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Case No. 12844-VCMR

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEPHEN APPEL, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. DAVID J. BERKMAN, STEPHEN J. CLOOBECK, RICHARD M. DALEY, FRANKIE SUE DEL PAPA, JEFFREY W. JONES, DAVID PALMER, HOPE S. TAITZ, ZACHARY D. WARREN, ROBERT WOLF, LOWELL D. KRAFF, and APOLLO MANAGEMENT VIII, L.P., Defendants.	C.A. No. 12844-VCMR REDACTED VERSION Dated: November 26, 2018

DEFENDANT APOLLO MANAGEMENT VIII, L.P.'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE VERIFIED AMENDED CLASS ACTION COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff's Verified Amended Class Action Complaint (D.I. 97, the "Complaint"), filed nearly two years after Diamond Resorts International, Inc. ("Diamond" or the "Company") was acquired by certain equity funds managed by Apollo Management VIII, L.P. ("Apollo") in an arm's-length, all-cash tender offer transaction valued at approximately $2.2 billion (the "Merger"), alleges for the first time that Apollo somehow aided and abetted purported breaches of fiduciary duty by Diamond's board of directors (the "Board") in connection with their approval of the Merger and related disclosures to Diamond's stockholders.

The Complaint does not come close to alleging the type of facts necessary to state an aiding and abetting claim against Apollo. An aiding and abetting claim is "among the most difficult to prove" under Delaware law, in part because a plaintiff must advance well-pleaded allegations suggesting that a third party acted with scienter to knowingly participate in an alleged breach of fiduciary duty. *RBC Capital Mkts., LLC* v. *Jervis*, 129 A.3d 816, 865–66 (Del. 2015) (citations omitted). Here, the Complaint is devoid of any allegations suggesting that Apollo knew of or substantially assisted any purported breach of fiduciary duty.

Plaintiff fails to identify, let alone adequately allege: (i) any purported bargaining advantage that Apollo somehow obtained for itself in connection with the Company's auction; (ii) any action or inaction by Apollo (or any of Diamond's

directors allegedly taken at Apollo's behest) that in any way impeded the bidding process; or (iii) any way in which Apollo purportedly exploited any alleged conflict of interest. And while Plaintiff asserts that Diamond's Schedule 14D-9 contained misleading statements, he does not allege any facts suggesting that Apollo played any role in the issuance or drafting of that document.

Stripped of bare legal conclusions and rhetoric, the facts alleged in the Complaint show only that Diamond's directors—all of whom were themselves substantial stockholders with significant incentive to maximize the value of their Diamond shares—put the Company up for sale in early 2016, and that an independent committee of the Board then ran a vigorous auction that drew indications of interest from both financial and strategic buyers. Plaintiff does not dispute that Apollo prevailed in that auction by making the highest offer—an all-cash bid at $30.25 per share that represented a ***58% premium*** to the Company's unaffected stock price—and that no topping bid ever emerged. Under well-settled precedent, Apollo's emergence as the highest bidder in an arm's-length auction negates any contention that it knowingly participated in an alleged breach of fiduciary duty.

Notably absent from the Complaint is any well-pleaded allegation suggesting that Apollo—in participating and ultimately prevailing in the Company's auction—acted with scienter to cause or induce any purported breach of fiduciary

duty. Plaintiff alleges in conclusory fashion that certain directors somehow steered the Company to Apollo. Even after receiving more than ***one million pages*** of discovery in this Action, Plaintiff alleges no facts suggesting that Apollo played any role in Diamond's directors' business judgments concerning the timing or conduct of the Company's sale process.

Indeed, no allegations suggest that Apollo played any role in any of the business judgments attacked in the Complaint, let alone that it knowingly participated in any alleged breach of fiduciary duty. Accordingly, the Complaint should be dismissed with prejudice as to Apollo.

STATEMENT OF FACTS[1]

A. The Parties

Defendants David J. Berkman, Stephen J. Cloobeck, Richard M. Daley, Frankie Sue Del Papa, Jeffrey W. Jones, David Palmer, Hope S. Taitz, Zachary D.

[1] Apollo treats all well-pleaded factual allegations in the Complaint as true for purposes of this motion. *See Cent. Mortg. Co.* v. *Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011). In evaluating this motion, the Court may also consider documents incorporated by reference in the Complaint, *see Allen* v. *Encore Energy Partners, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013) (citation omitted), and take judicial notice of facts not reasonably subject to dispute set forth in SEC filings, including the Company's 14D-9 concerning the Merger, *see Solomon* v. *Armstrong*, 747 A.2d 1098, 1121 n.72 (Del. Ch. 1999) (citations omitted), *aff'd*, 746 A.2d 277 (Del. 2000) (TABLE). Citations to "¶ __" are to paragraphs of the Complaint, while citations to "Ex. __" are to the exhibits to the Transmittal Affidavit of Brendan W. Sullivan, Esq., filed contemporaneously herewith.

Warren and Robert Wolf (together, the "Director Defendants") were members of Diamond's Board when it approved the Merger. (¶¶ 14–23.) Non-Party Diamond is a global leader in the hospitality and vacation ownership (*i.e.*, timeshare) industry. (¶ 26.)

The Director Defendants each held a substantial stake in Diamond and were therefore strongly incentivized to achieve the highest price attainable for their own Diamond shares.[2] Cloobeck was the Company's largest stockholder prior to the Merger, holding approximately 24% of the Company shares, or approximately 12.6 million shares. (¶ 15; 14D-9 at 7.) Palmer, the Company's CEO, held approximately 4.9 million shares. (14D-9 at 7.)

