.

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Third, at the same time the Company was negotiating the Merger Agreement, both M Stern and E Stern were negotiating a Sale Bonus Agreement with the Company, which was entered into on April 11, 2016. The Sale Bonus Agreement provides that M Stern and E Stern each will receive up to a $105,000 payment (roughly a 38% bump over their annual salary), depending on the Company's cash balance as of the closing of the Merger. A022.

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Arlington Lowers its Bid as a Result of the Side Deals. A023.

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it appears that the adjustment from $18.75 to $18 was made in part due to costs associated with the side deals for M Stern and E Stern (the sale bonuses alone cost $0.11 per share). A023.

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> In summary, this is an underpriced Merger designed to meet the various selfish needs of different members of the Stern family. Insiders competed for Merger consideration, secured side deals for themselves, did not engage in a value maximizing process, and intentionally thwarted public stockholders from determining the higher value of the Company and learning of the Defendants' defective sales process. A030.
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> ***
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> First, ***Defendants breached their fiduciary duties by knowingly engineering and/or approving a sales process designed to benefit the particular selfish interests of Company insiders rather than engage in an open process reasonably designed to maximize stockholder value.*** A032 (emphasis added).
>
> ***
>
> Second, ***Defendants breached their fiduciary duties by knowingly competing for Merger consideration or permitting other insiders to compete for Merger consideration by securing or approving lucrative deals for M Stern and E Stern***, all of which resulted in lower Merger price. A032-33 (emphasis added).

Also, Plaintiff pleaded that the Information Statement was materially deficient, which further supported Plaintiff's argument that Defendants acted in bad faith. *Id; see also* A030. Reading these allegations, it is difficult to understand Defendants' claim that Plaintiff made no substantive process claims.[5]

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[5] *See* A215 (Mr. Wood: "Well, we didn't have to [argue that *Corwin* applied] because it's a disclosure claim. When we saw in the opposition brief that there were telltale signs to arguments about the merger, that's where this came in. And we did reference Corwin in the reply brief.").

2. Plaintiff Has Consistently Argued the Same Theory

Defendants disingenuously cast Plaintiff's allegations and supporting arguments as a "moving target." Def. Opp. at 2.[6] Plaintiff's allegations and arguments have been consistent throughout the litigation.

a. Plaintiff has consistently relied on the correct standard

Consistent with his argument in the Court of Chancery (A179), Plaintiff contends on appeal that there are at least two established, alternative methods for pleading bad faith and the Court below erred in disregarding Plaintiff's well-pleaded allegations of Defendants' conscious disregard for their duties to act in the best interest of the stockholders. Pl. Op. Br. at 19-20 (citing *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006); *In re PLX Tech. Inc. S'holders Litig.*, Del. Ch., C.A. No. 9880-VCL, Tr. at 45-58 (Del. Ch. Sept. 3, 2015) and *In re Answers Corp. S'holders Litig.*, C.A. No. 6170-VCN, 2012 WL 1253072, at *7 (Del. Ch. Apr. 11, 2012)). Defendants ignore *Answers* but argue that "Plaintiff attempts to mislead the Court" because *PLX* involved *Revlon* claims. Def. Opp. at

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[6] Defendants point to Plaintiff's treatment of Defendant Daly as another example of Plaintiff's so-called "moving target" arguments. Def. Opp. at 20. That Plaintiff may have decided to narrow the issues by not challenging Daly's independence at this stage should be applauded, not criticized. Certainly, it is not a ground to find Plaintiff improperly raised new issues before this Court.

13. This is not a distinction at all.[7] *See PLX*, Tr. at 45-58 (*PLX* court's exculpation analysis was independent of its *Revlon* analysis). That *PLX* involved a *Revlon* claim is no basis for disregarding its holding that a plaintiff can support a "pleading-stage inference that [disinterested directors] acted in bad faith by giving into the wishes of [interested directors]" even where such inference is "not the only possible inference." *Id.*[8]

Moreover, contrary to Defendants' assertion (Def. Opp. at 14), Plaintiff is not arguing that *Parnes*[9] is bad law.[10] Allegations that the decision under attack is

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[7] Both this case and *PLX* involve sale claims. Plaintiff did not, as Defendants suggest, "concede[]" at oral argument that *Revlon* had no applicability. Def. Opp. at 15. Plaintiff merely said he was not relying on enhanced scrutiny alone to overcome Section 102(b)(7). *See* A251 ("You didn't need *Revlon*").

