



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DOMINGO MIHOVILOVIC, et al.,	)	
	)	
Plaintiffs,	)	C.A. No. 2024-0976-MTZ
	)	
v.	)	
	)	
EXABEAM, INC., et al.,	)	PUBLIC VERSION
	)	Filed February 10, 2025
Defendants.	)	

**THE INDIVIDUAL AND FUND DEFENDANTS'
OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS
THE VERIFIED CLASS ACTION COMPLAINT**

Date: January 31, 2025

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PRELIMINARY STATEMENT

The Individual and Fund Defendants move to dismiss the Verified Class Action Complaint (the “Complaint”) because it lacks well-pled allegations of conflicts or anything else to rebut the application of the business judgment rule to directors who approved an arms’ length merger with a third party who made the best offer after a lengthy sale process. Similarly, even if the Plaintiffs had adequately pled a predicate underlying fiduciary duty breach (which they have not), the claims against the Fund Defendants would still fall far short of the standard required to plead aiding and abetting because the Complaint is devoid of the kind of specific facts required to plead knowing participation.

Exabeam, Inc. (“Exabeam” or the “Company”) is a global cybersecurity company that delivers artificial intelligence (AI) driven security operations. Despite some initial success, Exabeam began 2024 in dire financial straits. Over a decade of consistent losses, mounting debts, and a business strategy that would require substantially more capital for even a chance at profitability meant the Company would run out of cash before the end of the year. Facing that reality, the Company’s board of directors (the “Board”) enlisted J.P. Morgan to seek strategic alternatives. After several months of outreach and discussions with dozens of potential partners, it became obvious that no buyer was interested in acquiring the Company for anything approaching enough to result in consideration being due for the common

stock after accounting for debts, expenses, and the preferred stockholders' aggregate liquidation preference of approximately \$615 million (the "Preference").

The Board thus chose the best option before it—a stock-for-stock merger with LogRhythm, Inc., an affiliate of Thoma Bravo, LP—that valued Exabeam at approximately \$487.5 million. That was \$127 million short of satisfying the Preference, so the common stock was out-of-the-money in the transaction.

Plaintiffs were Exabeam common stockholders before the transaction. The main claim of the Complaint is against members of the Board for breach of fiduciary duty challenging the Merger on the ground that it was not entirely fair. The thesis of their fairness claim is that the Company—even though it was saddled with debt and running out of cash—was worth almost double what the Board agreed to accept from LogRhythm in an arms' length sale. In other words, Plaintiffs' theory is that the preferred stockholders agreed to a transaction worth \$127 million less than their Preference when they could have sold to someone else for much more, such that their full Preference would have been satisfied and the common stock would have received some of the merger consideration.

Plaintiffs' implausible scenario is unsupported by any pled facts. The Complaint does not explain why the Board or the investors would have agreed to an economically irrational transaction. And Plaintiffs do not point to a different available alternative transaction which the Board ignored. Indeed, the Complaint

leaves us to speculate whether anyone would have been willing to pay so much for the Company, when it attracted no such interest from the dozens of potential buyers contacted during the sale process.

The fairness claims should be dismissed because the Complaint fails to allege facts that rebut the business judgment rule for a majority of the Board. Plaintiffs' primary argument is that a majority of the Board suffered from conflicts of interest because they are affiliated with investors that held preferred stock, which stood to receive Merger consideration while the common stockholders did not. This argument has three major flaws, each of which is fatal.

First, the Complaint does not rebut the business judgment rule by alleging facts from which it can be inferred that a majority of the directors were conflicted due to mere affiliation with preferred stock investors. The fact that a director is affiliated with a stockholder that allegedly has an interest in a transaction does not automatically undermine the director's presumption of independence and lead to the conclusion that the director is interested.

Second, the Complaint does not rebut the presumption that the directors and preferred stockholders were motivated to maximize returns in any transaction. The fact that some directors were affiliated with significant stockholders means that their interests were aligned with those of the common stockholders: they are presumed to have had every incentive to seek the highest sale price available. The Complaint

does not rebut that presumption with allegations of fact that the stockholders were so desperate for liquidity that they would not have sought to maximize the return on their investments. Indeed, the transaction itself—receipt of illiquid interests in the post-Merger company—belies any desire for immediate liquidity.

Third, the Complaint does not allege facts from which it can conceivably be inferred that any of the directors, even if they or their affiliates were conflicted, did anything disloyal. Such facts are required to state a claim given the Company's exculpatory charter provision adopted pursuant to 8 *Del. C.* § 102(b)(7). Instead, the Complaint does not allege facts showing the directors failed to carry out their duties in connection with the negotiation or approval of the Merger. And it does not contain well-pled facts that show Defendants willingly left over \$127 million on the negotiating table, i.e., that the Merger price was so inadequate that the common stock might have been in-the-money but for some breach of duty.

Because the Complaint fails to establish that a majority of the Board was interested in the Merger, the decision is protected by the business judgment rule and the fairness claims should be dismissed.

The Complaint's ancillary claims should be likewise dismissed. Plaintiffs allege disclosure claims against the former directors. They should be dismissed because no damages are possible under the facts as pled. The Complaint also strains to assert aiding and abetting claims against the Fund Defendants. Plaintiffs'

allegations fall far short of the standard required to plead aiding and abetting, even if there were a predicate underlying fiduciary duty breach. Plaintiffs do not allege the kind of specific facts required to plead the requisite knowing participation, which, as the Delaware Supreme Court recently reiterated in *Mindbody*, requires both (i) knowledge of the underlying breach, and (ii) that the aider and abettor knew their conduct was improper. The Complaint alleges nothing even remotely suggesting any of the Fund Defendants had the scienter sufficient to support an inference of knowing participation in any breach of fiduciary duty. Accordingly, all the Fund Defendants should be dismissed.¹

At bottom, Plaintiffs’ attempt to evade their failure to state a claim by analogizing to the “familiar” *Trados* “fact pattern.” Compl. ¶ 2. That does not excuse their failure to plead enough to establish a reasonably conceivable claim. Plaintiffs’ case ultimately boils down to asserting they have stated a claim because they did not get any consideration for their underwater common shares and former common stockholders who did not receive consideration were able to state claims that survived pleadings-stage motions in superficially similar situations like *Trados*.

¹ In addition, four of the Fund Defendants should be dismissed under Court of Chancery Rule 12(b)(2) because the Court lacks personal jurisdiction over them.

That is not enough to plead a claim; there is no *per se* rule that directors are conflicted just because underwater common stock receives no consideration in a merger.

Moreover, every prior example of this “familiar” fact pattern—from the progenitor *Trados*, decided over a decade ago, to *Jacobs v. Akademos, Inc.*, decided in fall 2024—ended up the same way: the plaintiffs’ shares were never worth anything to begin with, so their damages are inevitably zero. Thus, even accepting Plaintiffs’ framing of the case, their Complaint is pointless; there is no reason to subject the parties and the Court to burdensome and expensive discovery, motion practice, and trial, when we already know how the familiar story ends.

For these reasons, the Complaint should be dismissed in its entirety.²

² Plaintiffs also accuse the Company of violating 8 *Del. C.* § 228 for allegedly not having disseminated an Information Statement in connection with the Merger in a timely manner. That claim is discussed in the Company’s separate brief, whose arguments the Individual and Fund Defendants adopt and incorporate by reference.

FACTS

The facts relevant to Defendants’ motion to dismiss under Rule 12(b)(6) are drawn from the Complaint, certain documents incorporated by reference in the Complaint, and publicly available Securities and Exchange Commission (“SEC”) filings. The Court may take judicial notice of those documents. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004); *see also In re Gen. Motors (Hughes) S’holder Litig.*, 897 A.2d 162, 170 (Del. 2006) (explaining that the Court may take judicial notice of facts in SEC filings not subject to reasonable dispute).

I. PARTIES

A. The Individual Defendants

Defendant Nir Polak co-founded Exabeam and served as Secretary and Chairman of the Board through the date of the Merger. Compl. ¶ 32; *id.* Ex. A at 22 (Exabeam, Inc., Information Statement) [hereinafter “Information Statement” or “IS”]. Polak is affiliated with the Arad Polak GST Trust dated 10/22/2021, the Gal Polak GST Trust dated 10/22/2021, the Tomer Polak GST Trust dated 10/22/2021 and the Polak Family Trust (the “Polak Trusts”), which each held Company Capital

Stock³ at the time of the Merger and, according to the Information Statement, would receive proceeds in such capacity as a result of the Merger. Compl. ¶ 32.

Defendant Adam Geller served as Exabeam’s CEO and as a director from 2023 through the date of the Merger. *Id.* ¶ 34. The Information Statement disclosed that Geller might receive “(i) a bonus following the Closing and an exit bonus upon a change of control of Buyer and (ii) partnership interests in the Aggregator.” IS at 22.