Defendant Lowell Kraff (collectively with the Director Defendants, the "Individual Defendants") was a Diamond director up to May 24, 2016, the date of the Company's Annual Meeting, when his term expired and Del Papa was elected to replace him. (14D-9 at 19; ¶¶ 24, 72, 75.) Thus, Kraff was no longer on the Board when it considered or approved the Merger.

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[2] As of July 13, 2016: Wolf had 31,496 shares; Berkman had 101,538 shares; Taitz had 20,842 shares; Jones had 3,842 shares; Daley had 24,024 shares; and Warren had 21,570 shares. (Ex. 1 (hereinafter, "14D-9"), at 7.) Each also held thousands of restricted shares. (*Id.* at 9.) Del Papa, who joined the Board in May 2016, had 16,961 restricted shares. (*Id.*)

Defendant Apollo Management VIII, L.P., an affiliate of non-party Apollo Global Management, LLC ("AGM"), manages certain equity funds that acquired Diamond in the Merger. (¶ 125.)

Plaintiff Stephen Appel purports to have been a Diamond stockholder. (¶ 13.)

B. 2015: Diamond Forms A Transaction Committee To Explore Potential Acquisitions

In the spring of 2015, the Board formed a transaction committee (the "2015 Transaction Committee") consisting of Taitz, Jones, and Berkman to review various corporate development opportunities. (¶¶ 33–34.) In determining to commence this exploration of potential strategic opportunities, the Board considered, among other things, the fact that [redacted] (¶ 33.)

In August 2015, the 2015 Transaction Committee retained Centerview Partners LLC ("Centerview") as its financial advisor. (¶ 48.) The Company, with Centerview's assistance, entered into non-disclosure agreements and commenced preliminary discussions with certain acquisition targets and potential financing sources for any such acquisitions. (14D-9 at 15.) The 2015 Transaction Committee

disbanded in September 2015 without having accomplished any major transaction. (¶ 49.)

In the course of the 2015 Transaction Committee's and Centerview's work, [redacted] (*Id*.) [redacted] (*Id*.) [redacted] (¶¶ 62, 142.)

C. Early 2016: Diamond Forms A Strategic Review Committee To Explore Strategic Alternatives

The Board continued to believe it was important for the Company to actively review strategic alternatives, including a potential sale of the Company, in light of the Company's performance and the performance of the hospitality and vacation ownership sector as a whole. (14D-9 at 16.) In ultimately determining to explore potential strategic alternatives, the Board considered, among other things, [redacted] (¶ 53.)

On February 22, 2016, the Board—including Cloobeck—voted to form a strategic review committee (the "SRC") consisting of Taitz, Jones, Berkman, and Wolf to review potential strategic alternatives, including a potential sale of the Company. (14D-9 at 16; ¶ 63.) [redacted][3]

Plaintiff's claim that the Diamond Board somehow [redacted] (¶ 55) is demonstrably false, and Plaintiff's further claim that Apollo somehow caused the Board to do so (*id.*) is entirely unsupported. The Board did not [redacted] to the contrary, the Board's publicly-communicated rationale for launching an exploration of strategic alternatives was to address "the perceived disconnect between the market value of the Company and the potential value of the underlying business, which had continued to meet its financial expectations." (14D-9 at 16.) Indeed, in a February 24, 2016 news release announcing the formation of the SRC, Diamond explained:

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[3] The Court may consider all documents produced in response to Plaintiff's Section 220 Demand, even those not referenced in the Complaint, as the Company's production was expressly conditioned on the documents being considered "incorporated by reference into any plenary complaint or other pleading filed by Stockholder." (Ex. 3 (August 22, 2016 Confidentiality and Non-Disclosure Agreement), ¶ 8.); *see generally Amalgamated Bank* v. *Yahoo! Inc.*, 132 A.3d 752, 791 (Del. Ch. 2016).

> [T]here continues to be a significant dislocation between the intrinsic value we have built in this business and the market value of our public equity. For this reason, our Board of Directors is initiating a process to explore and evaluate a wide range of strategic alternatives to unlock value for shareholders.

(Ex. 4 (Feb. 24, 2016 Press Release).)

Like the prior 2015 Transaction Committee, the SRC retained Centerview as its financial advisor. (¶ 65.)

D. The SRC And Centerview Conduct An Auction And Apollo Emerges As The Highest Bidder

In March 2016, Centerview contacted 22 potential bidders—including both strategic and financial buyers—and the Company entered into non-disclosure agreements with 15 interested parties, including Apollo. (¶ 67; 14D-9 at 17.) On April 25, 2016, Centerview received written indications of interest from five parties: [redacted] Apollo, [redacted] (¶ 67.) These initial indications of interest ranged from $23.00 per share to $33.00, with Apollo's ranging from $28.00 to $30.00 per share. (*Id.*)

As the auction unfolded, two bidders remained at the end: Apollo and [redacted] In anticipation of receipt of the final bids, Taitz recused herself from any further SRC meetings at which the SRC would deliberate on its recommendation to the Board in light of her position as a director on the boards of certain entities

affiliated with Apollo. (14D-9 at 20; ¶ 82.) On June 23, 2016, Apollo submitted a final bid of $30.25 per share, while [redacted] submitted a bid range of $27 to $29 per share conditioned upon an additional 30 to 45 days of due diligence. (¶ 80; 14D-9 at 20.)

The full Board met on June 24, 2016 to discuss the final bids. (¶ 82.) The Board approved the SRC's recommendation to authorize Centerview to seek "best and final" offers from Apollo and [redacted] by the following day. (*Id*.) The next day, after neither bidder increased its bid, the SRC and Board held joint meetings with their counsel, Centerview, and Diamond management, and the SRC recommended that the Board authorize Diamond's counsel and Centerview to negotiate a transaction with Apollo at a Merger price of $30.25 per share. (¶ 83; 14D-9 at 21.)

