IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: TRANSKARYOTIC THERAPIES, INC.	)	Consolidated Civil Action No. 2776-CC
	)	**PUBLIC VERSION - REDACTED**

DEFENDANT WAYNE P. YETTER'S OPENING BRIEF IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

PUBLIC VERSION - REDACTED

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NATURE AND STAGE OF THE PROCEEDINGS

On July 27, 2005, Transkaryotic Therapies, Inc., a Delaware corporation ("TKT"), was merged into a subsidiary of Shire Pharmaceuticals, Plc ("Shire"). On August 10, 2005, the plaintiffs in this action commenced in this Court a proceeding seeking an appraisal of their TKT shares pursuant to 8 *Del. C.* § 262 (the "Appraisal Proceeding"). Nineteen months later, on March 8, 2007, the plaintiffs filed a separate action (the "Fiduciary Action") against Shire, TKT, and four former members of TKT's seven-person board of directors. In their complaint filed to initiate the Fiduciary Action ("Complaint"), the plaintiffs have alleged, *inter alia*, that the four individual defendants (including Wayne P. Yetter) breached their fiduciary duties in connection with their consideration and approval of the Shire-TKT merger. Based on such alleged breaches, the plaintiffs ask this Court to enter a judgment against the four director defendants for monetary rescissory damages.

The Appraisal Proceeding and the Fiduciary Action were consolidated by an order of this Court entered on August 6, 2007.

Defendant Wayne P. Yetter has moved for summary judgment in his favor as to all claims asserted against him. Mr. Yetter also joins in Shire's arguments for summary judgment based on the plaintiffs' lack of standing and the unavailability of rescissory damages. This is Mr. Yetter's opening brief in support of his motion for summary judgment.

STATEMENT OF FACTS

Wayne P. Yetter has had a distinguished career in the pharmaceutical industry, spanning almost 40 years. After earning his undergraduate (biology) and MBA degrees and serving as a U.S. Army officer in Vietnam, Mr. Yetter began his career in 1970 as a sales representative with Pfizer. He quickly rose into management positions at Pfizer, and in 1977 he moved to Merck & Co. At Merck, he held several product-management and vice-president positions before being named general manager of Astra Merck, a then-new joint venture between Merck and European pharmaceutical company Astra. Astra Merck, Inc. became a free-standing entity in 1994, at which time Mr. Yetter was named its first president and CEO. He then continued in a series of chief executive positions — including president and CEO of Novartis Pharmaceuticals Corporation, COO of IMS Health, Inc., Chairman and CEO of Synavant, Inc., and CEO of Odyssey Pharmaceuticals. (Yetter Dep. 6-15; WPY 03203-04; WPY 00628-37).[1]

Mr. Yetter has served as a director of many pharmaceutical and healthcare companies, including public companies Matria Healthcare, Noven Pharmaceuticals, Maxim Pharmaceuticals, EpiCept Corporation (successor by merger to Maxim), Synvista Therapeutics (f/k/a Alteon, successor by merger to HaptoGuard, Inc.), InfuSystem Holdings, and a private company, Lathian Systems. (Yetter Dep. 17-22, 190-197). He was recruited to join TKT's board of directors in November 1999, served as chair of its audit committee, and was named chairman of TKT's board in April 2004. (WPY 03203-04). He is presently the CEO of Verispan, LLC, a joint venture of McKesson Corp. and Quintiles Transnational Corp. and a provider of information products and service to the healthcare industry. (Yetter Dep. 182-185).

[1] Citations herein to deposition transcripts refer to the deponent's last name and the page numbers of the transcript, as above. Citations to deposition exhibits include the deponent's last name and the exhibit number, *e.g.*, "Yetter Dep. Ex. 1." Copies of various materials cited in this brief are included in an appendix filed herewith.

Since 2003, the CEO of Shire has been Matthew Emmens. Mr. Emmens and Mr. Yetter formerly worked together at other pharmaceutical companies. In the mid-1980s, Yetter had interviewed and hired Emmens as a product manager at Merck. Mr. Emmens reported to Mr. Yetter there for about 1½ years, until Yetter was transferred to a different Merck location. Several years later, after Yetter had moved to Astra Merck, he hired Emmens again, as vice president, sales and marketing. They worked together at Astra Merck from 1992 until January 1997, when Mr. Yetter left to become CEO of Novartis Pharmaceuticals. They did not work for the same company again. (Yetter Dep. 11-15, 18; Emmens Dep. 5-8, 70-71).[2]

Shire's business strategy was to grow by acquisitions, and it frequently heard from investment bankers with suggestions of potential acquisition targets (Emmens Dep. 29-33). In July 2004, investment banker Goldman Sachs visited Shire with a list of potential targets that included TKT. (Katzman Dep. Ex. 2). Soon afterwards, Goldman gave Shire a detailed written presentation about TKT. (Deptula Dep. Ex. 5). On September 29, 2004, a Shire vice president suggested that Matt Emmens contact Wayne Yetter "to confirm the potential availability of TKT." (Deptula Dep. Ex. 5; Emmens Dep. Ex. 9).[3] At about the same time that Shire's business development team was considering TKT as an acquisition target, a different Shire team responsible for renal products was highly interested in licensing rights to market Dynepo, a renal drug that TKT was seeking to out-license. (Emmens Dep. 78-79).

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[2] Even before the merger negotiations with Shire began, Mr. Yetter had mentioned to people at TKT that he and Mr. Emmens were acquainted. For example, in May 2004, when a Shire employee, Mark Webster, inquired about possible employment at TKT, Mr. Yetter e-mailed TKT's CEO Astrue and asked: "Does Shire management (*e.g.* Matt Emmens) know he's looking? Could I discuss with Matt Emmens CEO of Shire who I know very well?" (Yetter Dep. Ex. 31). However, the call never happened. (Yetter Dep. 229-230).

[3] It was Shire's usual practice to approach an acquisition target by contacting its chairman. (Deptula Dep. 86-97).

An extensive discovery record has been developed in this case. There are inconsistencies among various witnesses' recollections of how and when Shire initially contacted TKT regarding Shire's potential interest in acquiring TKT. Shire's former CEO Michael Astrue testified it was "sometime in September or October 2004." (9/15/06 Astrue Dep. 28-29). In his deposition, the first contact Mr. Yetter could specifically recall receiving from Shire was in mid-November 2004. (Yetter Dep. 25-33, 231-248, 402-423). Mr. Emmens's testimony was similar. (*E.g.*, Emmens Dep. 73-76). However, several documents reflect that Emmens called Yetter in early October 2004 about potential interest in a collaboration or acquisition, and that Emmens followed up the next day with a call to Astrue. (*e.g.*, Yetter Dep. Ex. 4; Leff Dep. Exs. 16, 17). Former TKT director Jonathan Leff recently testified that some such documents refreshed his recollection that each of Astrue and Yetter told him in October 2004 of having heard from Emmens that Shire was interested in licensing Dynepo and was also evaluating the possibility of acquiring TKT. (Leff Dep. 362-375). Despite being shown such documents, Mr. Yetter still did not remember receiving a call from Mr. Emmens in early October 2004 about Shire's potential interest in an acquisition (Yetter Dep. 25-29), but he acknowledged that a call from Emmens at about that time may have happened, and that his own handwritten notes suggest that he did receive a call from Emmens in early October 2004 (Yetter Dep. 29; Yetter Dep. Ex. 48).

The record consistently shows that Mr. Emmens and Mr. Astrue arranged a TKT-Shire meeting for October 13, 2004, at TKT's headquarters in Cambridge, Massachusetts. (*E.g.*, Yetter Dep. Ex. 4). Emmens and Barbara Deptula attended for Shire, and Astrue attended alone for TKT. (Emmens Dep. 73-74). Emmens recalled the meeting as focused on Dynepo, but did not recall any discussion of Shire's potential interest in acquiring TKT. (Emmens Dep. 74). Astrue, on the other hand, initially recalled the meeting as focused on a possible acquisition, not

Dynepo, but then was uncertain after reviewing his own contemporaneous e-mail (11/6/07 Astrue Dep. 13-14, 201-204; Astrue Dep. Ex. 45). The third attendee, Barbara Deptula, testified that the meeting was about a possible strategic relationship between TKT and Shire involving Dynepo, but that Shire also used the meeting as an informal way to gauge Astrue's feelings about a possible broader strategic relationship between the two companies. Ms. Deptula described the meeting as "a get-to-know-you . . . to understand what would be his [Astrue's] interest in other relationships, whether . . . Dynepo [or] some sort of big company alliance." Further, "Dynepo was the way to talk about a broader transaction without [Astrue's] telling his staff." Ms. Deptula testified Shire was "very careful not to talk of merger because it always has to go through the chairman," but that Shire gave Mr. Astrue a "hint" that Shire might like to acquire TKT, and she felt he got the message. (Deptula Dep. 128-131).

