



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DOMINGO MIHOVILOVIC, NADAV
LAVY, URI BEN-DOR and RAJIV TANEJA,
as Trustee of the TANEJA 2004 FAMILY
TRUST, on behalf of themselves and all other
similarly situated holders of common stock of
EXABEAM, INC.,

Plaintiffs,

v.

EXABEAM, INC., ADAM GELLER,
THERESIA GOUW, MATTHEW HOWARD,
MARK JENSEN, RAVI MHATRE, JEB
MILLER, NIR POLAK, PRAVIN VAZIRANI,
ASPECT VENTURES, LP, ASPECT
VENTURES I-A, L.P., ASPECT VENTURES
II, L.P., ASPECT VENTURES II-A, L.P.,
ACREW DCF EXABEAM SPV, L.P.,
ACREW DCF EXABEAM AGGREGATOR,
L.P., ACREW DIVERSIFY CAPITAL FUND,
L.P., NORWEST VENTURE PARTNERS
XII, L.P., ICON VENTURES V, L.P.,
LIGHTSPEED VENTURE PARTNERS
SELECT III, L.P, LIGHTSPEED VENTURE
PARTNERS SELECT II, L.P., LIGHTSPEED
STRATEGIC PARTNERS I, L.P., LSVP XB-
F, LLC, XA SPV, LLC, BLUE OWL
OPPORTUNISTIC LENDING I (H) LP,
BLUE OWL TECHNOLOGY FINANCE
CORP., BLUE OWL OPPORTUNISTIC
LENDING MASTER FUND II LP, and BLUE
OWL OPPORTUNISTIC LENDING DL (C)
LP,

Defendants.

C.A. No. 2024-0976-MTZ

PUBLIC VERSION

Filed February 10, 2025

**EXABEAM, INC.'S OPENING BRIEF IN SUPPORT OF
ITS MOTION TO DISMISS COUNT IV OF
PLAINTIFFS' VERIFIED CLASS ACTION COMPLAINT**

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I. INTRODUCTION

Defendant Exabeam, Inc. (“Exabeam”) moves to dismiss Count IV, Violation of Section 228, of Plaintiffs’ verified class action complaint (the “Complaint”), the sole claim Plaintiffs assert against Exabeam.

Plaintiffs acknowledge that Exabeam gave minority stockholders two weeks advance notice of Exabeam’s merger (the “Merger”) with LogRhythm Parent, LP (“LogRhythm”) on June 18, 2024, before the Merger closed on July 2, 2024. Compl. ¶ 127. Exabeam delivered this advance notice via a 190-page Information Statement that sets forth details regarding the Merger, excerpts provisions of Delaware law applicable to Plaintiffs, and encloses copies of both the merger agreement and the written stockholder consent approving the Merger. *See* Compl. Ex. A at 34, 145.

In Count IV, Plaintiffs nevertheless contend that Exabeam’s notice violates the requirement to give non-voting stockholders “prompt notice” of such written consent pursuant to 8 *Del. C.* § 228(e), because the stockholder consent was executed on May 4, 2024. But Section 228(e) does not define “prompt” notice, and Plaintiffs do not articulate how they suffered any cognizable harm arising from the timing of this notice. And the only Section 228(e) case that Plaintiffs cite in support of their prompt notice claim involved notice given over two weeks after the merger had closed (and in violation of the appraisal statute)—not two weeks before (and in compliance with the appraisal statute), as Plaintiffs acknowledge happened here.

Moreover, Plaintiffs' contention that the Information Statement was substantively deficient is not relevant to Section 228(e). The Information Statement includes the text of Section 228, and it attaches the entire stockholder written consent (i.e., the written consent subject to Section 228) as Exhibit B. *See* Compl. Ex. A at 144. This disclosure fully satisfies Section 228(e)'s notice requirement, which demands only "notice of the taking of the action" and imposes no substantive requirements.¹ If Plaintiffs believe they have claims related to the substance of disclosures to stockholders, a technical challenge directed to the Company based on Section 228(e) is not the appropriate vehicle through which to bring them.