All of the Board members approved the SRC's recommendation except Cloobeck. (¶ 84.) [redacted]

Later that day, Centerview issued a fairness opinion, opining that Apollo's $30.25 per share offer was fair to the Company's public shareholders from

a financial point of view. (¶ 86.) Centerview and the Board noted that Apollo's offer represented a roughly ***58% premium*** over the Company's unaffected stock price on February 24, 2016, the last trading day before the Company's announcement that it was forming the SRC. (¶ 127; 14D-9 at 22.)

No topping bid was ever received. More than 81% of Diamond's outstanding shares were tendered in favor of the Merger, and the Merger closed on September 2, 2016. (¶¶ 123–125.)

Despite having abstained from the Board's vote to approve Apollo's bid, Cloobeck, the Company's largest stockholder, tendered his Diamond shares. (¶ 119.) [redacted]

[redacted]

(¶ 128.) [redacted] (*Id.*)

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff filed his initial complaint on October 21, 2016 (D.I. 1), after the Company had produced more than 1,400 pages of documents to him in response to his Section 220 Demand. Centerview was named as a defendant in the initial complaint, but Kraff and Apollo were not. The Court granted the defendants' motions to dismiss the initial complaint on July 13, 2017. (D.I. 40.) Among other things, the Court rejected Plaintiff's claim that the Company should have disclosed in its 14D-9 Cloobeck's statements about the reasons for his abstention.

Plaintiff appealed solely in regard to the Court's ruling concerning the alleged failure to disclose Cloobeck's statements. On February 20, 2018, the Delaware Supreme Court reversed and remanded on the ground that a reasonable stockholder could have found Cloobeck's statements material. *See Appel* v. *Berkman*, 180 A.3d 1055 (Del. 2018).

After remand, the Director Defendants renewed their motion to dismiss the initial complaint on March 9, 2018. (D.I. 46.) On April 4, 2018, this Court issued an order permitting Plaintiff to pursue discovery while the Director Defendants' motion to dismiss was pending. (D.I. 65.) In response to Plaintiff's third-party subpoena, AGM produced to Plaintiff all documents that it and Diamond had produced in an appraisal action before this Court. Between the Company's earlier Section 220 production and subsequent document productions from Diamond, its former Board members, Apollo, and Centerview, Plaintiff has received more than one million pages in document productions.

On August 29, 2018, Plaintiff filed his new Complaint, adding for the first time a breach of fiduciary duty claim against Kraff and an aiding and abetting claim against Apollo. This is Apollo's opening brief in support of its motion to dismiss the Complaint pursuant to Court of Chancery Rule 12(b)(6).

ARGUMENT

I. THE APPLICABLE STANDARD

Under Court of Chancery Rule 12(b)(6), dismissal for failure to state a claim is warranted if a plaintiff "could not recover under any reasonably conceivable set of circumstances susceptible of proof." *Cent. Mortg. Co.*, 27 A.3d at 536 (citation omitted). This Court "do[es] not need to accept as true any 'conclusory allegations unsupported by specific facts,' nor must [it] draw any 'unreasonable inferences in the plaintiffs' favor.'" *Veloric* v. *J.G. Wentworth, Inc.*, 2014 WL 4639217, at *8 (Del. Ch. Sept. 18, 2014) (quoting *Gantler* v. *Stephens*, 965 A.2d 695, 704 (Del. 2009)). Moreover, "[t]he failure to plead an element of a claim warrants dismissal under Rule 12(b)(6)," *id.* (citation omitted), and "a claim [also] may be dismissed if allegations in the complaint . . . effectively negate the claim as a matter of law," *Malpiede* v. *Townson*, 780 A.2d 1075, 1083 (Del. 2001) (citations omitted).

To survive a motion to dismiss an aiding and abetting claim, a plaintiff must plead facts sufficient to show: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, (3) knowing participation in that breach by the defendant, and (4) damages proximately caused by the breach. *Malpiede*, 780 A.2d at 1096 (citations omitted).

"Knowing participation in a board's fiduciary breach requires that the third party ***act with the knowledge*** that the conduct advocated or assisted constitutes such a breach." *Id.* at 1097 (emphasis added & citation omitted). "[T]he requirement that the aider and abettor act with *scienter* makes an aiding and abetting claim among the most difficult to prove." *RBC Capital*, 129 A.3d at 865–66 (emphasis in original & citations omitted). As the Supreme Court has explained:

> It is the aider and abettor that must act with *scienter*. The aider and abettor must act knowingly, intentionally, or with reckless indifference; that is, with an illicit state of mind. To establish *scienter*, the plaintiff must demonstrate that the aider and abettor had actual or constructive knowledge that their conduct was legally improper.

Id. at 862 (emphasis in original; citations, quotation marks & formatting omitted).

In addition to scienter, "the element of knowing participation requires that the secondary actor have provided ***substantial assistance*** to the primary violator." *In re Dole Food Co., Inc. Stockholder Litig.*, 2015 WL 5052214, at *41 (Del. Ch. Aug. 27, 2015) (emphasis added; citation & internal quotation marks omitted). Accordingly, "[t]o plead knowing participation adequately, [Plaintiff] must allege facts that [Apollo] directly sought to induce the breach of a fiduciary duty or make factual allegations from which knowing participation may be inferred." *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *14 (Del. Ch. Jan. 31, 2013) (citation & internal quotation marks omitted).