Within a week after the meeting, Shire's business development team followed up with Mr. Astrue. In an e-mail to Yetter and Leff on October 19, 2007, Astrue stated:

> Their BD people have moved politely but aggressively to set up a *Dynepo discussion* next week or the week after. I also heard this morning from a law firm I know well that contacted me about a broader due diligence and needed to get a waiver on a minor conflict. Shire was clear with him to talk only to me in the company. I've hooked him up with Redlick to work out those details. *No issue to be resolved just a sign they're still looking*.

(Astrue Dep. Ex. 45) (emphasis added). Mr. Astrue testified that his "still looking" comment meant that, at that point, Shire and TKT "were just exchanging information," and Shire's degree of interest in TKT was unclear to him. Astrue also recalled no discussion of any possible acquisition price terms as of that point in time. (11/6/07 Astrue Dep. 206-207)

In mid-November 2004, about a month after Shire's initial meeting with Mr. Astrue, Ms. Deptula prepared an outline for a specific, acquisition-related call to be made by Mr. Emmens to Mr. Yetter. (Deptula Dep. Ex. 6). In her outline, Deptula suggested that Emmens tell Yetter that

he was following up on the TKT-Shire October 13 meeting to discuss Dynepo, and was calling to provide an update on Shire's development of an internal understanding of TKT and its products. The outline also suggested that Emmens say that Shire's initial assessment was "very encouraging," and that Shire would like to broaden due diligence discussions so it could propose a cash transaction to acquire TKT at a premium to its 52-week-high stock price. (*Id.* at p. TKT_APP_0015785). Goldman also provided its own detailed outline for the planned call. (Katzman Dep. Ex. 4). Mr. Emmens testified he had sought Goldman's advice on what to say to Mr. Yetter because "I wanted to do everything up and up and to make the phone call correctly." (Emmens Dep. 80-81).[4]

On November 14, 2004, Mr. Emmens made the planned call. Mr. Yetter had been on vacation, checked messages from the Los Angeles airport, and learned that Emmens had called. Yetter returned the call that evening, and Emmens outlined Shire's interest in acquiring TKT. (Yetter Dep. 30-33). During the call, Yetter made handwritten notes reflecting Emmens's proposal: a "combination of the business," a "cash deal," and a "premium on 52 wk high." (Yetter Dep. Ex. 46). Emmens suggested a premium in a range of 30% to 50% above the TKT's 52-week high stock price. (Yetter Dep. 406). Mr. Yetter considered this call highly significant:

> Everyone was aware that Shire had met with TKT relative to Dynepo, etc., and I think . . . Mike [Astrue] was involved with that. I considered the contact that I had in November because it was, in my mind, somewhat of a surprise and it was very explicit. And that, for me, was the starting point of a serious expression of interest by Shire in TKT. And so that was the kind of where I believe the dialogue, in a sense, really started, focused on an acquisition.

[4] Ms. Deptula's outline states that Mr. Emmens might inquire of Mr. Yetter: "Wondering if you would consider a board seat at Shire. Looking for someone with your experience." But this language was crossed out. (Deptula Dep. Ex. 6). The record is unclear as to whether the idea of offering Mr. Yetter a board seat originated with someone from Shire or someone from Goldman Sachs, but both Mr. Emmens and the head of the Goldman team rejected the idea, and in fact no such offer was ever made to or even discussed with Mr. Yetter. (*See* Emmens Dep. 80-84; Katzman Dep. 30-33; Yetter Dep. 43-44; *see also* Katzman Dep. Ex. 5.)

(Yetter Dep. 246).

Upon receiving Mr. Emmens's call, Mr. Yetter, who was still traveling, promptly contacted Messrs. Astrue and Leff. The next day, November 15, Astrue, Leff and Yetter held a conference call with TKT outside attorney David Redlick, in which they discussed what Shire had just communicated. The group asked Yetter to seek clarification from Shire on its thinking about a possible price range. In a second call on November 15, the same group discussed what actions were appropriate, and agreed that a meeting should be scheduled to update the full board. Redlick was asked to arrange a board meeting. (Yetter Dep. Ex. 5; Yetter Dep. 410)

On November 17, 2004, while still traveling in California, Mr. Yetter received a call from Mr. Emmens on the announcement of Yetter's appointment as CEO of Odyssey Pharmaceuticals. Emmens also inquired about any TKT feedback on Shire's expression of interest. Mr. Yetter replied that a TKT board meeting was being scheduled. (Yetter Dep. Ex. 5; Yetter Dep. 35-36).

On November 19, 2004, there was a conference call among Messrs. Astrue, Leff and Yetter to discuss possible engagement of a financial advisor, and it was agreed that Astrue and Yetter would contact SG Cowen. A telephonic board meeting was scheduled for November 24, 2004. (Yetter Dep. Ex. 5).

At the TKT telephonic board telephonic meeting held on November 24, 2004, there was substantial discussion about Shire's approach to TKT. The directors expressed various views — ranging from interest in exploring discussions to doubt whether Shire's informal telephone contact deserved further board discussion to outright opposition. (*See*, *e.g.*, Leff Dep. 69-75, 81-82; Villa-Komaroff Dep. 54-56). As recalled by Mr. Leff, Mr. Astrue made "a strong and impassioned statement" against considering any overtures from Shire, stating that he considered Shire unethical and a "bottom feeder" that did not engage in serious research and science, and

felt Shire would lay off many TKT employees if it ever acquired TKT. (Leff Dep. 70-71). The board decided to approve TKT's hiring of SG Cowen as a financial advisor, and assigned Mr Astrue responsibility for working on an engagement letter and fee arrangement. The board also decided to direct SG Cowen to request, through Shire's bankers, that Shire provide written confirmation of its interest, and that it also address in writing the price range and form of consideration it had in mind. (Leff Dep. 75-76; Yetter Dep. 48-51; Villa-Komaroff Dep. Ex. 8).

On December 6, 2004, Shire put its expression of interest in writing. In a letter to Mr. Astrue, Mr. Emmens proposed acquiring TKT through "an all cash transaction in the range of $29.00 to $31.00 per share." (Emmens Dep. Ex. 11). Mr. Emmens noted that "[t]his represents a 67 to 79% premium to the TKT stock price of $17.36 on October 13, 2004, the date of our meeting, and a significant premium to any TKT stock price over the past two years."

On December 14, 2004, TKT held a board meeting at its Cambridge offices. The board now had the written expression of interest it had requested from Shire, but there continued to be debate about whether it was sufficient to justify permitting Shire to conduct due diligence. Mr. Yetter felt the board should move forward to determine whether Shire's proposal could be developed into a transaction that would be in shareholders' interest, but certain other directors (including Astrue) were opposed to that view. As Mr. Yetter testified:

> The debate was . . . around whether the proposal in hand was sufficient to initiate, or, better yet, continue a process that would engage Shire and provide sufficient information to see if a superior offer, . . . an offer that represented good value could be developed. And there was debate. Certainly Mike Astrue wanted nothing to do . . . with a potential acquisition by Shire, but it was more centered on what Shire might do with TKT, what would become of the [TKT] employees. And in my view, in a cash proposition, those were not facts that I as a board member could consider. I had to consider shareholders' interests and value.
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> * * *
>
> The debate was really do we terminate a process prematurely or do we continue a process and provide information that might allow Shire to make a more valuable

> offer for shareholders. And . . . speaking for myself, . . . I felt it was the fiduciary responsibility of the board to conduct an adequate process in evaluating the offer and trying to develop it. And I felt that others were prematurely cutting off that process.

(Yetter Dep. 470-473). In addition to debating their views on moving forward with due diligence, the board also received detailed advice from its legal and financial advisors. (Yetter Dep. Ex. 8). Ultimately, the board authorized SG Cowen to offer Shire the opportunity for limited due diligence on specific legal and financial matters. (Leff Dep. 139-145). **REDACTED**

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On December 17, 2004, Shire conducted limited due diligence on TKT legal matters. (Emmens Dep. Ex. 8). Two days later, Shire submitted a written due-diligence request to TKT. Dr. Gilbert found it too extensive, and Mr Astrue described himself as "extremely upset" and "extraordinarily distressed." (*See* Yetter Dep. Ex. 42). Over the next few weeks, there were discussions between representatives of Shire and TKT over competing concerns about due diligence. The bankers perceived a "chicken and egg" problem — Shire wanted due diligence to find out if there was a basis for raising its offer, and some at TKT wanted Shire to raise its offer before they would agree to more due diligence. (Katzman Dep. Ex. 13; Katzman Dep. 66-68).

On the afternoon of January 7, 2005, Mr. Yetter e-mailed the board, attempting to schedule a board meeting (TKT_APP_0502817-18). That evening, while driving home from his job as CEO of Odyssey Pharmaceuticals, Mr. Yetter received an emotional call from Mr. Astrue. As described by Mr. Yetter in his 2006 deposition:

> [H]e called me on my cell phone and was very emotional, very concerned that the proposition was continuing to be considered. And he made accusations of me that basically – you know, why are you doing this? Do you have some sort of special deal? And it was totally absurd. And I suggested to Mike that I expected better leadership from him in helping the Board understand and evaluate the proposal and to support a good, sound process . . . I said I don't understand what he was

> talking about and it was totally ludicrous . . . I recall vividly I ran my car into the side of the garage because I was so upset listening to him on the cell phone and trying to get into my garage.

