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Transaction ID 60850275
Case No. 12844-VCMR

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEPHEN J. APPEL, Individually and On Behalf of All Others Similarly Situated,	)	
Plaintiff,	)	
v.	)	C.A. No. 12844-VCMR
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,	)	
Defendants.	)	

ORDER GRANTING MOTIONS TO DISMISS

WHEREAS, Plaintiff Stephen J. Appel was a stockholder of Diamond Resorts International ("Diamond" or the "Company") at all relevant times;

WHEREAS, Defendants David J. Berkman, Stephen J. Cloobeck, Richard M. Daley, Frankie Sue Del Papa, Jeffrey W. Jones, David Palmer, Hope S. Taitz, Zachary D. Warren, and Robert Wolf were directors of Diamond at all relevant times (collectively, save Cloobeck, the "Director Defendants");

WHEREAS, Defendant Centerview Partners LLC ("Centerview") was the financial advisor to Diamond's strategic review committee that reviewed the transaction (the "Strategic Review Committee") and the Diamond board;

WHEREAS, non-party Apollo Global Management LLC ("Apollo") acquired Diamond in a two-step merger under 8 *Del C.* § 251(h) at $30.25 per share, which closed on September 2, 2016;

WHEREAS, Plaintiff challenges the process by which the Diamond board and Defendant Cloobeck, the largest stockholder, negotiated the transaction, the failure of the board to disclose all material information to the Diamond stockholders regarding the tender offer, and the alleged knowing concealment by Centerview of its true relationship with Apollo;

WHEREAS, the Director Defendants, Centerview, and Cloobeck have separately moved to dismiss, and I have reviewed the parties' briefs and the applicable law;

NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS:

1. The motions to dismiss are GRANTED.

2. In considering a motion to dismiss under Rule 12(b)(6), "(i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are 'well-pleaded' if they give the opposing party notice of the claim; [and] (iii) the Court must draw all reasonable inferences in favor of the non-moving party." *In re Gen.*

Motors (Hughes) S'holder Litig., 897 A.2d 162, 168 (Del. 2006). While I must draw all reasonable inferences in Plaintiff's favor, I need not "accept as true conclusory allegations 'without specific supporting factual allegations.'" *Id.* (quoting *In re Santa Fe Pc. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995)). "[D]ismissal is inappropriate unless the 'plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.'" *Id.* (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

3. In *Corwin v. KKR Financial Holdings LLC*, the Delaware Supreme Court held that "when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies." 125 A.3d 304, 309 (Del. 2015). In *In re Volcano Corp. Stockholder Litigation*, this Court held that the same policy reasons dictate that "the acceptance of a first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares in a two-step merger under Section 251(h) has the same cleansing effect under *Corwin*." 143 A.3d 727, 747 (Del. Ch. 2016). Where the business judgment rule under *Corwin* applies, claims are dismissed unless there is a showing of waste. *Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152, at *15 (Del. Ch. May 31, 2017); *Singh v. Attenborough*, 137 A.3d 151, 151-52 (Del. 2016).

4. "In that light, there are two limitations on the application of *Corwin*: the vote must be fully informed, and be uncoerced." *Sciabacucchi*, 2017 WL 2352152, at *15. If the vote is uninformed, the Court cannot assume "that stockholders determined the transaction was beneficial, in light of the actual facts; thus, an uninformed vote has no ratification effect." *Id.* Similarly, if a vote is coerced, the Court cannot rely on the fact that the "stockholders have made a determination that *the transaction at issue* is beneficial, only that, under whatever coercive factors exist, they are better accepting the transaction than the alternative." *Id.*

5. Here, the first-step tender offer expired on September 1, 2016, with approximately 81.26% of the Company's outstanding shares tendered. Compl. ¶ 118. On September 2, 2016, the merger was consummated under Section 251(h). *Id.* Plaintiff has not argued that waste occurred or pled that the tender offer was coerced. Thus, in order to avoid dismissal, Plaintiff must show that the vote was not fully informed.

