



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

DHRUV KHANNA, PATRICK SAMS, and  
SYBIL MEISEL, derivatively, and on behalf of  
all those similarly situated,

Plaintiff,

v.

CHARLES MCMINN, DANIEL LYNCH,  
FRANK MARSHALL, RICH SHAPERO,  
ROBERT HAWK, ROBERT E. KNOWLING,  
JR., DEBRA DUNN, HELLENE RUNTAGH,  
LARRY IRVING, CHARLES HOFFMAN, L.  
DALE CRANDALL, RICHARD A. JALKUT,  
and CROSSPOINT VENTURE PARTNERS,  
L.P.,

Defendants,

and

COVAD COMMUNICATIONS GROUP, INC.,  
a Delaware corporation,

Nominal Defendant.

Civil Action No.: 20545-NC

Public Version

**REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANT CROSSPOINT  
VENTURE PARTNERS, L.P.'S MOTION TO DISMISS PLAINTIFFS'  
AMENDED DERIVATIVE AND CLASS ACTION COMPLAINT**

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### PRELIMINARY STATEMENT

Crosspoint Venture Partners showed in its opening brief ("Crosspoint Mem.") that the amended complaint ("AC") suffers from four fundamental pleading deficiencies. First, plaintiffs have not pleaded any basis for relief from the statute of limitations. Second, plaintiffs have not pleaded that Crosspoint, a minority investor, was a controlling shareholder of Covad or otherwise owed a fiduciary duty to the company. Third, plaintiffs have not pleaded an underlying breach of fiduciary duty by Covad's directors. Finally, plaintiffs have not pleaded that Crosspoint affirmatively or knowingly participated in any of the alleged breaches of duty by Covad's directors.

In their answering brief ("Pl. Mem."), plaintiffs generally do not dispute the legal principles set forth in Crosspoint's opening papers. Plaintiffs also concede that Crosspoint, a minority investor in Covad, was not a "controlling shareholder" of Covad and therefore did not become a fiduciary of Covad by virtue of its stock ownership. Rather, plaintiffs argue that Crosspoint should be liable for the actions of Covad's board because Crosspoint supposedly "controlled" a majority of Covad's directors, notwithstanding the fact that most of those directors were unaffiliated with Crosspoint.

The facts pleaded by plaintiffs in support of their allegations of "control" are scant, conclusory, and inadequate. Plaintiffs simply have not set forth facts that would give Crosspoint a fiduciary duty to Covad or that would allow Crosspoint to be held liable for the conduct of Covad's directors. Plaintiffs' theory that Crosspoint controlled the Covad board is nothing more than speculation based on allegations of remote, attenuated connections between Crosspoint and some of Covad's directors. As a matter of law, plaintiffs' allegations are insufficient to state a legally cognizable claim of "control." Nor have plaintiffs pleaded facts that would excuse plaintiffs' failure to assert their claims before the expiration of the limitations period.

Crosspoint respectfully submits this reply brief in support of its motion to dismiss the claims asserted against it. As shown below, plaintiffs have not stated a cause of action against Crosspoint. These claims should be dismissed.

### **ARGUMENT**

#### **I. PLAINTIFFS HAVE NOT PLEADED ANY BASIS FOR RELIEF FROM THE STATUTE OF LIMITATIONS**

Defendants' opening papers demonstrated that a three-year statute of limitations bars plaintiffs' claims based on Crosspoint's 1999 investment in Certive (Count II), Covad's 1999 investment in Certive (Counts VI-VII) (together, the "Certive Claims"), and the BlueStar Merger (Counts VI-VII). *See* Crosspoint Mem. at 8, 12-13; Individual Defendants' Memorandum ("Ind. Def. Mem.") at 8-13, 25-27. In response, plaintiffs argue for tolling of the statute of limitations. Plaintiffs' arguments run afoul of both Delaware law and their own allegations.

##### **A. Plaintiffs' Certive Claims Are Time-Barred**

Plaintiffs contend that Crosspoint usurped a corporate opportunity from Covad in 1999 by investing in Certive's Series A financing (the "corporate opportunity claim"). AC ¶¶ 47-55, 149-157. Plaintiffs also argue that Crosspoint should be secondarily liable for Mr. Shapero's and Mr. Hawk's alleged fiduciary breaches in connection with Covad's October 1999 investment in Certive (the "Certive Transaction"). *Id.* ¶¶ 47-55, 177-190.

A three-year statute of limitations applies to claims for breach of fiduciary duty. *In re Dean Witter P'ship Litig.*, C.A. No. 14816, 1998 WL 442456, at \*4 (Del. Ch. July 17, 1998). The statute of limitations for breach of fiduciary claims begins to run at the time of the alleged wrongful act, even if plaintiffs are ignorant of the cause of action. *See* Crosspoint Mem. at 8 (citing *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, C.A. No. 19875, 2004 WL 405913, at \*5 (Del. Ch. Mar. 2, 2004)). The limitations period thus began to run in 1999 and expired in 2002. Plaintiff Khanna did not file the original complaint in

this action until September 15, 2003; plaintiffs Sams and Meisel did not assert their claims until August 2004. *See* Crosspoint Mem. at 8, 12-13. Thus, it appears on the face of the amended complaint that plaintiffs' claims are time-barred. *See id.*

In the answering brief, plaintiffs acknowledge that they did not assert the Certive Claims until more than three years after the alleged breach.<sup>1</sup> However, plaintiffs contend the limitations period was tolled until May 2004, when Covad produced documents in the § 220 action. *See* Pl. Mem. at 16-18. Plaintiffs also contend Crosspoint is not entitled to dismissal based on the statute of limitations because "laches is a fact-based defense [that] cannot be decided on a motion to dismiss." *Id.* at 16. Plaintiffs are wrong on both points.

#### 1. The Statute Of Limitations Was Not Tolled.

Under Delaware law, "tolling [of the statute of limitations] is only applicable in very limited circumstances, and the plaintiffs have the burden of pleading specific facts to prove that tolling is warranted." *Wal-Mart*, 2004 WL 405913, at \*6. Plaintiffs' answering brief urges that the statute of limitations on the Certive Claims was tolled until Covad "produced [documents] in May 2004 pursuant to the Court's § 220 order." Pl. Mem. at 17. Plaintiffs argue that prior to that time, they (i) "could not have known that Crosspoint participated in the founding of Certive;" and (ii) "had no way to know what Crosspoint's or its designees' actions were on the [Certive] [T]ransaction." *Id.* at 17, 22. Plaintiffs' own allegations, however, contradict their arguments that they could not have known of Crosspoint's role in connection with Certive.

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<sup>1</sup> *See* Pl. Mem. at 2 ("the [alleged] usurpation occurred in 1999"), 8 ("the Board on October 11, 1999 approved Covad's investment in Certive"), and 4 ("Khanna brought this action on September 15, 2003").

a. **Khanna**

Plaintiff Khanna contends he was not on notice of Crosspoint's investment in Certive before Covad produced documents following the Section 220 proceeding in May 2004. However, Khanna's original complaint filed in September 2003 alleged that Certive was a "business opportunity for Covad" and that Crosspoint "made a substantial equity investment in Certive." Affidavit of Alan J. Stone ("Stone Aff."), Ex C at ¶¶ 41-43. Long before Covad's May 2004 document production, therefore, Khanna knew enough to lead him to plead the facts upon which he now bases his claim. The May 2004 document production could not have put him on notice of facts he already had pleaded.