Defendant Theresia Gouw was a director through the date of the Merger. Compl. ¶ 35. Gouw was an affiliate of Defendants Aspect Ventures, LP, Aspect Ventures I-A, L.P., Aspect Ventures II, L.P. and Aspect Ventures II-A, L.P. (together, “Aspect”). *Id.* Gouw was also an affiliate of Defendants Acrew DCF Exabeam SPV, L.P., Acrew DCF Exabeam Aggregator, L.P. and Acrew Diversify Capital Fund, L.P. (together, “Acrew”). *Id.* ¶ 36. Aspect and Acrew held Company Capital Stock and/or were lender to the Company and received proceeds in such capacity as a result of the Merger. IS at 22.

³ “Company Capital Stock” refers to the issued and outstanding capital stock of the Company as of May 4, 2024, consisting of (i) Common Stock, (ii) Series A Preferred Stock, (iii) Series A-1 Preferred Stock, (iv) Series B Preferred Stock, (v) Series C Preferred Stock, (vi) Series D Preferred Stock, (vii) Series E Preferred Stock, (viii) Series F Preferred Stock and (ix) Series F-1 Preferred Stock. IS, Merger Agreement at 13.

Defendant Matthew Howard was a director through the date of the Merger. Compl. ¶ 37. Howard was an affiliate of Norwest Venture Partners XII, LP (“Norwest”). IS at 22. Norwest held Company Capital Stock, was a lender to the Company, and received proceeds in that capacity as a result of the Merger. *Id.*

Defendant Ravi Mhatre was a director through the date of the Merger. Compl. ¶ 39. Mhatre was an affiliate of LSVP XB-F, LLC, Lightspeed Venture Partners Select III, L.P., Lightspeed Venture Partners Select II, L.P., Lightspeed Strategic Partners I, L.P. and XA SPV, LLC (together, “Lightspeed”). *Id.* Lightspeed was a holder of Company Capital Stock, was a lender to the Company, and received proceeds in that capacity as a result of the Merger. IS at 23.

Defendant Jeb Miller was a director through the date of the Merger. Compl. ¶ 41. Miller was an affiliate of Icon Ventures V, L.P. (“Icon”), a holder of Company Capital Stock and a lender to the Company who received proceeds in that capacity as a result of the Merger. IS at 23.

Defendant Pravin Vazirani was a director through the date of the Merger. Compl. ¶ 42. Vazirani was an affiliate of Defendants 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 (together, “Blue Owl”). IS at 23. Blue Owl was a holder of Company Capital Stock, was a lender to the Company, and would receive proceeds in that capacity as a result

of the Merger. *Id.* It was also disclosed that Blue Owl might participate in the debt financing related to the Merger. *Id.*

Defendant Mark Jensen was a director from 2022 through the date of the Merger. Compl. ¶ 45. Jensen is not alleged to have been a stockholder or to have any particular personal interest in the Merger.

Defendants Polak, Geller, Gouw, Howard, Mhatre, Miller, Vazirani, and Jensen are referred to collectively as the “Individual Defendants.”

B. The Entity Defendants

Defendant Exabeam is a global cybersecurity company that provides AI-driven security solutions. *Id.* ¶ 31. Exabeam is a Delaware corporation headquartered in Foster City, California. *Id.*

Defendants Aspect Ventures, LP, Aspect Ventures I-A, L.P., Aspect Ventures II, L.P., and Aspect Ventures II-A, L.P., are Delaware limited partnerships. *See id.* ¶ 35.

Defendants Acrew DCF Exabeam SPV, L.P., Acrew DCF Exabeam Aggregator L.P., and Acrew Diversify Capital Fund L.P., are Delaware limited partnerships. *See id.* ¶ 36.

Defendant Norwest is a Delaware limited partnership. *See id.* ¶ 37.

Defendant Icon is a Delaware limited partnership. *See id.* ¶ 41.

Defendants Lightspeed Venture Partners Select III, L.P., Lightspeed Venture Partners Select II, L.P., and Lightspeed Strategic Partners I, L.P., are limited partnerships registered in the Cayman Islands. *See id.* ¶ 39; Ex. 1 (Cayman Islands General Registry, Entity Details for Lightspeed Venture Partners Select III, L.P., retrieved Dec. 16, 2024); Ex. 2 (Cayman Islands General Registry, Entity Details for Lightspeed Venture Partners Select II, L.P., retrieved Dec. 16, 2024); Ex. 3 (Cayman Islands General Registry, Entity Details for Lightspeed Strategic Partners I, L.P., retrieved Dec. 16, 2024).⁴ Defendants LSVP XB-F, LLC, and XA SPV, LLC, are Delaware limited liability companies. *See* Compl. ¶ 39.

Defendants Blue Owl Opportunistic Lending I (H) LP, Blue Owl Opportunistic Lending Master Fund II LP, and Blue Owl Opportunistic Lending DL (C) LP, are Delaware limited partnerships. *See id.* ¶ 42. Defendant Blue Owl Technology Finance Corp. is a Maryland corporation with its principal place of

⁴ The Court may consider judicially noticeable documents, such as public corporate filings, in deciding a motion to dismiss. *See, e.g., Walker v. Cabo Verde Cap., Inc.*, 2017 WL 2491516, at *1 (Del. Ch. June 8, 2017) (“The Court may take judicial notice of documents on file with the Secretary of State at the motion to dismiss stage.” (citation omitted)), *adopted by* 2017 WL 2882383 (Del. Ch. June 26, 2017); *PVP Aston, LLC v. Fin. Structures Ltd.*, 2023 WL 2728775, at *13 (Del. Super. Ct. Mar. 31, 2023) (in dismissing complaint, taking judicial notice of the Florida corporate filings of the parent company of certain plaintiffs).

business in New York, New York. *See id.*; Blue Owl Tech. Fin. Corp., Form 10-Q at i (Nov. 8, 2024).

Defendants Aspect, Acrew, Norwest, Icon, Lightspeed, and Blue Owl are referred to collectively as the “Fund Defendants.”

C. Plaintiffs

Plaintiff Domingo Mihovilovic co-founded Exabeam in 2013 and served as its Chief Technology Officer until 2021. Compl. ¶ 27. Mihovilovic alleges that at the time of the Merger he was the direct or indirect owner of 1,356,594 shares of Exabeam common stock. *Id.*

Plaintiff Uri Ben-Dor and Nadav Lavy co-founded SkyFormation, a cloud security company that Exabeam acquired in 2019. *Id.* ¶ 28. Ben-Dor and Lavy allege that at the time of the Merger, they held 309,917 and 242,629 shares of Exabeam common stock, respectively. *Id.*

Plaintiff Rajiv Taneja was Vice President, Product Development at Exabeam through 2022. He alleges that at the time of the Merger he owned 249,637 shares of Exabeam common stock. *Id.* ¶ 29.

II. THE MERGER

Since its founding in 2013, Exabeam had a history of significant losses, negative cash flows from operations, limited liquidity, and was dependent on additional financing rounds to fund operations. *See* IS at 4. Through 2023 and into

early 2024, the Company's operating losses continued to accrue. It was incurring significant research and development expenses—[REDACTED] during fiscal years 2023 and 2024, respectively. Compl. ¶ 77. The Company was likely to run out of cash in 2024. *Id.* ¶ 18. In the notes to the Company's Consolidated Financial Statements for the fiscal years ended January 31, 2023 and 2024, Exabeam's independent auditor, Ernst & Young, opined about the situation in bleak terms:



The Company's history of significant losses, its negative cash flows from operations, its limited liquidity resources currently on hand, and its dependence on additional financing to fund its operations after the current resources are exhausted, raise substantial doubt about its ability to continue to operate as a going concern for one year after the date that the accompanying consolidated financial statements were issued.

. . . In the event the Merger does not close, the Company will need to raise additional financing to fund its business operations. If such a need arises, the Company believes it will be able to secure required investments from existing or potential investors. Although the Company has been successful in raising capital in the past, there can be no assurance that these current plans will be successful.

Therefore, it is not considered probable that the Company's plans to raise additional capital will alleviate the substantial doubt regarding its ability to continue as a going concern. If the Company is unable to raise capital on acceptable terms, or at all, the Company would be required to take additional actions to address its liquidity needs, including **additional cost reduction measures such as further reducing operating expenses, extending payables, or scaling back its current operating plan, or the Company may be required to cease operations entirely, liquidate all or a portion of its assets, and/or seek protection under the U.S. Bankruptcy Code.**

IS, Notes to Consolidated Financial Statements for Years Ended Jan. 31, 2023 and 2024, at 8 (emphasis added).

Facing these circumstances, the Board and management determined going into 2024 that there was substantial doubt about the Company's ability to continue to operate as a going concern absent a strategic transaction or a new round of financing. Compl. ¶ 84. During the second half of 2023, Exabeam had received several inbound inquiries about possible acquisition proposals. *Id.* On December 22, 2023, the Company engaged J.P. Morgan Securities LLC ("J.P. Morgan") and Goodwin Procter LLP to assist it in evaluating potential transactions. *Id.* ¶ 87.