Here, Plaintiff's own allegations suggest only that Apollo negotiated with Diamond at arm's-length, and thus negate any contention that Apollo knowingly participated in any alleged breach of fiduciary duty. *See, e.g.*, *Dent* v. *Ramtron Int'l Corp.*, 2014 WL 2931180, at *17 (Del. Ch. June 30, 2014). Plaintiff's apparent belief that Apollo "got too good a deal" is insufficient to sustain an aiding and abetting claim against Apollo as an arm's-length acquiror. *See Morgan* v. *Cash*, 2010 WL 2803746, at *8 (Del. Ch. July 16, 2010); *see also Malpiede*, 780 A.2d at 1097–98 ("[A] bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting.") (citations omitted); *McGowan* v. *Ferro*, 2002 WL 77712, at *4 (Del. Ch. Jan. 11, 2002) ("[The acquiror] was entitled to bargain to obtain the best price for itself, and breached no duty by doing so . . . .") (citation omitted).

As this Court has explained:

> [This] requirement that the third party knowingly *participate* in the alleged breach—whether by buying off the board in a side deal, or by actively exploiting conflicts in the board to the detriment of the target's stockholders—is there for a reason. That rule protects acquirors, and by extension their investors, from the high costs of discovery where there is no reasonable factual basis supporting an inference that the acquiror was involved in any nefarious activity. [. . .] [T]he long-standing rule [is] that arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting . . . . [. . .] [This rule] reflects the underlying assumption that social welfare can

> be improved by M&A transactions reached by parties bargaining at arm's-length. [. . .] To allow a plaintiff to state an aiding and abetting claim against a bidder simply by making a cursory allegation that the bidder got too good a deal is fundamentally inconsistent with the market principles with which our corporate law is designed to operate in tandem.

Morgan, 2010 WL 2803746, at *8 (emphasis in original).

Under this stringent standard, Plaintiff does not come close to adequately pleading an aiding and abetting claim against Apollo.

II. THE AIDING AND ABETTING CLAIM AGAINST APOLLO FAILS TO STATE A CLAIM FOR RELIEF

Plaintiff alleges that the Individual Defendants breached their fiduciary duties in the following four ways:

i. running a purportedly ill-timed and conflict-laden sale process;

ii. appointing to the SRC a majority of conflicted directors with purportedly close personal and professional ties to Apollo;

iii. purportedly failing to secure fair value for Diamond's shares;

iv. purportedly failing to disclose all material information necessary to allow Diamond stockholders to make an informed decision in connection with the Merger.

(¶¶ 164, 169.) Despite having received over one million pages of discovery to date, Plaintiff does not allege that Apollo played any role in any of these business

judgments, and thus cannot state a claim against Apollo for knowingly participating in any alleged breach of fiduciary duty. *See, e.g.*, *In re BioClinica, Inc. S'holder Litig*., 2013 WL 5631233, at *11 (Del. Ch. Oct. 16, 2013) (dismissing aiding and abetting claim because plaintiffs' allegations "in no way suggest that [the acquiror] participated in the board's decisions, conspired with the board, or otherwise caused the board to make the decisions at issue") (citation & internal quotation marks omitted); *In re Sea-Land Corp. S'holders Litig*., 1987 WL 11283, at *4 (Del. Ch. May 22, 1987) (dismissing aiding and abetting claim against defendant not alleged to have "played any role" in the target board's decision-making).

A. Timing And Conduct Of The Sale Process

Any aiding and abetting claim concerning the timing or conduct of the sales process necessarily fails because Plaintiff does not adequately allege any underlying breach of fiduciary duty by the Individual Defendants. The decision to initiate a sale process is "one of the many debatable choices that fiduciaries and their advisors must make when exploring strategic alternatives in an uncertain world . . . ." *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 91 (Del. Ch. 2014). The Board fully disclosed the reason for launching Diamond's strategic review: "to unlock full value for [Diamond's] shareholders" that was "not being recognized in the public equity markets." (14D-9 at 16; *see also* Ex. 4 (Feb. 24, 2016 Press Release).) The Company succeeded, as the per share consideration

to Diamond's stockholders in the Merger entailed a ***58% premium*** to Diamond's unaffected stock price.

In any event, Plaintiff does not allege any facts suggesting that Apollo knowingly participated in any breach of fiduciary duty by the Individual Defendants in connection with the timing and conduct of the sale process. Indeed, the Complaint is devoid of any well-pleaded allegations suggesting that Apollo played any role in the Board decisions that Plaintiff second-guesses in his Complaint. Nor does Plaintiff allege any facts suggesting that Apollo somehow bought off the Board with alleged "side deals" or actively exploited any purported conflicts of interest. To the contrary, the Board ran a full and fair auction in which Apollo ultimately emerged as the highest bidder. Accordingly, Plaintiff fails to state an aiding and abetting claim concerning the timing and conduct of the sales process. *See, e.g.*, *BJ's Wholesale Club*, 2013 WL 396202, at *14 (dismissing aiding and abetting claim based in part upon unsupported allegations that the buyer "pressured the Board to accept a lower price and engage in a hasty sale"); *see also In re BioClinica*, 2013 WL 5631233, at *11; *In re Sea-Land*, 1987 WL 11283, at *4.

Plaintiff's attempts to avoid dismissal are all unavailing, as Plaintiff uniformly fails to allege any way in which Apollo acted with scienter to substantially assist any purported breach of fiduciary duty.

1. [redacted]

[redacted] (¶ 62 (emphasis omitted).)

