IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARLES HOKANSON, JOHN HOKANSON, FOYE STANFORD, CHARLES SEITZ and ELIZABETH SEITZ	)	
Plaintiffs,	)	
v.	)	C.A. No. 3438-VCS
WILLIAM PETTY, M.D. TREVOR MOODY, BUZZ BENSON, MARC GALLETTI, CRAIG CORRANCE DAVID GRANT, and ALTIVA CORPORATION	)	
Defendants.	)	

DEFENDANTS WILLIAM PETTY, M.D., TREVOR MOODY, BUZZ BENSON, MARC GALLETTI, CRAIG CORRANCE, DAVID GRANT AND ALTIVA CORPORATION'S REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

In December 2007, Exactech exercised its option to purchase Altiva (the "Merger"), as provided for in 2003 after it invested heavily in Altiva, which was "on the brink of financial ruin." (Compl., ¶ 25.) The Merger was approved by Altiva's board. William Petty, Exactech's Chairman and CEO, was Exactech's only representative on the Altiva board. Of the remaining four directors, Trevor Moody, Buzz Benson, and Marc Galletti, were outside directors with no financial ties to Exactech or Petty. As demonstrated in defendants' Opening Brief, because a majority of the 2007 Altiva board was neither interested in the Merger nor dependent on Petty, the business judgment rule applies to its decision to approve the Merger. There are *no* allegations in the Complaint to suggest otherwise.

In their Answering Brief, plaintiffs do not identify any allegations in the Complaint to support their claim the Altiva board was disloyal. Instead, they now improperly present new allegations to the Court, alleging Altiva's directors in 2007 ("Directors") were disloyal because (1) "each of them retained their respective management positions in the post-Merger Altiva," becoming "members of the post-Merger Altiva Board," and (2) they were "to receive common stock of the post-Merger Altiva and Exactech entities" under the Securities Purchase Agreement ("SPA"). (Pls.' Brief at 15.)

These allegations were never pled in the already once amended Complaint and cannot be considered by this Court. As demonstrated by the documents plaintiffs provided to the Court, neither of these allegations is true. For example, plaintiffs' claim the Directors personally benefited from the 2007 Merger by retaining their directorships, quoting language of the Merger Agreement: "Exactech's Form 8-K dated December 7, 2007 (the "8-K") states on page 3 that '[t]he directors of [Altiva] prior to the Effective Time shall be the directors of the Surviving

Corporation . . ..'" (Pls.' Brief at 8.) This is not, however, what the document says. Plaintiffs have replaced the word "Sub" with the word "Altiva." (*See* Pls.' Brief, Ex. A at 3.)[1] On page 1 of the Merger Agreement Exactech Spine, Inc. is referred to as the "Sub." (*Id.* at 1.) In contrast, Altiva is referred to as the "Company." (*Id.*) In light of the actual language in the documents, the Court is not required to accept the allegation that Moody, Benson, or Galletti retained their board positions or other new allegations as true.

Plaintiffs next attempt to plead around the Section 102(b)(7) clause in Altiva's Certificate of Incorporation by claiming for the first time that Exactech's 17% ownership in Altiva made it a controlling shareholder. To make this claim, they misstate fundamental principles of Delaware law. There are no allegations in the Complaint to support a claim that Exactech was a controlling shareholder or exercised any actual control over the other Directors. Section 102(b)(7) shields the Directors from liability for any claims they breached a duty of care.

In their Answering Brief, plaintiffs clarify several issues. First, they acknowledge defendant Grant was not on Altiva's board and fail to offer any basis for a claim against him. He should thus be dismissed. Second, they fail to offer the basis for any claim against nominal defendant Altiva Corporation. It should likewise be dismissed. Third, they provide no basis for a claim that defendants violated any duty to disclose information to them in 2007. Thus, there are no disclosure violations to support a claim for breach of duty of loyalty or care. Fourth, they offer no evidence of bad faith. Thus, if there are no well pled facts supporting a claim for breach of duty of loyalty, the case should be dismissed as defendants are protected by the exculpatory clause. Fifth, none of the facts pertaining to the actions of Altiva's board in 2003 support

[1] The Agreement and Plan of Merger ("Merger Agreement"), dated December 7, 2007, is part of the Form 8-K. The cited language is from the Merger Agreement.

plaintiffs' claims. Plaintiffs state that "the fiduciary violations which form the basis of all plaintiffs' claims relate solely to the Directors' conduct at the time of the Merger in 2007." (Pls.' Brief at 19.) These so-called "fiduciary violations" do not support a claim for a breach of the duty of loyalty and thus this case should be dismissed.