J.P. Morgan and the Company had initial discussions with 39 interested parties. *Id.* After that initial round, and at the Board's direction, the Company and J.P. Morgan continued to engage in more detailed negotiations with a narrowed subset of interested parties. *Id.* None of these discussions with potential acquirers

involved a valuation of the Company that, after paying off existing debts, would satisfy the Preference due to preferred stockholders. *Id.* ¶ 88. Under Article IV(B)(2) of Exabeam’s Certificate of Incorporation,⁵ the Preference had to be satisfied before common stockholders would be entitled to consideration in an acquisition transaction. As such, the Board determined that none of the proposals that were practically available could have resulted in any consideration being due to common stockholders. *See* IS at 4-6.

During the negotiations, discussions with LogRhythm regarding a merger with Exabeam emerged as an attractive opportunity based on strategic fit, valuation, and likelihood of closing. *Id.* at 4. In particular, such a deal would provide a solution to Exabeam’s financial challenges and was projected to enhance LogRhythm’s go-to-market strategy for enterprise customers, accelerate its cloud transition, provide additional offerings and capabilities, and provide opportunities for cost savings.

Negotiations among J.P. Morgan and management, at the Board’s direction, and LogRhythm continued through March 2024. *Id.* Through these negotiations, LogRhythm agreed to significant improvements from its initial offer, including

⁵ Compl. Ex. B (Restated Certificate of Incorporation of Exabeam, Inc., dated May 2, 2024) [hereinafter “Certificate of Incorporation”]; *see also* Ex. 4 (Restated Certificate of Incorporation of Exabeam, Inc., dated May 11, 2023, as amended June 15, 2023). The Court may take judicial notice of that provision. *See Malpiede v. Townson*, 780 A.2d 1075, 1090 (Del. 2001).

(1) agreeing to pay off the Company's existing debt obligations, (2) agreeing to provide funds for the combined Company's near-term working capital needs following closing, and (3) increasing the total consideration Exabeam stockholders would receive by approximately 39%. Compl. ¶ 90.

On April 4, 2024, following a review of the improved terms of LogRhythm's proposal, the Board unanimously authorized the Company to enter into a term sheet and an exclusivity agreement with LogRhythm. IS at 4. Following the execution of the term sheet and the exclusivity agreement, the parties negotiated the Merger Agreement and other transaction documents. *Id.*

On May 4, 2024, after a thorough evaluation of the terms of the proposed transaction and other relevant considerations, including the alternatives available to the Company, the Board unanimously (1) approved the Merger, the Merger Agreement and the other transactions contemplated by the Merger Agreement, (2) declared the proposed Merger advisable and in the best interests of the Company and its stockholders, and (3) recommended that stockholders adopt the Merger Agreement and approve the Merger and the other contemplated transactions. Compl. ¶ 95. Following the Board's unanimous approval, the parties executed the Merger Agreement. *Id.* ¶ 96. After the execution of the Merger Agreement, stockholders sufficient to satisfy the approval requirements of the DGCL and the Company's relevant organizational documents adopted the Merger Agreement and

executed and delivered a stockholder consent to that effect pursuant to 8 *Del. C.* § 228. *Id.*

The Merger was a stock-for-stock transaction that assigned Exabeam an enterprise value of \$487.5 million. *Id.* ¶ 3; IS Merger Agreement at 78. Exabeam’s preferred stockholders received preferred equity interests in the surviving company via Excalibur Aggregation L.P. (the “Aggregator”), an entity created to facilitate the transaction. Compl. ¶ 100. These interests were allocated to preferred stockholders *pro rata* based on the amount of pre-Merger Exabeam preferred stock they held. IS at 7.

On June 18, 2024, the Company distributed the Information Statement to stockholders. Compl. ¶ 9. The Information Statement provided information about the background of the Merger, the reasons the Board had decided to enter into it, a copy of the Merger Agreement, information about stockholder’s appraisal rights under 8 *Del. C.* § 262, and other pertinent information, including Exabeam’s Consolidated Financial Statements for the fiscal years ended January 31, 2023 and 2024, audited by Ernst & Young. It also disclosed that the Merger had already been approved by written consent of the requisite number of shares. IS at 5. The Information Statement requested that stockholders return signed consents by June 29, 2024. *Id.* at 3. The Merger closed on or about July 2, 2024. Compl. ¶ 106.

III. PROCEDURAL HISTORY

On September 19, 2024, Plaintiffs filed the Complaint on behalf of a putative class comprised “all holders of Exabeam common stock who were harmed by Defendants’ actions described” therein. *Id.* ¶ 129. Count I alleges the Individual Defendants breached their fiduciary duties as directors by causing the Company to enter into the Merger under terms that did not result in consideration to common stockholders and by issuing a materially misleading Information Statement, among other things. *Id.* ¶¶ 137-41. Count II alleges Geller also violated his fiduciary duties in his capacity as an officer. *Id.* ¶¶ 143-47. Count III alleges the Fund Defendants aided and abetted the Individual Defendants’ purported breaches of fiduciary duties. *Id.* ¶¶ 149-52. And Count IV alleges the Company violated 8 *Del. C.* § 228 by failing to give stockholders sufficiently prompt notice of the Merger. *Id.* ¶¶ 154-57. None state a claim.

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 12(B)(6).

A motion to dismiss should be granted where “the [nonmoving party] would not be entitled to recover under any reasonably conceivable set of circumstances.” *Cent. Mortg. v. Morgan Stanley Mortg. Cap. Hldgs.*, 27 A.3d 531, 535 (Del. 2011). Under Court of Chancery Rule 12(b)(6), the Court assumes the truthfulness of all well-pled allegations of fact in the Complaint, but it need not credit “conclusory allegations that are not supported by specific facts, or draw unreasonable inferences in the plaintiff’s favor.” *In re Estate of Mergenthaler*, 2024 WL 4052994, at *5 (Del. Ch. Sept. 4, 2024) (quoting *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013)).

A. The Complaint Should Be Dismissed Because Plaintiffs Have Not Rebutted the Business Judgment Rule.

Directors of Delaware corporations are protected by the business judgment rule, which is the default “presumption that in making a business decision the directors . . . acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled in part on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (citations omitted). “The rule posits a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be

‘attributed to any rational business purpose.’” *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (citing *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)). Plaintiffs challenging a board’s decision have the burden to allege facts rebutting the presumption. *Id.* Failure to do so results in dismissal. *Hindlin v. Gottwald*, 2020 WL 4206570, at *4-5 (Del. Ch. July 22, 2020).

Article IX of Exabeam’s Certificate of Incorporation contained an exculpatory provision pursuant to 8 *Del. C.* § 102(b)(7). Where such a provision is present, a “claim for post-closing damages against the directors for breach of fiduciary duty can survive only if the Complaint alleges facts from which it reasonably can be inferred ‘that (1) a majority of the Board was not both disinterested and independent or (2) that the [Board] did not act in good faith’” with respect to the challenged transaction—here, the Merger. *In re MeadWestvaco S’holders Litig.*, 168 A.3d 675, 683 (Del. Ch. 2017) (quoting *In re BJ’s Wholesale Club, Inc. S’holders Litig.*, 2013 WL 396202, at *6 (Del. Ch. Jan. 31, 2015)) (modification in original). “In the context of a sales process,” plaintiffs can state a non-exculpated breach of the duty of loyalty “by alleging non-conclusory facts, which suggest that a majority of the board was either interested in the sales process or acted in bad faith in conducting the sales process.” *van der Fluit v. Yates*, 2017 WL 5953514, at *8 (Del. Ch. Nov. 30, 2017) (quoting *In re Answers Corp. S’holders Litig.*, 2012 WL 1253072, at *7 (Del. Ch. Apr. 11, 2012)).

Plaintiffs do not challenge that a majority of the Board was disinterested and independent insofar as they did not personally stand on both sides of the Merger. No director is alleged to have had any relationship with LogRhythm or Thoma Bravo, which were arms' length, third-parties. Plaintiffs do not allege a majority of the Board, including each of the outside directors, personally received non-ratable benefits in the Merger.

Plaintiffs' complaints about the Merger boil down to disagreements with the Board's business judgments. For example, the Complaint alleges the Merger was at a "fire sale" price that did "not reflect Exabeam's fair value," and should have obtained a higher price. *See* Compl. ¶¶ 19, 21. But such allegations are merely second-guessing directors' decision-making and do not state a claim on which relief can be granted in light of the business judgment rule and the exculpatory provision in the Certificate of Incorporation. *See Flannery v. Genomic Health, Inc.*, 2021 WL 3615540, at *11 (Del. Ch. Aug. 16, 2021) ("Delaware courts will not second-guess a board's decision unless it 'cannot be attributed to any rational business purpose.'" (quoting *Cede*, 634 A.2d at 361)); *In re Comverge, Inc. S'holders Litig.*, 2014 WL 6686570, at *13 (Del. Ch. Nov. 25, 2014) ("'[C]laims of flawed process are properly brought as duty of care, not loyalty, claims and . . . those claims are barred' by exculpation provisions adopted in conformity with 8 *Del. C.* § 102(b)(7)." (quoting *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *7 (Del. Ch. Sept. 30, 2009))).