This claim fails as a matter of law. [redacted]—would not support an aiding and abetting claim, as no allegations suggest that Apollo knowingly participated in any alleged breach of fiduciary duty. *See, e.g.*, *In re Novell, Inc. S'holder Litig.*, 2013 WL 322560, at *18 (Del. Ch. Jan. 3, 2013) ("Elliott's initial bid for Novell in March 2012 was a catalyst for the sales process that resulted in the Acquisition, but that does not demonstrate—and the Plaintiffs have not adequately alleged—any material role for Elliott in the Board's decision-making process."); *see also In re Hansen Med., Inc. Stockholders Litig.*, 2018 WL 3030808, at * 12 (Del. Ch. June 18, 2018) (dismissing aiding and abetting claim where the plaintiff did not adequately allege

that the defendant "knew of, let alone 'exploited,' any conflicts" and did not "state well-pled facts that make it reasonably conceivable [the defendant] partook in more than arm's length negotiations . . . ."); *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 735 (Del. Ch. 1999) ("[T]he Complaint's conclusory allegation that [the acquiror] 'approved and urged' the Director Defendants to enter into the Merger Agreements does not satisfy this pleading burden [for aiding and abetting liability].") (citation omitted), *aff'd sub nom. Walker* v. *Lukens, Inc.*, 757 A.2d 1278 (Del. 2000) (TABLE).

2. Alleged Director Conflicts Of Interest Do Not Suggest Any Knowing Participation By Apollo

Plaintiff accuses certain Individual Defendants of alleged conflicts of interest, but does not come close to alleging that a majority of the Diamond Board was conflicted in regard to the timing or conduct of the Company's strategic review. *See Malpiede*, 780 A.2d at 1098 ("[T]here is no dispute that only one of the Frederick's directors who approved the merger had a conflict of interest, and that director did not dominate or control the others."). In any event, Plaintiff's conflict allegations amount to nothing, because Plaintiff does not allege any facts suggesting that Apollo exploited any such purported conflicts or took any action of any nature to further any purported breach of fiduciary duty in relation thereto. *See In re Hansen Med.*, 2018 WL 3030808, at *12.

Cloobeck, Kraff and Palmer: Plaintiff alleges that Cloobeck, Kraff, and Palmer were somehow conflicted because, in addition to their substantial stock holdings in Diamond, they also held certain call options to purchase additional Diamond shares. (¶ 58.) Plaintiff ignores that these call options were fully disclosed in the 14D-9 as well as dozens of other SEC filings. (*See, e.g.*, 14D-9 at 7, 27, 37.) Regardless, Plaintiff's attack on the call options fails on its face, because any such options would have been interest aligning and provided a further incentive for Cloobeck, Kraff and Palmer to ***maximize*** the per share consideration in any potential sale of Diamond. *See In re Toys 'R' Us, Inc. S'holder Litig.*, 877 A.2d 975, 1004 n.42 (Del. Ch. 2005) ("Delaware courts have concurred . . . that stock options, when used and designed prudently, can help align insiders' interests with those of public shareholders, because it gives insiders an incentive to increase the value of the company's shares.") (citations omitted); *see generally In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1035 (Del. Ch. 2012) (observing that significant stockholders "have the largest financial stake in the transaction and thus have a natural incentive to obtain the best price for their shares") (citations omitted). Cloobeck, Kraff and Palmer, like all of the Individual Defendants, held a substantial stake in Diamond and thus were strongly incentivized to achieve the highest possible price in any potential sale of the Company.

Plaintiff's attack on the call options as presenting some purported conflict of interest also ignores that: (i) [redacted] and (ii) Kraff was no longer on the Board when it approved the Merger. Thus, there is no conceivable theory under which Kraff or Palmer committed an underlying breach of fiduciary duty in connection with the Board's decision to commence the strategic review, or Kraff committed any breach of fiduciary duty in regard to the Merger.

In any event, Plaintiff does not allege any way in which Apollo knowingly participated in any purported breach of fiduciary duty by Cloobeck, Kraff or Palmer in relation to their call options. Thus, any such purported conflict of interest could not support an aiding and abetting claim against Apollo.

Taitz, Jones and Berkman: Plaintiff alleges that three of the Director Defendants—Taitz, Jones, and Berkman—were conflicted due to alleged business or personal ties to Apollo (¶¶ 36–45), which is far less than a Board majority. Plaintiff does not allege that Taitz, Jones or Berkman dominated or controlled any of the other directors. And Plaintiff concedes that Taitz, who served on the boards of certain entities affiliated with Apollo, recused herself once it became clear that Apollo might be one of the final bidders.

Plaintiff's allegations regarding Jones' and Berkman's purported ties to Apollo consist entirely of unremarkable social connections or outdated business

associations. Plaintiff alleges that Jones [redacted] (¶ 42.) Plaintiff alleges that Berkman [redacted] (¶ 45.)

This Court has repeatedly held that these types of social connections and out-of-date business connections do not rise to the level of a conflict of interest. *See, e.g.*, *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig*., 2017 WL 3568089, at *20–21 (Del. Ch. Aug. 18, 2017) ("[A] bare allegation of a past business relationship . . . does nothing to call into question Smyth's independence."); *Zimmerman* v. *Crothall*, 2012 WL 707238, at *13 (Del. Ch. Mar. 27, 2012) (allegations that director and CEO were "were good friends, that their families socialized, and that the two had worked closely together on previous occasions, including in founding a start-up company" and that another director and CEO "worked together in the past and, on one occasion, went to a professional football game together" were insufficient to impugn directors' disinterest and independence);

Kohls v. *Duthie*, 765 A.2d 1274, 1284 (Del. Ch. 2000) (allegations that director was a friend of CEO and that CEO gave director a summer job while director was in business school did not suggest director could not exercise independent judgment).