(Yetter Dep. 53). In his more recent deposition, Mr. Yetter testified:

> [H]e was very emotional. He . . . kept asking why are you . . . moving this process forward, in so many words. And I said that because the board had a fiduciary responsibility; if there was a proposal here that was in shareholder interests, we needed to understand it and then evaluate it, and that was my sole interest. I didn't care if a deal got done or not, but I wanted to ensure that the board fulfilled its appropriate role. And Mike was very concerned and exercised about that this was moving forward and, again, said: Why are you doing this? And then made some comment, which I don't recall specifically how he phrased it, but made the suggestion that I had some other benefit or ulterior motive for moving this forward. And I . . . said, Mike . . . that's totally wrong. . . . I'll discuss this with the board or plan to. He also threatened at that time that if I continued to press forward — and it wasn't me, it was really the board — with consideration of the proposal that Shire had put forward, that he would lead the people . . . out of TKT is what his suggestion was.

(Yetter Dep. 341-342).

During this time, Shire was frustrated with what it perceived as Mr. Astrue's resistance to due-diligence. On January 11, 2005, Shire's Mr. Colpman e-mailed Barbara. Deptula and Goldman's Christiana Stamoulis: "I assume we still have no news from SG Cowen on our desire to move forward with the DD. Given that really there has been very little progress since the end of last year could I suggest alternative ways into [TKT]. In particular we are suggesting that Matt should speak with Wayne directly." (Deptula Dep. Ex. 11). Mr. Katzman of Goldman replied: "Matt speaking to Wayne could be the best strategy, as Wayne is more receptive than the CEO to a deal." (Katzman Dep. Ex. 15).

On January 14, 2005, Mr. Emmens called Mr. Yetter at his Odyssey office, to inquire about the status and timing of the process, which was then principally in the hands of Astrue and the bankers. (Yetter Dep. Ex. 5; Yetter Dep. 36-38; *see also* Emmens Dep. 87-88). Mr. Yetter then called Messrs. Astrue, Leff and Redlick to inform them of the contact. (*Id.*)

Meanwhile, Mr. Astrue was spreading his accusations against Mr. Yetter to other board members. Mr. Leff recalled the following conversation with Astrue on or about January 15:

> Mike Astrue conveyed to me that he had some very serious concerns about Wayne Yetter and he said that he believed that Wayne had initiated this dialog with Shire – as opposed to the other way around . . . [and] Wayne had essentially offered up to Matt Emmens that he would deliver TKT to Shire at a cut rate price for some other goal that he had and Mr. Astrue conveyed that he believed that goal was in order to get consulting business from Shire, because Mr. Yetter was between jobs at the time. So Mike . . . indicated that he believed Wayne was doing this to get consulting payments from Shire, perhaps some kind of a special payment on the side, Mike said, for delivering the transaction to Shire and that Wayne had been promised some role at Shire in the future like a role on their board of directors or perhaps even chairman . . . So I felt the allegations were among the most serious things I had ever heard on a board of directors . . . But I also asked . . . what's your basis for saying this about Mr. Yetter. And he provided none except to say why else would he be so, so interested in advancing this process.

(Leff Dep. 161-166). Mr. Leff's contemporaneous notes similarly reflect what Mr. Astrue told him on January 15, 2005: "A lot of people are very concerned about the circumstances in which this came up — Wayne was looking for consulting work — He stands to get some inappropriate payoff, such as consulting work or being on board of Shire, even chairman." (Leff Dep. Ex. 9).

As part of his campaign to discredit Mr. Yetter, Astrue also called Dr. Villa-Komaroff some time before the board meeting scheduled for January 17, 2005. He told her he had lost confidence in Yetter as board chairman, and asked her if she was willing to become chairman. She replied that she thought either Dr. Gilbert or Dr. Langer would make a better chairman, so Astrue called Gilbert, who agreed to become chairman. (Villa-Komaroff Dep. 57-58).

On the morning before the scheduled board meeting, Mr. Yetter e-mailed Mr. Astrue:

> I am preparing an agenda for the Board meeting that I will send to you and [outside counsel] Stuart [Falber] for review and distribution. I also feel it will be necessary for me to ask the board to investigate concerns that you expressed regarding my independence and 'motivation' in this process that you raised during our phone conversation on Friday evening, January 7.

(Astrue Dep. Ex. 5). Mr. Astrue replied: "Thanks I think a frank Board discussion is a good idea." (*Id.*)

The January 17, 2005 board meeting was held at Wilmer Hale's office in Boston. Mr. Yetter had prepared a meeting agenda, listing "Review of Chairman's Role and independence" as the first item of business. (Astrue Dep. Ex. 4). Mr. Astrue testified that this item was on the agenda "because I had raised it . . . because I felt that Mr. Yetter was acting inappropriately and I was concerned that it was on the basis of his various connections with Shire and Mr. Emmens." (9/15/06 Astrue Dep. 43). Mr Yetter prepared some handwritten notes to guide himself through remarks he intended to make to open the discussion. He wrote:

> Consideration of the Sparta proposal has been an intense and emotional process. I am personally concerned by comments made by Mike Astrue and later by David Redlick. Mike suggested that my motivation in leading the process to facilitate full consideration of the Sparta proposal was inappropriate and bias[ed]. I understand that he has made specific claims that I may be motivated by consulting fees or promises from Sparta. David Redlick made comments to me that I was not appropriately representing the board. Brief on 1/7 MA call and 1/13 discussion with DR. I request that the board investigate this serious matter directly with Mike and others. I will step out. I also believe that the trust required for an effective working relationship between the Chairman & the CEO has been eroded.

(Yetter Dep. Ex. 45, at WPY01035). Mr. Yetter also prepared himself to resign as board chairman because he believed his relationship with the CEO was "fractured." (Yetter Dep. 345). But Mr. Yetter was unable to deliver his remarks as planned, because the meeting proceeded differently. (*E.g.*, Yetter Dep. 375-376). Mr. Astrue described the meeting as follows:

> I was offered an opportunity to present to the board my concerns, which I did, and then Mr. Yetter was given an opportunity to respond, and at that time, he denied any connections with Shire. And then we were both excused and wandered the hallways of Hale & Dorr for what seemed like a very long time, and then we were brought back into the room and they reconvened. At that point, Dr. Villa-Komaroff seemed to be running the meeting. I was given a very strong reprimand for making these charges about Mr. Yetter and then was informed that he had stepped down. And then there was discussion about who was going to become chairman. There had been some discussion about this contingency in advance. I had thought that Dr. Villa-Komaroff and Dr. Gilbert had talked and

> agreed that . . . in the event . . . that Mr. Yetter stepped down — that Dr. Gilbert would become chairman, and I was surprised, because something had changed, and at that point, it was clear that Dr. Villa-Komaroff was going to become chairman.

(Astrue Dep. 42-44, 47-50). Regarding what Astrue said about Yetter at the meeting, and how the board responded, Mr. Astrue testified:

> I basically repeated what Mr. Yetter had told me about his — what I recalled at that time of his consulting arrangements with Shire and that I was tired of being bullied for one choice and one choice only and that I thought his judgement had been compromised by his personal relationships and perhaps his financial relationships. The inference was that the — at the time was that I had stepped over a line because these things weren't true, because Mr. Yetter had denied ever having any relationship with Shire. . . . I don't remember very much. It was very upsetting. I felt humiliated and I thought it was unfair and it's kind of a blur for me now.

(Astrue Dep. 42-44, 47-50). Astrue's accusations against Yetter were also recorded in notes Leff took at the meeting. According to those notes, Astrue claimed Yetter "went to Shire to propose [a transaction] for personal gain," and stated "I believe there will be some reward for Wayne if this transaction is completed." (Leff Dep. Ex. 12). The board obviously rejected Astrue's suspicions as unsupported. They remain unsupported today.

Astrue also told the board of "Wayne's conversations last Friday" (*id.*) — *i.e.*, the two January 14th calls that Yetter received from Emmens. Although Mr. Yetter had reported those calls to Astrue and Leff upon receiving them, Dr. Villa-Komaroff felt that Mr. Yetter used "bad judgment in having accepted those calls." (*Id.* 392). Consequently, her "confidence was shaken in [Yetter's] ability to lead the board through this transaction." (Villa-Komaroff Dep. 386-389) The end result was that Mr. Yetter offered (as he had planned) to step down as board chairman. (*Id.*). As for what course to take with respect to the transaction, the board instructed SG Cowen to communicate to Shire that it could conduct limited additional due diligence, but the $29-$31

price range would need to be significantly increased for there to be any hope for a transaction. (Emmens Dep. Ex. 8).