[8] *In re NYMEX S'holders Litig.*, C.A. No. 3621-VCN, 2009 WL 3206051, at *6 (Del. Ch. Sept. 30, 2009) does not impact Plaintiff's argument. Plaintiff argues that *all* the Directors acted in bad faith and breached their duty of loyalty, either by accepting side deals that diverted Merger consideration or giving into the wishes of those that did. Moreover, once again Defendants misstate the record. Plaintiff did not ignore Defendants' citation to *In re NYMEX* in his opposition to Defendants' motion to dismiss. Rather, Plaintiff addressed this case in his brief below. A180.

[9] *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243 (Del. 1999).

[10] Defendants cite to a portion of the hearing transcript involving an entirely different issue to suggest wrongfully that Plaintiff is changing its position. Def. Opp. at 14 ("Kahn explicitly informed the Court he was making his claim under *Parnes*," citing to A237-38, A250). In the quoted colloquy, Plaintiff indicated that he was not relying on enhanced scrutiny to get past a motion to dismiss for money damage claims and that bad faith could be demonstrated by improper diversion, such as in *Parnes* and *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 981 (Del. Ch. 2000). *See* A250 (the Court: "Which brings me to the fundamental point here, I think, which is, I need to understand whether you are attempting to

so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on grounds other than bad faith would state a non-exculpated claim. However, making such allegations is one way – but not the only way – to plead non-exculpated bad faith. Numerous Delaware decisions have recognized that a plaintiff may plead a non-exculpated claim by alleging that the fiduciary failed to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. *See, e.g.*, *Walt Disney*, 906 A.2d at 67; *see also Answers*, 2012 WL 1253072, at *7; *In re Saba Software S'holders Litig.*, C.A. No. 10697-VCS, 2017 WL 1201108, at *20, n.123 (Del. Ch. Apr. 11, 2017) (citations omitted). The Court of Chancery's failure to consider Plaintiff's allegations under this pleading standard was error.

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rely on enhanced scrutiny to get you by the motion to dismiss or whether you are relying on your pleadings to demonstrate bad faith or other duty of loyalty violations." Mr. Notis: "I think that our allegations would satisfy the higher standard [*i.e.*, bad faith], the *Parnes* standard [involving improper diversion], if you will. . . . If you look at *Crescent/Mach I* --"); A237-38 (indicating that Plaintiff was relying on improper diversion to support his bad faith claim). Plaintiff was addressing whether Plaintiff could rely on enhanced scrutiny alone to overcome Section 102(b)(7) and clearly informed the Court Plaintiff was relying on the substantive rules articulated in *Parnes* and its progeny. This has nothing to do with alternative pleading standards for satisfying bad faith. Again, both standards were referenced in Plaintiff's brief below (A179) and on appeal (Pl. Op. Br. at 19-20). There is no moving target.

b. Plaintiff has consistently argued that Defendants' disclosure violations are indicative of, and further evidence of, Defendants' bad faith

Plaintiff alleged a single cause of action for breach of fiduciary duty in connection with the Merger. A032-33. There is no separate disclosure claim. The inadequate and misleading disclosures provide additional evidence of Defendants' bad faith. A012 (Complaint alleging "The Information Statement was a product of Defendants' deliberate effort to hide and/or misrepresent material facts about the Company and the Merger in order to minimize the risk that stockholders would seek appraisal and trigger the buyer's Appraisal Out option"); *see also* A030 (Complaint alleging "this is an underpriced Merger designed to meet the various selfish needs of different members of the Stern family [accomplished by defendants who] . . . intentionally thwarted public stockholders from determining the higher value of the Company and learning of the Defendants' defective sales process."). Plaintiff made this argument in the Court of Chancery and does so now. A184 (Plaintiff's brief below claiming "Defendants Acted in Bad Faith through Misrepresentations and Failing to Disclose Material Information to Stockholders"). Plaintiff has neither "changed his position" nor "conceded his disclosure claim." Def. Opp. at 33, 36.