The Information Statement and disclosures contained therein satisfied Section 228(e). Plaintiffs received the prompt notice they were due under Section 228(e) in advance of the Merger, and the notice was delivered in sufficient time for Plaintiffs to exercise whatever rights they may have had with respect to the Merger (i.e. making a books and records demand, asserting appraisal rights, or filing fiduciary claims). Plaintiffs do not assert otherwise. In these circumstances, Plaintiffs identify

¹ *See* 8 *Del. C.* § 228(e) ("If an action by consent under subsections (a) or (b) of this section has been taken by stockholders or members by less than unanimous consent, prompt notice of the taking of the action by consent shall be given to those stockholders or members as of the record date for the action by consent who have not consented and who would have been entitled to notice of the meeting if the action had been taken at a meeting and the record date for the notice of the meeting were the record date for the action by consent.").

no cognizable harm due to the timing of this notice. Because Count IV of the Complaint, the only claim asserted against Exabeam, fails to state a claim on which relief may be granted, this Court should grant Exabeam's motion and dismiss Exabeam from this dispute.

II. BACKGROUND AND PROCEDURAL HISTORY

Leading up to the Merger, Exabeam was a Delaware corporation engaged in cybersecurity services. *See* Compl. ¶ 31. Although a leader in the security information and event management (SIEM) space, Exabeam experienced significant financial and operational headwinds over the past several years. *See* Compl. Ex. A at 10. [REDACTED]

[REDACTED]. *See* Compl. Ex. A at 10. Exabeam's business requires significant liquidity, and by late 2023 it faced limited options for further financing. *See* Compl. Ex. A at 10. At that time, Exabeam's board of directors (the "Board") determined [REDACTED]
[REDACTED]
[REDACTED], and it therefore decided to consider potential alternative transactions. *See* Compl. Ex. A at 10.

Exabeam, through its advisors, began initial discussions with 39 potential parties regarding transactions, resulting in multiple potential bidders considering merging with or acquiring Exabeam. *See* Compl. Ex. A at 10. While Exabeam

considered various proposals from different bidders, none involved a valuation of Exabeam that would have resulted in an amount equal to or greater than Exabeam's existing liquidation preferences owed with respect to the outstanding classes of preferred stock. *See* Compl. Ex. A at 10. As a result of these negotiations, the Board determined that there were no proposals that could have resulted in any consideration for Exabeam's common stockholders. *See* Compl. Ex. A at 10.

Through this process, Exabeam determined that LogRhythm was the most attractive opportunity, including based on strategic fit, valuation, and closing certainty. *See* Compl. Ex. A at 10. After further negotiation, on May 4, 2024, the Board voted to approve the Merger, and then obtained the requisite stockholder votes to adopt the Merger through written consent pursuant to Section 228. *See* Compl. ¶ 124. On May 15, 2024, LogRhythm and Exabeam issued a joint press release publicly announcing their intent to merge.²

On June 18, 2024, the Board disseminated the Information Statement, including the requisite Section 228(e) notice, to Exabeam's common stockholders. *See* Compl. ¶ 127. The Information Statement included detailed information

² *See* Respondent Exabeam, Inc.'s Opening Brief in Support of its Motion to Dismiss Petitioner Asaf Barkan's Verified Petition at 2, *Asaf Barkan v. Exabeam, Inc.*, No. 20244-0855-MTZ, (Del. Ch. Sept. 10, 2024), D.I. 8. This Court may take judicial notice of public filings in other cases. *See Fiat North America LLC v. UAW Retiree Medical Benefits Trust*, 2013 WL 3963684, at *2 n.2 (Del. Ch. Jul. 30, 2013) (taking judicial notice of public filings and proceedings in another litigation).

regarding the Merger and attached a complete copy of the written consent for the Merger pursuant to Section 228. *See* Compl. Ex. A. The Merger closed on July 2, 2024. *See* Compl. ¶ 15.

Plaintiffs brought this litigation on behalf of a purported class of similarly situated former common stockholders of Exabeam, asserting four claims. Counts I through III of the Complaint assert breach of fiduciary duty claims against former directors and officers of the Board and certain allegedly affiliated parties. Plaintiffs' fourth and final claim asserts that Exabeam violated Section 228 because it failed to provide the necessary "prompt notice" to Plaintiffs under Section 228(e). *See* Compl. ¶ 154. Plaintiffs do not allege any specific harm arising from the timing of the notice, nor do they seek any specific remedies for that claim.

III. LEGAL STANDARD

Dismissal under Rule 12(b)(6) is appropriate where the plaintiffs "would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof." *In re Hennessy Cap. Acquisition Corp. IV S'holder Litig.*, 318 A.3d 306, 318 (Del. Ch. 2024) (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002)). The court "must draw reasonable inferences in favor of the plaintiff[s]," but is "not required to accept every strained interpretation of [their] allegations." *Id.* (internal citations and quotations omitted). "[N]either inferences

nor conclusions of fact unsupported by allegations of specific facts must be accepted as true.” *Id.* (internal citations and quotations omitted).

