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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| ALEX BÄCKER and RICARDO BÄCKER, | § | |
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| Defendants Below, Appellants, | § | No. 156, 2020 |
| | § | |
| v. | § | Court Below–Court of Chancery of the State of Delaware |
| | § | |
| PALISADES GROWTH CAPITAL II, L.P., | § | C.A. No. 2019-0931-JRS |
| | § | |
| Plaintiff Below, Appellee. | § | |

# APPELLANTS' REPLY BRIEF

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## INTRODUCTION

Before the November 15 Meeting, two Board factions prepared in their respective corners. One faction turned out to be less prepared than the other. But there was no affirmative or inequitable deceit.

Palisades knew before the November 15 Meeting that, because of Markman's resignation, Alex and Ricardo constituted a Board majority and might act as they viewed best for QLess and contrary to Palisades's view. After strategizing, Palisades, through QLess's counsel, Alderton, issued an ultimatum to Alex and Ricardo: sign written consents relegating themselves to a Board minority or Anderson, the only other sitting director, would boycott the meeting and prevent a quorum. Alex and Ricardo refused the ultimatum. Anderson attended the meeting anyway, insisting that D'Addario was also a director, and together they blocked Alex and Ricardo's votes.

D'Addario was not a director, the Court of Chancery later found. The Court of Chancery nevertheless invalidated the 2-1 votes at the November 15 Meeting by which Alex and Ricardo removed a CEO who was failing based on a finding that Alex and Ricardo affirmatively deceived Anderson into attending the meeting by misrepresenting that Grauman was or would become the CEO Director, an argument not raised by Palisades below. The Court of Chancery's application of equity was inconsistent with this Court's

precedent because it effectively imposed a non-existent advance-notice obligation for a regular board meeting and because it granted equitable relief for a matter governed by the Voting Agreement.

Palisades's Answering Brief failed to explain how Anderson, a sophisticated director advised by sophisticated counsel, was subjectively deceived into attending the November 15 Meeting or objectively could have been. To conjure deception, Palisades relied on statements that could not have been designed to deceive because they were made *before* Markman resigned and *before* Alex and Ricardo comprised a majority.

After Markman resigned on the eve of the November 15 Meeting, Alex and Ricardo had no legal or equitable obligation to notify Palisades of their agenda for the Board meeting the next day. Their 2-1 votes at the November 15 Meeting by which Alex and Ricardo implemented their view of what was best for QLess were valid and not inequitable.

The Opinion and Final Judgment should be reversed.

## ARGUMENT

### 1. Alex and Ricardo Did Not Affirmatively Deceive Anderson

The Court of Chancery's affirmative-deception finding was based on clearly erroneous factual findings and a misapplication of facts to law.

#### a. The Court of Chancery Made Clearly Erroneous Factual Findings Regarding Grauman's Prospective Board Appointment

A factual finding is clearly erroneous if it is not sufficiently supported by the record or is not the product of an orderly and logical deductive process. *Biolase, Inc. v. Oracle Partners, L.P.*, 97 A.3d 1029, 1035 (Del. 2014). The Court of Chancery erroneously found that:

- As of October 28, 2019, the date of JX 224, Alex "assumed Grauman had already joined the Board," Op. at 29;
- "Grauman also understood [JX 224] to mean he was now a member of the Board," *id.* at 29 n.116; and
- Alex "affirmatively represented to Anderson (and Markman) that [Alex and Ricardo] supported Grauman's appointment to the Board." *Id.* at 30.

Each of these findings independently constitutes reversible error because each led to the Court of Chancery's ultimate determination that Alex and Ricardo's conduct constituted affirmative deception.

### i. Alex Did Not Assume as of October 28, 2019, or Ever, That Grauman Was a Director

The Court of Chancery found that, as of October 28, 2019, Alex "assumed Grauman had already joined the Board." Op. at 29. In support, the Court of Chancery cited JX 224 and described it as Alex "writing, 'Kevin [Grauman] is on the thread, assuming [the Board] now includes him, *which I requested it does.*'" *Id.* (quoting JX 224) (textual alterations and emphasis added by Court of Chancery). The Court of Chancery separately characterized JX 224 as "Bäcker expressing his belief that Grauman had been added to the Board, per his request." *Id.* at 26 n.107.