In any event, despite having already received over one million pages of discovery, Plaintiff makes no well-pleaded allegations suggesting that Apollo took any action of any nature to exploit any purported conflict of interest or induce any breach of fiduciary duty by Taitz, Jones or Berkman. Rather, Apollo participated and prevailed in the Company's auction (which is not alleged to have been compromised in any respect), and thus Plaintiff falls far short of adequately alleging Apollo's knowing participation in any purported breach of fiduciary duty.

3. Plaintiff Fails To Adequately Allege Any Purportedly Improper Or Excessive Side Deals

As a last-ditch effort to impugn the sales process, Plaintiff alleges that Apollo [redacted] (¶¶ 118–124, 129–131.) These allegations also fall far short of adequately alleging Apollo's knowing participation in any purported breach of fiduciary duty.

Delaware law sets a high bar for breach of fiduciary duty and aiding and abetting claims based upon alleged post-closing roles for target officers or directors, in part because this Court recognizes that buyers will often have a rational

desire to retain certain knowledgeable individuals in connection with an acquisition, rather than cleaning house and replacing all of them *en masse*. *See Morgan*, 2010 WL 2803746, at *5 ("[R]etaining management is a routine occurrence for the obvious reason that an acquiror often wants to keep existing management in order to ensure that the acquired assets continue to be managed optimally. To view the retention of management on reasonable terms with suspicion would only undermine business practices that often facilitate the difficult transitions required when two businesses merge.") (citations omitted); *accord BJ's Wholesale Club*, 2013 WL 396202, at *15.

Accordingly, knowing participation may be inferred with respect to purportedly improper post-closing roles and "side deals" only if (1) "the terms of the transaction are so egregious or the magnitude of the side deals is so excessive as to be inherently wrongful" or (2) "it appears that the defendant may have used knowledge of the breach to gain a bargaining advantage in the negotiations." *Morgan*, 2010 WL 2803746, at *4 (citation & internal quotation marks omitted). A plaintiff must make "direct factual allegations supporting a theory that the defendant sought to induce the breach of fiduciary duty, such as through the offer of side payments intended as incentives for the fiduciaries to ignore their duties." *Id.* (citation & internal quotation marks omitted). Any such claim will necessarily fail

if the purported side deal was negotiated ***after*** agreement was reached on the transaction's essential terms. *See McGowan*, 2002 WL 77712, at *3.

Plaintiff's allegations [redacted] do not come close to satisfying this well-settled standard. Plaintiff makes no attempt to identify any "bargaining advantage" that Apollo supposedly gained by purportedly [redacted]—nor would any such allegation make sense given that Apollo participated and prevailed in the Company's auction.

Plaintiff's claims concerning alleged [redacted] all fail to hold water:

[redacted] Plaintiff alleges that Palmer remained in his role as Diamond's president and CEO through the end of 2016, [redacted] (¶¶ 19, 130.) But the Schedule 14D-9 put all stockholders on notice of the possibility that Palmer might continue in a post-closing role, disclosing that in June 2016 Palmer met with all potential bidders, including Apollo, and informed each of them that he was willing to be involved with the Company on a post-transaction basis. (14D-9 at 19.) The 14D-9 further disclosed that neither Palmer nor any bidder made any commitments with respect to the terms of any such post-closing arrangements at that time. (*Id.*) Plaintiff does not: (1) suggest that this disclosure was in any way inaccurate; (2) allege the terms

of Palmer's compensation or claim that it was excessive; or (3) allege that, apart from the meeting disclosed in the 14D-9, Apollo and Palmer had any negotiations concerning any post-closing role before the Board's approval of the Merger.

[redacted] Plaintiff alleges that [redacted] (¶ 118), but does not allege any facts suggesting that [redacted] Plaintiff's own allegations suggest that [redacted] (¶ 122), and long after the Board approved the Merger (with Cloobeck abstaining from that vote) (¶ 118). Plaintiff does not allege [redacted] Plaintiff's failure to [redacted] It is inconceivable that Cloobeck—as Diamond's largest stockholder, and whose Diamond shares were worth nearly $400 million at the Merger price (14D-9 at 7)—would tender his shares for a return he considered inadequate in order to [redacted] Plaintiff's allegation concerning [redacted] do not suggest Apollo's knowing participation in any breach of fiduciary duty.

[redacted] Plaintiff alleges that [redacted]

[redacted] (¶ 129.) But, as with Cloobeck, Plaintiff does not allege that [redacted] Regardless, Kraff was no longer a fiduciary at the time, having left the Board more than two months earlier, and the Merger terms had already been agreed upon. Accordingly, [redacted] could not support an aiding and abetting claim.

[redacted] Plaintiff alleges that [redacted] (¶ 131 (emphasis omitted & alteration in original).) While Plaintiff fixates on the word [redacted] Plaintiff does not allege any favoritism or conduct of any nature for Apollo to reward. Absent from the Complaint is any allegation of any action or inaction by Taitz that would comprise a breach of fiduciary duty, advance Apollo's interests in the sale process, or impede any other bidders. To the contrary, Plaintiff alleges only that Apollo participated and prevailed in an auction. Moreover, Plaintiff does not allege: [redacted]

[redacted]

Plaintiff also alleges, in conclusory fashion, that [redacted] (¶ 44.) But, like Plaintiff's other deficient allegations regarding [redacted] Plaintiff does not allege that [redacted] or that [redacted]

[redacted]

For all of these reasons, Plaintiff does not come close to satisfying the high bar to adequately alleging an aiding and abetting claim concerning purported [redacted]

B. Appointment Of The SRC

No factual allegations suggest that Apollo aided and abetted any purported breach of fiduciary duty relating to the Board's appointment of certain directors—Taitz, Jones, Berkman and Wolf—to serve on the SRC.