Because the board meeting ran late, Mr. Yetter was unable to catch a flight home that evening; instead, he stayed overnight in Boston and arose for an early flight to Philadelphia. (Yetter Dep. 84-85). Mr. Yetter had reflected on Mr. Astrue's statement to the board that Mr. Yetter had formerly done consulting for Shire.[5] Thinking that Astrue could have misinterpreted something Yetter had said in the past, Yetter called and left Astrue a voice-mail message:

> Hey Mike, It's Wayne. Last night after going to the hotel, it dawned on me that I may have misanswered perhaps to the one question about consulting. I was putting it in the context of some of the retained consulting that I was doing for the last year with a couple of other companies and didn't make the connection. I believe in the first discussions we had, I talked about having made an introduction to Alterity Partners to Matt and having had a dinner and that was probably, I don't know, a little more than, more than a year ago when he was first made CEO of that company, and it was announced that he was going to shed some business units, most notably their oncology business and I think their dosage form pharmaceutical development business and we introduced two of the partners of from Alterity to Matt and we had dinner, and discussed some of his interest and what he was going to be doing with the company, mostly shedding those businesses and that was discussion centered on that. I believe that I had mentioned that to you, perhaps, and I believe that I had mentioned that to the full Board, maybe not in that detail. But when you had mentioned consulting, it just, you know, totally went over my head. I was thinking in a context of sort of marketing consulting or other types of consulting because I really never did anything at all with Alterity but make a few introductions. But that was more than a year ago. I will reach out to David Redlick, Rudman, whomever. I will ask that a conference call be set-up with Lydia and Rudman, Redlick and Rudman, etc., and yourself just to set the record straight on that particular point because your recollection I think is. . . .[6]

[5] As Mr. Emmens testified unequivocally, Mr. Yetter has done no consulting for Shire. (Emmens Dep. 71).

[6] The above quotation is Mr. Astrue's transcription of the voice-mail message. He testified he had the message transcribed because "I felt that my integrity had been called into question in making these charges, . . . and I believed this was a substantial vindication of what I had said, so I wanted to make a record of it." (Astrue Dep. 50-52).

(Astrue Dep. Ex. 7). Thus the message related to the fact that, in the fall of 2003, Mr. Yetter had set up a meeting with Mr. Emmens to introduce him to two principals of Alterity, an M&A boutique firm, who were interested in providing services to Shire on matters unrelated to TKT. Nothing resulted from this introduction. At that time, Mr. Yetter was on an informal "advisory board" of Alterity. Mr. Yetter never received any compensation for this introduction, or for anything related to it. Mr. Yetter did not think of this minor event when Mr. Astrue made his comments at the January 17 board meeting about Mr. Yetter's supposed "consulting with Shire." (Yetter Dep. 18-19, 23-24, 81-84, 223-225, 338).

As to what he understood Mr. Yetter to be saying in the message, Mr. Astrue testified:

> Well, it was confusing to me. I mean, I think that when he had talked about the consulting to me before, he had talked about it I think in fairly general terms. I mean, I don't — you know, I don't think he laid it out with a lot of specificity. And I believe what he was telling us was that despite the fact that he had listened to everything I had said, which included things that would be in this zone, and adamantly denied it, he had a sudden flash of recall at 4:45 in the morning and now was trying to correct the record.

(9/15/06 Astrue Dep. 50-52).

In the days that followed, Mr. Astrue re-confirmed that his opposition to a transaction had little to do with maximizing shareholder value. Instead, it was grounded in his personal antipathy to Shire and his preconceived notions as to what a Shire acquisition would mean for TKT employees. As he explained to Mr. Leff in a phone call on January 20, 2005:

> I don't think we're as far apart [on price] as you think. And that goes for Wally [Gilbert] too. I think you have to get to the mid-$30s. If there's reasoned discussion about selling the company to a decent party that we respect and can all be proud of what we've done, you'll find that I'll be supportive of doing something at a price level that's lower than you might think. On the other hand, if it's a party like Shire, who's going to gut the company and make a mess of everything, then there's no way I'm going to let that happen. The question is how do we find a path that is good for the shareholders but also good for the employees. It is clearly not Shire.

(Leff Dep. Ex. 12).[7]

Mr. Astrue's obstructionism was frustrating to the TKT board, Shire, and their respective financial advisors. Mr. Leff complained to Dr. Villa-Komaroff, the new chairperson, "Mike needs to be reminded that he answers to the Board and has a fiduciary responsibility to shareholders. His persistent refusal to engage this process in a credible way clearly suggests that he continues to be unable to separate his personal interests from those of TKT and its shareholders." (LEFF 005783) And during due diligence meetings in mid-February, Astrue accosted Emmens in the hallway and said "you're not going to get this company. And if you do, you're going to pay so much you're going to look like a fool." (Emmens Dep. 66, 90-91). James Katzman, who led the Goldman Sachs team advising Shire, testified that during these meetings Astrue was "beyond obstructionist . . . extraordinarily obnoxious . . . rude, dismissive, antagonistic, unhelpful. I've actually never dealt with someone who was that rude in that type of format before or subsequently." (Katzman Dep. 57-61, 64-66). Declan Quirke of SG Cowen remarked to Leff, "[y]ou don't need my advice, but if I were a board member, I would want [Astrue] fired. I have never seen such irresponsible, childlike, inappropriate and self-serving behavior from a CEO." (Leff Dep. Ex. 14, p. TKT_APP_0482344).

On February 23, 2005, Shire wrote to TKT and proposed an offer price of $31 per share based on the due diligence that it had been permitted to conduct. (Emmens Dep. Ex. 12). The TKT Board met on February 26, 2005, and discussed Shire's offer in detail. Mr. Emmens addressed the TKT directors at the meeting and informed them that Shire's board did not feel it could offer above $31 per share. For the first time in months of negotiations, the TKT board

[7] Astrue's disdain for Shire did not change throughout the negotiations. Astrue testified that, even as late as the final board vote in April 2005, he thought Shire was "sleazy" and "dishonest." (11/06/07 Astrue Dep. 30).

took a formal vote on Shire's offer. A resolution was introduced to reject Shire's offer, and the board voted 5-2 to approve that resolution. Mr. Yetter voted with the majority. (9/15/06 Astrue Dep. 154-156; Astrue Dep. Ex. 25). The board authorized SG Cowen to advise Shire that its offer would need to be increased significantly if negotiations were to proceed. (*Id.*) At that point, Astrue was becoming "confident that I was going to beat this off" (9/15/06 Astrue Dep. 156) and "optimistic" that no deal with Shire would ever take place. (11/6/07 Astrue Dep. 250). Shire then "got very quiet . . . for a couple weeks," and Astrue "started feeling more optimistic because they [Shire] were running out of time." (9/15/06 Astrue Dep. 158-159).

On March 9, 2005, Mr. Emmens tried to speak to Mr. Yetter. According to a Shire timeline: "Matt Emmens attempted to speak to Wayne Yetter for clarification. Yetter advised Matt that he cannot speak with him. There is no conversation." (Yetter Dep. Ex. 11). Mr. Yetter confirmed that he did not engage Mr. Emmens in conversation: "I think [Emmens] was trying to determine where the process stood. And I indicated that all communications had to be either through the bankers or with the then-chairman and appropriate channels." (Yetter Dep. 92-93).

At a board meeting on March 29, 2005, TKT's directors again discussed the possibility of a transaction with Shire. (*See* Villa-Komaroff Dep. Ex. 21). The board considered the question of an acceptable price, and reached a consensus that $36-$37 per share was an acceptable range. Shortly thereafter, on March 31, 2005, Dr. Cavanaugh, Shire's chairman, wrote to Dr. Villa-Komaroff to notify her that Shire was interested in making an offer at $37. (Deptula Dep. Ex. 22). After months of negotiations, the parties were finally converging on a price. Shire's board authorized management to proceed with the offer on April 16, 2005. On April 21, 2005, the TKT board voted to approve the merger by a vote of 5-2, and Mr. Astrue resigned as a director and CEO. TKT's shareholders approved the merger in July 2005.

ARGUMENT

The plaintiffs assert two claims against Mr. Yetter. Count I of the Complaint alleges that Mr. Yetter breached his duty of disclosure. Count II alleges that Mr. Yetter breached his duty of loyalty. As is shown below, neither claim against him is sustainable on the record, even when viewed in a light most favorable to the plaintiffs. Summary judgment should therefore be entered in Mr. Yetter's favor on both counts, resulting in his dismissal from the case.

The standard for reviewing a motion for summary judgment is well settled:

> Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Justice demands that the court view the facts in the light most favorable to the nonmoving party, and the moving party has the burden of demonstrating that there is no material question of fact. The nonmoving party, however, may not rest upon mere allegations or denials of their pleading, but must set forth specific facts showing that there is a genuine issue for trial.