The Complaint's factual allegations about the Board's decision-making and exercise of its business judgment are conclusory and not well pled. As detailed in the background above, the Board conducted a banker-led sale process in which dozens of potential purchasers were contacted; the Board considered all available alternatives in light of the Company's imminent financial crisis; and, before approving the Merger, concluded that potential acquirers did not ascribe sufficient value to the Company to put the common equity in-the-money.

These facts should end this case. An independent, fully informed Board majority approved an arms' length Merger with a third party. Nevertheless, in attempting to rebut the business judgment rule, Plaintiffs advance the implausible and wholly unsupported theory that the Company was worth over twice what any buyer was willing to pay for it, and the directors and Funds left over half a billion dollars on the table in order to receive an equity interest in the post-Merger Company worth a fraction of the Preference.

As discussed below, this theory fails to rebut the business judgment rule for three independent reasons. First, the Complaint has not adequately pled that the directors' "affiliations" with preferred stockholders, in and of themselves, constitute disabling interests. Second, nor does the Complaint contain well-pled allegations that the preferred stockholders' interests diverged from those of the common stockholders such that the directors' affiliations constitute a conflict rebutting the

business judgment rule. Third, the Complaint fails to allege the directors did anything disloyal. For these reasons, the Complaint fails to rebut the business judgment rule and should be dismissed.⁶

1. Plaintiffs Have Not Rebutted the Presumption that the Directors’ Were Motivated to Seek the Highest Possible Merger Price Because of their “Affiliations.”

Plaintiffs’ theory that a majority of the Board harbored conflicts starts with the idea that they lacked the incentive to negotiate a price in excess of the Preference because they are affiliated with the Fund Defendants, who simply wanted to proceed with any transaction, regardless of the price, as long as it gave them equity interests in the post-Merger Company and repayment of “debts owed to them” that the Complaint does not identify.⁷ *See, e.g.*, Compl. ¶¶ 1, 4, 24. But appointment of a director to the board by even an allegedly interested party is not sufficient to render the director interested. *Olenik v. Lodzinski*, 2018 WL 3493092, at *17 (Del. Ch. July 20, 2018) (“[A] director’s nomination or election [to the board] by an interested

⁶ Plaintiffs’ failure to rebut the business judgment rule as to the approval of the Merger necessitates dismissal of Count II asserted against Geller as an officer as well. *See Cede*, 634 A.2d at 361 (“[T]he business judgment rule attaches to protect corporate officers . . .”).

⁷ Even if director conflicts attributed to the prospect of debt repayment or participation in the Merger debt financing for certain affiliated funds were well pled, Plaintiffs have not pled that a majority of the Board was affiliated with such funds, as they must to rebut the business judgment rule.

party,’ standing alone, does not support a reasonable inference that the director lacks independence.” (quoting *In re EZCORP Inc. Consulting Agmt. Deriv. Litig.*, 2016 WL 301245, at *40 (Del. Ch. Jan. 25, 2016))), *rev’d in part on other grounds*, 208 A.3d 704 (Del. 2019).

Accepting for the sake of argument Plaintiffs’ (incorrect) premise that the Fund Defendants had an interest in the Merger at odds with common stockholders, mere “affiliation” with particular stockholders, as is alleged here, does not make a director interested absent specific factual allegations speaking to the materiality of the relationship and how it creates a conflict. *See DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *23 (Del. Ch. Sept. 30, 2013) (finding bare allegation that a director was “affiliated” with controller’s hedge fund, and served on board of other company of which controller was president, chairman, and CEO, fell “well short of what is required under Delaware law to establish that a director lacks independence” in absence of allegations speaking to how this “was material to him in any way”); *Chen v. Howard-Anderson*, 87 A.3d 648, 670-72 (Del. Ch. 2014) (granting summary judgment in favor of director where affiliations alleged—past board service with other purportedly conflicted individuals—were insufficient to give rise to material issue of independence, and also in favor of other directors who worked for private equity funds whose interests could not be said to diverge from those of stockholders); *In re Gen. Motors Class H S’holders Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999)

(holding the Court must inquire into whether the benefit is “material” meaning significant enough “in the context of the director’s economic circumstances, as to have made it improbable that the director could perform her fiduciary duties . . . without being influenced by her overriding personal interest”). A stockholder cannot “simply argue in the abstract that a particular director has a conflict of interest because she is affiliated with a particular type of institution.” See *In re Rural Metro Corp. S’holder Litig.*, 102 A.3d 205, 257 (Del. Ch. 2014), *aff’d sub nom. RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015).

The Complaint makes minimal effort to explain or describe the materiality of the “affiliations” it alleges, let alone how such affiliations might translate into anything but an alignment of incentives to get the highest possible price. For example, it suggests Mhatre’s affiliation with Lightspeed Venture Partners, Compl. ¶¶ 39-40, and Vazirani’s affiliation with Blue Owl, *id.* ¶¶ 42-44, misaligned those directors’ incentives, yet fails to plead how those entities themselves had any divergent interests, discussed *infra* in the next section. Plaintiffs do not attempt to allege a specific affiliation on Jensen’s part, and his independence cannot reasonably be challenged merely because he described himself on LinkedIn as “an investor in private technology companies.” *Id.* ¶ 46.

The Complaint’s block quotation from *Trados* does not alter that conclusion, as there the Court was discussing a director who it found had “current and past

relationships [that] resulted in a sense of ‘owingness’ that compromised his independence.” *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 55 (Del. Ch. 2013). No such relationships have even been alleged here. Plaintiffs have therefore failed to rebut the business judgment rule because of the alleged “affiliations.”

2. Plaintiffs Have Not Conceivably Alleged that Preferred Investors Lacked Incentive to Negotiate a Merger Valuing Exabeam in Excess of the Preference.

Even if the Complaint adequately alleged that director affiliations with the Fund Defendants aligned them with those investors, it still fails to identify a conflict between those investors and the common stockholders. In *In re PNB Holding Co. Stockholders Litigation*, then-Vice Chancellor Strine observed that “it is useful to have directors with . . . skin in the game [because such] directors have a personal interest in ensuring that the company is managed to maximize returns to the stockholders.” 2006 WL 2403999, at *10 (Del. Ch. Aug. 18, 2006) (rejecting argument that directors acting in concert comprised a control group). This principle applies here; the directors’ alleged affiliations with major stockholders mean they, like all stockholders, had every incentive to see the Company sold for the highest price reasonably attainable, as Delaware law presumes. *See Katell v. Morgan Stanley Grp., Inc.*, 1995 WL 376952, at *12 (Del. Ch. June 15, 1995) (“Delaware law presumes that investors act to maximize the value of their own investments.”).

Indeed, the fact that a majority of the Board was affiliated with stockholders confirms the absence of a conflict; they had no incentive to agree to the Merger on inadequate financial terms. *See Gen. Motors*, 734 A.2d at 618 (rejecting allegation of “divergent interests” between directors holding large amounts of one class of common stock and holders of a class of tracking stock because the interests between the classes were “heavily balanced by their shared interest in obtaining the highest possible price from Raytheon” and there were “no facts alleged in the complaint which, if true, could support an inference that the GM directors’ holdings of [the one class of] stock were so substantial as to have rendered it improbable that those directors could discharge their fiduciary obligations in an even-handed manner”).

Exabeam’s preferred stockholders did not receive 100% of the Preference or indeed any cash consideration for their equity in the Merger. They received interests in the post-Merger entity worth well-under the value of the Preference (approximately \$615 million). Preferred investors do not invest in startups in order to get some of their money back or to have their investments exchanged for other equally illiquid investments; they are looking for significant returns, which the Fund Defendants certainly did not receive in the Merger. *See Frederick Hsu Living Tr. v. ODN Holding Corp.*, 2017 WL 1437308, at *28 (Del. Ch. Apr. 25, 2017) (“Venture capitalists tend to seek high returns over a short period of time”). It would not have been rational for those investors to have taken such a loss if a higher valued

transaction were attainable or if attempting to stay the course with Exabeam as an independent company would have had more upside. In this way, the preferred stockholders' interests were aligned with those of the common stockholders.

Yet the Complaint's theory that a majority of the Board was conflicted depends on the Court drawing the inference that they were willing to approve a sale of the Company in which the preferred investors would exchange their shares for a significant loss. It is not plausible to conclude that the preferred investors acted economically irrationally. The theory Plaintiffs urge is particularly implausible considering that accepting it requires the Court to conclude that *all* the preferred investors—at least five unrelated groups of funds—harbored the same or substantially similar motivations (which Plaintiffs cannot even identify) causing them *all* to forego pursuit of the best possible price and take a substantial loss on their Preference.