Khanna also contends he was unaware until May 2004 of the actions of Crosspoint and its "designees" in connection with the Certive Transaction.<sup>2</sup> Pl. Mem. at 22. However, Khanna's original complaint in 2003 alleged that Crosspoint should be liable for Mr. Shapero's and Mr. Hawk's actions in connection with the Certive Transaction. Stone Aff., Ex. C at ¶¶ 139-152. Again, Khanna was on notice of these claims before May 2004.

The allegations of Khanna's amended complaint also show that he was on notice in 1999 that Shapero, Hawk, Crosspoint, and Covad had an interest in Certive and that Certive was (allegedly) a corporate opportunity for Covad. See AC ¶¶ 52-53, 111. The amended complaint states that "[d]uring the second half of 1999, plaintiff Khanna objected to the improper founding of Certive by McMinn as a corporate opportunity for Covad" and that in September 1999, "[w]hen McMinn's (and Shapero's, Hawk's, and Crosspoint's) desire to have Covad make an investment in [Certive] was finally made

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<sup>2</sup> Plaintiffs now assert that Hawk was a Crosspoint "designee" on the Covad board. Pl. Mem. at 1, 24. This allegation does not appear in the complaint, and is not accurate. See *infra* at 16.

known to Khanna, Khanna voiced his opposition to the deal, and raised with defendant Knowing . . . the issue of Certive being a possible corporate opportunity for Covad.” *Id.* ¶¶ 111, 52. Indeed, the complaint brags of Khanna’s “vigilance” during 1999. *Id.* ¶ 53. Plaintiffs cannot reconcile these allegations with their current contention that Khanna was “kept in the dark” about the facts with respect to Certive.

**b. Sams and Meisel**

Plaintiffs’ contention that Sams and Meisel could not have known about the Certive Claims is also unavailing. By November 2000, Covad had publicly disclosed that (i) McMinn founded Certive in 1999; and (ii) McMinn was Certive’s CEO and director. *See* Pl. Mem. at 17. By that time, Covad had also disclosed that it was “a minority investor” in Certive. *See* Stone Aff., Ex. A at 72. These are the principal facts underlying plaintiffs’ Certive Claims. AC ¶¶ 8, 47, 49, 50-55. Sams and Meisel thus were on inquiry notice of their claims in November 2000, and the statute started to run. *See Dean Witter*, 1998 WL 442456, at \*6 (statute of limitations “is tolled *only until* the plaintiff discovers (or exercising reasonable diligence should have discovered) his injury”). The limitations period therefore would have expired in November 2003 – almost eight months before plaintiffs filed the amended complaint.<sup>3</sup>

In the answering brief, plaintiffs Sams and Meisel argue that even if Covad’s public disclosures could have put them on inquiry notice of their claims against McMinn, Covad’s disclosures could not have put them on inquiry notice of their claims against Crosspoint because “Crosspoint’s investment in Certive [was] not disclosed in *any* Covad filing.” *See* Pl. Mem. at 17. Plaintiffs are wrong. In Delaware, plaintiffs are deemed to

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<sup>3</sup> Crosspoint showed in the opening brief that the “relation back” doctrine does not apply to plaintiffs Sams and Meisel because Khanna’s original complaint was untimely filed. *See* Crosspoint Mem. at 8. Plaintiffs’ answering brief does not address this issue.

be on inquiry notice of their claims when they should have been aware of facts “which, if pursued, would lead to the discovery of the injury.” *Dean Witter*, 1998 WL 442456, at \*7 (emphasis added); see also *Official Committee of Unsecured Creditors of Integrated Health Servs., Inc v. Elkins*, C.A. No. 20228, 2004 WL 1949290, at \*8 (Del. Ch. Aug. 24, 2004)(while plaintiffs’ claim was focused on board’s “process” for approving CEO’s bonus, corporation’s disclosure of fact that bonus was approved was sufficient to put plaintiffs on inquiry notice of claim). Here, by November 2000 Sams and Meisel were at the very least on inquiry notice of the corporate opportunity claim against McMinn and the fiduciary duty claims against Covad’s directors (including Shapero and Hawk) concerning the Certive Transaction. Had plaintiffs pursued those claims at that time, they would have discovered Crosspoint’s investment in Certive through the discovery process or a § 220 inspection, long before the limitations period expired. Instead, plaintiffs sat on their rights for over three years and now seek refuge from the statute of limitations. Plaintiffs should not be allowed to benefit from their own failure to pursue claims of which they were on notice. See *Fike v. Ruger*, 754 A.2d 254, 262 (Del. Ch. 1999) (“Equity aids the vigilant, not those who slumber on their rights”), *aff’d*, 752 A.2d 112 (Del. 2000) (quoting *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982)).

Plaintiffs’ reliance on *Goldman v. Pogo.com, Inc.*, C.A. No. 18532, 2002 WL 1358760 (Del. Ch. June 14, 2002) is misplaced. In *Goldman*, the court found that where plaintiffs allege that several related transactions “taken together” constitute a breach of fiduciary duty, “the disclosure of one component of the transaction cannot necessarily operate to put the stockholders on notice of a claim that the entire transaction constituted a breach of duty.” *Id.* at \*2 (citation omitted). *Goldman* does not apply here. Plaintiffs have not alleged that McMinn’s founding of Certive, Crosspoint’s investment in Certive, and the Certive Transaction “taken together” were one breach of fiduciary duty. Rather,

plaintiffs allege that *each* of these transactions, in and of itself, was a separate breach of fiduciary duty.<sup>4</sup> Sams and Meisel clearly were on inquiry notice of facts underlying most of their Certive Claims in November 2000. Had they pursued those claims with reasonable diligence, they would have discovered the facts underlying all the Certive Claims. *Cf. Ellins*, 2004 WL 1949290, at \*8.

Plaintiffs' reliance on *Gelfman v. Weeden Investors, L.P.*, 859 A.2d 89 (Del. Ch. 2004) is equally unavailing. In that case, there was no indication that the statute of limitations had run. *See id.* at 117. Instead, the court suggested, in dicta, that the defendant partnership's disclosure of conduct which did not implicate a possible breach of fiduciary duty (distribution of new partnership units to employees) would not have put plaintiffs on notice of conduct which did constitute a breach of fiduciary duty (distribution of new partnership units to outside directors of the general partner). Here, by contrast, plaintiffs allege that the conduct that was disclosed (McMinn's founding of Certive and Covad's investment in Certive) did indicate a breach of fiduciary duty. Thus, *Gelfman* is inapposite. In sum, plaintiffs' Certive Claims are time-barred.

