EFiled: Feb 22 2019 03:33PM EST
Transaction ID 62996175
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,<br><br>Plaintiff,<br><br>v.<br><br>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, and CENTERVIEW PARTNERS LLC,<br><br>Defendants. | C.A. No. 12844-VCMR<br><br>**PUBLIC VERSION**<br><br>Filed: February 22, 2019 |

**DEFENDANT STEPHEN J. CLOOBECK'S REPLY BRIEF IN SUPPORT OF HIS MOTION TO DISMISS COUNT I OF PLAINTIFF'S VERIFIED AMENDED CLASS ACTION COMPLAINT**

Dated: February 15, 2019

Stephen B. Brauerman (No. 4952)
Sara E. Bussiere (No. 5725)
BAYARD, P.A.
600 N. King Street, Suite 400
P.O. Box 25130
Wilmington, Delaware 19899
(302) 655-5000

*Counsel to Defendant*
*Stephen J. Cloobeck*

## TABLE OF CONTENTS

**Page**

INTRODUCTION ..... 1

ARGUMENT ..... 2

I. Cloobeck's Abstention Does Not Give Rise as a Matter of Law to a Breach of Fiduciary Duty Claim Against Cloobeck. ..... 2

II. Cloobeck Did Not Breach His Duty of Disclosure. ..... 4

CONCLUSION ..... 5

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Dalton v. Am. Inv. Co.*,
1981 WL 7618 (Del. Ch. June 4, 1981) .......... 2

*Dias v. Purches*,
2012 WL 4503174 (Del. Ch. Oct. 1, 2012) .......... 4

*Frederick Hsu Living Trust v. ODN Holding Corp.*,
2017 WL 1437308 (Del. Ch. Apr. 14, 2017) .......... 4

*Gesoff v. IIC Industries, Inc.*,
902 A.2d 1130 .......... 3

*In re Tri-Star Pictures, Inc., Litig.*,
1995 WL 106520 (Del. Ch. Mar. 9, 1995) .......... 2

*Valeant Pharmaceuticals Int'l v. Jerney*,
921 A.2d 732 (Del. Ch. 2007) .......... 3

*Zirn v. VLI Corp.*,
621 A.2d 773 (Del. 1993) .......... 5

## INTRODUCTION[1]

In his Answering Brief, Plaintiff clarified that his claims against Cloobeck arise "not from his decision to approve the Transaction, but rather his misconduct in connection with (i) the process preceding the Board's formal approval, and (ii) the material omissions from the Proxy." (Ans. Br. at 51 (internal quotations omitted).) Unfortunately for Plaintiff, the Amended Complaint does not allege any facts from which the Court could conclude that Cloobeck played any role in the "process preceding the Board's formal approval" or in the preparation or approval of the proxy. Instead of identifying well-plead factual allegations concerning Cloobeck, Plaintiff ignores Cloobeck's opposition to the Transaction and his abstention from the vote approving it. Because the Amended Complaint does not allege that Cloobeck played any role in the process or the disclosures Plaintiff challenges, the Court should dismiss Count I against Cloobeck.

---

[1] Terms not defined herein shall have the meanings ascribed to them in Defendant Stephen J. Cloobeck's Opening Brief in Support of His Motion to Dismiss Count I of Plaintiff's Verified Amended Class Action Complaint ("Opening Brief"). (Trans. ID # 62674474.) Plaintiff's Omnibus Opposition Brief to Defendants Apollo Management VII, L.P.'s and Stephen J. Cloobeck's Motions to Dismiss is defined herein as "Answering Brief." (Trans. ID # 62864586.)