First, Plaintiff does not adequately allege any underlying breach of fiduciary duty by the Individual Defendants in regard to the SRC's composition. As discussed above, the only director on the SRC with any financial ties with Apollo was Taitz, and—once it became clear that Apollo might be one of the final bidders—Taitz recused herself from any further SRC meetings at which the committee would

deliberate on its recommendation to the Board. The tenuous and outdated business and social connections alleged for Jones and Berkman do not approach the level of disabling conflicts. (*See* pp. 21-23, above.) And Plaintiff does not allege that Wolf had any ties to Apollo at all. Thus, there was no underlying breach of fiduciary duty by the Board in selecting the SRC members.

Second, in any case, Plaintiff does not allege that Apollo played any role in the Board's decision-making as to the make-up of the SRC. Thus, regardless of whether Plaintiff adequately alleges any underlying breach of fiduciary duty, Plaintiff fails to state any aiding and abetting claim against Apollo.

C. Securing Fair Value

Plaintiff's allegation that Apollo aided and abetted the Individual Defendants' purported failure to secure fair value in the Merger also falls far short of the stringent standard for an aiding and abetting claim.

Plaintiff again does not adequately allege an underlying breach of fiduciary duty. The Complaint does not allege that any director had a financial interest in obtaining anything other than the highest possible price for the Company's shares. To the contrary, as discussed above, each of the directors had substantial shareholdings that aligned his or her interests with all stockholders, and no allegations suggest any director received any "side deal" that would put his or her interest at odds with other shareholders.

Nor does the Complaint allege any basis for concluding that the Board did not obtain a fair price. As discussed, the per share Merger consideration was a ***58% premium*** to the Company's unaffected stock price before it announced the formation of the SRC. This substantial premium, which represented the highest bid in an arm's-length auction and which Diamond's stockholders accepted by overwhelmingly tendering their shares, negates any suggestion that the Director Defendants failed to secure fair value. As the Supreme Court recently observed in a similar context:

> [F]air value is just that, "fair." It does not mean the highest possible price that a company might have sold for had Warren Buffett negotiated for it on his best day and the Lenape who sold Manhattan on their worst. Rather, as the Court of Chancery has put it in another context: "A fair price does not mean the highest price financeable or the highest price that fiduciary could afford to pay. At least in the non-self-dealing context, it means a price that is one that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept."

DFC Glob. Corp. v. *Muirfield Value Partners, L.P.*, 172 A.3d 346, 370 (Del. 2017) (quoting *Cinerama, Inc.* v. *Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995)).

Here, Plaintiff does not allege a single fact to show that the auction the SRC ran was not a full and fair auction or that Apollo's bid was not the highest bid in that auction. Thus, there is no basis for any underlying breach of fiduciary duty

claim against the Director Defendants concerning the price they obtained. *Cf. Equity-Linked Inv'rs* v. *Adams*, 705 A.2d 1040, 1055–56 (Del. Ch. 1997) (holding that *Revlon* duties "***may be satisfied through an auction***" or other form of market check) (emphasis added).

Nor has Plaintiff advanced any allegations suggesting that Apollo knowingly participated in any purported breach of fiduciary duty by participating and ultimately prevailing in the SRC's auction. Plaintiff cannot state a claim against Apollo by merely alleging that it "attempt[ed] to reduce the sale price through arm's-length negotiations . . . ." *Malpiede*, 780 A.2d at 1097. Moreover, "Delaware courts expressly and repeatedly have rejected th[e] argument" that an acquiror "got too good a deal, and that such conduct amounts to tortious conduct." *Ramtron*, 2014 WL 2931180, at *18 (citations omitted).

Despite having received more than one million pages of documents in discovery, Plaintiff points to no evidence supporting his conclusory claim that certain directors somehow "steered Diamond into the Transaction with Apollo" (¶¶ 14, 18, 20, 22), much less that Apollo knowingly participated in that alleged effort. *See In re PLX Tech. Inc. Stockholders Litig.*, C.A. No. 9880-VCL (Del. Ch. Sept. 3, 2015) (TRANSCRIPT), at 51–52 (dismissing aiding and abetting claim where plaintiff failed to allege that acquirer knew potentially conflicted financial advisor "was engaging in steering" and "used that to get information" regarding the

target). (Ex. 5.) To the contrary, Plaintiff concedes that Centerview contacted 22 bidders, received written indications of interest from five parties, and that—at the conclusion of the auction—Apollo emerged as the highest bidder. (¶¶ 67, 80–82.) Plaintiff does not allege any facts suggesting that the SRC refused to consider other bids or otherwise acted to promote Apollo or impede other bidders, much less that Apollo knowingly participated in any such conduct.

Plaintiff's misguided attacks on Centerview's fairness opinion and valuation analyses (¶¶ 92–114) likewise do not support any claim against the Board or Apollo. No well-pleaded allegations suggest that the Director Defendants breached their fiduciary duties in retaining Centerview or relying upon its advice. And in any event, Apollo is not alleged to have played any role in: (1) the SRC's selection of Centerview as an advisor; (2) Centerview's preparation of its analyses or fairness opinion; or (3) the Board's consideration of or reliance upon them.