In their Opening Brief, Alex and Ricardo showed that the original text of JX 224—a reference to "bod"—did not refer to Board composition or reflect Alex's belief that Grauman was a director. OB at 26-27. Even Palisades recognized that JX 224 was a "request[] that Grauman be added to the Company's Board listserv." A1224; AB at 20 (describing JX 224 as "an email in which Bäcker states that he 'requested' that Grauman be 'added' to 'bod,' a Board listserv").

Despite acknowledging that JX 224 referred to a listserv, Palisades claims that "the Bäckers' interpretation of 'bod' is debatable at best." AB at 22 n.9. But Palisades did not offer a reasonable, or any, alternative interpretation of "bod" in JX 224. It cannot reasonably be inferred, as the

Court of Chancery found, that as of October 28, 2019, when Alex referred to "bod" in JX 224, Alex "assumed Grauman had already joined the Board." Op. at 29.

### ii. No One, Including Grauman, Understood from JX 224 That Grauman Was a Director

The Court of Chancery found that "Grauman also understood [JX 224] to mean he was now a member of the Board." Op. at 29 n.116. Palisades repeated this conclusion, AB at 22 n.9, but failed to account for Grauman's testimony that he "didn't infer" from JX 224 that he was a director and that "bod" referred to a listserv. A824 (97:18-98:13).

Grauman did not believe he was a director before the November 15 Meeting. A835 (142:5-9) ("Q. Did you believe that you had become a director before the November 15th Board meeting?" A. "I don't believe I -- I didn't act in the capacity of director or participate in any Board stuff, so no."). No one else believed Grauman was a director, either. *See* A280 (signature page to unanimous Board written consent, omitting Grauman, circulated with Palisades's ultimatum).

It was clear error for the Court of Chancery to find that Grauman believed he was a director and that "at least a majority of the QLess Board

believed Grauman had been appointed to the Board prior to the November 15 [M]eeting, and stated as much in writing." Op. at 26.[1]

### iii. Alex Did Not Represent to Anderson or Markman That He Supported Grauman's Board Appointment

The Court of Chancery found that Alex "affirmatively represented to Anderson (and Markman) that [Alex and Ricardo] supported Grauman's appointment to the Board." Op. at 30.

A "representation" is a "presentation of fact—either by words or by conduct—made to induce someone to act" or "the manifestation to another that a fact, including a state of mind, exists." Black's Law Dictionary (11th ed. 2019). An "affirmative representation" is a "representation asserting the existence of certain facts about a given subject matter." *Id.*

Palisades characterized Alex's conduct before the November 15 Meeting as "feigned," "superficial," and "ostensible" support for Grauman's appointment, AB at 1, 17, but cited no assertion of Alex to Anderson that he supported Grauman's appointment. There was none.

[1] Palisades disagrees that JX 224 was the foundation of the Court of Chancery's finding of affirmative deception. AB at 20-21. The prominence of JX 224 in the Opinion and the inferences drawn from it, however, speak for themselves. *See* Op. at 14 n.52, 26 n.107, 29 n.116, 29 n.117.

With respect to the Court of Chancery's finding that Alex "affirmatively represented to … Markman … that Defendants supported Grauman's appointment to the Board," Op. at 30, the Court of Chancery found the opposite: Markman resigned "after a phone call with Bäcker that led Markman to believe Bäcker would try to reinstate himself as CEO." Op. at 15. Palisades accused Alex and Ricardo of misleading this Court by stating that Alex conveyed to Markman that he "wanted 'to replace Grauman,'" AB at 20 n.8, but that statement was based on Markman's testimony as found by the Court of Chancery. How else would Markman believe that Alex "would try to reinstate himself as CEO"? Op. at 15.

#### b. The Court of Chancery's Finding of Affirmative Deception Should Be Reversed

Applying *de novo* review, this Court should reverse the Court of Chancery's finding of affirmative deception.