Smith v. McGee, 2006 WL 3000363, at *2 (Del. Ch.) (emphasis added), citing, *inter alia*, *Elite Cleaning Co. v. Walter Capel and Artesian Water Co.*, 2006 WL 1565161 (Del. Ch.)

The claims against Mr. Yetter are classic examples of a party's resting entirely "upon mere allegations." The plaintiffs' case against him is based on allegations that he recommended the merger for the purpose of advancing his own personal interests. Yet the plaintiffs have offered nothing to support their allegations except blatant speculation and innuendo – *e.g.,* conjecture that Mr. Yetter could have been offered or promised a board seat, a future consulting relationship, or some other kind of benefit from Shire. None of this has any basis in the record. Discovery is complete, and it is now as clear as ever that these insinuations are the stuff of an active and mistrustful imagination, and nothing more. Plaintiffs themselves all but concede in their Complaint that they have no specific grounds for their accusations against Mr. Yetter, and

now, at the close of discovery, their case against him remains little more than a hopeless insistence that he must have gotten some sort of personal benefit, somewhere, somehow.

As the above-quoted case law makes clear, mere insinuations are not enough to survive summary judgment. Rather, a plaintiff must produce specific evidence to support its allegations. That has not happened here. The undisputed facts of record offer no support for the plaintiffs' reckless and unfounded charges against Mr. Yetter. Under those facts, Mr. Yetter is entitled to judgment as a matter of law.

I. SUMMARY JUDGMENT SHOULD BE ENTERED IN FAVOR OF MR. YETTER ON THE PLAINTIFFS' DUTY-OF-LOYALTY CLAIM.

"To establish a breach of the fiduciary duty of loyalty, plaintiffs must show that the defendants either (1) stood on both sides of the transaction and dictated its terms in a self-dealing way, or (2) received in the transaction a personal benefit that was not enjoyed by the shareholders generally." *In re Coca-Cola Enterprises, Inc.*, 2007 WL 3122370, at *4 (Del. Ch.), citing *Chaffin v. GNI Group, Inc.*, 1999 WL 721569, at *5 (Del. Ch.) and *Joyce v. Cuccia*, 1997 WL 257448, at *5 (Del. Ch.); *See also Frank v. Arnelle*, 1998 WL 668649, at *10 (Del. Ch.) *aff'd*, 725 A.2d 441 (Del. 1999) (duty of loyalty implicated only where the transaction was interested or where defendants "received [a] personal benefit"). There is no allegation in this case, nor could there be, that Mr. Yetter "stood on both sides of the transaction," as he was not a Shire director, officer, stockholder, employee or consultant. Instead, the plaintiffs' allegations of disloyalty fall within the second category – that Mr. Yetter allegedly received some form of personal benefit that was not enjoyed by TKT's stockholders generally. There is simply no support for this allegation in the factual record.

The plaintiffs' Complaint vaguely "suggests," but does not directly allege, that Mr. Yetter expected to receive some sort of personal benefit from Shire in exchange for approving

the merger — namely, a board seat or some role with Shire, consulting opportunities of some kind, or some other form of financial or professional benefit.[8] When asked in a contention interrogatory to state the complete factual basis for their allegations, the plaintiffs gave a response that was lengthy but strikingly weak:

> Yetter did not fully and voluntarily disclose to his fellow TKT board members the existence, nature, or extent of his relationship with Emmens, Shire's CEO. In addition to the documents and testimony set forth in the Verified Complaint, that fact is evidenced by an email/scheduling note (produced late in the appraisal action) which confirms that Emmens was in contact with Yetter regarding Shire's interest in TKT earlier than indicated in either party's official chronology or the definitive Proxy Statement. At the time of Emmens' approach to Yetter regarding the acquisition of TKT, Yetter was an 'independent consultant' who had worked for Shire in the past. Yetter voiced his personal regard for Emmens in discussing his support for Shire's overture, and Shire's internal communications confirm that Emmens approached Yetter because they were 'very friendly' based on their past associations. Yetter denied having close ties to Emmens during a January 2005 TKT board meeting, but then resigned as Chairman of the Board of TKT over questions about those ties and subsequently left TKT's then-CEO, Michael Astrue ("Astrue"), a 4:05 a.m. voice mail message 'to set the record straight' because it 'dawned on' Yetter that he 'may have misanswered' questions regarding those ties. The nature of the Yetter-Emmens relationship was also evidenced by Emmens' continuing attempts to contact Yetter in connection with the merger even after Yetter was no longer Chairman.
>
> Yetter supported Shire's acquisition from its inception and directed TKT's then-CEO, Michael Astrue, to talk with Emmens regarding a transaction even though there had been no prior TKT board discussions about a possible sale of TKT. According to Astrue's testimony, Yetter indicated that Astrue's job would be in jeopardy unless he supported the Shire acquisition. Internal documents produced by Shire demonstrate that it contemplated offering Yetter a role at Shire in order to obtain his support for the transaction. The proposal was memorialized in a document titled 'Conversation with Wayne Yetter 12 November 2004,' and the related testimony confirmed that Shire's primary consideration in that regard was how the proposal could be best utilized to help obtain Yetter's support for Shire's bid.
>
> The minutes and e-mails produced in the appraisal action show that Yetter accommodated Shire's preferred timeline for the transaction, which allowed the deal to be struck prior to TKT' s announcement of the positive Phase III results

[8] For example, the Complaint states that "*the evidence suggests* that Mr. Emmens offered [Mr. Yetter] an undisclosed Shire board seat or other consideration." Id. ¶ 104 (emphasis added).

> for I2S, and that he accepted Shire's bid notwithstanding the valuation analysis that TKT's management obtained from Chestnut Partners **REDACTED**.

Certain Plaintiffs' Response and Objections to Defendant Wayne P. Yetter's Interrogatories, dated 8/16/07, ¶ 2.

Based on the above response, the inadequacy of the plaintiffs' claims is plain on its face. Nowhere does it include facts that would constitute a breach of loyalty – *i.e.*, facts showing the receipt of a personal benefit not enjoyed by the shareholders generally. Instead, it consists only of irrelevant details and circumstances that – as a matter of law – fall far short of establishing a claim for fiduciary breach. When examined, the insufficiency of each of the above-quoted allegations is clear.

- "Yetter did not fully and voluntarily disclose to his fellow TKT board members the existence, nature, or extent of his relationship with Emmens, Shire's CEO. . . [T]hat fact is evidenced by [documents] which confirm . . . that Emmens was in contact with Yetter regarding Shire's interest in TKT earlier than indicated in either party's official chronology or the definitive Proxy Statement."

Even if these allegations were true, they could not support a claim for breach of the duty of loyalty, because there is no evidence that Mr. Yetter received, or expected to receive, any personal benefit from Shire.

In addition, the allegations are unsupported by the evidence. Mr. Yetter made no secret of the fact that he and Mr. Emmens were well acquainted from having previously worked together at Merck and Astra Merck. (*See*, *e.g.*, Yetter Dep. Ex. 31.) Mr. Astrue admitted that Yetter spoke of his prior association with Emmens while informing Mr. Astrue of Shire's interest in TKT. (11/6/07 Astrue Dep. 224-225). Indeed, the subject of their relationship was the first agenda topic for TKT's board meeting on January 17, 2005, and Astrue led an adversarial process to review this topic both before and during the board meeting. Thus, the "existence,

nature and extent of Mr. Yetter's relationship to Mr. Emmens" were fully aired long before TKT's board approved the merger with Shire.

The fact that Mr. Emmens may have first contacted Mr. Yetter in October rather than November is of no consequence. The evidence shows conclusively that Shire, its investment bankers, and Wayne Yetter all viewed Mr. Emmens's November 14 call as Shire's opening contact to acquire TKT for cash at a price reflecting a substantial premium over TKT's 52-week high. The mere existence of an earlier, preliminary call in no way evidences disloyalty by Mr. Yetter to TKT. *See also* argument II.B.1, *infra*.

- "Yetter was an independent consultant who had worked for Shire in the past."

There is no evidence to support this allegation. In 2003 and early 2004, Mr. Yetter had done some independent consulting — but none for Shire. Shire's CEO testified unequivocally that Mr. Yetter never worked for Shire as a consultant. (Emmens Dep. 71).[9] The claim that Mr. Yetter "had worked for Shire in the past" was based entirely on the supposition of Mr. Astrue, who had a vague recollection that Mr. Yetter said something about "consulting with Shire." In his deposition, however, Mr. Astrue admitted that he did not recall exactly what Mr. Yetter had said about that topic, and acknowledged that Mr. Yetter may have been "loose in his language" and may have been "doing consulting with someone else." As Mr Astrue testified, "I don't know what the ultimate truth was." (11/6/07 Astrue Dep. 257).

The record establishes that, prior to the fall of 2004, Mr. Yetter's only professional interaction with Shire was to introduce colleagues from Alterity Partners to Mr. Emmens at a dinner meeting in about October 2003. No business ever resulted from that introduction, and Mr. Yetter never received any compensation for it (or for anything else he did for Alterity).

