IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HAMILTON PARTNERS, L.P., a New Jersey limited partnership, Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT, L.P., a Delaware limited partnership, and JOSEPH F. FURLONG, III, Defendants.	:	**C.A. No. 6547-VCN**

MEMORANDUM OPINION

Date Submitted: January 30, 2014
Date Decided: May 7, 2014

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NOBLE, Vice Chancellor

Plaintiff Hamilton Partners, L.P. (the "Plaintiff") filed this stockholder class action challenging the merger (the "Merger") between a Nevada corporation, American HomePatient, Inc. ("New AHP"), a successor-by-merger to a Delaware corporation of the same name ("AHP"), and an affiliate of one of the company's stockholders, Defendant Highland Capital Management, L.P. ("Highland"). The Merger was the sixth step in a complicated, going-private transaction between AHP and Highland (the "Restructuring"). In brief, the Restructuring involved: (i) a small debt repurchase by AHP; (ii) a reincorporation by merger of AHP into New AHP; (iii) a self-tender offer by New AHP; (iv) a debt refinancing by New AHP; (v) director resignations from the New AHP board; and (vi) the Merger.

The Plaintiff claims that Highland, as a controlling stockholder, breached its fiduciary duties because the Merger was not entirely fair.[1] In addition, the Plaintiff has asserted breach of fiduciary duty and aiding and abetting claims against one of the directors of AHP and New AHP, Defendant Joseph F. Furlong, III ("Furlong," and together with Highland, the "Defendants"), for his actions related to the Merger.[2]

Highland and Furlong each moved to dismiss the Plaintiff's claims under Court of Chancery Rule 12(b)(6) for failure to state a claim. The Court concludes that Highland's motion must be denied, but Furlong's motion must be granted.

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[1] Compl. ¶¶ 59-64.
[2] *Id.* ¶¶ 65-72.

I. BACKGROUND[3]

A. *The Parties*

AHP (and then New AHP) was a home health care provider with 241 branches in 33 states.[4] Before the Restructuring, AHP was a publicly traded Delaware corporation.[5] As part of the Restructuring, and preceding the Merger, AHP reincorporated by merger as New AHP, a Nevada corporation, on June 30, 2010.[6] Furlong has been a director of AHP since 1994 and the company's President and Chief Executive Officer ("CEO") since 1998.[7]

Highland, a Delaware limited partnership, is a "credit-oriented hedge fund" based in Dallas, Texas.[8] Leading up to and throughout the Restructuring, Highland was a significant creditor of AHP.[9] In addition, before the Restructuring, Highland owned approximately 48% of AHP's outstanding common stock. By the time of the Merger, Highland held approximately 78.5% of AHP's stock.[10]

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[3] The Complaint is the source of the following factual allegations, which the Court accepts as true. *See Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).
[4] Compl. ¶¶ 5-6.
[5] *Id.* ¶ 4.
[6] *Id.* ¶ 42.
[7] *Id.* ¶ 4.
[8] *Id.* ¶ 2.
[9] *See, e.g.*, *id.* ¶¶ 9, 12. Specifically, prior to the Restructuring, Highland held $204 million of AHP's debt, due to mature August 1, 2009. *Id.* ¶ 13.
[10] *Id.* ¶¶ 1, 20.

The Plaintiff was a stockholder of AHP (and then New AHP) at all relevant times.[11]

B. *Highland's Initial Interest in AHP*

In hindsight, Highland's interest in AHP can be traced to the company's past financial troubles. Historically, a large portion of AHP's revenue came from services and products purchased through various Medicare and Medicaid programs.[12] During the 1990s, the company took on significant debt to fund dozens of branch office acquisitions. This expansion plan was successful until an untimely coincidence: around the time that AHP's debt levels seemed to peak, Congress reduced certain Medicare reimbursements, which caused some financial distress for the company.[13] In 2001, Highland started acquiring AHP's distressed debt.[14]

By 2002, under the weight of approximately $275 million in debt that had become due, AHP filed for bankruptcy.[15] With more than 37% of the company's secured debt, Highland was its largest secured creditor.[16]

[11] *Id.* ¶ 2.
[12] *Id.* ¶¶ 5-6.
[13] *Id.* ¶ 7.
[14] *Id.* ¶ 9.
[15] *Id.* ¶ 7.
[16] *Id.* ¶ 9.

Highland tried to work out a reorganization plan with AHP while it was in bankruptcy. Not only did the company resist Highland's overtures, but it even went so far as to propose a reorganization plan with its unsecured creditors—to which Highland and other secured creditors objected.[17] Despite the objection, however, the Bankruptcy Court approved the company's plan in July 2003. After its lack of success in obtaining control over AHP in bankruptcy, according to the Plaintiff, Highland started to acquire the company's stock.[18]

C. *Highland's First Acquisition Proposal*

In February 2006, when Highland owned approximately 9.9% of AHP's stock,[19] it proposed to acquire the rest of the company's outstanding stock for $3.40 per share. This offer was an 11% premium to the prior day's trading price. In its letter to the AHP board, Highland noted that if the directors were "unwilling" to negotiate with it, then it would "take all appropriate steps to accomplish a transaction," such as by seeking board representation at the upcoming AHP annual stockholder meeting.[20] The Plaintiff does not allege whether any negotiations took place between AHP and Highland regarding this acquisition proposal.

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[17] *Id.* ¶¶ 8-9.
[18] *Id.* ¶ 11.
[19] *Id.* ¶ 13.
[20] *Id.* ¶ 12.

Consistent with its earlier statement, Highland soon notified AHP of its intent to nominate a representative at the annual meeting. At the same time, Highland gave advance notice of its intent to solicit proxies for two bylaw amendments: one to expand the board and to allow for any vacancies created to be filled by a stockholder vote; and another to afford Highland, presumably by virtue of its ownership percentage, the ability to call a special stockholder meeting. The Plaintiff describes these proposals as being "designed to thwart AHP's staggered board protections."[21]

Once again, as in bankruptcy, AHP resisted Highland's advances. Furlong and the rest of the AHP board recommended that stockholders vote against Highland's nominee and bylaw amendments.[22] In particular, the board explained that its recommendation was "based on [its] assessment of the significant inherent conflicts and appearance of conflicts that exist between the interests of [AHP] stockholders and the interests of Highland."[23] Sensing this resistance, Highland withdrew its acquisition proposal in March 2006 and its board nominee and bylaw amendment proposals two months later.[24]

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[21] *Id.* ¶ 14.
[22] *Id.* ¶¶ 15-16.
[23] *Id.* ¶ 15.
[24] *Id.* ¶ 17.

D. *Highland Increases its Stock Ownership of AHP*

The Plaintiff suggests that Highland withdrew its offer in favor of a "more attractive chink in AHP's armor," alleging that the hedge fund proceeded to buy up the company's stock in the public market.[25] By April 2007, Highland acquired approximately 6.5 million additional shares of AHP stock at an average price of $2.85 per share. Altogether, Highland now held approximately 48% of AHP's stock.[26]

Highland's significant equity stake in AHP allegedly triggered change-in-control rights in Furlong's employment agreement with the company. The Plaintiff alleges, upon information and belief, that Furlong "knew" about Highland's intent to buy more AHP stock and that he declined to prevent it.[27] Under the terms of his agreement, Furlong now had the right to terminate his employment and demand a $6.6 million payment from the company. But, he elected not to do so. Instead, Furlong came to an alternative arrangement with AHP under which, in exchange for not exercising this contract right, he would remain President and CEO of the company and receive additional compensation of

[25] *Id.* ¶¶ 18-19.
[26] *Id.* ¶ 20.
[27] *Id.* ¶ 21.

nearly $5 million in 2008. According to the Plaintiff, Highland was involved in the contract negotiations between Furlong and AHP.[28]

The Plaintiff further alleges that Highland's large position in AHP rendered it, as of April 2007, an "interested stockholder" as defined in 8 *Del. C.* § 203. This designation would have generally limited Highland's ability to consummate a business combination with the company for three years.[29]

E. *AHP Enters into Several Forbearance Agreements with its Creditors*

For several years after it exited bankruptcy, AHP successfully paid its debt obligations. During the relatively tight financial markets of 2009, however, the company struggled to refinance a large line of credit set to mature in August.[30] Fortunately, AHP and a majority of its senior debt holders—namely, Highland, which now held approximately 82% of this debt—negotiated a one-month forbearance agreement in late July 2009.[31] Over the next several months, as one forbearance agreement expired, AHP and its creditors (i.e., Highland) entered into another, with the last of ten forbearance agreements set to expire on May 15, 2010. By the Plaintiff's calculations, May 2010 was "just past the Section 203 three year prohibition" for Highland to enter into a business combination with AHP.[32]

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[28] *Id.*
[29] *Id.* ¶ 22.
[30] *Id.* ¶¶ 23-24.
[31] *Id.* ¶ 25.
[32] *Id.* ¶ 27.