The Complaint fails to state a claim upon which relief may be granted. Nothing in plaintiffs' Answering Brief justifies continuing this litigation.

ARGUMENT

Plaintiffs argue that the Court should apply an entire fairness analysis to this case because (1) the board failed to exercise due care in approving the Merger consideration (Pls.' Brief at 12); (2) the board violated its duty of loyalty to the minority shareholders and a majority of the directors had a personal interest in the Merger (*id.* at 14); (3) the board was under the domination and control of Petty, who sat on both sides of the transaction (*id.* at 16); and (4) through Petty, Exactech was a controlling shareholder that occupied both sides of the transaction. (*Id.* at 17.) Plaintiffs further argue that Section 102(b)(7) does not insulate the Directors from personal liability. (*Id.* at 18.) Plaintiffs' arguments fail. The business judgment rule should be applied to the Directors' decisions here.

A. Altiva's Certificate of Incorporation Includes an Exculpatory Clause Shielding the Directors From Liability Under Section 102(b)(7)

Plaintiffs attempt to rebut the application of the business judgment rule to their claims for money damages by relying on their breach of the duty of care claim, despite the fact that Altiva's Certificate of Incorporation contains a Section 102(b)(7) clause insulating directors from liability for breaching their duties of care. (*See* Pls.' Brief at 12-14.) Citing *Emerald Partners v. Berlin*, 726 A.2d 1215, 1221 (Del. 1999) ("*Emerald Partners I*"), plaintiffs argue that "a breach of any one of the Directors' fiduciary duties sufficiently rebuts the business judgment presumption and permits a challenge to the Board's action under the entire fairness standard." (Pls.' Brief at 12.)

In so arguing, plaintiffs ignore subsequent cases that have repeatedly held the presence of a Section 102(b)(7) clause requires dismissal of complaints that allege only duty of care violations. In *Emerald Partners v. Berlin*, 787 A.2d 85, 92 (Del. 2001) ("*Emerald Partners II*"), the court said: "*Malpiede* establishes that the proper invocation of a Section 102(b)(7) provision can obviate a trial pursuant to the entire fairness standard, even if the presumption of the

business judgment rule is successfully rebutted by a duty of care violation, since liability for duty of loyalty violations or violations of good faith are not at issue." This is so because "if the shareholder complaint only alleges a duty of care violation, the entry of a monetary judgment following a finding of unfairness would be uncollectible" and proceeding on the claim would serve no purpose. *Id.* Thus, if plaintiffs' Complaint does not state a breach of loyalty or bad faith claim upon which relief may be granted, the case must be dismissed.

Plaintiffs cite a number of cases for the proposition that a Section 102(b)(7) defense cannot be ruled on until after an entire fairness review. These cases are inapplicable, as they all involve transactions requiring application of entire fairness review *ab initio* due to the presence of a controlling shareholder on both sides of the transaction. *See In Re LNR Prop. Corp. S'holders Litig.*, 2005 Del. Ch. LEXIS 171 (denying motion to dismiss because complaint alleged majority stockholder controlling 77% of shares stood on both sides of transaction requiring application of entire fairness review *ab initio*); *Emerald Partners I*, 726 A.2d at 1221 (reversing summary judgment because entire fairness review applied *ab initio* due to majority stockholder controlling 52.5% of shares standing on both sides of transaction); *In re Emerging Comm'cns, Inc.*, 2004 WL 1305745 (Del. Ch.) ("Both sides agree that . . . entire fairness is the standard of review ab initio" where ECM's CEO owned 52% of its shares and 100% of Innovative shares).

Here, plaintiffs argue Exactech (which is not even named as a defendant) was a controlling shareholder standing on both sides of the transaction because it owned 17% of Altiva's stock and held one board position. This argument is premised on a misstatement of Delaware's definition of "controlling stockholder." Plaintiffs define "controlling stockholder" as "[a] stockholder who holds more shares than any other stockholder, but less than a majority" and

cite *Weinstein Enterprises, Inc. v. Orloff*, 870 A.2d 499 (Del. 2005). (Pls.' Brief at 17.) That is not the holding of *Weinstein*, or any other Delaware case of which defendants are aware. In *Weinstein*, the court addressed whether a shareholder who owned 45% of a company and whose foundation owned another 6% of the company was a controlling stockholder, and found he was. *Id.* at 507–08. The court stated, however, that "a stockholder that owns less than half of a corporation's shares will generally *not* be deemed to be a controlling stockholder." *Id* at 507 (emphasis added). It said a minority shareholder may be considered controlling only when a plaintiff establishes that the minority shareholder exercised actual control. *Id.* Plaintiffs do not come close to carrying their burden to plead facts suggesting Exactech was a controlling shareholder.