## 2. Plaintiffs' "Laches" Argument Is Unavailing.

Plaintiffs' argument that the Certive Claims are not barred because "laches . . . cannot be decided on a motion to dismiss," Pl. Mem. at 6, simply misses the point. Defendants argue for the equitable application of the statute of limitations, which as this Court is well aware, is a separate defense from laches (acquiescence). *See Goldman*, 2002 WL 1358760, at \*2 n.16 (recognizing statute of limitations and laches as separate

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<sup>4</sup> *See* AC ¶ 156 ("McMinn did not offer the opportunity to found Certive to Covad, nor did McMinn, Crosspoint and Shapero offer the opportunity to invest in Series A shares to Covad"); ¶ 160 ("The Defendant Directors who were on the Board at the time and approved the Certive Transaction breached their duties of loyalty to Covad stockholders by agreeing to invest in Certive").

and distinct defenses).<sup>5</sup> While courts may grant dismissal at the pleading stage on either ground or both, “[t]here is clear legal precedent in Delaware for granting a motion to dismiss on the ground that a plaintiff’s claims are barred by operation of the statute of limitations.” *Dean Witter*, 1998 WL 442456, at \*3.<sup>6</sup> Indeed, this Court recently confirmed that a statute of limitations defense “may be raised in a motion to dismiss if the complaint alleges facts showing that the complaint was in fact filed too late.” *Elkins*, 2004 WL 1949290, at \*8 n.25. That is the case here.

**B. Plaintiffs’ Claim Based On The BlueStar Merger Is Time-Barred**

Defendants’ opening briefs demonstrated that the statute of limitations on plaintiffs’ fiduciary duty claim based on the BlueStar Merger (Counts VI-VII)<sup>7</sup> began to run on June 16, 2000, when Covad entered into the merger agreement with BlueStar. *See* Crosspoint Mem. at 13; Ind. Def. Mem. at 25-27 (citing *In re Marvel Entm’t Group, Inc. v. MAFCO Holdings, Inc.*, 273 B.R. 58, 73 (D. Del. 2002) (“the limitations period begins to run when the contract is formed”). As a result, the three-year limitations period on plaintiffs’ claim expired in June 2003. Khanna did not file the original complaint until

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<sup>5</sup> Plaintiffs’ cases thus are inapposite. *Tafeen v. Homestore, Inc.*, C.A. No. 23-N, 2004 WL 556733 (Del. Ch. Mar. 22, 2004), *Erickson v. Centennial Beauregard Cellular, LLC*, C.A. No. 19974, 2003 WL 1878583 (Del. Ch. Apr. 11, 2003), and *Clark v. Packem Assocs.*, C.A. No. 1326, 1991 WL 36470 (Del. Ch. Mar. 6, 1991) addressed whether defendants sufficiently showed acquiescence to prevail on a laches defense at summary judgment; the statute of limitations had not run in those cases.

<sup>6</sup> *See also Wal-Mart*, 2004 WL 405913, at \*5 (motion to dismiss granted; “the applicable statute of limitations bars all of Wal-Mart’s claims”); *In re USACAFES, L.P. Litig.*, C.A. No. 11146, 1993 WL 18769, at \*5-6 (Del. Ch. Jan. 21, 1993) (denying plaintiffs’ motion to amend; proposed claims were barred by the statute of limitations and, thus, would not survive a motion to dismiss).

<sup>7</sup> Contrary to plaintiffs’ answering brief (Pl. Mem. at 25), Crosspoint requested dismissal on statute of limitations grounds for the BlueStar Merger claim – not the BlueStar *Earn-Out* claim. *See* Crosspoint Mem. at 13.

September 15, 2003, and Sams and Meisel did not assert their claim until August 2004. *See supra* at 2-13. Thus, plaintiffs' claim is time-barred and must be dismissed.

Plaintiffs contend that the limitations period did not start to run until September 22, 2000, when the BlueStar Merger was consummated. For support, plaintiffs (Pl. Mem. at 24) point to *Dofflemyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372 (D. Del. 1983) and *Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982), but the individual defendants have demonstrated that those decisions do not apply here. *See* Ind. Def. Mem. at 27 n.12; Individual Defendants' reply brief ("Ind. Def. Reply") at 8-9. In those cases, the mergers in question could not have been completed without approval by the shareholders of the corporation whose board action was being challenged. *See Dofflemyer*, 558 F. Supp. at 375-76; *Kaufman*, 447 A.2d at 764. Consequently, the transactions were not complete for those shareholders – and the statute of limitations on their claims did not begin to run – until they voted to approve the merger. *See id.*

Here, plaintiffs challenge the actions of the Covad board. There was no requirement that the BlueStar Merger be approved by *Covad's* shareholders. *See* Ind. Def. Reply Mem. at 8-9. Instead, the role of Covad's shareholders in the transaction was complete on June 16, 2000, when the Company entered into the merger agreement and its contractual obligations were fixed. *See id.* Thus, *Dofflemyer* and *Kaufman* are inapposite. The statute of limitations began to run in June 2000 and expired in June 2003. *See, e.g., Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993).

## **II. PLAINTIFFS HAVE NOT PLEADED THAT CROSSPOINT WAS A FIDUCIARY OR CONTROLLING SHAREHOLDER AT ANY TIME**

Crosspoint's opening brief explained that plaintiffs cannot state a claim against Crosspoint for usurping a corporate opportunity (Count II) or for respondeat superior liability (Count VII) unless Crosspoint was a fiduciary of Covad. *See* Crosspoint Mem. at 8-11, 15-17. As a Covad stockholder, Crosspoint "could attain fiduciary status only if

it were a majority shareholder or it if [sic] actually controlled the affairs of [Covad].” *Emerson Radio Corp. v. Int’l Jensen Inc.*, C.A. Nos. 15130, 14992, 1996 WL 483086, at \*20 (Del. Ch. Aug. 20, 1996).

In the answering brief, plaintiffs concede that Crosspoint’s stock holdings did not make it a “majority” or “controlling” shareholder of Covad.<sup>8</sup> See Pl. Mem. at 19 (“Plaintiffs . . . certainly never contended that the number of shares Crosspoint owned . . . conferred a fiduciary status on Crosspoint”). Plaintiffs nonetheless assert that Crosspoint was a Covad fiduciary, arguing that Crosspoint “controlled” a majority of directors on Covad’s board. Pl. Mem. at 19-21. Specifically, plaintiffs contend that Crosspoint controlled directors Lynch, Marshall, Knowling, Hawk, McMinn, and Shapero (but not Kressel, Landy, Dunn, Runtagh or Irving) during their tenure on the Covad board. See *id.* at 19-21, 23-24, 26-27. The amended complaint fails to plead facts sufficient to support plaintiffs’ conclusory (and totally specious) allegations of control.

Covad’s board of directors was comprised of seven or eight members at the time of each challenged transaction. See Covad motion to dismiss (“Covad Mem.”) at 39, 41, 44, 45.<sup>9</sup> Thus, to sufficiently allege that Crosspoint “controlled” the board at any given time, plaintiffs must plead facts showing that Crosspoint “controlled” a majority, *i.e.*, at

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<sup>8</sup> Indeed, plaintiffs concede that Crosspoint did not hold *any* Covad shares at the time of the challenged BlueStar Merger. Compare AC ¶ 178 (“Very shortly after Covad’s shares began to trade publicly in 1999, Crosspoint . . . disposed of the Covad shares it held”) with ¶ 58 (“On June 16, 2000, Covad announced it had entered into a definitive merger agreement with BlueStar”).