F. *AHP and Highland Negotiate a (Complicated) Going-Private Transaction*

Meanwhile, in April 2009, Highland again proposed to acquire AHP for what the Plaintiff describes as "nominal value."[33] This time, Highland was allegedly intent on negotiating a deal. Part of its strategy to be the only potential acquirer of AHP, according to the Plaintiff, was to withhold its consent and prevent the company from refinancing its debt beyond the revolving, short-term forbearance agreements.[34]

AHP's board responded to Highland's new proposal by forming a special committee (the "Special Committee"), comprised of every AHP director except Furlong.[35] The four-member Special Committee then engaged Raymond James & Associates, Inc. ("Raymond James") as its financial advisor and retained legal advisors.[36] As it initiated a process to sell the company, the Special Committee purportedly "neither conducted a market canvass nor an auction." According to the Plaintiff, the Special Committee simply made "two telephone calls to what it believed were the most likely potential suitors."[37]

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[33] *Id.* ¶ 29.
[34] *Id.*
[35] *Id.* ¶ 30. The Plaintiff did not assert any claims against the Special Committee or even identify its members.
[36] *Id.*
[37] *Id.* ¶ 31.

The Special Committee then began negotiating with Highland. The Plaintiff maintains that Furlong "injected himself" into at least two aspects of these negotiations. Specifically, he was allegedly "involved" in the Special Committee's initial counterproposal for a transaction in the range of $1.30 per share. Then, after Highland noted that it preferred not to pay cash in a transaction, Furlong was allegedly "involved" in the Special Committee's proposing to use a self-tender offer structure. During this back and forth, Highland raised its offer to a slight premium to AHP's then-current stock price of $0.26 per share.[38]

Several weeks later, presumably after continued negotiations, Highland proposed its "final offer" to acquire the AHP stock it did not own for $0.67 per share through a self-tender offer initiated by the company. The offer required AHP to pay the legal fees for Highland's counsel.[39] Apparently, even though the Special Committee "quickly" agreed to Highland's final offer a mere "matter of weeks" after it was proposed in late 2009, the parties did not enter into a definitive agreement on the transaction that became the Restructuring until April 2010—allegedly after the Section 203 period expired.[40]

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[38] *Id.* ¶ 32.
[39] *Id.* ¶ 33.
[40] *Id.* ¶¶ 33-34.

The Special Committee received a fairness opinion as to the self-tender offer price of $0.67 per share from its financial advisor, Raymond James, on the evening of April 27, 2010.[41] That same day, the Special Committee recommended the Restructuring with Highland. Based on this recommendation, the AHP board approved the transaction. Highland, AHP, New AHP, and certain of the company's debtholders then executed the Restructuring Support Agreement (the "Restructuring Agreement"). By this time, AHP's stock was trading slightly above the $0.67 per share that had been agreed to. The AHP board would later justify the transaction by stating, in part, that the debtholders "were unlikely to extend the forbearance agreement if the Company did not proceed with the proposed transaction."[42]

G. *The Terms of the Restructuring Agreement*

Part of the dispute in this action is whether the Restructuring Agreement required the Merger. For this reason, the Court considers its terms in some detail. The Restructuring Agreement, governed by New York law,[43] contemplated a six-step transaction.

[41] *Id.* ¶¶ 35, 41.

[42] *Id.* ¶ 35.

[43] Opening Br. of Def. Highland Capital Management, L.P., in Supp. of its Mot. to Dismiss Count I of Pl. Hamilton Partners, L.P.'s Compl. ("Highland Opening Br.") Ex. A (Restructuring Agreement) § 11.5. The Plaintiff's allegations regarding the steps contemplated by the Restructuring Agreement are sparse on detail and lacking in clarity. The Court may nonetheless consider the Restructuring Agreement at the motion to dismiss stage because the Plaintiff's

First, AHP would repurchase a small amount of debt from one its debtholders (the "Debt Repurchase").[44]

Second, AHP would reincorporate in Nevada by way of a reverse triangle merger with a grand-subsidiary, AHP DE Merger Corp. (the "Reincorporation Merger"). AHP was the parent of newly formed New AHP, a Nevada corporation, which was the parent of newly formed AHP DE Merger Corp., a Delaware corporation.[45] Through the Reincorporation Merger, AHP would merge with AHP DE Merger Corp., with AHP stockholders receiving New AHP stock on a one-to-one basis.[46] The Reincorporation Merger was subject to AHP stockholder approval, and Highland contractually agreed to vote its stock (48%) in favor of it.[47] Subject to a limited fiduciary out, the AHP board also agreed to recommend the Reincorporation Merger; the board also agreed to submit the matter to the stockholders even if its recommendation changed.[48] This reincorporation was necessary, according to the relevant proxy statement, because AHP's financial condition limited its ability to conduct a self-tender offer under Delaware law.[49]

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substantial reliance on it renders this document integral to the Complaint. *See Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).

[44] Restructuring Agreement § 1.

[45] *Id.* § 2.

[46] *Id.* § 2.4.

[47] *Id.* § 2.5.

[48] *Id.* §§ 2.6, 2.7.

[49] Compl. ¶ 39. The Plaintiff alleges that the Reincorporation Merger proxy statement noted that although a Delaware corporation may not "repurchase its own shares if after giving effect to such purchase its net assets would be less than its capital," a Nevada corporation may do so. *Id.*

Third, New AHP would commence a self-tender offer at $0.67 per share (the "Self-Tender Offer"). The Self-Tender Offer was subject to two main conditions, each of which was waivable by Highland: (i) the tendered shares, when added to the stock held by Highland, be more than 90% of the outstanding shares of New AHP on a fully diluted basis; and (ii) the next step in the Restructuring, a refinancing of the company's outstanding debt (the "Refinancing"), occur simultaneously.[50] Subject to another limited fiduciary out, the New AHP board agreed to recommend the Self-Tender Offer.[51]

Fourth, immediately following and contingent on the acceptance of the Self-Tender Offer, New AHP and its debtholders, including Highland, would complete the Refinancing.[52] In the interim, as they had since AHP defaulted on its debt in August 2009, these creditors agreed to forbear taking any adverse action against the company.[53]

Fifth, and again immediately following the Self-Tender Offer, the current directors of AHP and New AHP would resign and appoint directors chosen by Highland. If there were not enough resignations, then the AHP and New AHP

[50] Restructuring Agreement § 3.1.
[51] *Id.* §§ 3.6, 3.7.
[52] *Id.* § 4.
[53] *Id.* §§ 5.1, 5.2.

boards agreed to expand and appoint as many Highland's director designees as necessary to constitute a majority.[54]

Sixth, and finally, Highland and New AHP would merge. This step became the Merger that the Plaintiff challenges in this action. The Restructuring Agreement provides:

> [Highland] shall take all action and shall cause New AHP [] to promptly (but in the event of a short-form merger, within ten (10) business days) take all actions to effectuate a merger (whether short form or long form) . . . pursuant to which the remaining Shares not held by [Highland] will also be cancelled in exchange for an amount equal to the [Self-Tender Offer's] Per Share Amount [i.e., $0.67 per share].[55]

The Restructuring Agreement also provides that AHP, New AHP, and Highland "agree to execute and deliver such other instruments and perform such acts, in addition to the matters herein specified, as may be reasonably appropriate or necessary, from time to time, to effectuate the agreements and understandings of the Parties."[56] Further, the agreement was binding on the parties' successors and representatives.[57]

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[54] *Id.* § 3.9.
[55] *Id.* § 3.8(a) (the "Merger Provision").
[56] *Id.* § 11.3.
[57] *Id.* § 11.1.

The Restructuring Agreement contained certain deal protection devices. In addition to the force-the-vote provision for the Reincorporation Merger and an agreement to pay Highland's legal fees,[58] AHP agreed to a no-shop provision.[59] AHP and New AHP also agreed to a reverse termination fee of $2.26 million in liquidated damages if the Restructuring was terminated after a change in recommendation by the AHP board (for the Reincorporation Merger) or by the New AHP board (for the Self-Tender Offer).[60] This fee represented approximately 35% of the aggregate $6.257 million to be paid to New AHP stockholders were the Self-Tender Offer fully subscribed.[61]

H. *The Restructuring*

The Court notes a basic assumption underlying the Plaintiff's allegations and asserted claims: the directors of AHP—namely, Furlong and the four members of the Special Committee—were also the directors of New AHP. Although there is some uncertainty in the Complaint as to what exactly happened in the Reincorporation Merger, the best reading of the Complaint—especially in light of the Plaintiff's allegations regarding the conduct of Furlong and the Special Committee during the Self-Tender Offer, which clearly occurred after the Reincorporation Merger—is that the boards of these two companies were identical.

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[58] *Id.* § 10.2.
[59] *Id.* § 8.2.
[60] *Id.* § 9.3.
[61] Compl. ¶ 37.

The Court's analysis thus proceeds as if the same five directors (Furlong and the Special Committee) constituted the boards of both AHP and New AHP.