Plaintiff's subjective disagreements with Centerview's work are irrelevant given that the Company ran a full and fair auction. As the Supreme Court recently observed, there can be no better evidence of a fair price:

> Market prices are typically viewed superior to other valuation techniques because, unlike, e.g., a single person's discounted cash flow model, the market price should distill the collective judgment of the many based on all the publicly available information about a given company and the value of its shares. Indeed, the relationship between market valuation and fundamental

> valuation has been strong historically. As one textbook puts it, "[i]n an efficient market you can trust prices, for they impound all available information about the value of each security." More pithily: "For many purposes no formal theory of value is needed. We can take the market's word for it." But, a single person's own estimates of the cash flows are just that, a good faith estimate by a single, reasonably informed person to predict the future. Thus, a singular discounted cash flow model is often most helpful when there isn't an observable market price.

DFC Glob., 172 F.3d at 369–70 (citations omitted & alteration in original). That the Merger price resulted from a full and fair auction, with no alleged impediments to any bidder and no subsequent topping bid, forecloses Plaintiff's claim that the Board breached its fiduciary duty by failing to achieve a fair price or that Apollo aided and abetted any such breach.

In an attempt to overcome this well-settled precedent, Plaintiff purports to rely upon a handful of produced documents. But these documents do not support his aiding and abetting claim in the slightest.

First, Plaintiff alleges that [redacted] (¶ 76 (citation & alterations omitted).) But target companies routinely press bidders to increase their offers. Indeed, Apollo's offer at the time was in the range of $28 to $30 per share. (14D-9 at 17–18.) Thus, if anything, this passing reference evidences the Company pushing

Apollo to ***increase*** its bid to the very top of its range or even higher, not to "steer" the auction in Apollo's direction.

Next, Plaintiff refers to [redacted] (¶ 77 (citation omitted).) But that is precisely the type of discussion that one would expect to take place in a sale process to encourage a potential bidder's best and highest bid, and in no way suggests any favoritism toward Apollo.

Plaintiff then points to [redacted] (*Id.* (emphasis by Plaintiff & citation omitted).) But it was not a breach of fiduciary duty for the Company to [redacted] nor does [redacted] suggest knowing participation in any alleged breach of fiduciary duty.

Plaintiff also points to [redacted] (¶ 78 (emphasis by Plaintiff & citation omitted).) But every acquiror believes it is buying

the target at an [redacted] price or it would not pursue the acquisition. Simply negotiating a good deal does not constitute aiding and abetting. *Ramtron*, 2014 WL 2931180, at *18. Indeed, if an acquiror's view that a deal is [redacted] were evidence of aiding and abetting a breach of fiduciary duty, every acquisition would be a tort.

Finally, Plaintiff alleges that, "shortly after the Board formed the [SRC], [redacted] (¶ 63 (alterations in original & citation omitted).) This allegation is a dramatic distortion of [redacted]

As the Complaint itself alleges, [redacted] (¶ 72.) [redacted].[4] [redacted]

[4] [redacted]

[redacted] (Ex. 7, at DRII_Appraisal_00615628.)

[redacted] In any event, whatever [redacted] meant by [redacted] and whatever he meant by a [redacted] was referring to [redacted] which—as Plaintiff knows full well given the voluminous discovery he already has received—never happened. Indeed, Plaintiff does not allege that [redacted] And [redacted] has nothing to do with the sale process that ***actually*** took place in which Apollo competed with other potential acquirors and ultimately submitted the highest bid in the Company's auction—a process that [redacted]

In sum, Plaintiff alleges no facts suggesting that any of Diamond's directors "steered" the sale process in Apollo's favor, much less that Apollo

[redacted]

knowingly participated in any such effort. Accordingly, Plaintiff necessarily fails to state an aiding and abetting claim.

D. Diamond's Disclosures

Finally, Plaintiff fails to state an aiding and abetting claim against Apollo in connection with Diamond's 14D-9 because Plaintiff does not adequately allege that Apollo played any role—let alone that it knowingly participated—in that alleged breach, either.

This Court has made clear that a third party's alleged "passive awareness" of the purported omission of a material fact is insufficient to state an aiding and abetting claim. *See Buttonwood Tree Value Partners, L.P.* v. *R.L. Polk & Co., Inc.*, 2017 WL 3172722, at *10 (Del. Ch. July 24, 2017) ("Such passive awareness on the part of [a non-fiduciary] does not constitute 'substantial assistance' to any breach resulting from the Individual Defendants' failure to disclose the facts."). Rather, as with any aiding and abetting claim, Plaintiff must adequately allege facts suggesting that Apollo knowingly participated in the Individual Defendants' alleged breach of their duty of disclosure. *See Weinberger* v. *Rio Grande Indus., Inc*., 519 A.2d 116, 131 (Del. Ch. 1986) (dismissing aiding and abetting claim where the facts alleged "do not support a claim that the [non-fiduciary] defendants participated at all (let alone knowingly participated) in any disclosure violations by the [fiduciary] defendants.") (citations omitted).

Plaintiff fails to satisfy this standard. Plaintiff alleges no facts suggesting that Apollo played any role in the issuance of the 14D-9 or any alleged omission or misstatement therein (¶¶ 133–154), including the Board's alleged failure to disclose Cloobeck's reasons for abstaining on the Merger vote—much less that Apollo ***knowingly*** participated in any purported disclosure violation. Indeed, Plaintiff does not allege that Apollo was aware of the purported reasons for Cloobeck's abstention, which Cloobeck allegedly voiced at Board meetings that Apollo did not attend.

Accordingly, Plaintiff's aiding and abetting claim concerning Diamond's disclosures fails to state a claim for relief, as do all the other aspects of his aiding and abetting claim.

CONCLUSION

For the foregoing reasons, we respectfully submit that Plaintiff's claims against Apollo should be dismissed with prejudice.

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Dated: November 15, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, the foregoing was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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