To make out a claim premised on this theory, the Complaint must allege facts showing that investors acted contrary to the ordinary impetus to maximize returns because of some other consideration, such as timing pressure due to a liquidity problem. *See Larkin v. Shah*, 2016 WL 4485447, at *16 (Del. Ch. Aug. 25, 2016) (observing “liquidity theories” are rarely successful because they “ask the Court to make an extraordinary inference: that rational economic actors have chosen to short-change themselves”). They must rise to the level of pleading the transaction was the

product of a “fire sale” at the investor-level in which the investors, “in order to satisfy an exigent need (such as a margin call or default in a larger investment)[,] agreed to a sale of the corporation without any effort to make logical buyers aware of the chance to sell, give them a chance to do due diligence, and to raise the financing necessary to make a bid that would reflect the genuine fair market value of the corporation.” *In re Synthes, Inc. S’holder Litig.*, 50 A.3d 1022, 1036 (Del. Ch. 2012).

Plaintiffs have not pled facts that conceivably support such a conclusion as to any of the preferred investors, let alone all of them. Instead, Plaintiffs rely on unsupported and objectively inaccurate allegations that the preferred stockholders were motivated by a desire “to recoup a portion of their investments in cash” and preserve the ability to participate in the upside of a future exit. *See, e.g.*, Compl. ¶¶ 5, 97.

For instance, Plaintiffs point to Lightspeed Venture Partners, which—according to a news article—faced “pressure” in 2024 to return more capital to investors. *Id.* ¶ 40. But the inference Plaintiffs ask the Court to draw does not make sense; the article is about how Lightspeed applied with the SEC to be classified as a “registered investment adviser” to allow it to use a greater percentage of its funds to trade secondary markets, and attributes this in part to pressure to return more capital

to investors.⁸ Plaintiffs do not explain how Lightspeed’s receipt of illiquid interests in the post-Merger company would help it to return capital to investors, to say nothing of the fact that there is no basis to infer such a motivation would cause Lightspeed to be willing to take a significant loss on an existing investment.

Plaintiffs also point to Blue Owl, which owned a significant amount of Exabeam preferred stock and was affiliated with another company, Owl Rock Capital Advisors, with “a recent history of supporting Thoma Bravo acquisitions,” most recently in 2022. Compl. ¶¶ 44-45. If anything, holding substantial equity in Exabeam would *align* Blue Owl’s interests with other stockholders—not set them at odds with each other. And Plaintiffs do not give any reason why affiliations with an entity that participated in certain historical transactions involving Thoma Bravo is a reason why Blue Owl would seek to liquidate its existing investments at a significant loss.

Moreover, the lack of specific, well-pled supporting facts distinguishes this case from instances where this Court has found well-pled allegations sufficient to create an inference that directors succumbed to a liquidity motive against the interests of stockholders. In *New Jersey Carpenters Pension Fund v. InfoGroup*

⁸ Tabby Kinder, *Silicon Valley’s Lightspeed Shifts Focus to Secondary Markets*, FIN. TIMES (June 14, 2024).

Inc., the Court declined to dismiss a breach of fiduciary duty claim where the plaintiff had sufficiently pled the company's founder and largest stockholder forced fellow directors to approve a sale of the company at an unfair price to provide himself with much-needed liquidity. 2011 WL 4825888, at *11, 13 (Del. Ch. Sept. 30, 2011). Specifically, the founder owed at least \$12 million under certain SEC and derivative settlements and \$13 million related to loans used to buy company shares and was trying to fund a new venture, all while having no significant source of cash flow. *Id.* at *9. The Court therefore held the plaintiff had adequately pled the founder's liquidity pressures made him interested, explaining "the Court cannot find as a matter of law that receipt of \$100 million in cash by a man purportedly in desperate need of liquidity is immaterial." *Id.* at *10.

In *In re PLX Technology Inc. Stockholders Litigation*, the Court held a fund with three board designees aided and abetted a breach of fiduciary duties by the directors predicated on the board having succumbed to the fund's desire for a quick sale. 2018 WL 5018535, at *2 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019). The Court concluded the fund "had a divergent interest in achieving quick profits by orchestrating a near-term sale" because it had, during an activist campaign, "argued vehemently that PLX should be sold quickly," had an investment thesis that "depended entirely on a short-term sale," "never prepared any valuation or other analysis of the fundamental value of PLX," and "lacked any ideas for generating

value at PLX other than to sell it.” *Id.* at *42. No analogous factual allegations of desperate liquidity or other need on the part of any of the preferred investors are present here. Indeed, nothing specific is alleged about the motivations of any of the preferred investors.

For similar reasons, this case is unlike *In re Good Technology Corp. Stockholder Litigation*, where there was evidence that despite the company running out of cash, its “[f]iduciaries nonetheless delayed entering into a transaction in the hopes of achieving greater financial upside,” along with “evidence that this decision was motivated by the [f]iduciaries’ economic interests, which caused them to be more risk-seeking than a loyal fiduciary.” 2017 WL 2537347, at *2 (Del. Ch. May 12, 2017).

This case is also distinguishable from *Trados*, where the plaintiff’s main theory was that the “merger took place at the behest of certain preferred stockholders,” supported by well-pled allegations that those stockholders were motivated by desire to exit their investments. 2009 WL 2225958, at *7 (Del. Ch. July 24, 2009). This theory was bolstered by the plaintiff’s allegations that Trados’ “performance had significantly improved and that the Company had secured additional capital through debt financing,” undermining claims that a sale was born of necessity. *Id.*

And it is likewise distinguishable from *Arthur v. Rothrock*, where the Court permitted claims focused on the CEO's efforts to shift millions in merger consideration to management and employees to proceed. C.A. No. 2022-0178-KJSM, at 10 (Del. Ch. Mar. 20, 2023) (TRANSCRIPT) (Ex. 5). Those claims were supported by well-pled facts, including that venture capital investors were documented as saying they “would love to get out [as soon as possible],” *id.* at 12, as well as positive financial results that undermined the defendants’ argument that the company was about to run out of cash, *id.* at 34 (“Given [the company]’s successful first quarter 2018, it is reasonable to infer that the common stockholders would have been able to receive a higher amount of the consideration at some point in the future, had the merger not occurred.”).

Plaintiffs allege nothing similar to *Good*, *Trados*, or *Arthur* here. Rather, this case is more like *Synthes* and other decisions where failures to plead an extreme and specific liquidity need proved fatal to the plaintiffs’ theories. In *Synthes*, the Court rejected a “liquidity-based” allegation against a controlling stockholder due to a lack of any “well-pled facts to suggest that [the controller] forced a crisis sale of Synthes . . . to satisfy some urgent need for cash.” 50 A.3d at 1036.

Similarly, in *Firefighters’ Pension System v. Presidio, Inc.*, the Court held allegations that venture fund investors wanted to exit their investments were insufficient to create a divergent interest, reasoning that although the “desire to wrap

up an existing fund or to provide potential investors with attractive realizations while raising a new fund can affect a fund manager's approach to achieving liquidity for an investment[, t]he cyclical process, however, is not so formulaic and structured that the cycle itself would support an inference of a liquidity-based conflict.” 251 A.3d 212, 257-58 (Del. Ch. 2021); *see also Flannery*, 2021 WL 3615540, at *19 (“The vague allegation that the Baker Brothers Entities sought liquidity, without more, does not suffice.”); *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 366 (Del. Ch. 2008) (granting defendants’ motion for summary judgment because unsubstantiated liquidity motives were insufficient to sustain a breach of fiduciary duty claim where the plaintiffs had “not shown any evidence supporting their contention either that [major investor] Warburg needed to divest itself of its Transkaryotic shares or that Warburg had definitively decided to do so.”).

Here, given the Merger was a stock-for-stock transaction (and Plaintiffs do not allege shares of the surviving company were widely traded such that they could be easily sold to provide liquidity), a liquidity motive such as was critical in *Trados* and other cases has no application. Plaintiffs allege the “reasons for the [Fund] Defendants’ exclusive focus on selling Exabeam are not entirely clear,” thus acknowledging that the inferences they would have the Court draw about the Fund Defendants’ motivations would be pure speculation. They speculate the Fund Defendants may have been averse to a “down round” financing to avoid potential

dilution and having to write down the value of their investments, or averse to taking on “straight debt” because it might have required them to subordinate their position to senior creditors. *See* Compl. ¶ 86. Plaintiffs’ speculation ignores and contradicts the fact that “possible alternatives to the Merger (including the possibility of continuing to operate the Company as an independent entity *and pursuing additional rounds of financing*), the range of possible benefits to the Stockholders of such alternatives and the timing and the likelihood of accomplishing the goal of any of such alternatives,” were expressly considered by the Board, but ultimately determined not to be viable. IS at 5. “The court need not accept as true allegations that are contradicted by documents upon which the complaint is based.” *Feldman v. AS Roma SPV GP, LLC*, 2021 WL 3087042, at *5 (Del. Ch. July 22, 2021). Moreover, the speculation invites the Court to make the irrational inference that the Fund Defendants were averse to being diluted or writing down their investments in the Company, and so instead they locked down significant losses by selling at an allegedly inadequate price.