##### i. The Standard of Review Is *De Novo*

The Court of Chancery's finding of affirmative deception was itself an application of equity to the facts. *See, e.g.*, Op. at 28 ("As our case law makes clear, however, there must be *some* affirmative deception before equity will intervene.") (emphasis in original). This presents a mixed question of fact and law subject to *de novo* review. OB at 23 (citing *Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996)).

Palisades cannot avoid this Court's scrutiny by quoting definitions of "affirmative" and "deception" and claiming this issue is factual one. AB at 28. Palisades cited no case law requiring clearly erroneous review. *Id.*

Whether Alex and Ricardo's conduct was affirmatively and inequitably deceptive is analogous to whether a consent solicitation is "inequitably timed," *Brody v. Zaucha*, 697 A.2d 749, 753 (Del. 1997), or "whether an employee's conduct is 'wilful,' 'intentional,' or 'reckless,' as defined in 19 *Del. C.* § 2353(b)," *Stewart v. Rodenberg & Son Floor Coating Contractor*, 1981 WL 377355, at *3 (Del. Super. Ct. Mar. 27, 1981), both of which are mixed questions of fact and law.

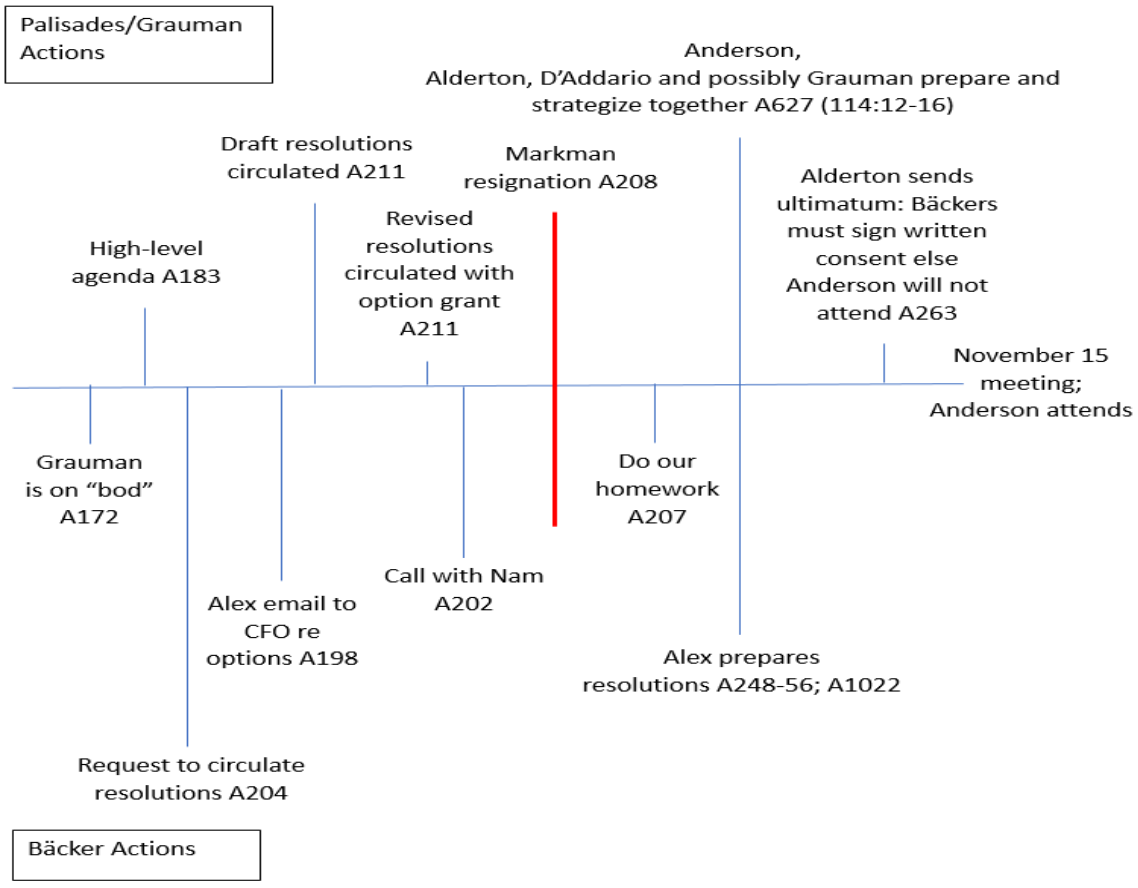
Under either standard, *de novo* or clearly erroneous, this Court should reverse the finding of affirmative deception.