6. "Although a plaintiff generally bears the burden of proving a material deficiency when asserting a duty of disclosure claim, a defendant bears the burden of demonstrating that the stockholders were fully informed when relying on stockholder approval to cleanse a challenged transaction." *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 748 (Del. Ch. 2016). The Court, however, in *In re*

Solera Holdings Inc. Stockholder Litigation held that "a plaintiff challenging the decision to approve a transaction must first identify a deficiency in the operative disclosure document, at which point the burden would fall to defendants to establish that the alleged deficiency fails as a matter of law in order to secure the cleansing effect of the vote." 2017 WL 57839, at *8 (Del. Ch. Jan. 5, 2017). Information is material if there is "a substantial likelihood that the undisclosed information would significantly alter the total mix of information already provided." *Berger v. Pubco Corp.*, 2008 WL 2224107, at *3 (Del. Ch. May 30, 2008) (quoting *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000)), *rev'd on other grounds,* 976 A.2d 132 (Del. 2009). "[O]mitted facts are not material simply because they might be helpful." *Id.* Plaintiff alleges that Defendants have not satisfied their burden of demonstrating that the stockholder vote was fully informed because the relevant disclosures were materially false and misleading in three significant ways.

7. First, Plaintiff asserts that the Company's Schedule 14D-9 (the "14D-9") fails to disclose the chairman and founder of Diamond, Stephen J. Cloobeck's "disappointment" with the price and timing of the merger, as well as with "the Company's management for not having run the business in a manner that would command a higher price." Compl. ¶ 102. Plaintiff points to a single case, *Gilmartin v. Adobe Resources Corp.*, to support its position. 1992 WL 71510 (Del. Ch. Apr. 6, 1992). But in *Newman v. Warren*, then-Chancellor Allen held that Delaware law

does not require "that individual directors state (or the corporation state for them) the grounds of their judgment for or against a proposed shareholder action." 684 A.2d 1239, 1246 (Del. Ch. 1996). This reasoning has been followed repeatedly since. *See e.g.*, *Huff Energy Fund, L.P. v. Gershen*, 2016 WL 5462958, at *15 (Del. Ch. Sept. 29, 2016); *In re Williams Cos., Inc. S'holder Litig.*, 2016 WL 197177, at *2 (Del. Ch. Jan. 13, 2016); *Dias v. Purches*, 2012 WL 4503174, at *9 (Del. Ch. Oct. 1, 2012); *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1130 (Del. Ch. 2011). Additionally, in *Huff Energy Fund, L.P. v. Gershen*, this Court held this principle applies equally to an abstention. 2016 WL 5462958, at *15. The 14D-9 expressly states that Cloobeck abstained from the vote on the merger three times. DeFelice Aff. Ex. 1 at 15, 21, 22 (hereinafter, "14D-9"). For example, the 14D-9 states that the "board of directors authorized" the negotiation of the final merger agreement and the "chairman abstained from this vote," with each director later "reconfirm[ing] his or her prior vote (with the chairman again abstaining)." *Id.* In addition, the 14D-9 states: "To the Company's knowledge, the chairman of the board of directors has not yet determined whether to tender or cause to be tendered all of his Shares." *Id.* at 27. Plaintiff does not point to any representation in the 14D-9 that the board approval was unanimous or that Cloobeck approved the merger. Plaintiff has not convinced me that Cloobeck's reasoning for his abstention is

required under the significant weight of twenty-five years of Delaware authority on this point, nor has he explained why I should depart from that Delaware case law.

8. Second, Plaintiff asserts that there is a misleading disclosure regarding Centerview's conflicts of interest. Plaintiff asserts that Centerview is conflicted because it has a history of providing financial services to Apollo. Plaintiff claims, "other than the engagement of Centerview by the board of directors of Apollo portfolio company," Caesars Entertainment Corporation, the 14D-9 did not "identify any of Centerview's other Apollo engagements," such as the relationship with Hexion, Inc. (an Apollo affiliate), "or the compensation Centerview had received or would receive in connection therewith." Compl. ¶ 107. This is untrue. The 14D-9 discloses the relationship with Caesars Entertainment Corporation, and that Centerview

> has been engaged to provide, and is currently providing, financial advisory services to a committee of independent members of the Board of Directors of Caesars Entertainment Corporation, a portfolio company of funds affiliated with the Sponsor, in connection with a merger transaction with Caesars Acquisition Corporation, a portfolio company of the Sponsor, and other matters, and Centerview has received, and may in the future receive, compensation for such services.