In re BHC Communications, Inc. Shareholders Litig., 789 A.2d 1, 9 (Del. Ch. 2001), cited at page 11 of plaintiffs' Answering Brief, actually supports defendants' argument. There, the court addressed an action for breach of fiduciary duty brought by minority shareholders against a corporation and its directors. In it, plaintiffs did not deny the Certificate of Incorporation contained a Section 102(b)(7) provision but claimed, as plaintiffs do here, that it did not apply. According to the Court:

> The function of a Section 107(b)(7) provision "is to render duty of care claims not cognizable and to preclude plaintiffs from pressing claims of breach of fiduciary duty, absent the most basic factual showing (or reasonable basis to infer) that the directors" conduct was the product of bad faith, disloyalty or one of the other exceptions listed in the statute.

Id. at 9-10. The Court went on to say the complaint should be dismissed if it appears the "factual bases for [the] claim solely implicates a violation of the duty of care." *Id.* at 10. The Court then considered whether the claims in the Complaint asserted claims for violations of the duty of care or duty of loyalty, and held claims regarding the director defendants' failure to maximize value

for minority stockholders, without more, were due care claims falling within the protection of the Section 102(b)(7) charter provisions. *Id*.

Here, no pled facts support application of entire fairness review *ab initio*, and, as further discussed below, the plaintiffs' claims alleging breach of the duty of loyalty do not state claims for which relief may be granted. Instead, the Complaint states only claims that the defendants breached their duty of care, which must be dismissed pursuant to Section 102(b)(7).

B. Plaintiffs Have Failed to Allege Breach of the Duty of Loyalty by the Directors

To state a claim for breach of the duty of loyalty, plaintiffs must plead facts showing that a majority of the individual directors were interested in the transaction or not independent. *Orman*, 794 A.2d at 22 ; *In re Ply Gem Indus. Inc. S'holders' Litig.*, 2001 WL 755133, *7 n. 33 (Del. Ch.) (plaintiffs must allege that the merger would not have been approved without the vote of directors who were interested or disqualified). Plaintiffs claim the majority of directors were disloyal because (1) they all retained their directorships with Altiva after the Merger; and (2) they all received Exactech stock as a result of the merger. These allegations do not appear in the Complaint. Neither of them survives examination, as the majority of the five-member board—Benson, Galletti, and Moody—were uninterested in the merger, independent of Petty, and had strong incentives to maximize the consideration Altiva shareholders received.

1. Neither Plaintiffs' New Allegations Nor the Allegations in the Complaint Support Their Claim That the Majority of the Board Was Interested in the Merger[2]

Plaintiffs acknowledge they must provide the Court with factual allegations and legal argument that support a claim for breach of duty of loyalty to defeat defendants' motion. (Pls.'

[2] Plaintiffs concede in their Answering Brief that "the fiduciary violations which form the basis of all Plaintiffs' claims relate solely to the Directors' conduct at the time of the Merger in 2007." (Pls.' Brief at 19.) They do not rely on any alleged violations by the 2003 board. (*Id.*) Thus, none of the allegations in paragraphs 20-36 of the Complaint support plaintiffs' claims.

Brief at 12, 18.) Plaintiffs have failed in their effort to do either. Instead, after defendants challenged the conclusory allegation that each of the defendants would retain their respective management positions in the post-Merger Altiva (Defs' Opening Br. 16-19), plaintiffs offer new allegations in an effort to avoid dismissal of this case. They submit Exactech Inc.'s December 7, 2007, Form 8-K Report, which includes the merger agreement between Exactech and Altiva and a news release issued by Exactech. Defendants do not object to the documents and agree that they are incorporated by reference, or that the court may take judicial notice of them.[3]

However, allegations not contained in a complaint, or conclusory allegations without specific, supporting facts, are not accepted as true. *Hillman v. Hillman*, 910 A.2d 262, 269 (Del. Ch. 2006); *In re LNR Prop. Corp. S'holders Litig.*, 2005 Del. Ch. LEXIS 171, at *16 ("[A] trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiff's favor unless they are reasonable inferences."). Also, a complaint's allegations that contradict the unambiguous language of documents on which the claims are based are not to be accepted as true. *Id.*; *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003).