[9] Dr. Lydia Villa-Komaroff, the TKT director who succeeded Mr. Yetter as TKT's board chairman, testified that, as far as she was aware, Mr. Yetter had not had a relationship with Shire or done any consulting for Shire (Villa-Komaroff Dep. 57-59).

Even if the plaintiffs' allegation were true (and it is not), it would be immaterial. As this Court has held, past business relations with the counterparty to a corporate transaction do not, on their own, support a breach of fiduciary duty. "[E]vidence of personal and/or past business relationships does not raise an inference of self-interest." *State of Wisconsin Inv. Bd. v. Bartlett*, 2000 WL 238026, at *6 (Del. Ch.). *See also In re CompuCom Systems, Inc. Stockholders Litig.*, 2005 WL 2481325, at *9 (Del. Ch.) ("Our cases have determined that . . . outside business relationships, without more . . . [are] insufficient to raise a reasonable doubt of a director's ability to exercise business judgment"); *Litt v. Wycoff*, 2003 WL 1794724, at *4 (Del. Ch.) ("mere outside business relationships alone" are not "sufficient to raise a reasonable doubt regarding a director's independence"); *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1050-52 (Del. 2004) (same).

- "Yetter voiced his personal regard for Emmens in discussing his support for Shire's overture."

Obviously, "personal regard" for an individual or business on the other side of a transaction is not evidence of disloyalty. *See*, *e.g.*, *In re Grace Energy Corp. Shareholders Litig.*, 1192 WL 145001, at *4 (Del. Ch.) ("the Delaware Supreme Court has made it clear that conclusory allegations of such personal affinity alone are not sufficient to establish director interest"); *In re Western National Corp. Shareholders Litig.*, 2000 WL 710192, at *12 (Del. Ch.) ("fond recollections" of another company "do not warrant the inference that [fiduciary] favored" the other company over his own). Moreover, the fact that Mr. Yetter voiced personal regard for Mr. Emmens undermines the plaintiffs' assertion that Mr. Yetter improperly concealed the fact of their past association. The plaintiffs cannot have it both ways.

- Emmens and Yetter "were very friendly based on their past associations."

It has been repeatedly held that mere friendship is not evidence of fiduciary disloyalty. Many Delaware cases make this point. *See*, *e.g.*, *Benihana of Tokyo Inc. v. Benihana, Inc.*, 891 A.2d 150 (Del. Ch. 2005) (close friendship of 40-45 years with meetings every 10-14 days did not affect director's independence or render him interested); *In re CompuCom Systems, Inc. Stockholders Litig.*, 2005 WL 2481325, at *9 (Del. Ch.) ("Our cases have determined that personal friendships, without more . . . are each insufficient to raise a reasonable doubt of a director's ability to exercise independent business judgment"); *Litt v. Wycoff*, 2003 WL 1794724, at *4 (Del. Ch.) ("mere personal friendship alone . . . [is not] sufficient to raise a reasonable doubt regarding a director's independence"); *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d at 1051 ("Allegations that Stewart and the other directors moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as 'friends,' even when coupled with Stewart's 94% voting power, are insufficient, without more, to rebut the presumption of independence. They do not present a reasonable basis from which to infer that [fiduciaries] may have been beholden to Stewart."); *Benerofe v. Cha*, 1998 WL 83081 (Del. Ch.) (allegations of long-standing friendship insufficient to raise reasonable doubt that director exercised his independent business judgment); *Kohls v. Duthie*, 765 A.2d 1274, 1284 (Del. Ch. 2000) ("Plaintiffs point to Morgan's friendship with Lerdal . . . to show that Morgan lacks independence. Nevertheless, the law is clear that evidence of personal and/or business relationships does not raise an inference of self-interest.").

- "Yetter denied having close ties to Emmens during a January 2005 board meeting."

The allegation is unsupported by evidence in the record. As noted above, the former relationship was extensively discussed at the board meeting. Mr. Yetter never denied that former

relationship. What he denied was the unfounded assertion that he had previously served as a consultant for Shire and was motivated by some sort of "special deal."

- On the morning after the January 17, 2005 TKT board meeting, Yetter "left TKT's then-CEO, Michael Astrue, a 4:05 a.m. voice mail message 'to set the record straight' because it 'dawned on' Yetter that he 'may have misanswered' questions regarding those ties [to Mr. Emmens]."

The "misanswer" at issue is both minor and completely innocuous. Before and during the TKT board meeting held on January 17, 2005, Mr. Astrue accused Mr. Yetter of having conflicted interests arising from alleged past "consulting with Shire," which Mr. Yetter denied. On reflection, Mr. Yetter concluded that Mr. Astrue might have been thinking of the fact that Mr. Yetter once arranged to introduce Mr. Emmens to Alterity Partners, a boutique M&A advisory firm that was interested in offering Shire services having nothing to do with TKT. The introduction occurred in October 2003, a year before the first meeting between Shire and TKT. Nothing came of it, and Mr. Yetter never received any compensation from Alterity Partners – in relation to this or anything else.

Mr. Yetter's early-morning voice-mail message regarding his 2003 introduction of Alterity to Mr. Emmens, on a matter unrelated to TKT, is no evidence that Mr. Yetter breached his duty of loyalty. If anything, it is evidence of his integrity and high personal standards. Mr. Yetter considered the information completely innocuous and irrelevant, but nonetheless he wished to make certain that he disclosed each and every detail, no matter how trivial. This demonstrates his *loyalty* to TKT, and the sheer frivolity of the plaintiffs' claims against him.

The information conveyed in Mr. Yetter's voice-mail message should have reassured Mr. Astrue, who persistently had recalled Mr. Yetter's mentioning something about past consulting with Shire. Instead, Mr. Astrue, and now the plaintiffs, have sought to distort this message to

"vindicate" Mr. Astrue's suspicions of disloyalty. But this distortion is futile. No reasonable interpretation of Mr. Yetter's voice-mail could stretch it into evidence of disloyalty.

- Mr. Emmens made "continuing attempts to contact Yetter in connection with the merger even after Yetter was no longer Chairman."

The plaintiffs offer no specific facts as to the "continuing attempts" that they allege Mr. Emmens made. In any event, unilateral attempts by Mr. Emmens to contact Mr. Yetter are no evidence of disloyalty by Mr. Yetter. Moreover, after the January 17, 2005 board meeting at which Mr. Astrue made an issue of the Emmens-Yetter "relationship," Mr. Yetter stopped taking Mr. Emmens's calls. The record reflects that Mr. Emmens called Mr. Yetter on March 9, 2005, but Mr. Yetter declined to engage him in conversation and told him all communication has to be through TKT's bankers or then-chairman. (Yetter Dep. Ex. 11; Yetter Dep. 92-93). Similarly, although the plaintiffs have not made an issue of it, Shire chairman James Cavanaugh placed calls to Mr. Yetter and three other TKT directors in about March 2005, but Mr. Yetter refused to take his call too. (Cavanaugh Dep. 24-34, 126-127, 129-130, 134-136).

- "Yetter supported Shire's acquisition from its inception and directed [Mr. Astrue] to talk with Emmens regarding a transaction even though there had been no prior TKT board discussions about a possible sale of TKT."

As set forth above, a breach of loyalty requires that the fiduciary either stood on both sides of the transaction and dictated its terms in a self-dealing way, or received a personal benefit not enjoyed by the shareholders generally. The allegation supports neither. Moreover, the plaintiffs' allegation that Mr. Yetter supported Shire's acquisition from its "inception" is sheer fantasy. As Mr. Astrue admitted in his deposition, Mr. Yetter voted to reject Shire's $31 offer at TKT's board meeting on February 26, 2005. (Astrue Dep. 234-235, 251-252). This was the TKT board's first formal vote on a Shire offer, and it came only after months of negotiations.

The factual premise for the plaintiffs allegation is simply not credible in the face of these undisputed facts.

- "Yetter indicated that Astrue's job would be in jeopardy unless he supported the Shire acquisition."

Mr. Astrue testified that Mr. Yetter at some point made what Mr. Astrue perceived as a "veiled" threat to fire him: "He would start saying things like we're going to go into executive session to deal with you, or phrases along that line." (Astrue Dep. 33). This testimony fails to support the plaintiffs' allegation. And even if true (it is not),[10] the allegation would not establish a breach of Mr. Yetter's fiduciary duty of loyalty. As noted above, such a breach requires proof that a fiduciary stood on both sides of a transaction or received a personal benefit not enjoyed by shareholders generally. This allegation is evidence of neither. As was noted in the testimony of Dr. Gilbert (who was unaware of any threat by Mr. Yetter to fire Mr. Astrue), boards often threaten to fire CEOs, and indeed it was action by the TKT board that resulted in the departure of Richard Selden, the previous CEO whom Mr. Astrue replaced. (Gilbert Dep. 65-67).

- Shire "contemplated offering Yetter a role at Shire in order to obtain his support for the transaction."