1. Steps One and Two: the Debt Repurchase and the Reincorporation Merger

The Restructuring appears to have begun without material problems. The Plaintiff did not allege any issues with the Debt Repurchase. After a stockholder vote, AHP completed the Reincorporation Merger on June 30, 2010.[62]

2. Step Three: the Self-Tender Offer

That same day, the Special Committee (presumably now of New AHP) received another fairness opinion from Raymond James that the $0.67 per share to be received by New AHP stockholders in the Self-Tender Offer was still fair.[63] The Plaintiff alleges certain deficiencies in Raymond James's financial analysis. In particular, Raymond James is said to have "discounted the Company's projected free cash flows and terminal values using extremely aggressive rates ranging from 20.0% to 30.0%" based on its estimate of the company's current cost of capital in light of its being in default on its debt since August 2009.[64]

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[62] *Id.* ¶ 42. For clarity, the Court continues to refer to New AHP as such, although the Court recognizes that New AHP changed its name to American HomePatient, Inc. immediately preceding the Reincorporation Merger. *See* American HomePatient, Inc., Definitive Proxy Statement (Schedule 14A), at 30 (May 25, 2010).

[63] Compl. ¶ 42.

[64] *Id.* ¶ 53.

Based on its review, the Special Committee (and then, presumably, the full board of New AHP) recommended the Self-Tender Offer.[65] The offer began on July 7, 2010.[66] Soon thereafter, New AHP encountered a potential problem during this step: one of the waivable conditions—the 90% minimum stock tendered (when added to Highland's 48%) condition—was not met by the initial expiration date. To solve this dilemma, Highland and New AHP agreed to extend the offer period and to lower the minimum condition from 90% to 80%.[67] This lower condition was soon met, and the Self-Tender Offer closed on September 1, 2010. New AHP paid approximately $4.6 million for an amount of stock that, when added to Highland's interest, represented approximately 87% of New AHP's outstanding shares.[68]

3. Step Four: the Refinancing

The next day, September 2, New AHP announced in a Securities and Exchange Commission ("SEC") filing that it had completed the Refinancing concurrently with the Self-Tender Offer.[69] Through the Refinancing, New AHP refinanced its defaulted debt from an interest rate of 6.785% into multiple term loans. Approximately 44% of these term loans would bear interest at LIBOR plus

[65] *Id.* ¶ 42.
[66] *Id.* ¶ 43.
[67] *Id.* ¶ 45.
[68] *Id.* ¶ 46.
[69] *Id.* ¶ 47.

4.0%, and the rest would bear interest at LIBOR plus 7.00%. As of September 2010, the published 12-month LIBOR rate was .0844, meaning that the interest rates on the term loans were 4.0844% and 7.0844%, respectively. This step in the transaction, in the Plaintiff's words, meant that New AHP "managed to refinance 44% of its debt [at] an interest rate of nearly 2% less th[a]n what the Company was burdened with prior to the Self-Tender Offer." That is, as a result of the Debt Repurchase and the Refinancing, "[t]he company stepping out of the self-tender was therefore a less leveraged company carrying debt on significantly more favorable terms than the company stepping into the self-tender."[70]

4. Step Five: the New AHP Director Resignations

When the Self-Tender Offer closed, two of the Special Committee directors of New AHP resigned, and Highland did not request that any new appointments be made. The New AHP board thus numbered three—Furlong and the two remaining members of the Special Committee.[71]

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[70] *Id.*

[71] *See* American HomePatient, Inc., Definitive Proxy Statement (Schedule 14A), at 15-16 (Sept. 20, 2010). This limited portion of the SEC filing may be considered by the Court because these facts are not subject to reasonable dispute. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170-71 (Del. 2006) (recognizing that it may be appropriate in certain circumstances for this Court to "take judicial notice of [a] publicly available fact," such as one disclosed in an SEC filing and "not subject to reasonable dispute"). It effectively negates the Plaintiff's contrary allegations that all New AHP directors except Furlong resigned after the Self-Tender Offer and that Highland designees were then appointed to those vacancies. *See, e.g.*, Compl. ¶ 48.

5. Step Six: the Merger

After the Self-Tender Offer, Highland owned approximately 78.5% of the common stock of New AHP.[72] Because it did not own at least 90%, Highland could not complete a short-form merger under Nevada law. Rather, as contemplated by the Restructuring Agreement, Highland sought to effectuate a long-form merger, which would require approval by New AHP's board and stockholders, at the same $0.67 per share consideration offered in the Self-Tender Offer. According to the Plaintiff, New AHP "was not obligated to enter into [the] Merger with Highland." Nonetheless, the three-member New AHP board approved the Merger by unanimous written consent without a meeting.[73]

In a proxy statement filed with the SEC on September 20, 2010 (the "Proxy Statement"), the New AHP board recommended that stockholders vote in favor of the Merger.[74] The Proxy Statement noted that the New AHP board "expect[ed] that the merger agreement will be approved whether or not you vote your shares."[75] In support of its recommendation, the board relied on the June 2010 fairness opinion from Raymond James.[76]

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[72] *Id.* ¶ 1.
[73] *Id.* ¶ 49.
[74] *Id.* ¶¶ 49-50.
[75] *Id.* ¶ 51.
[76] *Id.* ¶ 52.

By its terms, this opinion was expressly limited to "the information made available . . . as of June, 30, 2010." Raymond James further disclaimed "any obligation to reaffirm or reconsider its opinion" after any "subsequent developments"—an example of which, according to the Plaintiff, would include the changes in the company's capital structure that occurred during the Restructuring.[77] That is, the fairness opinion did not seek to reflect what the Plaintiff describes as the "increased value of the remaining shares outstanding" by the time of the Merger. This increase likely occurred for two reasons: (i) a lower total number of diluted shares outstanding after the Self-Tender Offer; and (ii) improved debt terms after the Debt Repurchase and the Refinancing.[78] For this reason, the Plaintiff criticizes this opinion as "stale" and thus an inadequate basis for the New AHP board to recommend the Merger.[79] The Proxy Statement noted that although Raymond James's fairness opinion did not address the fairness of the Merger consideration, the $0.67 per share consideration was "identical," as required by the Restructuring Agreement, to that of the Self-Tender Offer.[80]

The Plaintiff alleges several material misstatements and omissions in the Proxy Statement. These include the New AHP board's failing to disclose:

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[77] *Id.* ¶ 55.
[78] *Id.* ¶¶ 53-54.
[79] *Id.* ¶¶ 52-54.
[80] *Id.* ¶ 56.

- That New AHP was not required to enter into the Merger;
- Certain valuation information, such as the 2014 terminal value multiple and the projected free cash flows used by Raymond James in its June 2010 fairness opinion;
- The terms of the Refinancing;
- Whether Highland's open market purchases of AHP stock in April 2007 triggered 8 *Del. C.* § 203;
- The compensation Furlong received in exchange for not exercising the change-in-control rights under his employment agreement; and
- Certain information about the Special Committee's advisors, such as the compensation received by Raymond James.[81]

The Plaintiff alleges these material misstatements and omissions in support of its claim that Furlong breached his fiduciary duties as a New AHP director.[82]

II. CONTENTIONS

A. *The Claim against Highland*

Highland contends that the Plaintiff's breach of fiduciary duty claim should be dismissed because it was not a controlling stockholder of AHP when they

[81] *Id.* ¶ 51. In the Complaint, the Plaintiff also alleged that the Proxy Statement failed to disclose the identity of the Special Committee's legal advisors. *Id.* At oral argument, the Plaintiff conceded that this allegation was mooted by a disclosure to that effect in an unusual section of the Proxy Statement. Tr. of Oral Arg. Defs.' Mots. to Dismiss 46 (Feb. 9, 2012).