14D-9, at 34. Additionally, the 14D-9 discloses that "Centerview has been engaged to provide, and is currently providing, financial advisory services unrelated to the Company or the transaction to a portfolio company of funds affiliated with Apollo

Global Management, LLC (the '**Sponsor**'), and Centerview has received compensation, and may in the future receive, compensation for such services." *Id.* Although the 14D-9 does not specifically disclose the name of the portfolio company as Hexion Inc., it alerts the stockholders as to the conflict.

9. The 14D-9 does not disclose the amount of compensation paid to Centerview by Apollo, which Plaintiff argues is required under the *In re Art Technology Group Inc. Shareholders Litigation* oral ruling. C.A. No. 5955-VCL (Del. Ch. Dec. 20, 2010) (TRANSCRIPT). The facts in *Art Technology* are distinguishable. The entire disclosure there stated, "In the two years prior to the date of its November 1, 2010 fairness opinion, Morgan Stanley has provided financial advisory and financing services for Art Technology Group and Oracle and has received fees in connection with such services." Am. Compl. ¶ 81(a), *Art Technology*, C.A. No. 5955-VCL. The representation only discussed a prior relationship between Oracle and Morgan Stanley and did not disclose Oracle and Morgan Stanley's ongoing relationship. Here, however, the disclosures state that Centerview has provided "and is currently providing" services to Apollo-affiliated entities and has been and will be receiving compensation from Apollo. Additionally, the representation in *Art Technology* did not list the various capacities in which Morgan Stanley had been affiliated with Oracle. Here, in contrast, the representation discusses financial advisory services being provided to "a portfolio company of

funds" affiliated with Apollo. It specifies that Centerview is advising a "committee of independent members of the Board of Directors of Caesars Entertainment Corporation, a portfolio company of funds affiliated with the Sponsor, in connection with a merger transaction with Caesars Acquisition Corporation, a portfolio company of the Sponsor, and other matters . . . ." 14D-9, at 34. The disclosure expressly discusses the relationships Apollo and Centerview have, and the complaint does not allege that there are any undisclosed relationships.

10. Further, in *Art Technology*, the complaint contained specific allegations regarding the breadth and depth of the relationship between Oracle and Morgan Stanley. Specifically, the complaint alleged that the financial advisor's relationship with the acquirer was of a huge magnitude, with numerous dealings worth multiple billions of dollars. Am. Compl. ¶ 81, *Art Technology*, C.A. No. 5955-VCL. Plaintiff has not alleged that the amount of Centerview's compensation would "significantly alter the total mix" of information already provided regarding Centerview's disclosed relationships with Apollo. To the contrary, certain evidence in the documents obtained in Plaintiff's Section 220 request, namely Centerview's Relationship Disclosure Report, suggests the opposite. Huffman Aff. Ex. 3 ("Centerview has received retainer/advisory fees (in amounts immaterial to Centerview relative to its total annual revenue) in connection with certain of these engagements, and in the future may receive retainer, transaction and other fees in

connection with these engagements"). The complaint does not contain any specific allegations of materiality other than that these facts were "plainly material." Compl. ¶ 109. Although prudence would counsel in favor of disclosing the amount of compensation Centerview received from Apollo, the alleged disclosure violation does not prevent the application of *Corwin* in light of the disclosures already provided.