B. Plaintiff Has Pleaded a Reasonably Conceivable Claim that Defendants' Breached their Fiduciary Duties to Stockholders

1. Plaintiff's Bad Faith Allegations are Well-Pleaded

Plaintiff's allegations state a reasonably conceivable claim that the Defendants acted in bad faith by agreeing to the Merger that diverted Merger consideration from public stockholders to Company fiduciaries through side deals. In support of this claim, the Complaint alleged non-conclusory allegations, including: (1) the Stern brothers received Sale Bonus Agreements that amounted to the Stern brothers each receiving an extra $0.11 per share more than the remaining stockholders on a fully diluted basis (A012, A023); (2) Edward negotiated an amendment to his Employment Agreement that he entered into just six months earlier (while the Company was being shopped) in order to increase his termination benefits (A011-12, A022); (3) Edward did not intend to continue to work for the new Company (A011); (4) Michael negotiated a new employment agreement with the buyer and a Rollover Agreement giving him an equity position in the privately held buyer company (A012, A021-22); (5) as a result of these side deals Arlington lowered its Merger consideration for stockholders (A012, A014, A023-24); (6) directors Daly, Bacher and Poling allowed the Stern brothers to control the process by hiring the bankers and lawyers and draft the Confidential Information Statement provided to potential bidders (A011, A018-19); (7) Daly, Poling, Michael and Edward all delivered a written consent for the Merger without

a stockholder vote (A023); (8) Bacher and Poling never met independently as a "Special Committee" of the full Board when the final agreements and presentations were being considered (A024); and (9) all of the Kreisler directors approved a false and misleading Information Statement that, among other things, failed to provide any detail regarding the $0.75 per share reduction in Merger price (other than the Merger price was reduced after the side agreements were negotiated), omitted material information about the Company's financial projections and bankers' analysis (A024-030), and affirmatively misrepresented that the merger agreement was available for "stockholder" review (A024-26).

While Defendants consistently claim Plaintiff's allegations are "conclusory," Defendants fail to meaningfully argue that any of these allegations are not indicative of bad faith or well-pleaded. At best, Defendants take issue with only one allegation – that the side deals resulted in a lowering of the Merger price. (Def. Opp. at 28).[11] The Information Statement states Arlington offered $18.75 per share, then entered into the side agreements with the Stern brothers, then lowered

[11] Defendants speculate that the amount of the Sale Bonus Agreements payments received by the Stern brothers could have been zero. Def. Opp. at 28, n.10. This guess is contrary to the well-pleaded claims in the Complaint that the quarter ending December 31 immediately preceding the entry of the Sale Bonus Agreements was the Company's best in many years, and the quarter immediately following the entry of the Sale Bonus Agreements was the best quarter in almost four years. A022-23. These allegations buttress Plaintiff's claims that the Stern

its offer to $18.00 per share, which the Board approved. A011-14, A021-24. A reasonably conceivable inference of a causal connection between the side deals and the drop in price exists from the sequential timing alone. Moreover, no alternative explanation is provided in the Information Statement for the offer reduction, making the entry of the side agreements a more than reasonably conceivable reason for the price decrease. A013, A023. Plaintiff's pleaded inference is reasonable.

2. Delaware Case Law Supports a Pleading-Stage Reasonably Conceivable Inference of Bad Faith Based on the Side Deals Alleged

In his opening brief, Plaintiff citied to numerous Delaware authorities holding that even an independent board can be liable for permitting Merger consideration to be diverted from stockholders. *See* Pl. Op. Br. at 22-25 (citing *Crescent/Mach I,* 846 A. 2d at 981; *Alidina v. Internet.com Corp.*, C.A. No. 17235-NC, 2002 WL 31584292 (Del. Ch. Nov. 6, 2002) and *Parnes*, 722 A.2d at 1243). Defendants' efforts to distinguish the cases cited by Plaintiff are unavailing.