[82] Compl. ¶ 69.

agreed to the Merger. It argues that the appropriate context for the Court to review the terms of the Merger is as one of the steps agreed to in the Restructuring Agreement. During those negotiations, according to Highland, it was not a controlling stockholder because it held only 48% of AHP's common stock and because it did not exercise control over the company.[83] Highland maintains that its purportedly self-interested conduct in negotiating the timing and price of the Restructuring Agreement was permissible because it was acting as a creditor, which does not owe fiduciary duties to stockholders such as the Plaintiff.[84]

In response, the Plaintiff contends that the Merger is subject to entire fairness review, and thus it would be premature for the Court to dismiss its claim, because Highland was New AHP's majority stockholder at the time of the Merger.[85] Were the Court to review the Merger as a step required by the Restructuring Agreement, the Plaintiff argues it has still alleged sufficient facts—namely, Highland's self-interested conduct while the holder of 48% of AHP's common stock and 82% of its secured debt—to support a reasonable inference that Highland was AHP's controlling stockholder at that time.[86] Highland rejects that position, claiming that the allegations in the Complaint conclusively demonstrate

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[83] Highland Opening Br. 10-12.
[84] Reply Br. of Def. Highland Capital Management, L.P. in Supp. of its Mot. to Dismiss Count I of Pl. Hamilton Partners, L.P.'s Compl. ("Highland Reply Br.") 7-8; Highland Opening Br. 12-13.
[85] Pl.'s Answering Br. in Opp'n to Defs.' Mots. to Dismiss ("Pl.'s Answering Br.") 12-14.
[86] *Id.* 14-17.

that AHP—represented in arm's length negotiations by the Special Committee and its advisors—was not under its control.[87]

B. *The Claims against Furlong*

Furlong contends that the Plaintiff has failed to rebut the business judgment standard of review as to his conduct because the Complaint does not sufficiently allege that he was interested in the Restructuring Agreement (or the Merger). He further argues that the Plaintiff failed to allege that he dominated or controlled the Special Committee during its negotiations with Highland, which he contends is necessary to assert a breach of fiduciary duty claim against only him, as one director on a five-member board.[88] As to his time as a director of New AHP after the Reincorporation Merger, Furlong maintains that Nevada law exculpates him from monetary liability for his allegedly improper conduct.[89] That is, Furlong believes he cannot be held liable for recommending the Merger without determining the purportedly higher value of New AHP in light of the Self-Tender Offer and the Refinancing or for failing to disclose certain information in the Proxy Statement.[90]

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[87] Highland Reply Br. 9-10; Highland Opening Br. 13-15.
[88] Def. Joseph F. Furlong's Opening Br. in Supp. of his Mot. to Dismiss ("Furlong Opening Br.") 16-22.
[89] Def. Joseph F. Furlong's Reply Br. in Supp. of his Mot. to Dismiss ("Furlong Reply Br.") 6-8.
[90] Furlong Opening Br. 22-24.

The Plaintiff, in opposition, submits that it has adequately alleged breach of fiduciary duty claims against Furlong without regard to the conduct of the other directors of AHP and New AHP. It contends that the circumstances regarding Highland's triggering of Furlong's change-in-control rights in his employment agreement with AHP, among other allegations, give rise to a reasonable inference that Furlong breached his fiduciary duty of loyalty by favoring his and Highland's interests in the Restructuring Agreement (and the Merger) over the interests of AHP stockholders.[91] The Complaint, it also argues, sufficiently alleges conduct by Furlong as a director of New AHP that is not exculpated under Nevada law.[92] For example, the Plaintiff contends that Furlong's approval of the materially misleading Proxy Statement supports its breach of fiduciary duty claim against him; separately, it also argues that the Proxy Statement omissions evidence a lack of fair dealing by Highland during the Merger.[93]

Regarding the aiding and abetting claim, Furlong argues that, even assuming the Plaintiff has stated a breach of fiduciary duty claim against Highland, it has nonetheless failed to allege that he knowingly participated in Highland's breaches. Accordingly, he contends that the Plaintiff's aiding and abetting claim must be

[91] Pl.s' Answering Br. 18-22.
[92] *Id.* 23-24.
[93] *Id.* 24-31.

dismissed.[94] For many of the same reasons asserted in support of its breach of fiduciary duty claim, the Plaintiff submits that the Court may reasonably infer from the allegations of the Complaint that Furlong did knowingly participate in Highland's unfair conduct.[95]

III. ANALYSIS

A. *The Procedural Standard of Review*

When hearing the Defendants' motions to dismiss under Rule 12(b)(6), the Court assumes the truth of the well-pled allegations of the Complaint and draws all reasonable inferences from those allegations in the Plaintiff's favor.[96] This standard does not mean, however, that the Court must accept as true "conclusory allegations unsupported by specific facts"[97] or draw unreasonable inferences that do not flow "logically" from non-conclusory allegations.[98] The motions to dismiss should be denied unless the Plaintiff "could not recover under any reasonably conceivable set of circumstances susceptible of proof."[99]

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[94] Furlong Reply Br. 8; Furlong Opening Br. 25-26.
[95] Pl.'s Answering Br. 24.
[96] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).
[97] *Gantler v. Stephens*, 965 A.2d 695, 704 (Del. 2009).
[98] *See Malpiede*, 780 A.2d at 1083.
[99] *Central Mortg. Co.*, 27 A.3d at 536.

B. *The Governing Law*

1. The Internal Affairs Doctrine

As an initial matter, the Court must determine whether the Plaintiff's claims arise under Delaware law or Nevada law. The guiding principle is the internal affairs doctrine, under which claims implicating a corporation's internal affairs—such as claims for breach of fiduciary duty[100] and aiding and abetting[101]—are governed by the corporate law of the state of incorporation.[102] The present circumstances—namely, because AHP reincorporated as New AHP before the Merger that AHP, New AHP, and Highland might have previously agreed to in the Restructuring Agreement—do not lend themselves to a straightforward application of the internal affairs doctrine to identify the governing law for the Plaintiff's claims.

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[100] *See VantagePoint Venture P'rs 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) ("[O]nly the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs.").

[101] *See In re Am. Int'l Gp., Inc.*, 965 A.2d 763, 817-22 (Del. Ch. 2009), *aff'd sub nom.*, *Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011) (noting that this Court would likely conclude that an aiding and abetting claim implicates the internal affairs doctrine) (citing *Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1038 (Del. Ch. 2006) ("[I]n cases involving the internal affairs of corporations, aiding and abetting claims represent a context-specific application of civil conspiracy law.")).

[102] *See generally Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) ("The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands."); *see also Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720, 726 (Nev. 2003) (applying Nevada corporate law to claims for breach of fiduciary duty against the directors of a Nevada corporation).

After reflection, the Court concludes that applying the doctrine here requires the Court to distinguish between the actions agreed to in the Restructuring Agreement and those not prescribed by it. When the parties agreed to the Restructuring Agreement, Highland and the Plaintiff were stockholders of, and Furlong was a director of, AHP—a Delaware corporation. Thus, the Plaintiff's fiduciary duty and aiding and abetting claims relating to what was agreed to in the Restructuring Agreement should be governed by Delaware law. Conversely, the Plaintiff's fiduciary duty claims regarding conduct that both occurred after the Reincorporation Merger and was not prescribed by the Restructuring Agreement—for example, the claim for purported omissions in the Proxy Statement against Furlong as a director of New AHP, a Nevada corporation—should be governed by Nevada law. What remains in dispute is whether the Restructuring Agreement required the New AHP board to (a) agree to the Merger, and (b) recommend the Merger to the stockholders.

2. The Actions Required by the Restructuring Agreement

Previously, the Court noted an apparent ambiguity in the Merger Provision of the Restructuring Agreement regarding whether the New AHP board was contractually obligated to recommend the Merger.[103] The Court's prior decision should not, however, be misinterpreted to suggest an ambiguity in the Merger

[103] *See Hamilton P'rs, L.P. v. Highland Capital Mgmt., L.P.*, 2012 WL 2053329, at *3 (Del. Ch. May 25, 2012).

Provision regarding whether New AHP was required to consummate a short form or long form merger—what became the Merger—with Highland.

Contracts governed by New York law, such as the Restructuring Agreement, should be "construed in accord with the parties' intent."[104] A provision in the Restructuring Agreement may be considered ambiguous if its terms are susceptible to more than one reasonable interpretation.[105] If a particular provision is unambiguous, then the Court should interpret it according to its plain meaning[106] in light of the entire Restructuring Agreement, not necessarily in isolation.[107] If the term is ambiguous, then the Court may consider parol evidence to resolve the ambiguity and determine the parties' intent.[108]

(a) Because the Restructuring Agreement Required the Merger, Delaware Law Governs the Plaintiff's Claims about the Parties' Agreeing to the Merger

The operative provisions of the Restructuring Agreement regarding whether New AHP was obligated to enter into the Merger with Highland, especially the Merger Provision, are clear and unambiguous. Although it was waivable, one of

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[104] *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 869 N.Y.S.2d 511, 516 (N.Y. App. Div. 2008), *aff'd*, 920 N.E.2d 359 (N.Y. 2009).

[105] *See Klein v. Empire Blue Cross & Blue Shield*, 569 N.Y.S.2d 838, 842 (N.Y. App. Div. 1991).

[106] *See Guachichulca v. Laszlo N. Tauber & Assocs., LLC*, 831 N.Y.S.2d 234, 236 (N.Y. App. Div. 2007).

[107] *See S & S Media, Inc. v. Vango Media, Inc.*, 446 N.Y.S.2d 52, 54 (N.Y. App. Div. 1982) ("Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.").

[108] *See Klein*, 569 N.Y.S.2d at 842.

the conditions of the Self-Tender Offer was that it would not close unless the number of shares tendered, when added to Highland's 48%, met or exceeded 90% (then reduced to 80%) of New AHP's fully diluted stock[109]—which, in effect, gave Highland majority control, by a wide margin, of the stock of New AHP. At the same time, when the Self-Tender Offer closed, the directors of New AHP were required, at a minimum, to appoint Highland nominees to be a majority of the directors of New AHP[110]—which, in effect, gave Highland majority control of the board of New AHP. Thus, when Highland then agreed in the Merger Provision to "take all actions to effectuate a merger,"[111] the plain meaning of this unambiguous provision is that Highland—with its majority control of New AHP at the stockholder and board levels—was bound to effectuate a merger between itself and the entity it now controlled, New AHP.