IV. ARGUMENT

Plaintiffs do not allege sufficient facts to state a Section 228 claim against Exabeam. *First*, delivery of the Information Statement two weeks before the Merger closed (and within the time periods required by the appraisal statute) was sufficiently prompt under Delaware law, and Plaintiffs do not allege they suffered any harm on account of such notice. *Second*, Plaintiffs’ assertion that the Information Statement was substantively deficient is misplaced with respect to Section 228(e); Section 228 concerns notice of the applicable written consent, which Plaintiffs received. To the extent Plaintiffs assert any other disclosure violations, those can be asserted as breach of fiduciary duty claims—and as such are not viable against Exabeam itself.

A. Plaintiffs Fail to State Any Actionable Violation of Section 228.

1. Plaintiffs fail to allege that notice of the Merger was not prompt.

Section 228 governs actions by written consent of stockholders of a Delaware corporation in lieu of a meeting. This section generally permits stockholders to take actions by written consent that would otherwise be taken at an annual or special stockholder meeting. *See* 8 *Del. C.* § 228(a). Pursuant to Section 228(a), stockholders may take action pursuant to written consent “without a meeting, without prior notice and without a vote, if a consent or consents, setting forth the

action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted.” *Id.* Put simply, Section 228(a) permits action by written consent without prior notice, so long as such action is approved by the requisite number of votes. For actions taken pursuant to this Section by less than unanimous written consent, Section 228(e) mandates that “prompt notice of the taking of the action by consent shall be given to those stockholders” who did not consent to such actions. *See 8 Del. C. § 228(e).*

Section 228(e) does not define “prompt notice.” *See Riskin v. Burns*, 2020 WL 7861209, at *1 (Del. Ch. Dec. 31, 2020). Determining when prompt notice was provided “is a context specific inquiry.” *Id.*; *see also Di Loreto v. Tiber Holding Corp.*, 1999 WL 1261450, at *5 (Del. Ch. June 29, 1999) (reviewing the circumstances surrounding the notice to determine whether notice was prompt “within the meaning of [Section] 228”); *Mehta v. Mobile Posse, Inc.*, 2019 WL 2025231, at *10 (Del. Ch. May 8, 2019) (reviewing the facts and holding of *Di Loreto* and finding it “not instructive” to determining whether notice was prompt because the facts were distinguishable). The purpose of such notice is to “ensure[] some level of transparency for non-consenting stockholders.” *Espinoza v. Zuckerberg*, 124 A.3d 47, 57 (Del. Ch. 2015).

While a context specific inquiry, notice is generally deemed not prompt when given several months after written consent was obtained. *See Di Loreto*, 1999 WL 1261450, at *5 (finding that an “unexplained five-month delay” in providing notice of written consent to amend the company’s charter removing a mandatory buyback provision violated Section 228(e)); *Riskin*, 2020 WL 7861209, at *1 (finding it “reasonably conceivable” that a five-month delay and an eight-month delay in providing notice of written consent approving two separate financings was not prompt); *Acero Capital, L.P. v. Swrve Mobile, Inc.*, 2021 WL 2207197, at *1 n.1 (Del. Ch. June 1, 2021) (suggesting that notice given nearly one year after obtaining written consent was not prompt); *New Enterprise Assoc’s 14 L.P. v. Rich*, 292 A.3d 112, 141 (Del. Ch. 2023) (finding that prompt notice was not provided because the non-consenting stockholders received notice of a charter amendment “months later,” and only after making a books and records demand). On the other hand, few cases have opined on what does constitute prompt notice.

Plaintiffs cite to *Mehta v. Mobile Posse, Inc.* for the proposition that “a more than ‘two-week delay’ in sending the notice ‘[is] not in fact prompt’ and violates Section 228.” *See* Compl. ¶ 128 (citing *Mehta v. Mobile Posse, Inc.*, 2019 WL 2025231 (Del. Ch. May 8, 2019)). But to support their contention that a more than two-week delay violates Section 228, Plaintiffs selectively quote *Mehta* to omit critical context.