Plaintiffs cite the news release attached to the 8-K filing that states "Exactech's first acquisition includes Altiva's experienced spinal management team . . ." (Pls.' Brief, Ex. A.), and point out that defendants acknowledge "Corrance holds a management position in the newly-formed Altiva." (*Id.* at 8.) This news release does not, however, apply to Directors Moody, Benson, or Galletti. And plaintiffs do not allege that Moody, Benson, or Galletti ever were or expected to be part of such a team.

Plaintiffs instead claim they remained directors of Altiva, again offering new facts. They mischaracterize Section 1.05 of the Merger Agreement between Exactech and Altiva, stating that

[3] The merger agreement is referred to in the Complaint at paragraph 37.

"[t]he directors of [Altiva] prior to the Effective Time shall be the directors of the Surviving Corporation . . .." (Pls.' Brief at 8.) Section 1.05, however, states: "The directors of *Sub* prior to the Effective Time shall be the directors of the Surviving Corporation . . .." (*Id.* Ex. A at 3, emphasis added.) "Sub" refers to "Exactech Spine, Inc., a Florida corporation and wholly-owned subsidiary of Parent [Exactech]." (*Id.* at 1.) There is no possible way to read Section 1.05 as supporting plaintiffs' claim that the Directors would retain their positions after the Merger. Instead, this clearly indicates the Directors were replaced by the directors of Exactech Spine, Inc. after the Merger. This new allegation should be rejected by the Court.

Plaintiffs have not alleged any credible facts to support their claim that Moody, Benson, and Galletti were interested in the transaction. Their new allegation—that they retained their directorships with Altiva after the Merger—is contradicted by the very documents they offer to the Court. With no other relevant allegations in the Complaint, plaintiffs have failed to plead self-interest or conflict in the majority of the board.

2. Plaintiffs' New Claim that the Directors Received Exactech Stock Is Not Asserted in the Complaint and Contradicts Language in the Underlying Documents

In addition to claiming the Directors remained directors of Altiva after the Merger, plaintiffs now allege the Directors were conflicted and dependent on Petty because they all received Exactech stock as a result of the Merger. They state, without citation to a specific section, that the 2003 Securities Purchase Agreement ("SPA") "makes clear that Altiva's pre-Merger Shareholders are to receive common stock of the post-Merger Altiva and Exactech entities." (Pls.' Brief at 9, 15.) They claim that, "by virtue of the Merger, the Directors have not only preserved their substantial financial position in Altiva . . . , but have also improved their lot by obtaining a financial position in Exactech." (*Id.*) These allegations are not in the Complaint and should not be considered on a motion to dismiss. "Briefs relating to a motion to dismiss are

not part of the record and any attempt contained within such documents to plead new facts or expand those contained in the complaint will not be considered." *Orman v. Cullman*, 794 A.2d 5, 28 n.59 (Del. Ch. 2002).

In any event, plaintiffs' contentions are not supported by the underlying documents. The Merger Agreement states that Series A Preferred shareholders received $281,197 in Exactech common stock, while Series B Preferred shareholders received $4,499,159 in cash. (Pls.' Brief, Ex. A at § 2.01(d)(ii) and (iii).) Plaintiffs do not claim that any of the directors represented FFS Opportunity Fund I, LLC, the sole holder of Series A Preferred stock. (*Id.* at 41.) Also, to the extent plaintiffs now claim that any entity or person other than Exactech obtained stock in post-Merger Altiva, such claim is contradicted by their own Complaint and the underlying documents, which state that post-Merger Altiva is a wholly-owned subsidiary of Exactech. (Compl., ¶ 37.)