The plain meaning of these unambiguous provisions, when considered together, is that Highland, AHP, and New AHP agreed to the Merger when they executed the Restructuring Agreement. This conclusion negates the Plaintiff's contrary allegation—that "[t]he Company was not obligated to enter into a Merger with Highland"[112]—as a matter of law. The Court recognizes that the Merger would ultimately be between Highland and New AHP (a Nevada corporation), but

[109] Restructuring Agreement § 3.1.
[110] *Id.* § 3.9.
[111] *Id.* § 3.8(a).
[112] *See, e.g.*, Compl. ¶¶ 49, 51.

the Merger was agreed to as the last step in a going-private transaction between Highland and AHP (a Delaware corporation). Therefore, the Court concludes that the Plaintiff's breach of fiduciary claims against Highland and Furlong regarding the Merger, as well as its aiding and abetting claim against Furlong, arise under Delaware law.[113]

(b) Regardless of Whether the Restructuring Agreement Required the New AHP Board to Recommend the Merger, Nevada Law Governs the Plaintiff's Claim about Furlong's Recommending the Merger

Even with the benefit of limited discovery into the parties' intent, the Court again concludes that the Merger Provision is ambiguous under New York law as to whether the New AHP board was required to recommend the Merger because the provision is susceptible to at least two reasonable interpretations.[114] It is reasonable to interpret the Merger Provision, in combination with other sections of the Restructuring Agreement, as requiring the New AHP board to recommend the Merger. It is just as reasonable to interpret the Merger Provision as not speaking to whether the New AHP board was obligated to do so.

[113] The Court acknowledges that the contrary conclusion—that Nevada corporate law should govern the Plaintiff's claims related to AHP and New AHP's agreeing to the Merger—also appears reasonable. Practically, the Court's conclusion is not dispositive because, as the Court discusses *infra*, Nevada corporate law generally follows that of Delaware. Nonetheless, the value of the Court's analysis here may be limited were this conclusion misguided.

[114] *See Hamilton P'rs*, 2012 WL 2053329, at *3-4 (requesting the parties to "coordinate discovery and briefing" on this issue before resolving the motions to dismiss).

For present purposes, however, resolution of this ambiguity is mainly academic. If the Restructuring Agreement did not bind the New AHP board to recommend the Merger, then its decision to do so relates to the internal affairs of New AHP as a Nevada corporation. But, even if the Restructuring Agreement did bind the board, the Court concludes that, under Nevada law, the directors of New AHP would have had continuing fiduciary duties to determine whether it was still appropriate to recommend the Merger.[115] Thus, the Plaintiff's breach of fiduciary duty claim against Furlong for recommending the Merger arises under Nevada law.

C. *The Plaintiff's Claim against Highland*

Delaware courts are skeptical of the fairness of transactions involving a corporation and its controlling stockholder because of the latter's ability to flex its

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[115] Where there is no controlling decision of Nevada law, courts hearing fiduciary duty claims arising under Nevada law frequently look to Delaware corporate law as persuasive authority. *See infra* note 158 and accompanying text. There appears to be no authoritative statement of Nevada law on this particular issue.

It is a general principle of Delaware law that directors of Delaware corporations have "continuing fiduciary duties" to evaluate whether an agreed-upon transaction is still in the best interests of the corporation's stockholders during the interim period between signing and closing, especially in determining whether it is appropriate to recommend that stockholders vote in favor of it. *See generally Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at *27 (Del. Ch. Apr. 29, 2005). This principle, of course, does not preclude the board from contractually limiting some of the circumstances in which it may change its recommendation to stockholders, but the board's binding itself absolutely is thought to be inconsistent with the standard of conduct required of fiduciaries. *See, e.g.*, *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 936-39 (Del. 2003).

The Court looks to these principles of Delaware law to determine this issue under Nevada law. If there were, as the Plaintiff alleges, material changes to New AHP's financial condition that were inconsistent with the parties' expectations under the Restructuring Agreement, then the New AHP directors had continuing fiduciary duties to determine whether to recommend that New AHP stockholders vote in favor of the Merger.

control and unilaterally dictate unfair terms to the former.[116] Largely for this reason, a corporation's controlling stockholder is said to owe fiduciary duties to the other stockholders.[117] A stockholder is subject to these duties where it either owns a majority of the corporation's stock or exercises sufficient control over its business affairs.[118] The Court's analysis of whether a 48% stockholder sufficiently controls a corporation to be deemed to owe fiduciary duties to other stockholders is, of course, contextual—as demonstrated by the broad range of cases cited by the Plaintiff and Highland on this issue.[119]

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[116] *See Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 502 (Del. Ch. 1990) ("[I]n a merger between the corporation and its controlling stockholder—even one negotiated by disinterested, independent directors—no court could be certain whether the transaction terms fully approximate what truly independent parties would have achieved in an arm's length negotiation."); *but see Kahn v. M & F Worldwide Corp.*, -- A.3d --, 2014 WL 996270, at *6 (Del. Mar. 14, 2014) ("We hold that business judgment is the standard of review that should govern mergers between a controlling stockholder and its corporate subsidiary, where the merger is conditioned *ab initio* upon both the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority stockholders.").

[117] *Citron v. Fairchild Camera & Instrument Corp*., 569 A.2d 53, 70 (Del. 1989).

[118] *See Ivanhoe P'rs v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987).

[119] *See, e.g.*, *id.* (affirming this Court's denial of a preliminary injunction and concluding that the record reflected that a 49.7% stockholder with two representatives on the corporation's nine-member board was not a controlling stockholder); *Citron v. Steego Corp.*, 1988 WL 94738, 14 Del. J. Corp. L. 634, 644-46 (Del. Ch. Sept. 9, 1988) (denying a preliminary injunction motion after concluding based on the record that a 48.8% stockholder with two designees on a nine-member board was not a controlling stockholder); *but see, e.g.*, *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114 (affirming this Court's post-trial conclusion that a 43.3% stockholder that designated five directors on an eleven-member board was a controlling stockholder); *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 551-53 (Del. Ch. 2003) (finding after trial that an individual stockholder who, with his subordinates and family members, held around 40% of the corporation's voting power through stock and options and who had two representatives on a five-member board was a controlling stockholder).

When a stockholder challenges the fairness of a merger between a corporation and its controlling stockholder, the Court reviews this type of parent-subsidiary transaction under the entire fairness standard of review.[120] Entire fairness is this Court's most rigorous standard of review; the initial burden of proof is on the controlling stockholder to establish, to the Court's satisfaction, that the transaction was a product of fair dealing and at a fair price.[121] The burden of proof may shift if the controlling stockholder establishes before trial that a "well functioning" special committee of the corporation approved the transaction.[122] The possibility that the entire fairness standard of review may apply tends to preclude the Court from granting a motion to dismiss under Rule 12(b)(6) unless the alleged controlling stockholder is able to show, conclusively, that the challenged

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[120] *See Lynch*, 638 A.2d at 1115.

The same is not necessarily true for certain non-coercive transactions in which a controlling stockholder initiates a tender offer for the minority stock and then completes the transaction with a short-form merger. *See, e.g.*, *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 445 (Del. Ch. 2002) ("[O]ur law should consider an acquisition tender offer by a controlling stockholder non-coercive only when: 1) it is subject to a non-waivable majority of the minority tender condition; 2) the controlling stockholder promises to consummate a prompt § 253 merger at the same price if it obtains more than 90% of the shares; and 3) the controlling stockholder has made no retributive threats."); *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787, *6 (Del. Ch. June 21, 2001) ("[U]nless coercion or disclosure violations can be shown, no defendant has the duty to demonstrate the entire fairness of this proposed tender transaction."); *see also In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 414 (Del. Ch. 2010) ("The choice among *Lynch*, *Pure Resources*, and *Cox Communications* implicates fundamental issues of Delaware law and public policy that only the Delaware Supreme Court can resolve.").

The parties did not explicitly advocate that this case law applies in this action, perhaps because the Restructuring Agreement involved not a tender offer and short-form merger but a self-tender and a long-form merger.

[121] *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995); *see also Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983).