Defendants argue (Def. Opp. at 25) that *Parnes* is distinguishable because it involved an attempt by a fiduciary to obtain "tens of millions of dollars that otherwise would have flowed to the stockholders" while the diversion in this case

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brothers benefitted from the Sale Bonus Agreement, thereby reducing the consideration paid to stockholders.

was in the hundreds of thousands. Def. Opp. at 25. Defendants cite no authority for the proposition that under Delaware law fiduciaries' accountability for malfeasance is dependent on the amount at stake.

Defendants further argue that *Crescent/Mach I* is distinguishable because plaintiff in that case alleged both aiding and abetting and loyalty claims. Def. Opp. at 26. Plaintiff in *Crescent/Mach I* alleged that in a merger transaction the CEO obtained special benefits not available to the minority stockholders, and that directors aided and abetted the CEO and violated their own duty of loyalty by agreeing to the transaction. 846 A.2d at 971-72. Thus, as explained more fully in Plaintiff's Opening Brief (at 22-23), the allegations in this case parallel the claims in *Crescent/Mach I*, except that here Plaintiff chose not to allege aiding and abetting. The Court in *Crescent/Mach I* held that both breach of fiduciary duty and aiding and abetting were properly alleged as to all of the directors, including the independent directors. 846 A.2d at 979. That an aiding and abetting claim was also alleged in *Crescent/Mach I* does not undermine the holding that independent directors who approve special benefits to an insider violate fiduciary duties.

Defendants' attempt to distinguish *Alidina* is equally unavailing. Def. Opp. at 26. Defendants claim that *Alidina* is irrelevant in part because there was no special committee in that case. *Id.* However, the lack of a special committee was discussed in *Alidina* in the context of an alleged duty of care violation, not the

diversion of consideration loyalty duty claim. 2002 WL 31584292, at *7. The absence of a special committee had no impact on the determination that the complaint stated a cause of action for violation of the duty of loyalty by a "disinterested, independent board" where the board approved the side deal for the CEO to buy a controlling interest in a subsidiary as part of a sale of the parent to a third-party buyer. *Id.*

Rather than address Plaintiff's reasoned arguments distinguishing *In re Alloy S'holder Litig.*, C.A. No. 5626-VCP, 2011 WL 4863716 (Del. Ch. Oct. 13, 2011) from the facts of this case, Defendants simply reiterate the findings of the lower Court that Plaintiff challenges here. Def. Opp. at 29-30. In *Alloy*, the plaintiff alleged that the board acted in bad faith by reason of special benefits granted by the acquirer to the two founders of the acquired company, including "continued employment as CEO and COO, . . . exchange of their existing Alloy shares for shares in Alloy's new parent company, and . . . profits interest grant in that parent." *Id.* at 12. The *Alloy* court noted that, "unlike in either *Parnes* or [*Crescent/Mach I*], however, the acquirer insisted on these terms as a condition of the Merger." *Id.* The Court dismissed the claim, because a "plausible, and legitimate, explanation [for the benefits] is that [the buyer] 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 do so." *Id.*

The contrast with the facts in the case at hand is striking. There is no evidence that Arlington insisted that the special benefits to the Stern defendants be granted. Moreover, although Michael agreed to employment after the Merger, Edward did not. Nevertheless, Edward received an amendment to his Employment Agreement to increase his termination benefits and the Sale Bonus Agreements were granted to *both* the Sterns. Had a Sale Bonus Agreement and an amendment to the Employment Agreement been given to Michael but not Edward, defendants might fairly argue that those agreements and amendments were conditioned on continued employment. However, the grant of Sale Bonus Agreements and amendments to Employment Agreements to *both* the Sterns, rather than just Michael, evidences that those benefits were unrelated to continued employment after the buyout. Rather, they were "side deals" of the kind condemned in *Parnes* and *Crescent/Mach I* – extra cash payments to the insiders who ran the Company.