### ii. There Could Not Have Been Deception Before Markman's Resignation, and There Was No Deception After

The timeline of deception relied on by the Court of Chancery (and now Palisades, AB 18-19) does not hold up. It was not until *after* Markman's resignation on November 14, 2019, that Alex prepared resolutions for the November 15 Meeting. All but one communication the Court of Chancery found to be deceptive *preceded* Markman's resignation. Alex and Ricardo addressed this timing issue in their Opening Brief:

> [W]hen Alex referred to the "bod" listserv in his October 28, 2019 email in JX 224, no one knew that Markman would resign weeks later on November 14, 2019, and leave Alex and Ricardo with a Board majority for the November 15 Meeting. Before Markman's resignation, Anderson's attendance was inconsequential for quorum purposes and Alex had no reason to "secure" it. And in the hours between Markman's resignation (when Anderson's attendance suddenly had significance for quorum purposes) and the November 15 Meeting, Alex did not "secure" Anderson's attendance "under deliberately false pretenses" or even have an opportunity to do so.

OB at 39-40. The timeline is illustrated below:



The only communication after Markman's resignation was Alex's request of Grauman, the CEO who prepared Board materials, to circulate materials for the meeting "so that we may all do our homework and be prepared to spend our time together most productively." A207 (JX 296). There is no evidence that this email gave Anderson the "impression that Bäcker approved of Grauman's Board membership," Op. at 30, nor could it reasonably have given such an impression. OB at 31-32.

Moreover, it is illogical that all this evidence was deceptive as to Grauman's appointment but not D'Addario's appointment. On this point, Palisades accuses Alex and Ricardo of "ignor[ing] the distinction between the Court's narrow determination that the Bäckers did not 'prevent Altos from exercising its rights' and its broader determination that the Bäckers nonetheless acted inequitably." AB at 23. To the contrary, the Court of Chancery held broadly and unequivocally that "**there was no deceptive action relating to the appointment of [D'Addario]** in advance of the November 15 meeting." Op. at 4 (emphasis added).

Palisades also argued that "the Court of Chancery did not need to 'find deception' as to D'Addario in order to 'find deception' as to Grauman." AB at 23-24. That would be true if there was distinct evidence as to each

prospective appointment. But there was not.[2] That "Alex included Grauman in several Board communications before the November 15 Meeting" and "communicated with Grauman about the Board materials before the Meeting," AB at 22-23, does not show that Alex or Ricardo acted deceptively or inequitably.

### iii. Alex and Ricardo Did Not Cause Anderson to Attend the November 15 Meeting

The Court of Chancery found that "Anderson's presence [at the November 15 Meeting] was secured under deliberately false pretenses." Op. at 30. But it was Alderton, not Alex or Ricardo, who caused Anderson to attend the November 15 Meeting. OB at 38-40. Palisades is wrong that "Bäcker's deception was the basis for Anderson's attendance." AB at 26.

If "Palisades believed D'Addario and Grauman would be seated at the November 15 [M]eeting," AB at 15, Alex did not instill that belief. There is no evidence that Anderson attended the November 15 Meeting because Alex caused him to believe that Grauman was or would become a director.

[2] Palisades argued that Alex and Ricardo "feigned support for a series of governance actions the Board planned to take at its November 15, 2019 meeting," including "confirming the appointment of Grauman as a director." AB at 1. Those same governance actions also purported to appoint D'Addario as a director.