<sup>9</sup> At the time of the Certive Transaction, Covad board had eight members (Kressel, Landy, Lynch, Marshall, Knowling, Hawk, McMinn, and Shapero). See *Stone Aff.*, Ex. F. There were eight directors on the board at the time of the BlueStar Merger (Dunn, Runtagh, Irving, Lynch, Marshall, Knowling, Hawk, and Shapero). See Plaintiff’s answering brief to Individual Defendant’s motion to dismiss (“Pl. Ans. to Ind. Def.”) at 38. At the time of the BlueStar Earn-Out, the board was comprised of seven directors (Runtagh, Irving, Lynch, Marshall, Hawk, McMinn, and Shapero). *Id.* at 41.

least four of Covad's directors. Plaintiffs have not done so. Indeed, even assuming *arguendo* that Crosspoint controlled Mr. Shapero, a Crosspoint General Partner, plaintiffs fail to plead facts showing that Crosspoint "controlled" any other Covad director, much less a majority of the board. Crosspoint Mem. at 10-11; *see* Ind. Def. Mem. at 21-23.

#### A. Lynch

Plaintiffs assert that Crosspoint controlled director Lynch because some time after Covad's investment in Certive, Lynch joined Certive's advisory board, he received Certive stock or other compensation for his services as an advisory board member, and he supposedly was beholden to Crosspoint for his position on the advisory board. Pl. Mem. at 9, 13, 21. These assertions fall far short of facts that would show Crosspoint's control over Lynch's actions as a Covad director. First, Crosspoint was merely an investor in Certive. Plaintiffs do not allege, even in conclusory fashion, facts showing that Crosspoint controlled the composition of Certive's advisory board. Second, plaintiffs have pleaded no facts showing that Lynch's non-employee position on the Certive advisory board put him under the "control" of Certive, much less Crosspoint. The mere receipt of advisory board fees does not establish that Certive controlled Lynch; rather, plaintiffs must plead facts showing that the fees were "material in relation to the outside income of [the] directors." *Merchants Nat'l Properties, Inc. v. Meyerson*, C.A. No. 13139, 2000 WL 1041229, at \*6 (Del. Ch. July 24, 2000) (granting motion for summary judgment).<sup>10</sup> Plaintiffs fail to plead such facts. Indeed, the amended complaint suggests the advisory board fees were immaterial to Lynch's income. *See* AC ¶ 9 (stressing

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<sup>10</sup> *See also Grobow v. Perot*, 539 A.2d 180, 188 (Del. 1988) (rejecting as insufficient plaintiffs' allegation that "all GM's directors are paid for their services as directors;" finding "such allegations, without more, do not establish any financial interest"), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

Lynch's Los Altos Hills home and Napa Valley winery). Finally, even if plaintiffs had set forth facts indicating that Certive "controlled" Lynch's actions as a Certive advisory board member, plaintiffs still offer no facts showing that this allowed Certive – let alone *Crosspoint* – to control Lynch's actions as a *Covad* director. Thus, plaintiffs have not pleaded facts showing that *Crosspoint* controlled Lynch's actions on the *Covad* board.

**B. Marshall**

Plaintiffs' allegation that *Crosspoint* controlled Marshall because he, like Lynch, was appointed to Certive's advisory board fails for the same reasons set forth above.

Plaintiffs also allege that Marshall was associated with another venture capital fund that "coinvested with *Crosspoint* on at least one occasion." Pl. Mem. at 20. This allegation also fails as a matter of law. Under Delaware law, directors do not lack independence simply by virtue of "outside business relationships" with an interested person. *See Elkins*, 2004 WL 1949290, at \*10 ("outside business relationships, without more . . . [are] insufficient to raise a reasonable doubt of a director's ability to exercise independent business judgment") (citation omitted); *Litt v. Wycoff*, C.A. No. 19083, 2003 WL 1794724, at \*4 (Del. Ch. Mar. 28, 2002). Nor are these particular allegations sufficient to show "control." Venture capital firms routinely "co-invest" with unrelated entities. This is their normal, routine business; it does not imply control over the co-investors. Plaintiffs do not plead anything about *Crosspoint*'s and Marshall's alleged "co-investments" that would support an inference that *Crosspoint* controlled Marshall. *See, e.g., Litt*, 2003 WL 1794724, at \*5 (mere allegation that corporation did business with director's family members did not support inference that director was controlled by corporation's CEO).

Plaintiffs also speculate that Marshall must have been controlled by *Crosspoint* because he approved the BlueStar Earn-Out

Pl. Mem. at 21 n.7. Not so. As explained in the individual defendants' papers, the question of how to resolve Covad's disputes with the BlueStar shareholders was a different question from whether or not in hindsight the merger was a good idea. Ind. Def. Reply at 17-19. Moreover, plaintiffs elsewhere contradict their own conjecture with inconsistent allegations that Marshall did not even participate in the negotiation or approval of the Earn-Out because the settlement decisions were delegated to Lynch. Pl. Mem. at 26-27; AC ¶ 74.

### C. Knowling

Plaintiffs contend that director Knowling "cannot be considered independent of Crosspoint's control because his salary as Covad's CEO was dependent on remaining on favorable terms with Shapero, one of two members of the Covad Board's Compensation Committee, and Marshall, an alternate member of the Compensation Committee." Pl. Mem. at 21. This argument fails for several reasons.

Plaintiffs admit that Shapero, one of two members of the compensation committee, could not have single-handedly affected (much less controlled) Knowling's compensation, but plaintiffs suggest that Shapero could have deadlocked the committee on the issue of Knowling's compensation. Pl. Mem. at 23 n.8. However, plaintiffs plead no facts showing how a deadlock would have been broken, or how Shapero could have used a deadlock to control Knowling's compensation. Thus, plaintiffs have failed to allege facts showing that Shapero could have used his position on the compensation committee to "control" Knowling. Plaintiffs point out that Marshall was an alternate compensation committee member, but as discussed above, plaintiffs have failed to plead facts showing that Crosspoint had the ability to control Marshall. Thus, plaintiffs have failed to plead facts showing that Crosspoint could have controlled Knowling through the compensation committee, much less that it actually exercised such control.

Plaintiffs' reliance on *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 970 (Del. Ch. 2003), *aff'd*, 845 A.2d 1040 (Del. 2004) is inapposite. In *Beam*, the court found that the chief operating officer of Martha Stewart Living Omnimedia, Inc. ("MSO") was beholden to Martha Stewart for her continued employment. The court explained:

Because [Martha] Stewart is the company's chairman and chief executive, controls over 94% of the shareholder vote, and is the "personification of MSO's brands as well as its senior executive and primary creative force," Stewart certainly has the ability to affect [the chief operating officer's] employment and compensation at MSO.

*Id.* at 978. Here, plaintiffs cannot seriously contend that Shapero's membership on Covad's compensation committee allowed him to exert the same type of influence over Knowling that Martha Stewart was capable of exerting over the executives at MSO. To the contrary, *Beam* actually highlights the inadequacy of plaintiffs' allegations concerning Shapero's alleged control of Knowling – unlike Martha Stewart, Shapero was not a majority shareholder of Covad, he was not an executive of the Company, and he could not have unilaterally affected Knowling's employment or compensation.