[122] *See Frank v. Elgamal*, 2014 WL 957550, at *28 (Del. Ch. Mar. 10, 2014) (citing *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997)).

transaction was entirely fair based solely on the allegations of the complaint and the documents integral to it.[123]

In contrast to a controlling stockholder, a corporation's creditor—even one that owns a majority of the corporation's debt—does not owe fiduciary duties to stockholders. It is well established in Delaware corporate law that the obligations of creditors to corporate debtors are governed by contract, not fiduciary duty principles.[124] Despite this distinction, it is nonetheless possible, as this case demonstrates, that a just-less-than-majority (*e.g.*, 48%) stockholder may be considered a controlling stockholder—especially at the motion to dismiss stage where the Court must view all reasonable inferences in the plaintiff's favor—by virtue of also being a significant creditor that exercises sufficient control over the corporation's business affairs.[125]

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[123] *See, e.g.*, *M & F Worldwide*, 2014 WL 996270, at *7 n.14 (explaining that this Court may not be able to determine at the motion to dismiss stage whether certain procedural protections were sufficient to reduce the standard of review from entire fairness to business judgment for a merger between a corporation and its controlling stockholder); *Krasner v. Moffett*, 826 A.2d 277, 285-86 (Del. 2003) (concluding that the issue of whether two directors were sufficiently independent to warrant review of a merger under the business judgment standard was a "fact-intensive inquiry" that could not be resolved on a motion to dismiss because the "allegations and incorporated references [did not] effectively negate the plaintiffs' claim as a matter of law").

[124] *See generally Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 173 (Del. Ch. 2006), *aff'd sub nom.*, *Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007) (TABLE) ("Delaware public policy is strongly supportive of freedom of contract, thereby supporting the primary means by which creditors protect themselves . . . ."); *Prudential-Bache Sec., Inc. v. Franz Mfg. Co.*, 531 A.2d 953, 955 (Del. Super. 1987) ("Creditors' rights arise from contract and do not, by themselves, implicate the fiduciary duties officers owe their corporations and shareholders.").

[125] *Cf. Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *5 (Del. Ch. Aug. 25, 2006) ("There may be circumstances where the holding of contractual rights, coupled

The Court concludes that the allegations of the Complaint sustain a reasonable inference, even if not the best inference, that Highland—the holder of 48% of AHP's stock and 82% of its debt, which was in default—was the company's controlling stockholder when the parties agreed to the Merger as part of the Restructuring Agreement. Highland's alleged willingness to enter into a series of strategic, short-term forbearance agreements with AHP until just after the expiration of the three-year waiting period under Section 203, at which point Highland withheld its consent to prevent AHP from refinancing its defaulted debt or considering other acquirers in order to force the company to agree to a transaction with it at a price that was below the stock's trading price when announced, supports the reasonable inference that Highland controlled AHP.[126] Moreover, the alleged unreasonableness of the 20-30% discount applied to AHP's discounted cash flows by Raymond James in its fairness opinion analysis to justify the $0.67 per share consideration offered in the Self-Tender Offer supports a

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with a significant equity position and other factors, will support the finding that a particular shareholder is, indeed, a 'controlling shareholder,' especially if those contractual rights are used to induce or to coerce the board of directors to approve (or refrain from approving) certain actions.").

[126] *See, e.g.*, *In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *21 (Del. Ch. Sept. 19, 2008) (concluding in a post-trial opinion that a less-than-majority stockholder controlled a corporation because, among other reasons, it had the power to "shape[] the process for considering and approving the [interested transaction]"); *see also La. Mun. Police Employees' Ret. Sys. v. Fertitta*, 2009 WL 2263406, at *7 (Del. Ch. July 28, 2009) (concluding at the motion to dismiss stage that it was reasonably conceivable that a 39% stockholder who was the CEO and chairman of the board was a controlling stockholder because he "used his influence on the corporation . . . to his own benefit and to the detriment of the interests of the minority stockholders").

reasonable inference that the identical (and contractually mandated) $0.67 per share offered in the Merger may not have been a fair price.

In sum, the Plaintiff sufficiently alleges that Highland, as a stockholder and a creditor, exercised its control over AHP to facilitate the Restructuring Agreement on unfair terms. These allegations are sufficient to state a claim for breach of fiduciary duty against Highland regarding the Merger.[127] Therefore, Highland's motion to dismiss the Plaintiff's claim must be denied.

Separately, when viewing all reasonable inferences from the Complaint in the Plaintiff's favor, the Court is presently unable to conclude that the Special Committee was sufficiently "well functioning" as to shift the burden of proof under the entire fairness standard, to the extent it may apply, to the Plaintiff.[128]

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[127] It is important to remember that, at this procedural juncture, the Court is not tasked with determining definitively whether Highland was a controlling stockholder of AHP but only whether it is reasonably conceivable, based on the Complaint, that Highland controlled AHP when the parties negotiated and executed the Restructuring Agreement. *See, e.g.*, *Frank*, 2014 WL 957550, at *17 (noting that the Court was not bound when considering a motion for summary judgment to its conclusion at the motion to dismiss stage on the appropriate standard of review).

Were the Plaintiff to fail to prove that Highland controlled AHP, then Highland may not otherwise be liable to the Plaintiff regarding the Merger, particularly if it is reasonable to conclude that the potential changes in New AHP's value during the Restructuring were solely a result of the Restructuring Agreement. *See, e.g.*, *Shearin v. E.F. Hutton Gp., Inc.*, 652 A.2d 578, 596 (Del. Ch. 1994) ("[S]o long as the second step merger was effectuated on the terms negotiated by . . . [the] board and no fundamental change in the economics of the firm intervened, there can in my opinion be no liability of the acquiror arising out of the effectuation of the second leg of a single two step tender offer cash out/merger transaction.").

[128] Where the existence of a controlling stockholder mandates, *ab initio*, the entire fairness standard of review, and where there is not a non-waivable majority-of-the-minority condition that could (under the test articulated by the Delaware Supreme Court in *M & F Worldwide*) lead to this Court applying the business judgment standard of review, approval of a transaction between a corporation and its controlling stockholder by a "well functioning" special committee

D. *The Plaintiff's Claims against Furlong*

1. Furlong's Conduct as a Director of AHP

The directors of Delaware corporations are required to conduct themselves according to the standard of conduct of fiduciaries—namely, to exercise due care and to act loyally.[129] When a stockholder challenges a board decision as a breach of fiduciary duty, the Court determines whether the directors who made the decision satisfied the standard of conduct through a doctrinal standard of review.[130] The good faith business decisions of informed, disinterested, and independent directors of Delaware corporations are entitled to deference under the business

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of directors who were "truly independent, fully informed, and had the freedom to negotiate at arm's length" may shift the entire fairness burden of proof to the stockholder plaintiff. *See Tremont Corp.*, 694 A.2d at 428; *Lynch*, 638 A.2d at 1120-21; *see also In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 789-93 (Del. Ch. 2011), *aff'd sub nom.*, *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012) (interpreting the Supreme Court's statements on whether the burden of proof should shift as a conclusion that should be reached after determining "the actual effectiveness of the special committee"); *but see In re MFW S'holders Litig.*, 67 A.3d 496, 518 (Del. Ch. 2013), *aff'd sub nom.*, *M & F Worldwide*, 2014 WL 996270 ("[T]he court eschews determining that the special committee was 'effective' in a more colloquial sense. Although prior cases can potentially be read as requiring an assessment of whether a special committee was effective in the sense of being substantively good at its appointed task, such a precondition is fundamentally inconsistent with the application of the business judgment rule standard of review."); *see also M & F Worldwide*, 2014 WL 996270, at *8-14 (affirming this Court's legal conclusion that the appropriate inquiry where the business judgment standard may apply is one of whether special committee was independent, empowered, and exercising due care).

[129] *See Chen v. Howard-Anderson*, -- A.3d --, 2014 WL 1366551, at *15 (Del. Ch. Apr. 8, 2014) (citing *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 35-36 (Del. Ch. 2013)).

[130] *See Trados Inc.*, 73 A.3d at 35-36 (citing William T. Allen, Jack B. Jacobs, & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem*, 96 Nw. U. L. Rev. 449, 451–52 (2002)) ("The standard of conduct describes what directors are expected to do and is defined by the content of the duties of loyalty and care. The standard of review is the test that a court applies when evaluating whether directors have met the standard of conduct.").

judgment standard of review,[131] in which a breach of fiduciary duty claim can only be sustained if the challenging stockholder demonstrates that the directors' decision was irrational.[132] For the Court to examine whether directors satisfied the standard of conduct beyond just acting rationally, a stockholder needs to allege facts that rebut the presumptive business judgment standard for at least half of the directors who approved the decision at issue.[133] Because AHP's charter included the broadest exculpatory provision permitted under 8 *Del. C.* § 102(b)(7),[134] the Plaintiff must sufficiently allege conduct implicating bad faith or a breach of the duty of loyalty to survive Furlong's motion to dismiss.[135]

Naturally, it is not impermissible for a stockholder to assert a breach of fiduciary duty claim against less than half of the directors who approved a

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[131] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) ("The business judgment rule is an acknowledgment of the managerial prerogatives of Delaware directors under Section 141(a).").

[132] *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) ("A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose.").

[133] *See Cinerama*, 663 A.2d at 1168 (affirming this Court's conclusion that "if actual self-interest is present and affects a majority of directors approving a transaction," the then business judgment standard of review is rebutted and the entire fairness standard applies); *see also In re Frederick's of Hollywood, Inc. S'holders Litig.*, 2000 WL 130630, at *7 (Del. Ch. Jan. 31, 2000), *aff'd sub nom.*, *Malpiede*, 780 A.2d at 1075 ("[T]he pleaded facts show that only one of the four directors was interested, and as a result, the merger was approved by a majority of disinterested directors. Accordingly, the duty of loyalty claim fails for lack of a valid premise.").