Further, under the SA, if the merger consideration is paid in Exactech stock, the number of shares received is based on the average value of the stock on NASDAQ for the five days before the closing date. (Stockholders' Agreement § 3.2.) Whether the merger consideration was paid in cash or Exactech stock, the value of the consideration was the same: 37.5% of the value of the Preferred Stockholders' Investment. (*See* Def. Mot. Dismiss, Zeldin Aff., Ex. 4, Appraisal Notice at 2.) The allegation that Moody, Benson, and Galletti would have favored Exactech's interest in the Merger and taken a significant loss on their investment simply to receive the merger consideration in the form of Exactech stock is nonsensical.[4]

[4] Even if plaintiffs have alleged sufficient facts to indicate Corrance and Petty were interested in the Merger, that is not enough. In *Cede & Co. v. Technicolor, Inc.,* 634 A.2d 345, 363 (Del. 1993), cited at page 12 of plaintiffs' Answering Brief, the court said: "This Court has never held that one director's colorable interest in a challenged transaction is sufficient, without more, to deprive a *board* of the protection of the business judgment rule presumption of loyalty." (Emphasis in original.)

In *In re Ply Gem Industries, Inc. Shareholder Litig.*, 2001 WL 755133 (Del. Ch.), a case cited by plaintiffs on page 14 of their brief, the Court held that where directors only "received the merger consideration on the same terms as any other shareholder," there was no "improper benefit whatsoever." *Id.* at *7. That is the case here. The Directors received the merger consideration per the distribution set forth in the Certificate of Incorporation, which was approved by Charles Hokanson on behalf of Vertebral in 2003. They received no improper benefit from the Merger.

3. Plaintiffs' Claim that Petty Dominated the other Directors Is Conclusory and Makes No Sense in Light of Moody, Benson, and Galletti's Interest in Maximizing the Merger Consideration

In the absence of any credible allegations suggesting that Moody, Benson, and Galletti received any material benefit from the Merger, plaintiffs continue to claim that Petty dominated Altiva's board. Plaintiffs' argue that "none of [the Directors] were financially independent of Petty and Exactech and were motivated to do whatever would keep them in their future employer's good graces." (Pls.' Brief at 16.) They offer only the conclusory allegation that the Directors' "loyalties ran primarily to Petty and Exactech," which, plaintiffs claim, "is enough to show improper domination and control." (Pls.' Brief at 16.) The only case plaintiffs cite in support, *In re Emerging Communications, Inc. Shareholders Litigation,* 2004 WL 1305745 (Del. Ch. June 4, 2004), involves remarkably different facts than the conclusory allegations presented here.

In *Emerging Communications,* the directors were financially tied to one of the directors, Prosser, who owned 52% of ECM. Director Raynor, Prosser's long-time lawyer, was conflicted because virtually 100% of the legal fees he generated for his law firm were attributable to work performed for Prosser or Prosser-owned entities, and in the year of the transaction, he was put on a retainer where he was paid compensation of $25,000 per month and his law firm was paid

$5,000 per month. *Id.* at *33. Director Ramphal was beholden to Prosser because he had a lucrative consulting arrangement earning him between $140,000 to $120,000 per year in addition to his $30,000 director fee. *Id.* at *34. In addition, his son-in-law also had a consulting arrangement with Prosser. *Id.* Director Muonio was dependent on Prosser because he was a consultant to a Prosser entity, with an annual retainer of $200,000. In addition, he sought up to an additional $2 million for serving as a consultant on a potential acquisition by ECM. *Id.* Director Vandras expected to continue as a board member of a Prosser entity, and received annual director's fees of $100,000, along with $15,000 for committee service, which constituted about 10% of his income for that year, making him dependent on Prosser. *Id.* Directors Goodwin and Todman similarly expected to remain directors of Prosser entities, but were not necessarily dependent on Prosser despite receiving annual director's fees of over $100,000. *Id.* at *34-35. Plaintiffs offer no specific allegations remotely close to the facts in *Emerging Communications*. This case does not support plaintiffs' claim the majority of the directors were dependent on Petty.

In re Ply Gem also offers guidance here. In that case, plaintiffs claimed that one of the directors, Silverman, was able to induce the remaining directors to place his interests ahead of other stockholders' interests in a merger because he was the holder of 25% of Ply Gem's stock and its Chairman and CEO. 2001 WL 755133, at *7. The Court said that "Silverman's status alone [was] not sufficient to overcome the presumption that the other directors, in fact, performed their duties loyally." *Id.* The Court went on to explain that plaintiffs were "confronted with the challenge of pleading facts that create, at a minimum, a reasonable doubt that the board members could not honestly and objectively evaluate the . . . merger . . . because

of their relationship with Silverman," pointing out that "[s]peculation on the motives for undertaking corporate action 'will not satisfy Plaintiffs' burden." *Id.* (citation omitted).