Plaintiffs also contend that Crosspoint must have controlled Knowling because Crosspoint and Shapero had an interest in BlueStar, and Knowling voted to approve the BlueStar Merger. *See* Pl. Mem. at 21 n.7. This is circular reasoning. Essentially, plaintiffs are asking this Court to conclude that Crosspoint controlled Knowling's approval of the BlueStar Merger *because* Knowling approved the BlueStar Merger. Not surprisingly, Delaware courts have rejected this type of reasoning. *See, e.g., Elkins*, 2004 WL 1949290, at \*10 ("Our cases have determined that . . . *approving of or acquiescing*

*in the challenged transactions, without more, [is] insufficient to raise a reasonable doubt of a director's ability to exercise independent business judgment")* (citation omitted).<sup>11</sup>

#### **D. Hawk**

Plaintiffs argue that Crosspoint controlled director Hawk simply by alleging that Hawk was a "Special Limited Partner" of Crosspoint. Pl. Mem. at 5. Plaintiffs, however, fail to plead any facts indicating that Hawk's role as a "Special Limited Partner" held any particular significance, much less that it put him under Crosspoint's control. Plaintiffs do not allege that Hawk was an employee of Crosspoint or that he depended on Crosspoint for salary or other compensation. Plaintiffs do not allege facts (as opposed to conclusory assertions) indicating that Hawk was an agent of Crosspoint. Plaintiffs offer no specific allegations of Hawk's supposed financial interest in Crosspoint. Plaintiffs do not allege that Hawk personally participated in Crosspoint's business, nor can such participation be inferred from the title of "Special Limited Partner." *See 6 Del. C. § 17-303* (2004) (a limited partner need not be an employee or agent of the limited partnership, and is not required to participate in control of the business). Indeed, limited partners often have no personal role in a partnership's business. *See, e.g., Harper v. Delaware Valley Broadcasters, Inc.*, 743 F. Supp. 1076, 1089 (D. Del. 1990) ("Inability to control the business of the Partnership combined with limited liability for the obligations incurred in the business of the Partnership are precisely the attributes of a limited partner"), *aff'd*, 932 F.2d 959 (3d Cir. 1991). Simply put, there are no allegations showing that Crosspoint exercised control over Hawk. Plaintiffs' reliance on Hawk's mere title of

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<sup>11</sup> Plaintiffs also allege that Knowling was "controlled" by Crosspoint because he was "a very close friend of Hawk." Pl. Ans. to Ind. Def at 7. However, mere personal friendships, without more, do not raise a reasonable doubt of a director's ability to exercise independent business judgment. *See, e.g., Elkins*, 2004 WL 1949290, at \*10. In addition, Crosspoint did not control Hawk. *See infra*.

“Special Limited Partner” is not enough to support an assumption that Hawk was “controlled” by Crosspoint. *See Elkins*, 2004 WL 1949290, at \*10 (“a plaintiff must allege some facts showing a director is *beholden* to an interested director in order to show a lack of independence”).

Plaintiffs’ answering brief also asserts that Hawk was one of Crosspoint’s “designees” on the Covad board. Pl. Mem. at 1, 24. This allegation appears nowhere in the amended complaint and could not be added in good faith. *See* AC ¶ 12. The amended complaint lacks any allegations that would even suggest Hawk was a Crosspoint designee. The Court should refuse to consider this new, unsupported allegation. *See, e.g., Bergstein v. Texas Int’l Co.*, 453 A.2d 467, 473 (Del. Ch. 1982) (“[o]n a motion to dismiss, only the allegations in the complaint will be given consideration by the Court”). In any event, the bare allegation that Hawk was a Crosspoint “designee” would not by itself support a reasonable inference of control. *See, e.g., In re The Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 356 (Del. Ch. 1998) (mere fact that a director was “designated” to the board by an allegedly interested person does not raise a reasonable doubt concerning that director’s independence), *aff’d in part and rev’d in part by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

#### **E. McMinn**

Plaintiffs’ contention that Crosspoint controlled director McMinn is even more speculative. Plaintiffs assert that McMinn was interested in pursuing investment opportunities with Crosspoint during the spring of 1999. *See* AC ¶¶ 43-46. Of greater significance is what the amended complaint does *not* allege about this purported relationship between McMinn and Crosspoint: plaintiffs do not allege that McMinn was an agent or employee of Crosspoint; received any salary, compensation, or fees from Crosspoint; or participated in any Crosspoint internal decision-making. Plaintiffs allege

no facts showing that Crosspoint exercised any control over anything McMinn did. Rather, plaintiffs argue Crosspoint's control based on the mere allegation that McMinn was contemplating "pursuing . . . investment opportunities with Crosspoint" a few months before announcing his resignation from the Covad board. *See* AC ¶¶ 8, 43-46.

That McMinn contemplated, or made, an investment with Crosspoint simply does not support a reasonable inference that McMinn was controlled by Crosspoint. Investing is the business of venture capital firms. Such firms routinely invest in start-up companies alongside other unrelated entities. Venture capital firms get investment recommendations and investment opportunities from many different sources. Venture capitalists rely on their network of business contacts to help them find good investment opportunities. That is how the venture capital business works. The fact that a venture capital firm invested or contemplated investing with a particular person, or received an investment recommendation or investment opportunity from a particular person, does *not* provide a reasonable inference of control over that person by the venture capital firm. *See Beam*, 833 A.2d at 970 (on motion to dismiss, "[t]he Court will draw all inferences logically flowing from the amended complaint in favor of the plaintiff but only if such inferences are reasonable"). McMinn may have contemplated investing with Crosspoint, or he may have been part of Crosspoint's network of business contacts, but that is not sufficient to support an inference that Crosspoint controlled him.

\* \* \* \*

In sum, plaintiffs have not sufficiently pleaded facts showing that Crosspoint controlled a majority of Covad's directors. *See* Crosspoint Mem. at 11; *see also Siegnan v. Tri-Star Pictures, Inc.*, C.A. No. 9477, 1989 Del. Ch. LEXIS 56, at \*11 (Del. Ch. May 15, 1989) (fiduciary duty claim dismissed; 9% shareholder "had no power to exercise

actual board control” where “[i]t had only three designees on [the corporation’s] ten person board”).

### **III. PLAINTIFFS HAVE FAILED TO PLEAD AN UNDERLYING BREACH OF FIDUCIARY DUTY**

In the absence of an underlying breach of fiduciary duty by Covad’s directors, plaintiffs cannot state a claim against Crosspoint under secondary liability theories of aiding and abetting (Count VI) or respondeat superior (Count VII). *See* Crosspoint Mem. at 12-15, 17-18. Defendants have shown that plaintiffs have not sufficiently pleaded an underlying breach of fiduciary duty in connection with the Certive Transaction, the BlueStar Merger or the BlueStar Earn-Out because each of those transactions was approved by a majority of Covad’s disinterested and independent directors and is protected by the business judgment rule. *See id.*; Ind. Def. Reply at 9-17.

#### **A. Plaintiffs’ Claim Respecting the Certive Transaction Fails Under the Business Judgment Rule**

Four directors voted on the Certive Transaction: Hawk, Lynch, Marshall, and Knowling. *See* Pl. Mem. at 21. Plaintiffs’ answering brief acknowledges that directors Shapero and McMinn “abstained on the vote” for the Certive Transaction. *See id.* at 22. Indeed, plaintiffs concede that such recusal was Covad’s normal practice in situations of director interest. *See* AC ¶ 80 (“under normal Covad practice, self-interested directors would have left any Board meeting when matters pertaining to their self-interest [we]re discussed and voted upon”).