Regardless, at bottom Plaintiffs’ sparse and speculative allegations fail to rebut the business judgment rule by virtue of a supposed divergence of interests between the preferred and the common stockholders. All stockholders were aligned in being motivated to see the Company sold for the highest price reasonably attainable. And because the Fund Defendants’ interests did not diverge from those

of the other stockholders, even if the Individual Defendants are considered aligned with the Fund Defendants, there is no conflict.

3. Plaintiffs Have Not Conceivably Alleged a Majority of the Board Acted Unfairly.

Even if they had been able to plead the existence of an interested motive as to a majority of the Board (and they have not), Plaintiffs have not alleged that the Individual Defendants did anything consistent with any such motive. For a majority of the Board, the Complaint alleges nothing at all beyond that they were “affiliated” with preferred stockholder investors and that they voted to approve the Merger. *See* Compl. ¶¶ 35-44, 95. Plaintiffs have alleged nothing that any director did to interfere with a proper sales process or inhibit the Company from getting the highest price available. On the contrary, the process described in the Information Statement resulted in a material improvement in the terms of the deal that was ultimately consummated compared to LogRhythm’s initial offer, including an approximately 39% increase in total consideration. *Id.* ¶ 90; IS at 4. And it shows that the Board evaluated all available alternatives, though none ultimately provided a viable path forward that valued the Company above the Preference. *Id.* at 4-5.

Fundamentally, Plaintiffs’ only real complaint about the substance of the Merger is that it did not result in them receiving consideration. But the Complaint does not allege facts that conceivably support drawing the inference that the Board

left more than \$127 million of value on the table,⁹ as would be required for the common stock to have had even a penny of value at the time of the Merger. See, e.g., *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 649 (Del. Ch. 2008) (dismissing complaint alleging \$37.25 per share deal price was “unfair” where allegations of unfairness were contradicted and “unsupported by the pled facts”); *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 500 n.32 (Del. Ch. 2010) (denying preliminary injunction of transaction where plaintiffs pled inadequate basis to question adequacy of price, noting that although one equity research analysis described the price as a “bit low,” such scant evidence “is hardly persuasive”). A \$0 common stock value is, unfortunately, the natural consequence of the Company being worth less than the Preference. More importantly, this is the purchase price that resulted from a broad market check process.

That circumstance alone cannot be enough to trigger entire fairness review of an unconflicted, arms’ length merger. See *In re Primedia, Inc. S’holders Litig.*, 67 A.3d 455, 489 (Del. Ch. 2013) (“The entire fairness test is, at its core, an inquiry designed to assess whether *a self-dealing transaction* should be respected or set aside in equity.” (emphasis added) (citation omitted)). Otherwise a multitude of arms’

⁹ The difference between the value the Merger assigned to Exabeam, IS, Merger Agreement at 78, and the Preference, Compl. ¶ 4.

length private company mergers with third-party acquirers would be needlessly subject to that standard and its accompanying costs. *See PLX*, 2018 WL 5018535, at *31 (“Entire fairness, Delaware’s most onerous standard, applies when the board labors under actual conflicts of interest.” (citation omitted)); *see also Honma v. Schacknies*, 2024 WL 3027293, at *1 (Del. Ch. June 17, 2024) (“[B]ecause Plaintiff’s pleading fails to allege any facts from which the Court can infer that the Merger price conceivably was unfair to the common stockholders, I recommend that the Court grant the motion and dismiss the complaint.”).

Plaintiffs make no serious attempt to plead that Exabeam was actually worth more. They do not explain how valuations for financing rounds in 2021 and 2023 are relevant to what Exabeam was worth to a buyer as the Company was approaching running out of cash in 2024. *See* Compl. ¶ 54. If any buyer had come forward willing to pay over \$2 billion for Exabeam, the Board would have jumped at the opportunity. Plaintiffs also rely heavily on Exabeam’s positioning in the SIEM “Magic Quadrant” from Gartner, a technological research and consulting firm.¹⁰ But

¹⁰ <https://www.gartner.com/en/documents/5415763>.

by its own terms, Gartner’s “Magic Quadrant” is addressed to potential technology customers.¹¹ It is not—and does not purport to be—a valuation tool.

Finally, Plaintiffs attempt to suggest unfairness by pointing to two other recent SIEM company sales, calculating price to last-twelve-month (LTM) revenue multiples for those sales, and arguing that applying those multiples to Exabeam would value it at between \$917 million and \$1.14 billion. *Id.* ¶¶ 109-10. Yet Plaintiffs again offer no basis why such a valuation approach would conceivably suggest unfairness here. Both Splunk Inc. and Sumo Logic, Inc. were public companies. Plaintiffs’ approach simply ignores the financial condition and circumstances of Splunk and Sumo Logic, which has obvious relevance to what buyers might be willing to pay. *See Highfields Cap., Ltd. v. AXA Fin., Inc.*, 939 A.2d 34, 56 (Del. Ch. 2007) (noting importance of similarity between comparable companies and the valued company because “at some point, the differences become so large that the use of the comparable company method becomes meaningless for valuation purposes.” (citation omitted)). For example, neither Splunk nor Sumo Logic faced a severe liquidity crisis when they were acquired, and thus do not present reasonable comparisons to Exabeam. *See Splunk Inc., Form 10-K at 62* (Mar. 23,

¹¹ *Id.* (“The Magic Quadrant: Your view into smarter technology purchases”).

2023) (“As of January 31, 2023, we had \$2.0 billion of cash, cash equivalents and investments[.] We believe that these funds will be sufficient to meet our anticipated cash needs for at least the next 12 months.”); Sumo Logic, Inc., Form 10-K at 54 (Mar. 16, 2023) (“We believe our existing cash and cash equivalents, marketable securities, and cash provided by sales of access to our platform will be sufficient to meet our projected operating requirements for at least the next 12 months . . .”).

B. Plaintiffs’ Disclosure Claims Should Be Dismissed.

Plaintiffs allege the Information Statement made false and misleading statements. It did not. And, in any event, the Complaint does not state a claim for damages, the only relief sought.

1. Plaintiffs Have Not Pled a Basis for Compensatory Damages.

To state a claim for damages for a breach of the duty to disclose material facts, the Complaint must allege facts from which the following can be inferred: “(i) [Defendants had] a culpable state of mind or non-exculpated gross negligence, (ii) reliance by the stockholders on the information that was not disclosed, and (iii) damages proximately caused by that failure.” *In re Wayport, Inc. Litig.*, 76 A.3d 296, 315 (Del. Ch. 2013) (citing *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 146-47 (Del. 1997)). “[C]ompensatory damages for a disclosure claim are available only when a complaint pleads facts showing that ‘the damages [are] logically and reasonably related to the harm or injury for which compensation is

being awarded.” *Chatham Asset Mgmt., LLC v. Papanier*, 2017 WL 655028, at *5 (Del. Ch. Dec. 22, 2017) (quoting *In re J.P. Morgan Chase & Co. S’holder Litig.*, 906 A.2d 766, 773 (Del. 2006)). That means the Complaint must allege damages proximately caused by the disclosures in the Information Statement, distinct from the alleged unfairness of the Merger itself. *J.P. Morgan*, 906 A.2d at 773. Compensatory damages are usually not available post-closing. *See Transkaryotic*, 954 A.2d at 362 (holding monetary or injunctive relief not available for alleged disclosure violations three years after merger closed). This case is no exception.

Here, the Complaint fails to identify any damages Plaintiffs suffered from the allegedly deficient disclosures. For example, it alleges the lack of more detailed conflicts disclosures deprived common stockholders of “the ability to evaluate [] significant conflict[s]” and “the ability to understand the magnitude of their fiduciaries’ conflicts.” Compl. ¶¶ 11, 12; *see also id.* ¶¶ 115-18.

As a threshold matter regarding the conflicts disclosures, Plaintiffs cannot credibly argue the Information Statement’s reference to the Fund Defendants as “holder[s] of Company Capital Stock” that “will receive proceeds in such capacity as a result of the Merger” in a section called “Interests of the Company’s Directors and Officers” did not put stockholders on notice of possible perceived conflicts arising from preferred stock ownership. IS at 22-23. This is particularly so where “Company Capital Stock” is defined in the same disclosure to refer to all classes of

Exabeam's equity, including its various series of preferred stock. *Id.* Ex. A at 13. Nor do Plaintiffs explain what was misleading about disclosing that Blue Owl "may participate in the Debt Financing" of the Merger. Compl. ¶ 116. Although Debt Commitment Letters had already been delivered when the Information Statement was sent out, those commitments were still subject to certain contingencies and not necessarily guaranteed. *See* IS Ex. A at 62 ("[T]he applicable Buyer Parties shall have the right from time to time to amend, restate, amend and restate, replace, supplement or otherwise modify, or waive any of its rights under, the Debt Commitment Letters, any Debt Financing Agreements and/or substitute other debt financing for all or any portion of the Debt Financing from the same and/or alternative financing sources").