In *Mehta*, corporate insiders obtained written consent from preferred stockholders to approve a merger, and the merger closed the same day as the written consent. *Mehta*, 2019 WL 2025231, at *10. The company did not provide an information statement to common stockholders in advance of closing. *Id.* at *4. Instead, notice of the transaction was sent to former common stockholders seventeen days later. *Id.* Such delayed notice precluded common stockholders from the opportunity to exercise their Section 262 appraisal rights. *Id.*

The Court determined that the defendants should have provided stockholders with notice of the Merger consistent with the time period for notice set forth in Section 262 (governing appraisal rights), observing that “[w]hen a transaction approved by written consent triggers notice obligations under Section 262, the deadline in Section 262 should supply the outer bound of what constitutes ‘prompt’ notice under Section 228.” *Id.* at *10. Because the defendant delivered notice after the period required for delivering notice by the appraisal statute (i.e. within 10 days of the closing of the merger, 8 *Del. C.* § 262(d)(2)), the court concluded it was therefore “reasonably conceivable” that the defendant had violated Section 228(e)’s prompt notice provision. *Id.*

None of the same facts from *Mehta* apply here. Unlike in *Mehta*, Exabeam provided notice two weeks *before* the Merger closed. Thus, the notice fell within the “outer bound” identified by the Court in *Mehta*. Specifically, under Section

262(d)(2), Exabeam was permitted to inform stockholders of their appraisal rights “before the effective date of the merger.” 8 *Del. C.* § 262(d)(2). Exabeam did so by mailing the Information Statement on June 18, 2024, further informing stockholders of the right to assert appraisal rights “within 20 days after the date of giving such notice.” *Id.* Thus, unlike the company in *Mehta*, Exabeam afforded its stockholders the full 20-day period for demanding appraisal. Further, Exabeam’s advance notice also afforded Plaintiffs, and other stockholders, adequate time to exercise any other rights they may have had with respect to the Merger (such as Section 220 books and records demands or other relief). Accordingly, Plaintiffs’ conclusory contention that the notice was not prompt should be rejected.

2. *Plaintiffs fail to allege any harm due to the timing of the notice.*

In determining whether notice is “prompt” pursuant to Section 228(e), courts analyze whether non-consenting stockholders faced harm or prejudice due to late notice. For example, in *Mehta*, the plaintiffs were deprived of their ability to assert Section 262 appraisal rights because of the delayed notice. *Mehta*, 2019 WL 2025231, at *6; *see also Di Loreto*, 1999 WL 1261450, at *5 (suggesting that plaintiffs were deprived the ability to require the company to buy back their shares due to the delayed notice); *Brown v. Kellar* 2018 WL 6721263, at *10 (Del. Ch. Dec. 21, 2018) (describing *Di Loreto*, noting that “the lack of notice prevented those plaintiffs from reacting promptly to the majority’s written consent”); *Riskin*, 2020

WL 7861209, at *1 (finding that a five-month and eight-month delay deprived plaintiffs of their ability to object to certain financings approved by written consent); *Dubroff v. Wren Holdings, LLC*, 2011 WL 5137175, at *10 (Del. Ch. Oct. 28, 2011) (noting that inadequacies in a Section 228(e) notice prevented the plaintiffs from bringing “a legal action for rescission or rescissory damages with respect to the [Recapitalization]”).

Here, Plaintiffs do not allege they suffered any harm due to the timing of the notice. Plaintiffs received notice of the Merger, and a copy of the written consent pursuant to Section 228, two weeks before the Merger closed. *See* Compl. ¶ 127. Plaintiffs and all other stockholders had ample opportunity to seek relief during that period, including through books and records demands, appraisal demands, or fiduciary duty litigation. Notice was sent out with enough time for all common stockholders to exercise any of these rights. Because Plaintiffs do not allege any injury arising from purportedly insufficient advance notice, their Section 228 claim should be dismissed.

B. To the Extent Plaintiffs Claim a Disclosure Violation Under Section 228, Plaintiffs Fail to State a Claim Against Exabeam.

1. *Plaintiffs improperly conflate the Information Statement and the Section 228(e) notice.*

Plaintiffs’ Complaint attempts to expand their Section 228(e) prompt notice violation claim into a separate, and broader, inquiry about the substance of the

Information Statement. *See* Compl. ¶ 157 (“[T]he Information Statement is materially deficient and fails to disclose material facts relating to the Board’s evaluation and negotiation of the Merger Agreement, including with respect to the Individual Defendants’ relationship and interests in connections with the Merger, and the benefits they each expect to receive with the Merger.”).