[134] Furlong Opening Br. Ex. F, § 10 ("The personal liability of the directors of the Corporation is hereby eliminated to the fullest extent permitted by paragraph (7) of clause (b) of § 102 of the General Corporation Law of the State of Delaware.").

[135] *See, e.g.*, *In re Morton's Rest. Gp., Inc. S'holders Litig.*, 74 A.3d 656, 663 (Del. Ch. 2013) (applying the corporation's Section 102(b)(7) charter provision at the motion to dismiss stage); *see also Malpiede*, 780 A.2d at 1090-92 (noting that it may be appropriate for the Court to apply a Section 102(b)(7) charter provision at the pleadings stage, even if the provision is outside the facts alleged in the complaint, unless there is a legitimate challenge that the provision is "not authentic, was improperly adopted by the stockholders, or the like").

particular decision[136]—as the Plaintiff elected to do here by suing only Furling and not the four other AHP directors who approved the Restructuring Agreement. This atypical pleading situation, however, does not change the standard of review inquiry. For the Court to examine whether Furlong adequately discharged his fiduciary duties beyond acting rationally, the Plaintiff must allege disloyal conduct, and thereby rebut the business judgment standard, as to at least half of the AHP directors who agreed to the Merger as part of the Restructuring Agreement.[137]

The Plaintiff's theory of liability for Furlong is that he was interested in the purportedly unfair Restructuring Agreement. There are no allegations that the Special Committee's approving the Restructuring Agreement is not entitled to deference under the business judgment standard because its members were interested in the transaction, not independent from Highland, or not acting in good faith. Accordingly, for the Court to review Furlong's individual conduct, the Plaintiff must also allege sufficient facts to support a reasonable inference that

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[136] *Cf. In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *6 (Del. Ch. Sept. 30, 2009) ("At the outset, the Court observes that the Plaintiffs must plead sufficient facts to show that a *majority of the Board of Directors* breached the fiduciary duty of loyalty; whether they otherwise would have stated a claim against [less than a majority of the Board] would not be controlling. That two directors may have been conflicted does not, by itself, impinge upon the independence of the remaining members of the Board—all of whom supported the merger.").

[137] Were the Plaintiff first to survive Furlong's motion to dismiss and then to support its allegations with competent evidence, the Court would review Furlong's agreeing to the Merger under the exacting entire fairness standard. *See, e.g.*, *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 n. 9 (Del. 1993) ("Where actual self-interest is present and affects a majority of the directors approving a transaction, a court will apply . . . exacting scrutiny to determine whether the transaction is entirely fair to the stockholders.").

Furlong controlled or dominated the Special Committee or that he failed to disclose a material interest that a reasonable director would have considered significant in evaluating the Restructuring Agreement.[138]

A director may lack independence and be "beholden" to another director's domination or control if the former's decisionmaking process is effectively "sterilized" because it is based on the latter's influence rather than the merits of the business decision.[139] To survive a motion to dismiss, the allegations must support a reasonable inference that the controlled director sought "to comport with the wishes or interests" of the controlling director.[140] In other words, "[t]here must be some alleged nexus between the domination and the resulting personal benefit to the controlling party."[141]

The allegations of the Complaint do not sustain a reasonably conceivable set of circumstances in which Furlong dominated or controlled the Special Committee.

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[138] *See Cinerama*, 663 A.2d at 1168; *see also In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 363 (Del. Ch. 2008).

Perhaps more accurately, because the five directors of AHP (including Furlong) approved the Restructuring Agreement, the Plaintiff must rebut the business judgment standard as to Furlong and two other directors. Because the Plaintiff did not distinguish among the AHP directors on the Special Committee, the Court has no basis to do so.

[139] *See Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993); *Aronson*, 473 A.2d at 815-16.

[140] *See Aronson*, 473 A.2d at 816 (quoting *Kaplan v. Centex Corp.*, 284 A.2d 119, 123 (Del. Ch. 1971)).

[141] *Heineman v. Datapoint Corp.*, 611 A.2d 950, 955 (Del. 1992) (citing *Aronson*, 473 A.2d at 815-16) (applying this standard in the demand futility context); *see also Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 177 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006) (citing *Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2002)) ("This Court will not find a director beholden unless the purported controlling person has 'unilateral' power to substantially affect the director.").

The only allegations on this point in the Complaint are that Furlong "injected himself into every discussion" of the Special Committee as demonstrated by his being "involved" in two of their proposals to Highland: first, a transaction in the range of $1.30 per share; and, second, a self-tender offer structure.[142] It would be unreasonable to infer from these generalized allegations that the Special Committee's business judgment regarding the negotiation of the Restructuring Agreement (and the Merger) was sterilized or compromised because of Furlong's domination or control.[143] Further undermining any inference of domination or control is that the Plaintiff did not even identify the allegedly controlled Special Committee directors or describe their relationships with Furlong in any meaningful detail.[144] Finally, the Plaintiff's allegations do not in any way suggest that Furlong dominated or controlled the Special Committee's final review, along with its independent financial and legal advisors, of the merits of the transaction. Put simply, there is no alleged nexus of domination or control.[145]

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[142] Compl. ¶¶ 32, 70.

[143] *See Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins*, 2004 WL 1949290, at *10 (Del. Ch. Aug. 24, 2004) ("General allegations of domination over a Board are simply not sufficient under Delaware law to state a traditional duty of loyalty claim.").

[144] *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004) (concluding in the demand futility context that for the Court to infer that one director controlled another at the motion to dismiss stage, "a plaintiff must plead facts that . . . because of the nature of a relationship or additional circumstances . . . the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director").

[145] The Court acknowledges that the Plaintiff's position is "not that Mr. Furlong control or dominates the board of directors" but rather that Furlong's breach of the duty of loyalty is that "he improperly and inappropriately interfered with the special committee process." Oral Arg.

Similarly, there is no allegation that Furlong failed to disclose any material interest that a reasonable director would find important in evaluating the merits of the Merger and the overall Restructuring Agreement. Regardless of whether Furlong was interested because of the change-in-control payment he received by renegotiating his employment agreement with AHP, the Plaintiff does not allege that the AHP board was not aware of the President and CEO's modified compensation arrangement. Any inference by the Court to that effect would be unreasonable.

Thus, regardless of whether Furlong was interested in the Restructuring Agreement, there is no allegation that "raise[s] a reasonable doubt that [the Special Committee] could not exercise [its] independent business judgment in approving the transaction"[146] because of Furlong's undue influence or failure to disclose any material interest. The AHP board's decision to agree to the Merger as part of the Restructuring Agreement must be reviewed under the business judgment standard, and the Court concludes it would be unreasonable to infer that the decision was irrational. Therefore, the Plaintiff's breach of fiduciary duty claim against Furlong for agreeing to the Merger must be dismissed.[147]

Defs. Mots. to Dismiss 20 (Jan. 30, 2014). Under the case law set forth earlier, this position is insufficient to state a breach of fiduciary duty claim against Furlong in isolation.

[146] *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 980-81 (Del. Ch. 2000).

[147] The Plaintiff asks the Court to infer from the allegations of the Complaint that "Furlong discussed a going-private transaction with Highland [in 2007], agreed to support it three years down the line, and in return was paid his change-of-control payment and allowed to continue his

2. Aiding and Abetting Highland's Breach of Fiduciary Duty

Separately, the Plaintiff claims that Furlong aided and abetted Highland's breach of its fiduciary duties.[148] A claim for aiding and abetting includes four elements: "(i) the existence of a fiduciary relationship; (ii) a breach of that relationship; (iii) knowing participation in the breach by a defendant who is not a fiduciary; and (iv) damages proximately caused by the breach."[149]

As an AHP director, Furlong owed fiduciary duties to AHP stockholders, including the Plaintiff.[150] This fiduciary relationship existed throughout Furlong's alleged actions in the negotiation and approval of the Restructuring Agreement. Based on the allegations of the Complaint, which address Furlong's conduct as a director and thus as a fiduciary, the Court concludes that Furlong cannot be liable for aiding and abetting Highland's purported breach of fiduciary duty.[151] For this

employment." Pl.'s Answering Br. 22. Such an inference may well be an unreasonable one for the Court to make because the Plaintiff "put[s] forward very little and ask[s] the Court to presume quite a lot." *See In re INFOUSA, Inc. S'holders Litig.*, 953 A.2d 963, 987 n.44 (Del. Ch. 2007). Based on the other conclusions, however, the Court need not determine whether the Plaintiff sufficiently alleged that Furlong was interested in the Restructuring Agreement.

[148] Compl. ¶ 70.

[149] *McGowan v. Ferro*, 859 A.2d 1012, 1041 (Del. Ch. 2004), *aff'd*, 873 A.2d 1099 (Del. 2005) (TABLE); *see also Transkaryotic Therapies*, 954 A.2d at 371.