# ARGUMENT

## I. Cloobeck's Abstention Does Not Give Rise as a Matter of Law to a Breach of Fiduciary Duty Claim Against Cloobeck.

The Amended Complaint fails to state a claim against Cloobeck for breaching his fiduciary duties because Plaintiff has not alleged any facts demonstrating Cloobeck failed to act when he had a duty to act. Plaintiff concedes that Cloobeck did not breach his fiduciary duties in connection with the approval of the Transaction from which he abstained. (Ans. Br. at 51.) Instead, Plaintiff devotes a majority of his opposition to refuting an irrelevant argument he acknowledges Cloobeck concedes – namely, that a director is not absolved of fiduciary liability simply because he abstains from voting on an ultimate transaction. (Ans. Br. at 47-52.) Rather, as Cloobeck argued in his Opening Brief, to hold a director liable for breaching his fiduciary duty in connection with a transaction from which he abstained, Plaintiff must show that the director failed to act where he had a duty to act or otherwise engaged in misconduct by abstaining from the vote. *Tri-Star Pictures*, 1995 WL 106520, at *3 (recognizing circumstances where directors who engage in wrongful conduct cannot avoid liability by abstaining); *Dalton v. Am. Inv. Co.*, 1981 WL 7618, at *2 (Del. Ch. June 4, 1981) (observing that a director may face liability "from not taking a position when there is a clear duty to do so"). The Amended Complaint does not contain any such allegations and Plaintiff does not identify any in his Answering

Brief. Consequently, the Amended Complaint fails to state a claim against Cloobeck for breaching his fiduciary duties and the Court must dismiss Count I.

The allegations on which Plaintiff relies in its opposition to the Motion either describe the actions of other defendants or have nothing to do with the sale process. For example, Paragraph 59 [REDACTED] (Am. Compl. ¶ 59.) Paragraph 74 describes inquiries *to* Cloobeck from others. (*Id.* at ¶ 74.) Paragraphs 83-85, which describe some aspects of the sale process, allege Cloobeck's *objections* to the process undertaken by the Committee and the Board. (*Id.* at ¶¶ 83-85.) Paragraph 118 references [REDACTED] (*Id.* at ¶ 118.) None of these references alleges that Cloobeck played any meaningful role in the sale process or failed to act in the face of a duty to act that could expose him to any fiduciary liability in connection with the sales process.

Each of the cases referenced by Plaintiff on page 52 of the Answering Brief is distinguishable. In each case, the director defendant was alleged to have played a role in the transaction and faced liability as a result. *See, e.g.*, *Gesoff v. IIC Industries, Inc.*, 902 A.2d 1130, 1166 (observing that director was involved in meetings and discussions concerning challenged transaction); *Valeant Pharmaceuticals Int'l v. Jerney*, 921 A.2d 732, 753 (Del. Ch. 2007) (holding that an abstaining director may have liability if he "plays a role in the negotiation,

structuring, or approval of the proposal."); *Frederick Hsu Living Trust v. ODN Holding Corp.*, 2017 WL 1437308, at *38 (Del. Ch. Apr. 14, 2017) (permitting action to proceed where it was reasonably conceivable that director defendants were involved in discussions and decisions leading up to the transaction).[2] In contrast, the Amended Complaint does not allege any facts upon which the Court could find that Cloobeck breached any duty in connection with the Transaction. The Court should therefore dismiss all claims against Cloobeck.

## II. Cloobeck Did Not Breach His Duty of Disclosure.

The Amended Complaint repeatedly alleges that Cloobeck disclosed his objections to the Board, but claims that he is nonetheless guilty of a disclosure violation because he failed to ensure that the Board (which ignored his objections and approved the Transaction anyway) disclosed his objections to Diamond stockholders. By disclosing his concerns to the Board, Cloobeck discharged his fiduciary duty of disclosure. *Dias v. Purches*, 2012 WL 4503174, at *9 (Del. Ch. Oct. 1, 2012) (explaining that "a fiduciary is not required to disclose 'its underlying reasons for acting,' and asking why a fiduciary took a certain action does not state a meritorious disclosure claim. That is, all material *facts* must be

---

[2] The two transcript rulings on which Plaintiff relies are similarly inapposite as the Amended Complaint does not allege that Cloobeck had any reason to question the independence of the Committee. Indeed, given his substantial stockholdings, Cloobeck suffered substantially greater harm if Plaintiff's allegations have merit than has Plaintiff. Cloobeck does not belong as a defendant in this action and the Court should dismiss the claims against him.