The Court of Chancery found that Anderson attended the November 15 Meeting "because he 'believed Bäcker did not control a Board majority.'" AB at 24 (citing Op. at 30 n.122)). The sole source of Anderson's belief was Alderton. Palisades admitted that it "considered having Anderson and D'Addario not attend the November 15 Meeting to prevent a quorum, but ultimately attended on the advice of Alderton when Alex Bäcker did not propose any alternative agenda items." A1410; *see also* AB at 11-12 ("Anderson considered skipping the meeting to avoid a quorum, but he and Alderton ultimately concluded … that Anderson should attend."); A1101, 109:14-16 ("So in my [Anderson's] view, Paul was the board member. That's why Scott said, 'I think you and Paul should join the call.' It was always myself and Paul.").

Anderson and Alderton anticipated the events at the November 15 Meeting. They discussed in "several phone calls" after Markman's resignation, A627 (114:13-16), the action that Alex might (and did) take at the November 15 Meeting. A639 (161:7-163:24). And they issued an ultimatum "so that there wouldn't be a mathematical majority that Alex and his father, Ricardo, would have at the board meeting, but we were concerned about that. And so we [Alderton, D'Addario, Anderson and possibly Grauman] circulated this board consent to all of the directors to sign it in

advance." A627 (115:4-10). In those phone calls, Alderton discussed with Palisades specifically that the Bäckers could "get rid of Kevin and take back control of the company as CEO." A639 (161:8-14, 163:9-14).

**c. Palisades Did Not Argue Deception as to Grauman**

Palisades never argued below that Alex and Ricardo affirmatively deceived Anderson into believing that Grauman would be appointed as the CEO Director. Palisades called this fact "meritless," AB at 28, but did not cite to any argument below regarding deception as to Grauman.

Palisades pointed to its request in the complaint for "invalidation of all of the Bäckers' purported November 15 actions." AB at 28 (citing A326). Palisades's broad appeal to equity did not put the Bäckers on notice of an affirmative-deception theory as to Grauman, as it was untethered to any specific person, conduct, or claim.

Palisades argued that "the parties understood Grauman's appointment to be a key part of Palisades' deception theory" because Palisades's counsel stated during a preliminary hearing that "it was everyone's understanding … going into the November 15 meeting … that Mr. Grauman would be confirmed as the CEO director." AB at 28-29 (citing B131). This is misleading. First, Palisades did not unveil a deception theory until its pretrial brief, and then only as to D'Addario. A1231-32. Second, Palisades had a

contract claim for the appointment of Grauman under the Voting Agreement, which had nothing to do with equity or deception. *See* A322-23 (Count III).

Palisades argued that "Grauman's presumed directorship was likewise explored during depositions," that "Grauman's presumed role as the CEO Director was highlighted by Palisades in its pretrial brief," and that "[e]xploration of Grauman's directorship continued at trial." AB at 29-30. Of course the parties explored Grauman's prospective appointment. Palisades's contract claim sought that relief. A322-23 (Count III); Op. at 16. Nowhere in the parties' supposed exploration below was there a reference to any person being deceived into believing Grauman was a director.

Palisades quoted part of a sentence from its post-trial submission that "the record 'confirm[ed] that Palisades believed D'Addario and Grauman would be seated at the November 15 [M]eeting.'" AB at 30 (quoting A1402-03). But Palisades omitted its very next sentence, which was that the record citations at issue "expressly contradict the assertion that Bäcker had conveyed to Palisades, or anyone else, **that D'Addario's appointment was improper**." A1403 (emphasis added). Palisades's case hinged on D'Addario's election, not deception as to Grauman. *See* OB at 35-37.

Palisades did not acknowledge that the Court of Chancery recast Palisades's actual argument in its pretrial brief to introduce the idea of

deception as to Grauman. The Court of Chancery stated that "Palisades argues that even if D'Addario **and Grauman** were not elected to the Board, this Court should invoke its equitable powers to invalidate all actions undertaken by the Bäckers at the November 15 meeting." Op. at 18 (citing Palisades's Pre-Trial Brief at 52) (emphasis added); Op. at 27 (same). Palisades had only referred to D'Addario in its argument. A1241-42.