Only one of the directors who voted on the Certive Transaction is alleged to have had an interest in Certive: Hawk. *See* Pl. Mem. at 22-23. The other three directors – Lynch, Marshall, and Knowling – were disinterested and independent. *See* Ind. Def. Mem. at 19-23; Ind. Def. Reply at 10-12. Thus, because the Certive Transaction was approved “by a majority of disinterested directors,” the fiduciary duty claim based on the

Certive Transaction “fails for lack of a valid premise.” *In re Frederick’s of Hollywood, Inc. S’holders Litig.*, C.A. No. 15944, 2000 WL 130630, at \*7 (Del. Ch. Jan. 31, 2000) (dismissing duty of loyalty claim).

As set forth in the individual defendants’ papers, plaintiffs’ allegations do not come close to the specific facts required to cast doubt on the business judgment of these disinterested and independent directors. *See* Ind. Def. Reply at 12-14. For example, plaintiffs contend the September 22, 1999 board meeting was led by three clearly interested directors (McMinn, Shapero, and Hawk) and lasted “only one hour.” Pl. Ans. to Ind. Def. at 36-37. Elsewhere, however, plaintiffs admit that McMinn did not attend the meeting and that Shapero did not vote on the Certive Transaction. *See id.* Moreover, this Court has recognized that allegations concerning the length of time the board spent considering a particular transaction are “not particularly helpful in evaluating a fiduciary claim.” *Elkins*, 2004 WL 1949290, at \*14. Thus, plaintiffs have not met the high standard for pleading a breach of the duty of “good faith.” *See* Ind. Def. Reply at 12-14.

**B. Plaintiffs’ BlueStar Merger Claims Fail Under The Business Judgment Rule**

Five of Covad’s directors voted on the BlueStar Merger: Runtagh, Dunn, Lynch, Marshall, and Knowling. *See* Pl. Mem. at 26. Plaintiffs concede (as they must) that Shapero and Hawk abstained from voting on this transaction. *See id.*<sup>12</sup>

Plaintiffs do not allege that Runtagh or Dunn had an interest in BlueStar, nor do they challenge the independence of these directors. With respect to Lynch, Marshall, and Knowling, plaintiffs simply recycle the same defective allegations discussed above – *i.e.*, “Lynch served on the Certive Advisory Board at the pleasure of Crosspoint,” “Marshall

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<sup>12</sup> Plaintiffs insist that McMinn was “interested” in the merger, but concede he was not a Covad director when the merger was approved. Pl. Mem. at 12-13.

also served on the Certive Advisory Board and co-invested with Crosspoint,” and Knowling’s compensation “was controlled by Compensation Committee member Shapero.” *Id.* As shown previously, these allegations fail as a matter of law to show that these directors lacked independence. *See supra* at 11-15.

Plaintiffs hope to salvage their BlueStar Merger claim by alleging that Mr. Hawk did not disclose his *personal* interest in BlueStar to the directors who voted on the merger. *See* Pl. Mem. at 25-26. Even if this were true, plaintiffs’ claim still fails. In Delaware, “interested” directors are required to disclose only “[t]he material facts” as to their interest in a particular transaction. 8 *Del. C.* § 144(1) (2004); *see also Rothenberg v. Santa Fe Pac. Corp.*, C.A. No. 11749, 1995 WL 523599, at \*5 (Del. Ch. Sept. 5, 1995) (“the conflicting self-interest must be *material*”). Here, plaintiffs have not alleged any facts from which this Court could reasonably infer that Hawk had any material personal interest in BlueStar. Nor does the amended complaint contain any allegations indicating that any personal interest by Hawk would have been material to Covad’s directors in determining whether to approve the BlueStar Merger. Indeed, since it is undisputed that the 46% interest of Crosspoint funds in BlueStar was disclosed, there is nothing indicating that additional information about Hawk’s personal interest would have significantly altered the total mix of information available to Covad’s directors. Thus, because the BlueStar Merger was approved by a majority of disinterested and independent directors, plaintiffs have not stated an underlying breach of fiduciary duty in connection with that transaction. *See* Ind. Def. Mem. at 15; *see also Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002) (courts respect the business judgment of the board where plaintiff “is unable to plead facts demonstrating that a majority of a board that approved the transaction in dispute was interested and/or lacked independence”).

Again, plaintiffs' attempt to cast doubt on the business judgment of Covad's disinterested and independent directors fails as a matter of law. *See* Ind. Def. Reply at 15-16. As the individual defendants have shown, plaintiffs have come nowhere close to pleading the specific facts required to show these directors "consciously and intentionally disregarded their responsibilities." *Id.* at 16. To the contrary, plaintiffs' allegations demonstrate that the directors took adequate steps to inform themselves about the merits of the BlueStar Merger before voting to approve it. *See id.* at 15-16.

**C. The Business Judgment Rule Defeats the BlueStar Earn-Out Claims**

As shown in defendants' opening papers, four directors approved the BlueStar Earn-Out: Runtagh, Irving, Lynch, and Marshall. *See* Ind. Def. Mem. at 32-34. Plaintiffs concede that Messrs. Shapero, Hawk, and McMinn abstained from voting on this transaction. *See* Pl. Mem. at 26.

Plaintiffs do not allege that Runtagh and Irving had an interest in BlueStar, nor do they challenge the independence of these directors. *See id.* Plaintiffs' allegation that Marshall lacked independence fails for the reasons set forth above. *See supra* at 12-13.

Now, plaintiffs' answering brief contends that the BlueStar Earn-Out was negotiated and approved by "Lynch and Lynch alone." Pl. Mem. at 26.<sup>13</sup> Even if this were true, plaintiffs' claim still fails. The amended complaint is devoid of allegations showing that Lynch had an interest in the BlueStar Earn-Out. As discussed above, plaintiffs' allegation challenging Lynch's independence based on his Certive advisory board position is insufficient as a matter of law. *See, e.g., Grobow*, 539 A.2d at 188 (receipt of director fees, alone, is insufficient to show a lack of director independence).

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<sup>13</sup> Again, the Court should refuse to consider this new allegation which does not appear in the amended complaint. *See Bergstein*, 453 A.2d at 473.

In addition, neither plaintiffs' amended complaint nor their answering brief offers any factual allegations that would overcome the protections of the business judgment rule, whether with respect to the approving directors (Lynch, Marshall, Runtagh, Irving) or as to Lynch acting alone. *See* Ind. Def. Reply at 17-19. Accordingly, plaintiffs have failed to plead a breach of fiduciary duty claim. *See, e.g., Frederick's of Hollywood*, 2000 WL 130630, at \*7.

**IV. PLAINTIFFS FAIL TO PLEAD ANY KNOWING PARTICIPATION BY CROSSPOINT IN ANY PURPORTED BREACH OF FIDUCIARY DUTY**

The opening papers also highlighted a key flaw in plaintiffs' claims against Crosspoint: the lack of any allegations of an affirmative and knowing act by Crosspoint itself in connection with the directors' alleged fiduciary duty violations. Crosspoint Mem. at 18-20. To state a claim for aiding and abetting liability, plaintiffs must plead facts showing knowing participation by the defendant in a fiduciary's breach. *See Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001). Crosspoint previously showed that the amended complaint's allegations about Crosspoint's supposed role in and knowledge of alleged fiduciary duty violations are wholly conclusory and inadequate.