There are many reasons why this allegation cannot support a claim that Mr. Yetter breached his duty of loyalty. As a starting point, it is undisputed that no such offer was ever made. To the contrary, the evidence is undisputed that the idea of offering Mr. Yetter (and Mr. Astrue) a Shire directorship was rejected by both Mr. Emmens and Goldman Sachs, and the

[10] Similarly, Mr. Astrue wrote in an email dated January 16, 2005, that he believed Mr. Yetter included an "independent director" session in his proposed agenda for the January 17, 2005 board meeting as "an obvious follow-through on his threat to fire me." (Villa-Komaroff Dep. Ex. 39). He also he wrote in a March 25, 2005 e-mail that "Wayne has threatened to try to withhold nomination from me and unnamed others," a claim that Mr. Yetter denied as "absolutely false. I have no idea where he got this idea." To the contrary, although he had serious reservations about Mr. Astrue's ability to lead TKT if it remained independent, he believed there would be no point in changing TKT's CEO in the midst of ongoing merger negotiations. (Yetter Dep. 274-278).

subject was never even discussed with Mr. Yetter. Assuming it is true that Shire "contemplated" such an offer, such contemplation by Shire obviously cannot be held against Mr. Yetter. Finally, even if such an offer had been extended, and even if Mr. Yetter had intended to accept it, all this would still be insufficient. This Court has held that the prospect of directorship in the surviving corporation is not evidence of self-interest or disloyalty. *See Orman v. Cullman*, 794 A.2d 5, 28-29 (Del. Ch. 2002) ("The only fact alleged in support of Orman's allegation of director Barnet's interest is that he 'has an interest in the transaction since he will become a director of the surviving company.' No case has been cited to me, and I have found none, in which a director was found to have a financial interest solely because he will be a director in the surviving corporation.").

- Mr. Yetter "accommodated Shire's preferred timeline for the transaction, which allowed the deal to be struck prior to TKT's announcement of the positive Phase III results for I2S."

It is undisputed that, as Mr. Emmens communicated to Mr. Yetter in mid-November 2004, Shire's "preferred timeline" for a transaction with TKT contemplated a deal by year-end 2004. (Yetter Dep. 402-410). Therefore, this allegation is factually incorrect. Even if true, it would not constitute disloyalty. It would not show that Mr. Yetter stood on both sides of the transaction, or received any benefit not enjoyed by shareholders generally. Moreover, the fact that the merger agreement was reached before the announcement of favorable I2S results is irrelevant, as those favorable results were consistently assumed by TKT's financial advisors in valuing TKT, and by TKT's board in concluding that the merger provided good value to TKT stockholders.

- Mr. Yetter "accepted Shire's bid notwithstanding the valuation analysis that TKT's management obtained from Chestnut Partners **REDACTED**."

Once again, there is nothing here that supports disloyalty. It does not show that Mr. Yetter stood on both sides of the transaction, nor does it show that he received any benefit not enjoyed by the shareholders generally.

REDACTED

REDACTED

REDACTED As Astrue told his CFO about the Chestnut Partners report, "*we* are going to need to present and defend this [report] under hostile fire and if you have to be a finance jock to read *our message* into the data, the consequences could be devastating." (*Id.*) (emphasis added).

In sum, there is simply nothing in the record that can support plaintiffs' claim of disloyalty by Mr. Yetter. The "facts" on which the plaintiffs rely are woefully insufficient, as they do not demonstrate disloyalty even if true. Accordingly, plaintiffs' claim that Mr. Yetter breached his duty of loyalty must fail as a matter of law.

II. SUMMARY JUDGMENT SHOULD BE ENTERED IN FAVOR OF MR. YETTER ON THE PLAINTIFFS' DISCLOSURE CLAIM.

A. TKT's Charter and Section 102(b)(7) Exculpate Mr. Yetter from Liability for Monetary Damages as to the Disclosure Claims.

TKT's charter exempts its directors from liability to the fullest extent permitted under 8 *Del. C.* § 102(b)(7). It provides:

> Except to the extent that the General Corporation Law of the State of Delaware prohibits the elimination or limitation of liability of directors for breaches of fiduciary duty, no director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for any breach of fiduciary duty as a director, notwithstanding any provision of law imposing such liability. No amendment to or repeal of this provision shall apply to or have any effect on the liability or alleged liability of any director of the Corporation for or with

> respect to any acts or omission of such director occurring prior to such amendment.

(Amended and Restated Certif. of Incorp. of TKT, dated 10/22/96, Article VII.).

It is well established under Delaware law that such provisions shield directors from liability arising from violations of their duty of disclosure. Where such provisions exist in the corporate charter, a director may be liable in damages for a disclosure violation only where his conduct independently falls within one of the statutory exceptions to §102(b)(7) protection: *i.e.*, his conduct constitutes either a breach of the duty of loyalty, or an act or omission not in good faith or which involves intentional misconduct or knowing violation of the law. This principle has been explicitly articulated by the Delaware Supreme Court. *Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270, 1287 (Del. 1994) ("Thus, claims alleging disclosure violations that do not otherwise fall within any exception are protected by Section 102(b)(7) and any certificate of incorporation provision adopted pursuant thereto"). *See also Goodwin v. Live Entertainment, Inc.*, 1999 WL 64265 (Del. Ch.) (following *Arnold*, Court granted summary judgment against disclosure claims where non-disclosures did not breach duty of loyalty and there was no evidence that they were committed in bad faith); *Frank v. Arnelle*, 1998 WL 668649, at *10 (Del. Ch.), *aff'd*, 725 A.2d 441 (Del. 1999) (granting summary judgment against disclosure claims, Court observed that liability was barred by § 102(b)(7) because non-disclosure did not breach duty of loyalty and there was "no affirmative proof" that defendants deliberately withheld facts they knew to be material).

Here, there is no evidence to support a conclusion that Mr. Yetter's supposed disclosure violations fall independently within an exception to § 102(b)(7). Since there are no facts to show that Mr. Yetter either "stood on both sides of the transaction and dictated its terms in a self-dealing way," or "received in the transaction a personal benefit that was not enjoyed by the

shareholders generally," it cannot be argued that his purported non-disclosures breach his duty of loyalty.[11] Nor is there any basis for a finding of bad faith. To establish bad faith the plaintiffs would have to show that Mr. Yetter knowingly withheld from or misrepresented to TKT's stockholders facts that he knew to be material.[12] There is simply nothing in the record to support such a notion. Indeed, the plaintiffs' Complaint does not even directly allege that any alleged non-disclosure was committed in bad faith (rather than mere neglect), much less provide a specific factual basis for finding bad faith. "Without any additional, supportive factual basis for [its] claim, sufficient at least to create a genuine issue of material fact," a claim of bad faith non-disclosure cannot survive summary judgment. *Arnold* at 1288.[13]

Because there is no evidence that Mr. Yetter was disloyal or acted in bad faith to withhold material facts from TKT's stockholders, he is exculpated from any liability for monetary damages arising therefrom. Summary judgment in his favor is therefore appropriate. *See*, *e.g.*, *Arnold* (upholding entry of summary judgment against disclosure claims where alleged disclosure violations did not fit under an exception to Section 102(b)(7)); *Goodwin* (granting summary judgment against disclosure claims where the alleged disclosure violations did not fit under an exception to Section 102(b)(7)).

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[11] *See In re Coca-Cola Enterprises, Inc.*, 2007 WL 3122370, at *4.

[12] *See*, *e.g.*, *Frank* at *10 (for disclosure claim to survive summary judgment by fitting within second exception to § 102(b)(7), record must contain "affirmative proof" that the defendants deliberately withheld facts that *"they knew were material*.") (emphasis in original) (citing *Arnold*).

[13] It should be noted that Delaware law has long emphasized that directors are presumed to have "acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company." *See*, *e.g.*, *In re Tele-Communications, Inc. Shareholders Litig.*, 2005 WL 3642727, at *6 (Del. Ch.).

B. The Alleged Non-Disclosures Pertaining to Mr. Yetter Are Immaterial as a Matter of Law.

To prevail on a disclosure claim, "a plaintiff must prove not only an omission or misstatement of a particular fact, but also that the fact was material." *Oliver v. Boston University*, 2006 WL 1064169, at *31 (Del. Ch.). "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important to deciding how to vote." *Id.* at *31, quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985). "Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* The burden is on the plaintiffs to prove materiality. *Klang v. Smith's Food & Drug Centers, Inc.*, 1997 WL 257463 (Del. Ch.).

Of the approximately seventeen "facts" that the plaintiffs claim were improperly withheld from (or inaccurately disclosed to) TKT's shareholders, they identify only three as particularly pertinent to Mr. Yetter: (1) "Mr. Yetter's relationship with Shire and Mr. Emmens, including his undisclosed communications with Mr. Emmens at the start of the process;" (2) "The reasons Mr. Yetter stepped down as TKT's Chairman in January 2005;" and (3) Mr. Yetter's purported representation that "the proposed merger was a result of a 'model fiduciary process' which was 'beyond reproach.'"[14] None of these "facts" qualify as material.