Palisades also did not address the anti-sandbagging cases cited by Alex and Ricardo. OB at 37 (citing *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999 (Del. Ch. Aug. 18, 2006), and *HOMF II Inv. Corp. v. Altenberg*, 2020 WL 2529806 (Del. Ch. May 19, 2020)). Palisades did reference *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019), suggesting it is "inapposite." But the error in *Aruba* was repeated here: without "the ordinary adversarial process for testing the relevant factors," the decision was made by "the trial court alone." *Id.* at 139 n.58. Palisades concluded in a footnote, without citing the record, that "everyone understood that Palisades' deception theory included Grauman's seating as the CEO Director." AB at 30. The reality is that no one—not even Palisades—understood Palisades to be pursuing an affirmative-deception theory as to Grauman until the Court of Chancery conceived of it after trial.

### 2. The Court of Chancery Misapplied Settled Delaware Law

Compounding the errors in its finding of affirmative deception described above, the Court of Chancery effectively imposed an equitable advance-notice requirement for regular board meetings, invalidated the actions at the November 15 Board meeting despite Anderson's participation, and awarded equitable relief in the face of a contract that governed the issue. Each was reversible error.

#### a. No Equitable Advance-Notice Obligation Exists Here

Palisades's complaint, in a nutshell, is that Alex and Ricardo "feign[ed] support for the Board's planned governance actions," including Grauman's appointment, when they should have notified Palisades of their lack of support. AB at 37. The Court of Chancery accepted this theory by faulting Alex and Ricardo for "keeping mum" and invalidated Board action for such silence. Op. at 30. This was reversible error.

There was no feigned support as Palisades suggests. The planning referred to was done in secret among Palisades, Grauman, and Alderton, only one of whom, Anderson, was a director. A627. Alex and Ricardo did the opposite of "feign support" for the governance actions Palisades wanted to accomplish by refusing to comply with Anderson's ultimatum and threat to

prevent a quorum.[3] A263. They communicated they did *not* support those actions. Nevertheless, the Court of Chancery held that refusing the ultimatum and "keeping mum" was improper. Such an obligation is an equitable advance-notice requirement that this Court has held does not exist. *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1037, 1043 (Del. 2014).

Moreover, Palisades did not need to be notified that Alex and Ricardo would take control of QLess if they became a majority; Palisades discussed that before the meeting with Alderton. A627. If this Court ever determines to impose an equitable advance-notice requirement and overturn *Klaassen*, it should not be in a case like this one, where Anderson, a sophisticated party, was advised by sophisticated counsel before the meeting regarding the very action that could be (and was) taken.

Alex and Ricardo do not contend that equity is "wooden" or incapable of invalidating action that is technically legal, as Palisades argues. AB at 31-38. Equity is indeed flexible, but it should not turn precedent like *Klaassen* on its head. Palisades invoked equity only because of its own negligence in failing to have D'Addario properly elected.

[3] Palisades failed to explain why, if Palisades believed Grauman was already a director, a quorum depended only on Anderson's attendance.

Equity is not designed as a salve for parties who fail to exercise their legal rights. It has limits. *See McKesson Corp. v. Derdiger*, 793 A.2d 385, 394-95 (Del. Ch. 2002) (equity is not designed to encourage "lack of diligence" or "slipshod practice"); *Lions Gate Entertainment Corp. v. Image Entertainment Inc.*, 2006 WL 1668051, at *11 (Del. Ch. Jun. 5, 2006). In this case, the Court of Chancery exceeded those limits.

The Court of Chancery erred by effectively imposing an equitable advance-notice requirement of the type this Court said it would not do in *Klaassen*. 106 A.3d at 1035, 1043. Imposing equitable advance-notice requirements in some cases and not others does not foster the necessary predictability that directors depend on.

**b. Palisades Based its Case on Participation by Anderson and D'Addario, Nullifying its Deception Claim**

Palisades rested its case below on the premise that Anderson and D'Addario fully participated in the November 15 Meeting and, as a result, the votes were 2-2. A1231; A1232; A1226.

Palisades cannot now argue that Anderson did not participate and, moreover, that Alex and Ricardo waived an argument under *Koch v. Stearn*, 1992 WL 181717 (Del. Ch. July 28, 1992), regarding Anderson's participation. AB at 41-42. To the contrary, Anderson's participation in the

November 15 Meeting was established beyond a doubt and that participation precluded invalidation under *Koch*.