Relying on a transcript of the oral argument in *In re Cyan Inc.*, Del. Ch., C.A. No. 11027-CB (June 14, 2016), Defendants incorrectly argue that quasi-appraisal damages are "not properly available when suing *individual* director defendants." Def. Opp. at 30. The *Cyan* court did not hold that quasi-appraisal damages are not available against individual directors. Rather, *Cyan* held that

quasi-appraisal could not be plead as an independent equitable cause of action. *In re Cyan, Inc. S'holders Litig.*, C.A. No. 11027-CB, 2017 WL 1956955, at *18 (Del. Ch. May 11, 2017). The *Cyan* court explained "that 'quasi-appraisal' is simply a form of remedy." *Id.* Plaintiff here has only pleaded a single cause of action for breach of fiduciary duty and seeks quasi-appraisal as a measure of damages, all consistent with Delaware law. A032-34; *Cyan,* 2017 WL 1956955, at *17-18; *see also In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 42 (Del. Ch. 2014).

3. The Inadequate Information Statement is Further Evidence of Defendants' Fiduciary Breach

The Information Statement failed to disclose (1) the details regarding Robinson Humphrey's fairness analysis by omitting two of the three valuation analyses it performed (A027-28); (2) the reasons for any of the side deals; (3) any description of the negotiations other than that Arlington bid $18.75 per share and Defendants later accepted $18 per share (A028-29); and (4) the five-year projections created by management and provided to Robinson Humphrey (A028).[12]

[12] The omissions and misrepresentations here are akin to those in *Crescent/Mach I*, 846 A.2d at 987. There, plaintiffs alleged that the board failed to disclose details surrounding the fairness opinion, the terms of the "side deals" and the arrangements between the relevant entities. *Id.* Despite defendants' arguments that the allegations were conclusory and failed to alter the total mix of information, the Court of Chancery found that "plaintiffs' Complaint satisfies all of the

The failure to make such disclosure is particularly significant in this case, because Kreisler was a micro-cap company with no analyst coverage, and its stock was thinly traded. In addition to these omissions, the Information Statement makes the misrepresentation that a copy of the merger agreement was available "upon the request of any stockholder," when in fact it was only available to stockholders of record. A024-26.[13] This misstatement was not "made as a result of . . . good faith" but rather "was made in bad faith, knowingly or intentionally." *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 915 (Del. Ch. 1999).[14] These disclosure violations provide ample support for a bad faith finding, especially when viewed with Defendants' willingness to divert Merger consideration from stockholders.

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elements necessary to survive a motion to dismiss for breach of the fiduciary duty of disclosure." *Id.*

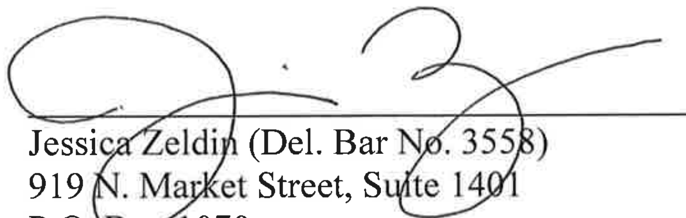
[13] Defendants seek to defend their decision to limit inspection of the Merger Agreement only to record holders by arguing that "Section 220 reflects a Delaware public policy of limiting inspection rights solely to record shareholders . . .." Def. Opp. at 43. As Plaintiff pointed out in his brief below, Section 220 was amended in 2003 to include beneficial stockholders, such as Plaintiff. *See* A189 (citing *Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc.*, C.A. No. 379-N, 2005 WL 1713067, at *5 n.22 (Del. Ch. July 13, 2005)).

[14] Defendants' attempt to distinguish *O'Reilly* is unconvincing. Def. Opp. at 34. While that case did involve a controller, Plaintiff relies on the case to demonstrate that disclosures can support a claim for a breach of duty of loyalty where "the disclosure violation was made in bad faith." 745 A.2d at 915. Whether or not a controller is present is irrelevant to this point of law. *See Crescent/Mach I*,

CONCLUSION

For all of the foregoing reasons, the Court of Chancery erred in dismissing the action. This Court should reverse and remand.

ROSENTHAL, MONHAIT & GODDESS, P.A.



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846 A.2d at 987 ("an alleged violation of the duty of loyalty is implicated where the required disclosure was made in "'bad faith, knowingly or intentionally'").