disclosed, but individual directors need not state 'the grounds of their judgment for or against a proposed shareholder action.'"); *Zirn v. VLI Corp.*, 621 A.2d 773, 779 (Del. 1993) ("As the standard of disclosure has evolved in the decisions of this Court, the focus is on what a reasonable investor would consider important in tendering his stock, not what a director considers important. In determining what information is to be provided to the shareholders, a director should not be controlled by his or her own subjective views to the exclusion of an objective analysis of what the investor might consider relevant."). Cloobeck had no ability or obligation to advise Diamond stockholders of reasons for his abstention in light of the Board's decision to proceed in the face of his objections. Plaintiff does not offer any case law that holds a director who objects to a transaction, and communicates his objections to the Board, is liable for a disclosure violation. The Court should not create a new theory of liability in this case and should dismiss the claims against Cloobeck.

## CONCLUSION

For the foregoing reasons, Stephen J. Cloobeck respectfully requests that the Court dismiss the Amended Complaint against him with prejudice.

Dated: February 15, 2019

BAYARD, P.A.

*/s/ Stephen B. Brauerman*
Stephen B. Brauerman (No. 4952)
Sara E. Bussiere (No. 5725)
600 N. King Street, Suite 400
P.O. Box 25130
Wilmington, Delaware 19899
(302) 655-5000

*Counsel to Defendant*
*Stephen J. Cloobeck*

**WORD COUNT: 1,117**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served upon the following counsel on February 15, 2019.

**VIA ELECTRONIC MAIL**

Peter B. Andrews, Esquire
Craig J. Springer, Esquire
David Sborz, Esquire
Andrews & Springer LLC
3801 Kennett Pike
Building C, Suite 305
Greenville, DE 19807

Daniel A. Mason
Brendan W. Sullivan
Paul Weiss Rifkind Wharton & Garrison LLP
500 Delaware Avenue, Suite 200
Wilmington, DE 19899

Raymond J. DiCamillo
Elizabeth A. DeFelice
Daniel E. Kaprow
Richards, Layton & Finger, P.A.
920 N. King Street
Wilmington, Delaware 19801

Joanne P. Pinckney
Patricia R. Urban
PINCKNEY, WEIDINGER, URBAN & JOYCE LLC
3711 Kennett Pike, Suite 210
Wilmington, Delaware 19807

Thomas A. Uebler
McCOLLOM D'EMILIO SMITH UEBLER LLC
Little Falls Centre Two
2751 Centerville Road, Suite 401
Wilmington, Delaware 19808

*/s/ Stephen B. Brauerman*
Stephen B. Brauerman (#4952)

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the following counsel on February 22, 2019.

**VIA ELECTRONIC MAIL**

Peter B. Andrews, Esquire
Craig J. Springer, Esquire
David Sborz, Esquire
Andrews & Springer LLC
3801 Kennett Pike
Building C, Suite 305
Greenville, DE 19807

Daniel A. Mason
Brendan W. Sullivan
Paul Weiss Rifkind Wharton & Garrison LLP
500 Delaware Avenue, Suite 200
Wilmington, DE 19899

Raymond J. DiCamillo
Elizabeth A. DeFelice
Daniel E. Kaprow
Richards, Layton & Finger, P.A.
920 N. King Street
Wilmington, Delaware 19801

Joanne P. Pinckney
Patricia R. Urban
PINCKNEY, WEIDINGER, URBAN & JOYCE LLC
3711 Kennett Pike, Suite 210
Wilmington, Delaware 19807

Thomas A. Uebler
McCOLLOM D'EMILIO SMITH UEBLER LLC
Little Falls Centre Two
2751 Centerville Road, Suite 401
Wilmington, Delaware 19808

*/s/ Stephen B. Brauerman*
Stephen B. Brauerman (#4952)