D'Addario and Anderson's participation in the November 15 Meeting was the cornerstone of Palisades's claims below:

- "D'Addario, having been validly appointed by Altos, insisted on remaining [at the November 15 meeting]." A1226.

- "*First* and foremost, … D'Addario was appointed as soon as Altos's General Counsel conveyed Altos's intent to do so in writing to QLess's outside General Counsel. Had the Bäckers recognized D'Addario's election as they were required to do, they would not have constituted a Board majority and thus would have been blocked from taking any of the actions they purportedly took at the November 15 Meeting." A1231.

- "Because D'Addario was a QLess director as of the November 15 Meeting, all of the actions of the Bäckers purported to take at that meeting after refusing to recognize D'Addario **or to count his vote** are invalid." A1232 (emphasis added).

It is also false that the resolutions at the November 15 meeting were passed "rapid-fire without any chance for deliberation." AB at 13. D'Addario took almost 30 pages of copious notes of the meeting, A518, and the lion's share of his deposition was devoted to his deciphering his notes and explaining all the meeting discussions. A518-526.

Palisades's participation meant that, under *Koch*, even if there were deceit to procure Anderson's attendance—and there was not—"the actions will not be invalidated where the deceived director remains at the meeting

and participates throughout." *Koch*, 1992 WL 181717, at *4 (citation omitted). Palisades's real gripe is that the majority outvoted the minority.

With Anderson's participation seemingly undisputed, Alex and Ricardo made the following equitable argument in their post-trial submission: "Palisades fails to grapple with the next step in its deception argument. '[W]here the deceived director remains at the meeting and participates throughout' the action taken at the meeting is not void or voidable." A1417 (citing and quoting *Klaassen*, 2013 WL 5967028, at *8 (Del. Ch. Nov. 7, 2013) (quoting *Koch*)). Palisades's statement that Alex and Ricardo are "assert[ing] their new 'participation' defense for the first time on appeal," AB at 42, is false.

The cases Palisades's relies on for its deceit argument involved special meetings. Palisades claims that distinction is immaterial, but the distinction runs through the cases Palisades relies on. AB at 34, 39. The language Palisades quoted from *OptimisCorp*, which is technically *dicta*, underscores that this Court has been careful to observe the distinction. *OptimisCorp. v. Waite*, 137 A.3d 970 (Del. 2016) (Table) (holding that the question at issue was "whether all directors are entitled to fair and non-misleading notice of the agenda for a special meeting" and specifically referring to its discussion, technically *dicta*, as pertaining to "special" meetings throughout). The

distinction between regular and special meetings is a long-recognized and undisturbed distinction, particularly as it pertains to the notice required for business to be conducted. *Klaassen*, 106 A.3d at 1043-45 (discussing that "in those cases" (relied on by Palisades here) "the disputed board actions all occurred at special—not regular—board meetings"). *Klaassen* refused to impose an equitable notice obligation precisely because the meeting at issue was a regular one and the special meetings cases were inapplicable. *Id.*

It is again inaccurate when Palisades claims that the Alderton minutes that incorrectly characterized the November 15 Meeting as a special meeting was the "lone piece of contemporaneous documentary evidence" as to whether the meeting was special or regular. AB at 39. Alex and Ricardo cited the mountain of available evidence to the contrary in response to the Court of Chancery's question of whether the November 15 Meeting was special:

> Only the Company's president or secretary may call a special meeting. JX 8 [A109], § 3.7. There is no dispute that no officer called the November 15 meeting. The required process for any special meeting was known to, and frequently used by, Palisades in 2019. JX 28; JX 31; JX 46 (attaching formal request for special meeting); JX 83 (Anderson referring to Nabil Kabbani being fired as "Pres./Corp sectry [sic], the day of the special board announcement. I would like to call another special board. Does Nabil have to do it again?"); Nam Dep. [A677] 196:17-198:6; Anderson Dep. [A1073] 86:8-10, 150:14-15, 150:22-24, 151:6-10, 151:23-152:2, 152:21-25, 153:1-2, 154:12-13,