[150] *See, e.g.*, *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998) (citing *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939) ("The directors of Delaware corporations stand in a fiduciary relationship not only to the stockholders but also to the corporations upon whose boards they serve.").

[151] The Plaintiff's argument is that a director of a Delaware corporation can be subject to non-exculpated, aiding and abetting liability for knowingly participating in a controlling stockholder's breach of fiduciary duty—or, by implication, another director's breach of fiduciary duty. Based on the allegations here, the Court cannot adopt such an overbroad and unsubstantiated expansion of Delaware law, which would seem to contravene decades of settled precedent on the deference this Court affords to the decisions of a majority of unconflicted

reason alone, the Plaintiff's aiding and abetting claim against Furlong must be dismissed.

3. Furlong's Conduct as a Director of New AHP

The Plaintiff's last breach of fiduciary duty claim against Furlong, based on his conduct as a director of New AHP, is governed by Nevada law because his actions were not required under the Restructuring Agreement and because they occurred after the Reincorporation Merger. Specifically, the Plaintiff claims that Furlong breached his fiduciary duties in two ways: (i) by recommending the Merger without making a "reasonable inquiry" into the then-present value of New AHP after the Self-Tender Offer and the Refinancing;[152] and (ii) by failing to disclose certain purportedly material information in the Proxy Statement.[153]

Subject to certain exceptions that are inapplicable here, Nevada law generally exculpates the directors of a Nevada corporation from personal liability to the corporation's stockholders unless "(a) [t]he director's . . . act or failure to act constituted a breach of his or her fiduciary duties as a director . . . ; and (b) [t]he

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directors and the General Assembly's adoption of 8 *Del. C.* § 102(b)(7). Rather, the Court anticipates that a director's knowingly participating in another's breach of fiduciary duty would *itself* be a breach of fiduciary duty to be evaluated under the appropriate standard of review.

Perhaps there may be an extreme set of facts in which a director, because of conduct somehow distinct from his or her status as a director, could be liable as an aider and abetter—but this is not that case.

[152] Compl. ¶¶ 67-68. Nevada law permits directors to make no recommendation on a merger if the board "determines that because of a conflict of interest or other special circumstances it should make no recommendation and it communicates the basis for its determination to the stockholders with the plan [of merger]." Nev. Rev. Stat. § 92A.120.2(a).

[153] *Id.* ¶ 69.

breach of those duties involved intentional misconduct, fraud, or a knowing violation of the law."[154] Courts hearing Nevada breach of fiduciary duty claims against directors have found it consistent with Nevada law to dismiss the claims at the motion to dismiss stage unless the well-pled allegations of the complaint overcome this exculpatory statute.[155]

Furlong contends that he should be exculpated under Nevada law for any liability for his conduct because he did not act intentionally or fraudulently. For example, he argues that the Plaintiff criticizes him for failing to become aware of New AHP's financial situation before recommending the Merger, not for knowing about it or intentionally not learning about it.[156] In opposition, the Plaintiff contends that the Complaint supports a reasonable inference that Furlong's conduct was an intentional act to benefit Highland such that he should not be exculpated from liability at this time.[157]

Nevada courts frequently look to Delaware corporate law for guidance on novel questions of Nevada corporate law.[158] The parties did not present, and the

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[154] Nev. Rev. Stat. § 78.138(7)(a)-(b).
[155] *See, e.g.*, *Fosbre v. Matthews*, 2010 WL 2696615, at *6 n.6 (D. Nev. July 6, 2010) (citing *Shoen v. SAC Hldg. Corp.*, 137 P.3d 1171, 1184 n.60 (Nev. 2006)).
[156] Furlong Opening Br. 22-23.
[157] Pl.'s Answering Br. 23-24.
[158] As an illustrative example, the Nevada Supreme Court incorporated the demand futility standards of *Aronson v. Lewis* and *Rales v. Blasband* for stockholder derivative actions arising under Nevada law. *See Shoen*, 137 P.3d at 1186-87. More recently, in recognizing a cause of action for aiding and abetting another's breach of fiduciary duty, the Nevada Supreme Court expressly "adopt[ed] the standard applied by Delaware courts." *See In re Amerco Deriv. Litig.*,

Court has been unable to identify, a decision of a Nevada state court in which a stockholder asserted a breach of fiduciary duty claim against only one named director. Absent a statement to the contrary, the Court concludes that the Nevada Supreme Court would likely follow Delaware law on this atypical pleading situation. Therefore, as under Delaware law, a stockholder asserting a breach of fiduciary duty claim against a single director of a Nevada corporation must nonetheless rebut the business judgment standard of review as to at least half of the directors who approved the decision being challenged.

In the Complaint, there is a dearth of references, let alone well-pled allegations, about the conduct of the New AHP directors besides Furlong. The Plaintiff does not even identify who those individuals were. As noted above, the directors of New AHP, when it recommended the Merger and when it approved the Proxy Statement, were Furlong and two members of the Special Committee. Again, as the Court concluded earlier, the Plaintiff has plainly failed to allege that Furlong dominated or controlled the board of New AHP or that he failed to disclose a material interest that a reasonable director would find important in deciding to recommend the Merger or approve the Proxy Statement. Hence, there

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252 P.3d 681, 701-02 (Nev. 2011) (citing *Malpiede*, 780 A.2d at 1096). This Court has also previously recognized the influence that Delaware law has on Nevada courts addressing novel questions of Nevada corporate law. *See Lewis v. Ward*, 2003 WL 22461894, at *2 (Del. Ch. Oct. 29, 2003), *aff'd*, 852 A.2d 896 (Del. 2004) ("Where there is no Nevada law on point, courts applying Nevada corporate law have traditionally looked to Delaware law for guidance. . . . I have every reason to anticipate that the Nevada Supreme Court would adopt the rule of *Lewis v. Anderson* as Nevada law, and no reliable basis to infer that it would take another approach.").

is no basis on which the Court could conclude that the business judgment standard of review has been rebutted as to either of these two other New AHP directors.

For similar reasons as why the Plaintiff failed to state a breach of fiduciary duty claim against Furlong under Delaware law, the Plaintiff has also not adequately pled a breach of fiduciary duty claim against him under Nevada law. The decisions by the New AHP board are entitled to deference under the business judgment standard of review, and it would again be unreasonable for the Court to infer that those decisions were irrational. Thus, regardless of whether Furlong's individual actions, in isolation, may have fallen below the standard of conduct required of a fiduciary, the Plaintiff has failed to rebut the business judgment presumption. Therefore, the Plaintiff's breach of fiduciary duty claim against Furlong for recommending the Merger and for approving the Proxy Statement must also be dismissed.[159]

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[159] Alternatively, the Court concludes that Furlong is exculpated from liability for the Plaintiff's claims by virtue of Nevada's statutory exculpatory provision because it is not reasonably conceivable that Furlong's actions, as alleged in the Complaint, were intentional misconduct, fraudulent, or a knowing violation of the law. *See* Nev. Rev. Stat. § 78.138(7)(b).

In particular, as to a director's personal liability for failing to disclose material information, it is likely that the Nevada Supreme Court would look to Delaware law for guidance on what appears to be a novel question of Nevada law. Under Delaware law, "where a breach of the disclosure duty does not implicate bad faith or self-interest, both legal and equitable monetary remedies (such as rescissory damages) are barred on account of the exculpatory provision authorized by 8 *Del. C.* § 102(b)(7)." *Transkaryotic Therapies*, 954 A.2d at 360; *see also Chen*, 2014 WL 1366551, at *36 ("The Exculpatory Provision bars any damages recovery for disclosure claims resulting from a breach of the duty of care.").

Accordingly, under Nevada law, where the exculpatory threshold is distinct from that of Delaware law, a court should exculpate the directors of a Nevada corporation from personal liability for failing to disclose material information so long as the directors did not act

IV. CONCLUSION

For the foregoing reasons, Highland's motion to dismiss under Rule 12(b)(6) is denied, and Furlong's motion to dismiss under Rule 12(b)(6) is granted.

An implementing order will be entered.

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intentionally or fraudulently. *See* Nev. Rev. Stat. § 78.138(7)(b). "[S]imply alleging that the public filings did not contain enough information . . . does not demonstrate that [the directors] engaged in intentional misconduct or fraud." *See Amerco Deriv.*, 252 P.3d at 701 (concluding that a derivative duty of loyalty claim was not pled with sufficient particularity where the plaintiff alleged that the directors merely "knowingly signed misleading and incomplete public filings").

Although the Plaintiff here identified purportedly material omissions from the Proxy Statement, it is not reasonably conceivable that Furlong intentionally or fraudulently failed to disclose that information. Furlong is thus exculpated for this conduct. Therefore, on this alternative ground, this claim against Furlong must be dismissed.

Based on this conclusion, the Court need not determine whether the undisclosed information is material under Nevada law.