11. The third and final alleged disclosure violation relates to Hope S. Taitz, who served as a Diamond board member from 2013 until the merger's closing in 2016, and her allegedly conflicting relationships with Apollo. The complaint alleges that the 14D-9 did not disclose "(a) how many directorships affiliated with Apollo Taitz has held, (b) the duration of her service in those directorships, or (c) the amount of compensation she received from Apollo for her Apollo-affiliated board service." Compl. ¶ 110. The 14D-9 provides that during a March 17, 2016 meeting of the Strategic Review Committee, they discussed each member's independence, and "it was noted that Ms. Taitz served on the boards of entities owned by certain investment funds managed by affiliates of Apollo Global Management, LLC (as described in the Company's proxy statement)." 14D-9, at 17. The proxy statement, incorporated by reference into the complaint, specifically lists the twelve Apollo-related entities on which Ms. Taitz serves as director. DeFelice Aff. Ex. 2, at 19 (listing MidCap FinCo Holdings Limited, MidCap Finco Limited, MidCap Funding

I (Ireland) Limited, MidCap FinCo Intermediate Holdings Ltd, Apollo Residential Mortgage, Inc., Athene USA Corporation, Athene Annuity and Life Company, Athene Life Insurance Company of New York, Athene Annuity and Life Assurance Company of New York, Athene Annuity & Life Assurance Company, Athene Life Re Ltd., and Athene Holding Ltd.). The 14D-9 goes on to state that around June 23, 2016:

> In anticipation of receipt of final bids, the strategic review committee revisited issues of independence. Although the strategic review committee, in consultation with counsel, determined that each member remained independent, Ms. Taitz decided to recuse herself from any strategic review committee meetings at which the strategic review committee would deliberate on its recommendation to the board of directors in light of her position as a director on the boards of entities affiliated with Apollo.

14D-9, at 20. Plaintiff does not convince me that additional information regarding Taitz's length of service or compensation from these various entities would "significantly alter the total mix" of information available to stockholders regarding Taitz's already-disclosed potential conflicts.

12. Plaintiff does not allege that the tender offer was otherwise coerced, and as I have found that the stockholders were fully informed when they tendered their shares, the business judgment rule applies. *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 749-50 (Del. Ch. 2016). In order to challenge the transaction, Plaintiff must allege waste. The complaint does not plead a claim for waste; therefore, the

complaint fails to state a claim for breach of fiduciary duty against the board members. Because I find that the complaint fails to state a claim, I need not address Defendants' laches arguments or Rule 12(b)(6) arguments. Thus, the Director Defendants' and Cloobeck's motions to dismiss are granted.

13. Plaintiff also asserts an aiding and abetting claim against Centerview. "Delaware has provided advisors with a high degree of insulation from liability by employing a defendant-friendly standard that requires plaintiffs to prove scienter and awards advisors an effective immunity from due-care liability." *Singh v. Attenborough*, 137 A.3d 151, 152 (Del. 2016). An advisor, however "is not absolved from liability simply because its clients' actions were taken in good-faith reliance on misleading and incomplete advice tainted by the advisor's own knowing disloyalty." *Id.* "To state a valid aiding and abetting claim, Plaintiffs must allege '(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, ... (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach.'" *Volcano*, 143 A.3d at 750 (citing *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001)). "An aiding and abetting claim, however, 'may be summarily dismissed based upon the failure of the breach of fiduciary duty claims against the director defendants.'" *Id.* (quoting *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 1003 (Del. Ch. 2014)). Here, because Plaintiff fails to state a claim for breach of fiduciary duty against the Director

Defendants, and because Plaintiff has failed to plead facts necessary to overcome the "high burden" from which "a court could reasonably infer that a financial advisor acted with the requisite scienter," the claim for aiding and abetting that breach also fails against Centerview, and Centerview's motion is also granted. *Id.*

14. For the foregoing reasons, I find that the disinterested stockholders of Diamond were fully informed and uncoerced when they overwhelmingly accepted the tender offer. Therefore, as outlined in *Corwin* and *Volcano*, the business judgment rule applies. Because Plaintiff has not alleged waste, the Defendants' motions to dismiss are granted, and all claims are dismissed.

/s/Tamika Montgomery-Reeves
Vice Chancellor
July 13, 2017