By way of further example, Plaintiffs' allegation that the disclosure related to the requisite voting requirements to approve the Merger was inaccurate leads nowhere. *See* Compl. ¶¶ 13, 122 (discussing disclosure that majorities of common stock as well as common stock held by founders then acting as service providers required to approve Merger). Plaintiffs do not plead how this disclosure was inaccurate, but more to the point they fail to demonstrate with well-pled facts how it caused them any cognizable harm.

Even if Plaintiffs' criticisms of these disclosures had merit, there would still be no reasonably conceivable way that Plaintiffs could be said to have been

damaged. They do not explain what stockholders would have done with additional information related to purported conflicts, voting requirements, or otherwise. Nor could they, as although common stockholders were asked to return a written consent for the Merger, for mathematical reasons their consent was not required to approve the Merger. *Id.* ¶ 61 (admitting that “preferred stockholders generally had the voting power to approve or reject any actions of the Company requiring stockholder approval”). *See, e.g., In re Novell, Inc. S’holder Litig.*, 2013 WL 322560, at *13 (Del. Ch. Jan. 3, 2013) (dismissing claim pertaining to a patent portfolio sale whose disclosures were allegedly “inadequate and precluded a meaningful shareholder vote” on the relevant agreement, reasoning that since “a vote on the Patent Sale was not required, the disclosure claims are irrelevant with regard to the Patent Sale”).

And to the extent Plaintiffs suggest their appraisal rights were somehow impaired, the Complaint contains no indication Plaintiffs were prevented from filing an appraisal petition because of the disclosures. *See In re Aristotle Corp.*, 2012 WL 70654, at *3 (Del. Ch. Jan. 10, 2012) (dismissing fiduciary disclosure claims where “the alleged disclosure inadequacies did not in any way impair the petitioners’ ability to seek appraisal, yet that is the theory on which they ground their claim”); *see also Smith v. Shell Petroleum Inc.*, 1990 WL 186446, at *3 (Del. Ch. Nov. 26, 1990) (rejecting “a direct cause and effect relationship between the defective disclosure documents and each Class member’s economic decision not to seek an appraisal”

because “there are numerous factors that influence a shareholder’s decision to seek an appraisal . . . other than the quality of the disclosures made”).

The reality that common stockholders’ consent was not required for the Merger to proceed also negates Plaintiffs’ allegations about the disclosures related to the Merger’s financial terms and alternatives considered. *See* Compl. ¶¶ 112-14. It would have made no difference to Plaintiffs if incrementally more information about the Merger had been disclosed; what was critical and was disclosed was that the LogRhythm transaction was the best alternative available and it was not close to satisfying the Preference. *Id.* ¶¶ 3-4, 88.

2. There Is No Basis for Nominal Damages.

Plaintiffs also cannot state a claim for an award of nominal damages. Nominal damages are only available for disclosure claims where compensatory damages are unavailable and the disclosure breach has “caused impairment to the economic or voting rights of stockholders.” *Chatham*, 2017 WL 6550428, at *6. Cases addressing nominal damages recognize that there must be an impairment of these rights for the plaintiffs. *See, e.g., Dohmen v. Goodman*, 234 A.3d 1161, 1174 (Del. 2020) (“[O]ur *J.P. Morgan Chase* decision limited the per se damages rule to nominal damages, and only when the breach of the duty of disclosure ‘caused impairment to the economic or voting rights of stockholders.’”); *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 142 (Del. 1997) (“[*In re Tri-Star Pictures, Inc.*

Litig.] stands only for the narrow proposition that, where directors have breached their disclosure duties in a corporate transaction that has in turn caused impairment to the economic or voting rights of stockholders, there must at least be an award of nominal damages.”).

Neither Plaintiffs’ economic nor voting rights were impaired by the contents of the Information Statement. Plaintiffs would be in exactly the same position after the Merger regardless of the breadth of the disclosures in the Information Statement, as disclosures do not have the power to alter economic reality. Nor can Plaintiffs contend their voting rights were in any way impaired by the alleged disclosure deficiencies. The Merger was going to proceed regardless of whether Plaintiffs returned a written consent; there is no additional information that could have affected the outcome.

3. Plaintiffs Have Not Stated a Non-Exculpated Disclosure Claim.

Plaintiffs’ disclosure claim is additionally subject to exculpation, and dismissal pursuant to 8 *Del. C.* § 102(b)(7), under Exabeam’s Certificate of Incorporation, which states in relevant part:

A director of this corporation shall not be personally liable to this corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to this corporation or its stockholders, (ii) for acts or omissions not in good faith or that involve intentional

misconduct or a knowing violation of law, (iii) under Section 174 of the [DGCL], or (iv) for any transaction from which the director derived any improper personal benefit

Certificate of Incorporation, Art. IX. Delaware courts have held consistently that the adoption of an exculpatory charter provision bars the recovery of monetary damages from directors for duty of care claims. *See, e.g., Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001); *Malpiede*, 780 A.2d at 1095; *see also van der Fluit*, 2017 WL 5953514, at *8 (dismissing complaint pursuant to exculpatory provision despite sufficiently alleged material disclosure violations where complaint failed to allege directors stood to receive non-ratable financial benefits or bad faith).

Plaintiffs have tried to cast their disclosure claim as a breach of the duty of loyalty involving self-dealing and a lack of good faith by the individual defendants. *See, e.g., Compl.* ¶¶ 17, 111. But, for the reasons already discussed, the Complaint is devoid of well-pled allegations sustaining any unexculpated loyalty claims. As such, even accepting Plaintiffs' allegations as true, the Individual Defendants did not stand to receive any benefit not equally available to other stockholders, leaving at most a duty of care claim. This is fatal to Plaintiffs' disclosure claim, as there are no credible allegations of disloyalty or bad faith regarding the disclosures that would remove them from the protections of Section 102(b)(7).

C. Plaintiffs' Aiding and Abetting Claims Against the Investor Defendants Should Be Dismissed.

To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege facts demonstrating (1) existence of a fiduciary relationship, (2) a breach, (3) that defendant knowingly participated in the breach, and (4) damages proximately caused by the breach. *See, e.g., In re Mindbody, Inc. S'holder Litig.*, 2024 WL 4926910, at *31 (Del. Dec. 2, 2024). Failure to state a predicate claim for breach of fiduciary duty warrants dismissal of a claim for aiding and abetting the same alleged breach. *Higher Educ. Mgmt. Grp., Inc. v. Mathews*, 2014 WL 5573325, at *13 (Del. Ch. Nov. 3, 2014) (“One of the necessary elements of an aiding and abetting claim is an underlying or predicate fiduciary breach.”).

For the reasons previously set forth, Plaintiffs do not plead sufficient facts alleging a predicate breach of fiduciary duty. Without a viable underlying breach claim, Plaintiffs' aiding and abetting claim against the Fund Defendants must fail as well. *See, e.g., In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995); *Related Westpac LLC v. JER Snowmass LLC*, 2010 WL 2929708, at *8 (Del. Ch. July 23, 2010) (“[B]ecause the breach of fiduciary duty claim is dismissed, the aiding and abetting claim must also be dismissed.”).

Even if Plaintiffs could establish a predicate breach of fiduciary duty, they nonetheless fail to plead an aiding and abetting claim against the Fund Defendants

because the Complaint does not allege they conceivably “participated knowingly” in any purported breach of fiduciary duty.

Establishing knowing participation is subject to a “stringent standard” that suggests “an illicit state of mind.” *Ryan v. Buckeye Partners, L.P.*, 2022 WL 389827, at *14 (Del. Ch. Feb. 9, 2022) (holding allegations in complaint fell “well short of meeting the ‘stringent standard’ applicable to allegations of ‘knowing participation’” (citation omitted)); *Cambria Equity Partners L.P. v. Relight Enters. S.A.*, 2021 WL 2336984, at *12 & n.165 (Del. Ch. Jan. 5, 2021). That scienter requirement “makes an aiding and abetting claim among the most difficult to prove.” *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 866–87 & n.192 (Del. 2015).

As the Delaware Supreme Court explained in *Mindbody*, a plaintiff must first show an aider and abettor knew the primary actor had breached its fiduciary duties. But that alone is not enough. 2024 WL 4926910, at *32. In addition, a plaintiff must “demonstrate that the aider and abettor had actual or constructive knowledge that their conduct was legally improper.” *RBC*, 129 A.3d at 862. “This requirement that the aider and abettor must know that *its own* conduct regarding the breach was legally improper is distinct from knowledge that the primary party’s conduct was a breach.” *Mindbody*, 2024 WL 4926910, at *32. The allegations must conceivably suggest “an understanding between the parties with respect to their complicity in any

scheme to defraud or in any breach of fiduciary duties.” *Comverge*, 2014 WL 6686570, at *18.