But the substance of the Information Statement is separate and distinct from the notice required by Section 228(e). Section 228 governs actions by written consent, and Section 228(e) provides for notice of such written consent to relevant non-consenting stockholders. *See* 8 *Del. C.* § 228(e) (requiring only “notice of the taking of the action”). The Information Statement attached the entire written consent for which Section 228(e) notice was required, and thus there can be no doubt that the notice was substantively sufficient for purposes of Section 228.

Plaintiffs’ allegations concerning the substantive inadequacy of the Information Statement is therefore not a potential Section 228 claim, but a potential claim for inadequate disclosure. Plaintiffs may seek to assert a fiduciary duty or other claim based on the perceived inadequacy (as indeed they do), but they cannot sustain such a claim against Exabeam based on Section 228.

“To the extent there is a duty to fully disclose information when requesting stockholder action, that duty arises from a fiduciary relationship.” *Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co.*, 2023 WL 9053173, at *7 (Del. Ch. Dec.

29, 2023); *see Dubroff*, 2011 WL 5137175, at *9-10 (considering whether plaintiffs stated a claim against controlling shareholders, *not* the corporation, for breach of the duty of disclosure for providing incomplete notice under Section 228(e)). A corporation does not owe its stockholders fiduciary duties and cannot be directly liable for any alleged breach of fiduciary duties. *See Arnold v. Society for Sav. Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996) (“Fiduciary duties are owed by the directors and officers to the corporation and its stockholders.”).

To the extent Plaintiffs’ Section 228 claim depends on Plaintiffs’ contentions regarding the substance of the Information Statement, such contentions should be disregarded, and the claim should be dismissed, because Exabeam does not owe fiduciary duties to its common stockholders. *See Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co.*, 2014 WL 3954987, at *4 (Del. Ch. Aug. 7, 2014) (dismissing a claim that the corporation violated disclosure obligations because “a corporation does not owe fiduciary duties to its stockholders”) (internal citation omitted).

2. *Exabeam disclosed all relevant information in the Section 228(e) notice.*

Notwithstanding Plaintiffs conflating the substance of the Information Statement and the Section 228(e) notice, Exabeam disclosed all relevant information within the notice.

Section 228(e) “contains no disclosure requirements other than that the written consents be in writing, set forth the action to be taken, and signed by the holders of the stock.” *Unanue v. Unanue*, 2004 WL 5383942, at *8 (Del. Ch. Nov. 9, 2004). However, this Court has found disclosure violations under Section 228 where the notice omits, or the stockholders are not otherwise provided, exhibits or other material information that are specifically referenced on the face of the consent. *See Mehta*, 2019 WL 2025231, at *8 (finding that the defendants’ Section 280G Solicitation asking stockholders to approve executive compensation related to the proposed merger but not providing information about the merger violated Section 228’s disclosure requirements); *Calesa Assocs., LP v. Am. Capital, Ltd.*, 2016 WL 770251, at *14 (Del. Ch. Feb. 29, 2016) (finding that director defendants violated Section 228’s disclosure obligations because many of the exhibits to the transaction documents were in draft form or missing attachments); *Carsanaro v. Bloodhound Techs, Inc.*, 65 A.3d 618, 641 (Del Ch.. 2013) *abrogated on other grounds by El Paso Pipeline GP Co. LLC v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016) (“[W]hen a consent specifically refers to exhibits and incorporates their terms, the plain language of Section 228(a) requires that a stockholder have the exhibits to execute a valid consent.”).

Here, Exabeam complied with its disclosure obligations under Section 228. The Section 228(e) notice identified that the requisite numbers of stockholders

adopted and approved the Merger, the Merger Agreement, and related transactions by written consent. Compl. Ex. A. at 33. The notice likewise attached the full written consent that “[t]he Stockholders adopted and approved” as Exhibit B to the Information Statement. *Id.* Additionally, all exhibits identified on the face of the consent itself are attached to the Information Statement or discussed within the Information Statement. The Merger Agreement is attached to the Information Statement as Exhibit A. *See, e.g.,* Compl. Ex. A. at 34 (attaching the Merger Agreement); Compl. ¶ 13 n. 8 (referencing Exabeam’s Restated Charter).

Plaintiffs were apprised off all necessary information that was discussed and approved by written consent pursuant to Section 228. Any alleged disclosure violation should therefore be dismissed.

V. CONCLUSION

For the foregoing reasons, Exabeam respectfully requests that the Court grant its motion to dismiss Count IV of Plaintiffs’ Complaint and dismiss Exabeam from this dispute.

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January 31, 2025

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