**A. The Certive Transaction**

Plaintiffs' answering brief does not dispute that Crosspoint itself did not participate in the Certive Transaction. *See* Pl. Mem. at 30-31. Plaintiffs allege that another Crosspoint fund had a prior investment in Certive, but that is not unusual or suspicious – venture funds exist to make investments. Mere stock ownership does not constitute an affirmative act or assistance in furtherance of any fiduciary duty violation. *See* Crosspoint Mem. at 18-19 (citing, *e.g., In re Telecommunications, Inc. S'holders Litig.*, C.A. No. 16470, 2003 Del. Ch. LEXIS 78, at \*11 (Del. Ch. July 7, 2003) (dismissing aiding and abetting claim against owner of merger partner); *In re Shoe-Town*,

*Inc. S'holders Litig.*, C.A. No. 9483, 1990 WL 13475, at \*8 (Del. Ch. Feb. 12, 1990) (dismissing aiding and abetting claim against 10% corporation's stockholder).

Unable to point to any actions taken by Crosspoint, plaintiffs contend that Crosspoint "participated" in the alleged breaches of fiduciary duty through director Shapero. *See* Pl. Ans. to Ind. Def. at 32. Plaintiffs concede that Shapero did not take part in the Covad board's decision to invest in Certive. *See* Pl. Mem. at 21. Nevertheless, they argue that Shapero "participat[ed]" in the Certive Transaction by "sending lengthy correspondence to the other Board members vociferously defending McMinn and his investment in Certive and berating Khanna for even suggesting the appearance of wrongdoing." Pl. Ans. to Ind. Def. at 32. This allegation is insufficient to support a claim of aiding a breach of fiduciary duty.

Looking at the specific allegations of the complaint rather than the rhetoric of plaintiffs' brief, it turns out that the "lengthy correspondence" that Shapero allegedly sent to the board consists of *one email* that Shapero sent on September 22, 1999. AC ¶¶ 52-53.

Contrary to plaintiffs' contentions, Shapero did not "vociferously defend[ ] McMinn and his investment in Certive," nor did he "berat[e] Khanna."

In any event, plaintiffs cite no authority indicating that a director who does not vote on a transaction can be held liable for aiding and abetting a breach of fiduciary duty merely because he communicated his views to other directors.

Plaintiffs also contend that Hawk, a "Special Limited Partner" of Crosspoint, voted in favor of the [Certive] [T]ransaction" and that "[h]is participation" should be imputed to Crosspoint. Pl. Mem. at 22-23. Plaintiffs do not explain *why* Mr. Hawk's

participation should be imputed to Crosspoint. As shown previously, plaintiffs do not – and cannot in good faith – allege that Hawk was a Crosspoint employee. Nor have plaintiffs pleaded facts that would demonstrate Hawk was an agent of Crosspoint or that he was controlled by Crosspoint. *See supra* at 15-16.

Moreover, even if Mr. Hawk's "participation" could be imputed to Crosspoint, plaintiffs' claim still fails for lack of facts showing that Crosspoint "knowingly" participated in an alleged breach of fiduciary duty. *See supra* at 22. Delaware decisions hold that there is no automatic inference from a director's association with a defendant that the defendant must have known of the director's purported breach; rather, plaintiffs must provide supporting factual allegations. *See* Crosspoint Mem. at 21-22 & nn.17-18 (citing cases). Here, there is no reasonable inference of knowledge on the part of Crosspoint as to the actions of "Special Limited Partner" Hawk. Plaintiffs fail to allege anything about the structure of Crosspoint's business or what it meant to be a "Special Limited Partner." *Id.* at 22; *see Barbieri v. Swing-N-Slide, Corp.*, C.A. No. 14239, 1997 WL 55956, at \*3 (Del. Ch. Jan. 29, 1997) (allegation that one member of general partnership violated fiduciary duty to another corporation did not support claim that partnership itself aided or abetted the breach).

Unable to link Crosspoint to the Certive Transaction, the answering brief now asserts that Crosspoint aided and abetted *McMinn's* alleged usurpation of a Covad corporate opportunity. *See* Pl. Mem. at 32. This allegation appears nowhere in the amended complaint. *Compare* Pl. Mem. at 32 with AC ¶ 51 (defining "Certive Transaction" as Covad's investment in Certive), ¶ 181 ("Crosspoint . . . aided and abetted the Defendant Directors in proposing, recommending and consummating Covad's investment in the Certive Transaction and BlueStar Transactions"). For this reason alone, the Court should refuse to consider it. *See, e.g., Bergstein*, 453 A.2d at 473. In any

event, there are no allegations here indicating that Crosspoint took any affirmative steps to assist McMinn in declining to offer an investment opportunity to Covad.

**B. The BlueStar Transactions**

As shown in the opening papers, Crosspoint itself is not alleged to have taken part in any of the negotiations associated with the BlueStar Merger or the BlueStar Earn-Out. *See* Crosspoint Mem at 18-20. Nor do plaintiffs allege that Messrs. Shapero and Hawk voted on these transactions. *See id.* at 13.

In the answering brief, plaintiffs admit that Mr. Shapero did not participate in the board's decisions to approve the BlueStar Transactions. *See* Pl. Mem. at 26-27. Rather, plaintiffs admit that such recusal was "normal Covad practice." AC ¶ 80. Plaintiffs nonetheless insist that Shapero "participated" in the BlueStar Merger by "actively lobb[ying] Knowling through lengthy emails on the weekend of May 20-21, 2000 for Covad and BlueStar to merge." Pl. Mem. 32. This is insufficient.

Crosspoint demonstrated in its opening brief that Shapero's communications with Knowling were not improper. *See* Crosspoint Mem. at 14-15, 20 (citing authority). Delaware courts have held repeatedly that a director may even negotiate or vote on a self-interested transaction as long as the board's disinterested directors make an informed and independent decision to approve the transaction. *See id.* at 14-15, 20; *see also In re Ply Gem Indus., Inc., S'holders Litig*, C.A. No. 15779, 2001 Del. Ch. LEXIS 84, at \*41 (Del. Ch. June 26, 2001) ("nothing inherently wrong" with interested CEO negotiating a merger transaction; "the issue becomes whether the [board] satisfied its 'ultimate

statutory duty and fiduciary responsibility to make an informed and independent decision' on whether to enter into the . . . merger transaction") (citation omitted); *Lewis v. Leaseway Transp. Corp.*, C.A. No. 8720, 1990 WL 67383, at \* 8 (Del. Ch. May 16, 1990) (dismissing aiding and abetting claim because "[t]here [was] nothing inherently wrongful about any of the purported breaches of the Leaseway directors"). An interested director's expression of his views does not taint the decision of the disinterested directors.

Plaintiffs do not dispute the authority cited in Crosspoint's opening brief. Instead, they argue that Shapero acted improperly because Knowing "expressed a concern regarding the overlap between [Covad and BlueStar]" and Shapero convinced Knowing that there was no such overlap. Pl. Mem. at 32-33.