Here, plaintiffs' conclusory allegations provide no basis to doubt Moody, Benson, and Galletti performed their duties loyally. There are no allegations to suggest that they depended on Petty financially or otherwise. They did not become Altiva employees or directors after the Merger. Conclusory allegations of domination and unfair price do not rebut the business judgment rule's presumption.

Moreover, plaintiffs' Answering Brief does not even respond to defendants' argument that directors Moody, Benson, and Galletti, who represented preferred shareholders and made up the majority of Altiva's directors, shared the common stockholders' interest in maximizing the merger consideration. Preferred shareholders had priority and would receive additional consideration before common stockholders, giving them a "powerful incentive to get the best deal in the sale of [Altiva]." *McGowan v. Ferro*, 859 A.2d 1012, 1030 (Del. Ch. 2004); *Unitrin v. Am. General Corp.*, 651 A.2d 1361, 1380 (Del. 1995) (director shareholders will generally try to maximize the value of their shares; "it cannot be presumed that the prestige and perquisites of holding a director's office . . . prevails over a shareholder-director's economic interest"). Plaintiffs acknowledge the fact that the preferred stockholders took a loss on their investment in Altiva, as they refer to the "deficit" between the preferred shareholders investment and the amount received from the Merger. (Compl., ¶ 40.) Preferred shareholders such as Moody, Benson, and Galletti, took a 62.5% loss on their investment in Altiva as a result of the Merger. (Zeldin Aff. Ex. 4, Appraisal Notice.) The fact that they represented preferred shareholders who received only 37.5% of their original investment is a strong basis to reject Plaintiffs' conclusory claims that they were self-interested in the Merger or dominated by Petty.

Moody, Benson, and Galletti had a strong incentive to seek the best deal available, and plaintiffs have pled no specific facts suggesting they were dominated by Petty or had any incentive to favor Exactech at the expense of Altiva's shareholders.

C. Plaintiffs Do Not Allege Any Facts to Support a Bad Faith Claim or a Disclosure Claim

In their Answering Brief, plaintiffs fail to cite any allegations or offer any argument in support of their claim the Directors acted in bad faith. In claiming the Directors violated their duty of care, they cite *In re Walt Disney Co. Deriv. Litig.,* 2005 Del. Ch. LEXIS 113 and parenthetically note the definition of bad faith. (Pls.' Brief at 14.)[5] This is not sufficient. Failure to respond in any meaningful way to a motion to dismiss requires the claim be dismissed. *Williamson v. New Castle County*, 2002 WL 453926, *3 (Del. Ch. 2002) ("Because the plaintiffs have not responded in any meaningful way to the County's pro-dismissal arguments, Count II must be dismissed for failure to state a claim.") (attached hereto as Exhibit A).

Also, plaintiffs present no argument responding to defendants' motion to dismiss their disclosure claims, and those claims should also be dismissed.

D. Plaintiffs' Answering Brief Fails to Present any Argument in Support of Claims against Altiva or David Grant

Plaintiffs do not offer any argument why claims against Altiva or David Grant—who is not alleged to ever have been an Altiva Director—should be allowed to proceed. (*See* Pls.'

[5] Plaintiffs cite *In re Walt Disney* as "recognizing that an intentional dereliction of duty and a conscious disregard for one's responsibilities is an appropriate standard for determining whether fiduciaries have acted in good faith." (Pls.' Brief at 14.) *See also In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 65, 67 (Del. 2006) (to demonstrate bad faith, plaintiffs must allege directors "intentionally fail[ed] to act in the face of a known duty to act" or "demonstrate[d] a conscious disregard for [their] duties."). Plaintiffs have never alleged that any of the Directors acted with "intentional dereliction of duty, intentionally failed to act in the face of a known duty to act," or acted with "a conscious disregard for [their] responsibilities."

Brief.) This failure requires the claims to be dismissed. *See Williamson*, 2002 WL 453926, at *3.[6]

[6] Plaintiffs recite certain allegations related to Grant, claiming that in 2003 he misrepresented to Charles Hokanson that "the Exactech transaction would ultimately increase the value of Plaintiffs' Altiva shares." (Pls.' Brief at 7.) They concede, however, that their Complaint asserts no claims arising from actions taken in 2003. (*Id.* at 19.) Since all plaintiffs' claims relate to Directors' approval of the Merger, Grant should be dismissed.

CONCLUSION

For the above stated reasons, and those stated in their opening brief, defendants respectfully ask that their motion to dismiss be granted.

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