[14] *See* Complaint at ¶88(b), (c); Plaintiffs' Interrogatory Responses at Response ¶ 2; "Yetter also caused materially misleading proxy materials to be disseminated to shareholders of TKT. Among other things, these communications: (i) omitted material facts regarding Yetter's contacts with Emmens; (ii) omitted material facts about the reasons Yetter stepped down as Chairman of the Board of TKT in January 2005; and (iii) materially misrepresented the facts in claiming (on multiple occasions) that the proposed merger was a result of a 'model fiduciary process' which was 'beyond reproach.'"

1. Mr. Yetter's Prior Relationship with Mr. Emmens and Early Contacts Are Immaterial.

The prior existence of an ordinary business or personal relationship is not considered material for disclosure purposes. For example, in *In re Siliconix Inc. Shareholders Litig.*, 2001 WL 716787 (Del. Ch.), the Court held as follows:

> The personal friendship of Segall and Talbert with Vishay executives and a limited volume of business done with Vishay by Segall's current employer were not disclosed. Under current Delaware law, personal friendship is not an indication of disloyalty. Similarly, the apparently limited business relationship between Segall's employer and Vishay does not trigger any significant issue of conflict. Thus, any additional disclosures that could have been made *would not have been material*.

Siliconix at *14 (emphasis added). *See also In re Netsmart Technologies Inc. Shareholders Litig.*, 924 A.2d 171, 206 (Del. Ch. 2007) (where Special Committee member and target's CEO had prior business relationship consisting of interlocking board service, Court upheld non-disclosure of these facts, explaining "I fail to perceive any requirement for the disclosure the plaintiffs demand . . . I am chary about adding a judicially-imposed disclosure requirement that past interlocking board service involving a target's CEO and another independent director must always be disclosed. This area of disclosure — i.e., the description of factors bearing on independence — is already well-covered, some might even say smothered.").

Accordingly, the plaintiffs' claims arising from the non-disclosure of Yetter's relationship with Emmens fail from the start. Moreover, even if exceptionally close or frequent business or personal relationships were deemed to rise to the level of materiality, Yetter's relationship with Emmens undoubtedly would not qualify. The facts about this "relationship" are not in dispute, and they are merely that Yetter and Emmens worked together for 1½ years about twenty years ago and for another five years over a decade ago, with unremarkable contacts

on an infrequent basis in the years that followed. Clearly, a reasonable stockholder would not have considered this trivia "important in deciding how to vote." *See*, *e.g.*, *Siliconix* at *14.

Nor are the purported "undisclosed communications . . . at the start of the process" material. The "undisclosed communications" pertain solely to a single conversation in early October 2004, that neither Yetter nor Emmens remembered. The record shows that Shire and its advisors intended Mr. Emmens's mid-November call to Mr. Yetter to be the significant opening salvo of negotiations, as the conversation was carefully prepared for in collaboration with Goldman Sachs, including an outline of talking points that guided Mr. Emmens in "mak[ing] the phone call correctly." Furthermore, an e-mail by Mr. Astrue following his October 13, 2004, meeting with Shire indicates that contacts between the companies were, at that point, mainly focused on Dynepo, and that Shire at that point was "still looking." The fact that an earlier conversation in October might arguably comprise a piece of the "back-and-forth" of the negotiations clearly does not make it material. This Court has frequently held that "a description of the process in play-by-play detail" is completely unnecessary, or else "disclosures in proxy solicitations will become so detailed and voluminous that they will no longer serve their purpose." *TCG Securities, Inc. v. Southern Union Co.*, 1990 WL 7525, at *7 (Del. Ch.). *See also McMillan v. Intercargo Corp.*, 1999 WL 288128, at *9 (Del. Ch.) ("In these circumstances, no reason has been shown why the Board should be required to disclose 'all of the . . . bends and turns in the road' which led to the final agreement").

It should be noted that the proxy statement reports a meeting between Astrue and Emmens that took place on October 13, 2004, less than two weeks after the conversation earlier in the month. Considering that negotiations played out for more than six months thereafter (as the proxy describes in lengthy detail), it is unimaginable that a reasonable shareholder would

consider the occurrence of the first a preliminary telephone call as something "important in deciding how to vote."

2. The Reasons for Mr. Yetter's Resignation as Chairman Are Immaterial.

The "reasons Mr. Yetter stepped down as TKT's Chairman" are immaterial as well. The Delaware Supreme Court has found that reasons underlying a director's resignation are immaterial where they occurred three months before the stockholders approved a proposed merger, explaining that it "requires a significant logical leap to suppose that reasonable stockholders would consider [a June 1997 resignation] significant in the total mix of information available to them in September 1997." *Malpiede v. Townson*, 780 A.2d 1075, 1088 (Del. 2001). If the reasons for the resignations in *Malpiede* were immaterial, then the reasons for Mr. Yetter's resignation are indisputably so, as he was only stepping down as chairman (rather than leaving the board) and doing so more than seven months before the shareholder vote.

Moreover, Mr. Yetter's reasons for resignation—namely, the unfounded suspicions of fellow director Astrue—are immaterial as a matter of law under the rule against self-flagellation. As explained by the Delaware Supreme Court, the self-flagellation rule relieves fiduciaries from disclosing "negative inferences or characterizations of misconduct or breach of fiduciary duty," -- including a director's personal suspicions concerning his fellow directors. *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997) (upholding non-disclosure of the reasons behind a director's resignation where they were merely his personal suspicions of misconduct by fellow directors concerning the matter to be voted on by the shareholders). As the trial court in *Loudon* observed, any obligation to disclose such suspicions would place directors in the "untenable position" of having to condemn themselves without justification while seeking shareholder action, which is exactly what "the rule against director self-flagellation is intended to

avoid." *Loudon*, 1996 WL 74730, at *6 (Del. Ch.). Likewise, here, the rule relieves the TKT board from explaining Yetter's resignation, and hence disclosing Astrue's unfounded suspicions, where they consisted of nothing more than imagination and innuendo.

3. Statements of "Model Fiduciary Process" Are Immaterial.

Finally, any statements characterizing the transaction as the result of a "model fiduciary process" also fail the materiality test. As long as the facts material to the transaction are disclosed, "disclosures relating to the Board's subjective motivation or opinions are not *per se* material." *In re MONY Group, Inc., Shareholders Litig.*, 853 A.2d 661, 681-82 (Del. Ch. 1992).[15]

Because all of the alleged disclosure violations pertaining to Mr. Yetter are immaterial, this Court should enter summary judgment in Mr. Yetter's favor on Count II.[16]

III. TO THE EXTENT THAT COUNT III ASSERTS A CLAIM AGAINST MR. YETTER, HE IS ENTITLED TO SUMMARY JUDGMENT ON COUNT III.

Count III of the plaintiffs' Complaint sets forth a claim for "Spoliation of Voting Records," alleging that "TKT did not even preserve the tabulation sheets and other materials necessary to determine whether the merger recorded a majority of the vote, including the profile of the record holders." (Complaint ¶ 96). Count III thus appears to be a claim asserted against TKT, but it nevertheless seeks an award of rescissory damages "from defendants" based thereon.

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[15] In fact, directors are generally "not required to state opinions or possibilities, legal theories or plaintiff's characterization of the facts," and to do so in a manner that would satisfy most plaintiffs would invariably constitute self-flagellation. *MONY Group* at 682.

[16] While the other non-disclosures alleged in the complaint do not relate to Mr. Yetter, it should be noted that this laundry list fails the materiality test as well. *See* Complaint at ¶88 (a)-(q). Even if all these "facts" were true (and many are not), items (d) and (f)-(m) are "play-by-play detail[s]" for which disclosure is unnecessary, (a) and (e) are plainly irrelevant to a reasonable shareholder, (o)-(q) fail as self-flagellation, and (n) is immaterial because it is overly speculative and unreliable. *See Weinberger v. Rio Grande Indus.*, 519 A.2d 116, 129-30 (Del. Ch. 1986) (disclosure of overly speculative projections not required).

(*Id.* 99). To the extent that Count III is asserted against Mr. Yetter, he is entitled to a summary judgment as to that claim was well. Delaware law does not recognize an independent tort of intentional or negligent spoliation of evidence. *See Lucas v. Christiana Skating Center, Ltd.*, 722 A. 2d 1247, 1251 (Del. Super. 1998). In addition, even if Delaware law recognized such a claim, which it does not, there is no evidence that Mr. Yetter (or any other TKT director) engaged in any activity whether intentional, negligent or otherwise — with respect to the safeguarding or destruction of TKT's voting records. As a result, Mr. Yetter is entitled to summary judgment in his favor on Count III, if it is asserted against him.

CONCLUSION

For the foregoing reasons, Mr. Yetter respectfully requests that this Court grant his motion for summary judgment.

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