Plaintiffs offer no facts showing that Shapero's communications with Knowing were improper. In any event, as noted earlier, the mere fact that Shapero communicated his views does not taint the disinterested directors' decision, and does not state a claim for aiding a breach of fiduciary duty. Crosspoint Mem. at 14-15, 20.

In sum, plaintiffs have not pleaded that Crosspoint acted affirmatively in furtherance of the Certive Transaction, the BlueStar Merger or the BlueStar Earn-Out, much less did so with knowledge of fiduciary duty violations. *See* Pl. Mem. at 33-35.

**V. EACH OF PLAINTIFFS' CLAIMS AGAINST CROSSPOINT FAILS AS A MATTER OF LAW**

In light of the four fundamental pleading deficiencies outlined above, each and all of plaintiffs' claims against Crosspoint should be dismissed.

**A. Plaintiffs' Claim For Usurping A Corporate Opportunity (Count II) Fails As A Matter Of Law**

Plaintiffs' first claim against Crosspoint is for allegedly usurping a corporate opportunity from Covad by investing in Certive's 1999 Series A financing without offering Covad "the contemporaneous opportunity to participate." AC ¶¶ 149-157. This claim must be dismissed as time-barred, and for the separate reason that plaintiffs have not pleaded that Crosspoint was a fiduciary of Covad. *Crosspoint Mem.* at 8-11.

As set forth above, plaintiffs did not assert their corporate opportunity claim until at least one-year after the limitations period expired. *See supra* at 2-3. Nor have they pleaded the "specific facts" necessary to permit the tolling of the statute of limitations. *See id.* Moreover, as shown in the opening brief, because a corporate opportunity claim is a type of fiduciary duty claim, plaintiffs cannot maintain such a claim where the defendant was not a fiduciary. *See Crosspoint Mem.* at 8-9; *cf. In re The Walt Disney Co. Derivative Litig.*, C.A. No. 15452, 2004 Del. Ch. LEXIS 132, at \*18-19 (Del. Ch. Sept. 10, 2004) (summary judgment granted; defendant was not a fiduciary at time of alleged usurpation). As shown above, plaintiffs have not sufficiently pleaded that Crosspoint was a fiduciary of Covad. *See supra* at 9-18. Plaintiffs concede that Crosspoint had only a minority, non-controlling interest in the company, and their conclusory allegations of

Crosspoint's alleged ability to "control" a majority of Covad's directors are insufficient as a matter of law. *Id.* The corporate opportunity claim must be dismissed.

**B. Plaintiffs' Claim For Respondeat Superior Liability (Count VII)  
Fails As A Matter of Law**

Plaintiffs contend that Crosspoint should be secondarily liable under the respondeat superior doctrine for alleged breaches of fiduciary duty by Shapero (General Partner) and Hawk ("Special Limited Partner") arising from the Certive Transaction, the BlueStar Merger, and the BlueStar Earn-Out. AC ¶¶ 184-190. Crosspoint has shown that dismissal is appropriate because plaintiffs have not sufficiently pleaded a basis for relief from the statute of limitations with respect to the Certive Transaction and the BlueStar Merger. *Supra* at 2-9. This claim also should be dismissed in its entirety because plaintiffs have not pleaded (and cannot in good faith plead) two key elements of respondeat superior liability: that Crosspoint was a controlling shareholder of Covad, and that there was any underlying breach of fiduciary duty. Crosspoint Mem. at 12-17.

Under Delaware law, minority, non-controlling shareholders owe no fiduciary duties to a corporation. Crosspoint Mem. at 15-17 (citing authority). Courts reject the notion that the doctrine of respondeat superior can be used "as a means of circumventing clear limitations imposed by Delaware corporate law" to hold non-controlling shareholders liable for breaches of fiduciary duty by their designees on the corporation's board of directors. *USAirways Group, Inc. v. British Airways PLC*, 989 F. Supp. 482, 494 (S.D.N.Y. 1997) (applying Delaware law). As shown above, plaintiffs have not adequately alleged that Crosspoint controlled Covad. Plaintiffs concede that Crosspoint's minority interest did not confer control. *Supra* at 10. Plaintiffs have not sufficiently pleaded that Crosspoint dominated or controlled the Covad board. *Supra* at 9-18.

As shown in the opening papers, an underlying breach of fiduciary duty is another necessary predicate of respondeat superior liability. Crosspoint Mem. at 12. Plaintiffs'

failure to plead a breach of fiduciary duty by Mr. Shapero or Mr. Hawk in connection with the Certive Transaction, the BlueStar Merger, or the BlueStar Earn-Out provides yet another basis for dismissal of the respondeat superior claim. *See supra* at 18-22.

**C. Plaintiffs' Claim For Aiding And Abetting Liability (Count VI) Fails As A Matter Of Law.**

Plaintiffs contend that Crosspoint should be held liable for aiding and abetting alleged fiduciary duty violations by Covad's directors in connection with the Certive Transaction, the BlueStar Merger, and the BlueStar Earn-Out. *See AC ¶¶ 177-183*. Once again, these claims must be dismissed in light of the basic gaps in plaintiffs' pleadings. Plaintiffs have not sufficiently pleaded a basis for relief from the statute of limitations with respect to the Certive Transaction and the BlueStar Merger. *Supra* at 2-9; Crosspoint Mem. at 8, 13. This claim also should be dismissed in its entirety because plaintiffs have not pleaded (and cannot in good faith plead) two key elements of aiding and abetting liability: that there was any underlying breach of fiduciary duty, and that Crosspoint knowingly participated in that breach. Crosspoint Mem. at 17-22.

In the absence of an underlying breach of fiduciary duty, plaintiffs' claim for aiding and abetting must fail. *See Moore Bus. Forms, Inc. v Cordant Holdings Corp.*, C.A. No. 13911, 1995 WL 662685, at \*6 (Del. Ch. Nov. 2, 1995) (dismissing aiding and abetting claim; "no cognizable breach of fiduciary duty [was] stated"). As shown, plaintiffs cannot state an underlying breach of fiduciary duty by Covad's directors based on the Certive Transaction, the BlueStar Merger or the BlueStar Earn-Out, because all of these transactions were approved by a majority of Covad's disinterested and independent directors and protected by the business judgment rule. *See supra* at 18-22.

Plaintiffs' failure to plead the "knowing participation" element of their aiding and abetting claim, provides separate grounds for dismissal. *See* Crosspoint Mem. at 19 (citing *Iotex Communications, Inc. v. Defries*, C.A. No. 15817, 1998 WL 914265, at \*4

(Del. Ch. Dec. 21, 1998) (dismissing aiding and abetting claim where "no allegations of fact that [defendant] played any substantial role in the negotiation or execution" of challenged agreement). As set forth above, plaintiffs have not sufficiently pleaded that Crosspoint acted affirmatively in furtherance of the Certive Transaction, the BlueStar Merger or the BlueStar Earn-Out, much less did so knowing of a breach of fiduciary duty. *See supra* at 22-27. The aiding and abetting claim cannot stand.

**CONCLUSION**

For the reasons set forth above and in the opening papers, plaintiffs' claims against Crosspoint should be dismissed in their entirety.

Respectfully submitted,

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