> 155:19-156:10, 160:22-24; JX 34.001, 003 (notice of meeting specifically referencing § 3.7's requirements –there is no equivalent for November 15 meeting); Trial Tr. [A1250] 14:20-21. A special meeting was always referred to in advance as such. The Bäckers are aware of no equivalent references to the November 15 meeting as a special meeting in the thousands of pages of the record because no party believed the November 15 meeting was a special meeting, with a single exception in Scott Alderton's draft minutes (JX 402 [A286]). Alderton was mistaken. No officer communicated in any way to call the meeting as a special meeting. The November 15 meeting was set as a regular meeting "by the Board of Directors." JX 8 [A109], § 3.6. On October 27, 2019, the scheduling of the November 15 meeting began: "Fellow Board Members, We have long had a board meeting in the calendar for this Thursday at noon PT. Does that still work for you all?" JX 224.003; *id.* at .001 [A172] ("As soon as this one is in the calendar, we should calendar the next 12 months so we have plenty of advance notice."); see also JX 236 (Anderson request that meeting be scheduled on non-emergency basis during week being accommodated).

A1415-16. The November 15 Meeting was not a special meeting.

Palisades cannot dispute the bedrock doctrine that a board at a regular meeting is not limited to a pre-defined agenda and that its deceit argument only applies to special meetings and, even then, not to special meetings in which a purportedly tricked director has fully participated. *Klaassen*, 106 A.3d at 1043; *Koch*, 1992 WL 181717, at *4.

### c. The Voting Agreement Precludes This Equitable Relief

The dispute regarding the appointment of Grauman as the CEO Director "relates to obligations expressly treated by contract" and therefore should be "governed by contract principles" to the exclusion of equitable claims regarding the same conduct or blue-penciling a new arrangement for the parties. *Nemec v. Shrader*, 2009 WL 1204346, at *4 (Del. Ch. Apr. 30, 2009) (internal citations and alterations omitted), *aff'd*, 991 A.2d 1120.

The Court of Chancery erred by imposing an equitable remedy despite declining to find a breach of the Voting Agreement or ordering specific performance of the Voting Agreement. The Court of Chancery imposed its view of what the parties should have done pursuant to the Voting Agreement notwithstanding the lack of breach and the Voting Agreement's remedies for non-compliance. *FrontFour Capital Group LLC v. Taube*, 2019 WL 1313408, at *33 (Del. Ch. Mar. 11, 2019) ("[O]rdering such relief would require the Court to blue-pencil Sierra's merger agreement … [and] deny Sierra the benefit of its bargain and force Sierra to comply with terms to which it never agreed."); *C&J Energy Servs., Inc. v. City of Miami Gen. Employees*, 107 A.3d 1049, 1054 (Del. 2014) ("To blue-pencil a contract as the Court of Chancery did here is not an appropriate exercise of equitable

authority" where there was no finding of aiding and abetting breach of fiduciary duty or breach of fiduciary duty.).

The Court of Chancery ruled as if the parties had hypothetically appointed Grauman pursuant to the Voting Agreement: "Grauman should have been appointed to the Board as of, or at, the November 15 meeting, [thus] the actions taken at that meeting lacked approval by a majority of the Board." Op. at 5.

Contrary to Palisades's argument, the critical issue is not in what capacity Alex and Ricardo acted or that the Court of Chancery supplied an equitable remedy available for breach of the Voting Agreement. AB at 43-44. The issue is that there was no breach of the Voting Agreement, Op. at 4; *id.* at 25 n.104, under which "Grauman should have been appointed to the Board as of, or at, the November 15 meeting." Op. at 5. With no breach, a remedy nevertheless appeared from equity. *Nemec* holds that free-floating concepts of equity do not vitiate "obligations expressly treated by contract" and disputes as to such obligations "will be governed by contract principles." 2009 WL 1204346, at *4. The Court of Chancery erred by not honoring the parties' negotiated obligations and associated remedies.

## CONCLUSION

This Court should reverse the Court of Chancery's Opinion and Final Judgment and hold that the actions at the November 15 Meeting are valid.

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