Applying these stringent standards, the Delaware Supreme Court in *Mindbody* recently reversed a finding that a buyer aided and abetted mis-disclosures in a proxy statement concerning the primary actor’s interactions with the buyer itself despite the buyer’s contractual right to review and correct the disclosures, finding the standard for “knowing participation” had not been satisfied by what amounted to passive awareness of the underlying breach. 2024 WL 4926910, at *33, 44. In *Kihm v. Mott*, this Court dismissed claims that the target’s main private equity investor aided and abetted its board’s alleged breach of fiduciary duty in connection with a sale to GlaxoSmithKline, which the plaintiff attributed to an exit motive on the sponsor’s part. 2021 WL 3883875, at *24 (Del. Ch. Aug. 31, 2021), *aff’d*, 276 A.3d 462 (Del. 2022). While the dismissal was based on a threshold failure to plead a predicate claim, the Court additionally criticized the complaint for, despite containing “pages of allegations about the sponsor’s motivations,” failing to allege that “the sponsor or any of its agents had any specific role in the flawed sale process.” *Id.* at *1.

Here, Plaintiffs have likewise alleged nothing that suggests the Fund Defendants had any role in the Merger process that might establish any inference of knowing participation. The Complaint’s only allegations that speak to the critical

element of knowing participation are conclusory and unsupported by any well-pled facts. *See Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) (“We do not . . . blindly accept conclusory allegations unsupported by specific facts. . . .”). Plaintiffs allege the Fund Defendants “effected” or “caused” the Merger and “secured for themselves . . . equity interests in the combined company and the repayment of debts owed to them by Exabeam.” Compl. ¶¶ 1, 3, 4. They also assert, without any support, that the Fund Defendants had an “exclusive focus on selling Exabeam.” *Id.* ¶ 86. But they do not allege anything the Fund Defendants actually did to influence the Merger in any way (save approving it by written consent), *id.* ¶ 8, which cannot properly be the basis for an aiding and abetting claim. *See New Enters. Assoc. 14, L.P. v. Rich*, 295 A.3d 520, 570 (Del. Ch. 2023) (observing that the right to vote is among the “rights associated with and appurtenant to a share of stock” and therefore is a right “the owner can freely exercise or decline to exercise”).

Plaintiffs’ assertion that knowledge of the alleged predicate breaches should be imputed to the Fund Defendants is likewise conclusory. Compl. ¶ 150. Although the Court was willing to impute knowledge from a director to his affiliated investment fund in *PLX*, in that case the fund had placed the director on the board with the express “idea of driving a near-term sale to the detriment of all of the stockholders.” C.A. No. 9880-VCL, at 51 (Del. Ch. Sept. 3, 2015) (TRANSCRIPT)

(Ex. 6).¹² No such intentionality has been alleged here. Although knowledge was also imputed in *New Enterprise Associates 14, L.P. v. Rich*, there the affiliated investor was itself the purchaser of certain allegedly ill-begotten preferred stock and well-pled allegations supported the theory that the conflicted director both engaged in a breach of duty and caused the affiliated investor, which he controlled, to act in support of his breach. 292 A.3d 112, 176-78 (Del. Ch. 2023). Again, no similar allegations are present here.

For all of these reasons, the aiding and abetting count should be dismissed.

II. THREE OF THE LIGHTSPEED DEFENDANTS AND BLUE OWL TECHNOLOGY FINANCE CORP. SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION.

“When a defendant moves to dismiss for lack of personal jurisdiction under Rule 12(b)(2), ‘the plaintiff bears the burden of showing a basis for the court’s exercise of jurisdiction over the defendant.’” *BrandRep LLC v. Ruskey*, 2019 WL 117768, at *1 (Del. Ch. Jan. 7, 2019) (quoting *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007)). The plaintiff must “make out a *prima facie* case establishing

¹² The aiding and abetting claim against the investor was tried but ultimately failed because there had been no damages. *PLX*, 2018 WL 5018535, at *56 (“[T]he details of the sale process that the Board conducted and the nature of the synergistic deal . . . that it generated means that the plaintiffs received consideration that exceeded the value of the Company on a stand-alone basis. . . . The plaintiffs failed to show causally related damages, and their claim for aiding and abetting therefore fails.”).

jurisdiction,” *id.*, and must plead specific facts and cannot rely on conclusory assertions. *Mobile Diagnostic Grp. Holdings, LLC v. Suer*, 972 A.2d 799, 802 (Del. Ch. 2009).

Delaware courts “follow[] a two-step analysis to determine whether personal jurisdiction over a nonresident defendant may otherwise be established.” *Cargill, Inc. v. Rossi*, 2023 WL 6812881, at *4 (Del. Super. Ct. Oct. 16, 2023). First, the Court “determines whether any subsection of the Delaware long-arm statute, 10 Del. C. § 3104, applies.” *Id.*; *Harris v. Harris*, 289 A.3d 277, 302 (Del. Ch. 2023) (“The starting point for analysis under the Long-Arm Statute is the identification of a Delaware-directed act that can supply the necessary nexus with this state.”). “Second, if the long-arm statute applies,” the Court “determines whether exercising personal jurisdiction over the nonresident defendant violates due process.” *Cargill*, 2023 WL 6812881, at *4.

Section 3104(c) permits Delaware courts to exercise personal jurisdiction over any nonresident who:

- (1) Transacts any business or performs any character of work or service in the State;
- (2) Contracts to supply services or things in this State;
- (3) Causes tortious injury in the State by an act or omission in this State;
- (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
- (5) Has

an interest in, uses or possesses real property in the State; or (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

Plaintiffs have purported to serve Defendants Lightspeed Venture Partners Select III, L.P., Lightspeed Venture Partners Select II, L.P., and Lightspeed Strategic Partners I, L.P.—each of which are limited partnerships registered in the Cayman Islands—pursuant to Section 3104. *See supra* at 11. Plaintiffs do not appear to have attempted to serve Defendant Blue Owl Technology Finance Corp.—which is a Maryland corporation with its principal place of business in New York, New York. *See id.* at 11-12.

The Complaint does not allege any “Delaware-directed act” by any of the three noted Lightspeed entities or Blue Owl Technology Finance Corp. There is no allegation that they transact any business, supply any service, or maintain any presence in Delaware. Nor does the Complaint allege they committed any acts or omissions in Delaware. *See Cargill*, 2023 WL 6812881, at *4 (“[S]ome act must actually occur in Delaware” to establish that a nonresident defendant “transacts any business or performs any character of work or service in the State.” (citations omitted)). The Complaint’s only connection between these Defendants and

Delaware is that they owned stock in a Delaware corporation. See Compl. ¶¶ 39, 42-43.

The bare allegation that these defendants were stockholders of a Delaware company is insufficient to extend jurisdiction over them under Section 3104(c). See, e.g., *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 975 (Del. Ch. 2000) (“Plaintiffs’ conclusory allegations do not indicate any Delaware business contact that would permit me to extend jurisdiction over the Turner Family Partnership under 3104(c)(1) other than its status as a controlling stockholder in Holdings. . . . [S]tock ownership of a Delaware corporation is not, without more, a sufficient contact on which to base personal jurisdiction.”); *In re Gen. Motors (Hughes) S’holder Litig.*, 2005 WL 1089021, at *22 (Del. Ch. May 4, 2005) (“Delaware law is clear that if the only link between the parent corporation and the alleged wrong is the parent’s ownership of stock in the subsidiary, that is insufficient to establish personal jurisdiction”), *aff’d*, 897 A.2d 162 (Del. 2006).

“Because no provision of 10 *Del. C.* § 3104 applies here, there is no need to engage in a due process analysis.” *Cargill*, 2023 WL 6812881, at *5. Nevertheless, exercising personal jurisdiction would violate due process because Plaintiffs have failed to plead any facts evidencing the requisite minimum contacts with Delaware. The minimum contacts analysis examines whether there is a “substantial connection between the defendant and the forum state” as the result of “actions of the defendant

purposefully directed towards the forum state.” *Ross v. Earth Movers, LLC*, 288 A.3d 284, 297 (Del. Super. Ct. 2023). “A defendant’s conduct and connection with the forum state should be such that she can reasonably anticipate being haled into court in her nonresident forum.” *Steinman v. Levine*, 2002 WL 31761252, at *10 (Del. Ch. Nov. 27, 2002), *aff’d*, 822 A.2d 397 (Del. 2003) (TABLE).

Again, the only connection the Lightspeed entities and Blue Owl Technology Finance Corp. have with Delaware is their investments in a Delaware corporation. That is not enough: “ownership of stock in a Delaware corporation is insufficient to satisfy due process requirements.” *In re Carvana Co. S’holders Litig.*, 2022 WL 3923826, at *6 (Del. Ch. Aug. 31, 2022); *see also Steinman*, 2002 WL 31761252, at *10 (“The general rule . . . is that ownership of stock in a Delaware corporation is not enough to satisfy the ‘minimum contacts’ test that due process requires.”). Accordingly, Plaintiffs cannot meet their burden to establish personal jurisdiction, and the claims against the Lightspeed entities and Blue Owl Technology Finance Corp. should be dismissed pursuant to Rule 12(b)(2).

CONCLUSION

For the foregoing reasons, Counts I, II and III of the Complaint should be dismissed with prejudice.

Date: January 31, 2025

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